JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition no.3159 of 2020
M/s Naseem & Company and others
Versus
Capital Development Authority and others

Petitioners by: Sardar M. Haroon Sami, Advocate
Respondents by: Syed Muhammad Ali Bokhari, Advocate
Date of Decision: 04.03.2022

SARDAR EJAZ ISHAQ KHAN, J:- This is the second time this trial has been escalated to the High Court. The first was an earlier civil revision in which the High Court remanded the case with the direction to frame additional issues. This second trip to the High Court arises out of the impugned order by which the learned trial court dismissed the petitioner's application for the CDA to produce its record relevant to the case.

The background

2 The suit was filed in 2001 by a sole proprietorship "M/S Nasim and Company" as plaintiff no.1, claiming to be in the soap and toiletries manufacturing business, and Mr Nasim Javed, the proprietor, as plaintiff no. 2. For a sole proprietorship not being a distinct legal entity, I refer to them both jointly as 'the plaintiff'. The defendant is the Capital Development Authority - the CDA. The other defendants are its officials.

3 In 1991, the plaintiff's application for an industrial plot of 2,222 sq yds in the then nascent Kahuta Industrial Triangle was accepted with an offer letter issued by the CDA with an instalments payment plan. The plaintiff paid some instalments. The plaint avers that during the instalments period, CDA did not live up to its promise of developing the plot nor was able to take possession of the land from the residents of the area to develop the plots. The plaintiff claims to have paid about 75 % of the plot price before CDA cancelled the plot in the year 2000 claiming default in

instalment payments[1]. The validity of this cancellation is in question in the suit. The primary relief of declaration prayed for in the suit turns on the answer to this question. As consequential relief, the plaint also prays for delivery of possession of the suit plot and, if the specific plot cannot be delivered, then for the allotment of an equivalent alternative plot.

4 CDA of course denies the claims with one liner para wise replies to the plaint, except for one para where its key defence appears that the cancellation of the allotment was valid because the plaintiff defaulted on the instalments. Paras 6 to 8 of the plaint, raising the factual plea of the CDA's inability to deliver possession on time, are denied or not admitted by the CDA with one liner replies. That wasn't very helpful indeed, and it was then left to a full trial to establish by evidence what could have been achieved by a notice to admit facts[2] or by an application for further and better particulars of the CDA's written statement[3].

5 The trial was led and it had almost reached its conclusion when the CDA's witness was cross-examined by the plaintiff's counsel. The CDA's witness had brought the record of the suit plot only. Issue no 6-C at the trial was whether the plaintiff was entitled to an alternative equivalent plot if the declaration went in his favour but the suit plot could not actually be delivered by CDA. When questioned about instances of alternative plots given to other allottees in the vicinity of the plaintiff's suit plot, CDA's witness said he could tell only by bringing the record of the other plots in the next hearing and, when asked to do so by the plaintiff's counsel, the cross-examination was stopped, presumably at the instance of the trial court. The cross-examination continued later wherein the CDA's witness admitted that alternative plots were given in some instances; even the numbers of some of those plots were mentioned.

6 In his examination in chief, the CDA's witness as DW-1 produced documents pertaining to the suit plot, but his cross-examination does tend

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[1] Why it took CDA 10 years to cancel when the instalment plan was for 3 years only is not relevant to this petition, though I should think it will be relevant for the judgment at trial.
[2] Order 12 Rule 4 CPC
[3] Order 6 Rule 5

to show that the plaintiff's averment of CDA's inability to deliver possession in time was not without foundation. I ought not go any further in appreciating the evidence, that being the task for the trial court.

7 The trial court didn't agree to the oral request by the plaintiff's counsel for CDA to produce the record of the other allotments where alternative plots were given, presumably because this evidence pertained to issue no 6-C. Issue no 6-C placed the onus of proof on the plaintiff as OPP. The plaintiff managed somehow to get some documents of the alternative allotments and moved the trial court under Order 13 Rule 2 CPC to admit these papers as additional evidence. The trial court rejected the application vide its *impugned order* dated 30.09.2020, for the reasons that (i) every case has its own facts, (ii) that the parties had produced sufficient record for decision, and (iii) permission for additional evidence could not be allowed to fill lacunas in the plaintiff's case. These three reasons had one common strand: that the burden of proof was on the plaintiff to establish allotment of alternative plots in other instances.

Burden of Proof – Legal vs Evidential

8 Respectfully I say, the trial court fell in a not uncommon error: conflating the *legal burden* of proof with the *evidential burden*. Though interrelated, the two are neither synonymous nor legal equivalents.[4]

9 The ensuing discussion must be read in the context of this case which primarily concerns documentary evidence. Though the principles under discussion under the relevant statutes are not confined to documentary evidence, subtle but important differences may arise for non-documentary evidence, especially in criminal cases, but there is neither the occasion nor the need to wander in that territory for now.

10 The burden of proof cannot be conflated with the burden to produce evidence which is not in a party's *possession or power* when it commences the suit or at any stage during the trial. This exception to the general

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[4] This distinction is discussed in numerous commentaries on the subject.

principle, that a party must produce its evidence to discharge its burden of proof, is found both in Order 13 Rule 2 CPC (O13-R2) and Article 122 of the Qanun-e-Shahadat Order, 1984 (QSO). O13-R2 creates the exception to the rule under O13-R1 that the *parties shall produce all the documentary evidence of every description*[5] *in their possession or power at the first hearing*. A party may still produce additional documentary evidence at a later stage in the trial by showing *good cause to the satisfaction of the court* under O13-R2, but this exception too is tied to the documentary evidence being in the possession or power of such party. The reason is obvious. A party is not meant to take the other by a surprise production of a document later in the trial; a civil trial runs on the basis of upfront disclosure of all documentary evidence in the *possession or pow*er of a party or which it can reasonably identify. But neither the O13-R1 restriction applies nor is there any occasion to invoke the exception in O13-R2 where the document in question is neither in the possession or power of a party nor where such party is unable to identify the document with any reasonably degree of certainty. Article 122 QSO says pretty much the same thing: *when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him*. Article 122 is the exception in the law of evidence to the general rule under Article 117 of the burden of proof lying with the party asserting the existence of the probative facts.

Precedent and Treatises

11 Let us turn to precedent and treatises on this topic.

a) The elucidation of the principle underpinning Article 122 is found in Woodroffe and Amir[6] as follows:

> In the administration of justice, it is desirable that the burden of producing evidence be placed on the party best able to sustain it, and there is authority for the view that the burden of evidence as to an issue rests on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue is peculiarly within the

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[5] On which they intend to rely.
[6] 19th edition. The first edition of this leading work was published in 1898.

> knowledge or control of a party, the burden of evidence as to such issue rests on him. It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negate, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence; the negative averment being taken as true unless disproved by the party having such knowledge or control. The party on whom the burden is put by his peculiar knowledge or control is obliged to go no further than necessity requires.
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> The court will more readily hold that a party has sustained the burden of evidence where the issue is one as to which the evidence is peculiarly within the adverse party's knowledge or control.

b) Woodroffe and Amir goes on to cite instances where these principles were applied in judgments. For brevity, two are summarized below:

> i) When goods are booked at the owner's risk, the railway administration is not liable for any damage to those goods except upon proof that such damage was due to the negligence or misconduct on the part of the railway administration or any of its servants. The burden of proving misconduct or negligence is on the plaintiff. Since the facts, as to how the damage or loss had occurred, are within the special knowledge of the railway administration under the provisions of this section, the railway administration must adduce evidence to show how the goods were dealt with in the course of transit.
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> ii) Whether there was a resolution by the Board of Directors of a company authorising the manager to borrow money is a fact within the special knowledge of the company and its directors; and if they fail to produce the Resolution-Book or the Minute-Book to show that there was no such delegation, an adverse inference must be drawn against them to the effect that had they produced them, they would have shown such delegation to the manager.

c) There is another name for the principle under discussion: the "best evidence rule". The best evidence rule was summarized by the Hon'ble Supreme Court in *Zakaullah Khan versus Muhammad Aslam and another (1991 SCMR 2126)* where, as author of the Court's opinion, His Lordship Mr.Justice

Shafiur Rehman cited M. Monir's commentary on section 91[7] of the Evidence Act:

> This section is an illustration of what in English law is known as "the best evidence rule", which requires that the best evidence of which the case in its nature is susceptible should always be presented … when better evidence than that which is offered is withheld, it is only fair to presume that the party has some sinister motive for not producing it, which would be frustrated if it were offered. It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents.

d) The best evidence rule rests on two pillars: Article 122 read with Article 129, illustration (g), of the QSO. A combined reading of the two was rendered in *Messrs Sentinel (Pvt.) Ltd. versus Mst. Gul Fareen Jana and another (2008 PLC 304)* as follows:

> Article 122 of Qanun-e-Shahadat, 1984, provided that the burden of proving a fact, specially within the knowledge of any person was upon that person and according to illustration (g) of Art.129 of Qanun-e-Shahadat, 1984 the court could presume that evidence which could be produced but was not produced, would, if produced, be unfavourable to the person who withheld the same.

Applying the best evidence rule[8], in a dispute over the entitlement of a deceased employee to compensation under a compulsory group insurance scheme, the defendant company claimed its employee strength to be less than 50 enabling it to escape the obligation to procure compulsory group insurance which fastened only if its employee strength was 50 or above. The Court held that the obligation to produce the evidence as to its employee strength rested with the employer, for this matter was within its special knowledge and an adverse inference was to be drawn against the employer due to its

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[7] Now Article 102 QSO

[8] Though the court did not use this term of art.

withholding the record of its employee strength in the trial. At para 16, the Court reproduced the oft-cited Indian judgment on this topic in many commentaries:

> In the case of Shanker Rao and others v. Kamtaprasad Govindprasad Agarwal and others, reported in AIR (34) 1947 Nagpur 129, a Division Bench of the Court has very aptly explained the principle regarding the burden of proof and withholding of evidence in the following words:-
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> > "No party should be allowed to take advantage of an abstract doctrine as to the burden of proof and conceal from the Court the evidence in its own possession which would assist the Court in arriving at a correct decision. In this case the burden of proof lay on the defendants. We are entitled to hold that the plaintiffs having failed to produce the accounts books in their own possession have made the task of the defendants easy, and we are justified in holding that had those accounts books been produced they would have proved the case of the defendants."

e) In *Pakistan Steel Mills Corporation Limited versus Malik Abdul Habib and another (1993 SCMR 848)*, a case under the Fatal Accidents Act, the Supreme Court held that although a plaintiff in a suit for negligence carries the burden to prove negligence, if the defendants took the plea that the accident had occurred on account of negligence of the deceased himself, then it was their duty to produce evidence to show that the elevator in question was in perfect order and that there was no defect in it, for these were matters within the special knowledge of the defendant mill. The Supreme Court rejected the plea of the employer that a rebuttal simpliciter in the written statement to the averments of negligence in the plaint was sufficient and that the burden to produce all the evidence concerning the elevator's operations was entirely on the plaintiffs.

f) The most expressive rendition of this principle I could find is by His Lordship Mr. Justice Sheikh Ijaz Nisar in *Ahmad*

Ashraf versus University of the Punjab and 2 others (1996 MLD 1064), where his Lordship held as follows:

> The burden of proof in the sense of introducing evidence constantly keeps on shifting. As the proceedings go on, the burden of proof may be shifted from the party on whom it rested first. Thus, when a plaintiff comes to a Court and asks for certain relief on the basis of certain facts, the responsibility to prove those facts has to be on him, but the law makes provision for which in the given circumstances a party on whom the burden of proof lies under Articles 117 and 118 of the Qanun e Shahadat, 1984 may shift the onus to the other party. By virtue of Article 122, Qanun e Shahadat, 1984 when any act was especially within the knowledge of any person the burden of proving that fact would be upon him. This rule is of very general application. It holds good whether the proof of the issue involves the proof of an affirmative or of a negative. In fact it is designed to meet certain exigencies in which it would be impossible or disproportionately difficult for a party to establish a fact which was especially within the knowledge of its opponent and which the latter could prove conveniently. This particularly applies in the case of record or documentary evidence which is required to prove or disprove a certain fact but is in the custody of the opposite party. Thus, where a plaintiff has produced the best evidence available to him and has taken all steps necessary for the production of record or evidence, the responsibility for the production of record or evidence especially in the knowledge and custody of the defendant would shift on to the latter.

Applying this principle, the Lahore High Court held that the University of Punjab, being the custodian of the relevant record, was bound to produce the record of examinations where it denied the qualification of the plaintiff, for the contrary evidence was in the University's special knowledge and in its custody.

g) This principle has found recognition and enforcement in numerous cases including in *Abdul Karim Nausherwani and another v. The State through Chief Ehtesab Commissioner (2015 SCMR 397)*, *Saeed Ahmed v. The State (2015 SCMR 710)* and recently in *Mohammad Hanif Abbasi versus Jahangir Khan Tareen and others (PLD 2018 Supreme Court 114)*.

Analysis

12 I should like to think I am now in a position to say that a party does not always carry the entire evidential burden in a trial, though it does carry the legal burden throughout and would fail if no evidence or insufficient evidence was produced in its favour[9]. But the law does not sit as a passive bystander where the evidential burden is possible to be discharged by production of evidence in the possession or power of the other party[10].

13 Returning to the case at hand, at long last, hoping exhaustion has not set in for the reader, the question of alternative plots granted by the CDA due to its inability to deliver the originally promised plots was a relevant fact for the purposes of the primary fact in Issue no 6-C[11]. The documentary evidence – the allotment records of alternative plots – were not in the possession or power of the plaintiff nor could he be burdened to produce them. That documentary evidence, being the record maintained by public servants in the discharge of their official duties, would in itself constitute relevant facts going to establish (or disprove) the primary fact in issue[12].

14 CDA is wearing two hats in this trial. It is both a seller of the plot in question and a custodian of public record of all the allotments. It was a public seller of plots for a public purpose, namely, development of an industrial triangle at the confluence of emerging transport arteries of the GT road. Being a public body performing functions in connection with the affairs of the Federation, it was and remains under an added duty of non-discrimination under Article 25 of the Constitution. Its civil and public law duties are intertwined in this trial. The CDA cannot be equated with a private seller of a property.

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[9] Articles 118 and 119 QSO
[10] or even third parties.
[11] see Articles 20 and 22 QSO
[12] see Article 49 QSO

15 The Courts are liberal towards production of record of public documents, and restrictive in production of record of private documents[13]. Records maintained by a statutory municipal body of disposal of lands acquired by it in the exercise of public powers are not private documents. Prima facie, they are also discoverable under the Freedom of Information legislation.

16 The plaintiff's counsel had other tools at his disposal. Two are noted in paragraph 4. He could have served a notice on CDA to admit facts under O12-R4. Or he could have filed applications for discovery, inspection or interrogatory under Order 11. He chose cross-examination.

17 The trial Court too has an abundance of tools at its disposal to ascertain where the balance of probabilities lies. It can allow amendments of pleadings and framing of additional issues at any stage. It can even exercise its inherent jurisdiction. It can even pose questions or direct a party to produce documents as long as the document is not privileged against disclosure[14]. CDA's records of allotments of public lands are not documents which enjoy privilege against disclosure. But the trial court in this case preferred disempowerment.

18 The trial court, I say respectfully, took too narrow a view of the tools at its disposal under the CPC and the law of evidence to ascertain the relevant facts to its satisfaction. It visualized its role as a silent spectator of the story unfolding before it in the court room, when it was meant to be the director of this play with the finale aimed at the discovery of the relevant facts. It conflated the burden of proof of Issue no 6-C with the obligation to produce the relevant documentary evidence, even if that documentary evidence was not in the possession or power of the plaintiff. The trial court, I dare say, does not truly appreciate that the CPC is not written to shackle it, but to empower it; if only it is read in that spirit. The impugned order shut the door for the plaintiff's entitlement to the consequential relief prayed for in the suit, assuming the primary reliefs were to go in his favour.

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[13] See, for instance, Muhammad Khaliq vs Tehsildar Settlement, 2004 YLR 1841 [Supreme Court (AJ&K)] and the judgments cited therein.
[14] see Article 161 QSO

19 I shall go not much further than that the trial court should have allowed the production of the record of the alternative plots in question. But as the relevance of such record arises only for the purposes of the consequential relief, which in turn depends on the finding on the question whether the cancellation of the plot was invalid, the trial court could have *proceeded to determine* the latter issue first under O15-R3(1) for which the evidence stood completed before it. If the trial court concluded that the cancellation was valid, it would have been *sufficient for the decision* and it could have *pronounced the judgment accordingly*, and in such case the need for further evidence bearing on consequential relief would not have arisen. Conversely, if its finding on the preliminary issue of the validity of cancellation was in favour of the plaintiff, it could have proceeded under O15-R3(2) to postpone the hearing for the production of such further evidence as the case required, and only then asked CDA to produce the record for the purposes of determining the consequential relief. The CPC does not require the entire evidence to be completed in one go in all cases. O15-R3 empowers the trial court to give findings on antecedent questions and proceed further only when its determination on the antecedent questions necessitates determination of the subsequent questions.

20 The trial Court in this case could also have framed an additional issue under O14-R5 as to whether the alternative allotments were in fact made by the CDA where it could not deliver possession of the promised plots, for it is empowered under O14-R5 to frame additional issues right up to the stage before the decree and "*all such additional issues as may be necessary for determining the matters in controversy between the parties shall be so made*". Since this is a Constitutional petition and not an appeal, I cannot frame that issue for the learned trial court but leave it to its wisdom and sagacity to frame that issue as best as it can if it chooses to deploy this tool rather than the others discussed earlier.

Summary

21 It might be useful for the readers to see the findings summarized in one place so I attempt to do so here:

i) *Burden of proof* has two interrelated but distinct facets: *legal* burden and *evidential* burden. The former remains on a party throughout the trial. It is the outcome of the entirety of the evidence before a court, regardless from which party or source the evidence originates. The evidential burden however is a shifting phenomenon. It is meant to originate from the party alleging the existence of certain facts, but may shift to the other party as the trial progresses.

ii) The *best evidence rule* postulates that each party must produce all material evidence in its *possession or power* and failure to do so entitles the court to draw an adverse inference against the party failing to produce it.

iii) A more liberal approach is to be followed for disclosure of record of public organisations than would be followed for private organisations.

iv) A party has several tools for the disclosure of relevant facts by the other party, including notices to admit facts, discovery, interrogatories, inspections, and the like. Unlike a criminal trial, overwhelming reliance on cross-examination trivializes the utility of the tools available in a civil trial.

v) A trial court must see the CPC as a toolkit for the discovery of truth and should deploy the tools as the exigencies require. If it looks hard enough, it will always find the right tool for the occasion.

vi) A civil trial need not in all cases wait for the entire evidence to be led on all the issues. In appropriate cases, the trial court can invoke Order 15 Rule 3 CPC to pronounce judgment if sufficient evidence on foundational issues has come on the record to do so. This approach will be convenient to adjudicate primary relief, and the question of consequential relief, if it remains relevant, may be gone into thereafter. The court should inform the parties of its intention beforehand,

and hear submissions if any as to why invoking Order 15 Rule 3 may not be appropriate in a given case.

The Decision

22 I conclude that the impugned order was erroneous in labelling the inability of the plaintiff to produce documents not in its possession or power as a lacuna in its case, and letting a custodian of public record withhold production of its record relevant to prove the facts in issue. I also conclude that the learned trial court mixed up the legal burden of proof with the evidential burden in this case by fastening the plaintiff with the obligation to produce documents not in his possession or power but in the possession and power of the CDA.

23 The impugned order is set aside. At the same time, it is left to the good judgment of the learned trial court to choose one from amongst the various options noted in this judgment to move forward to determine the matters in controversy between the parties.

24 I end with a note of appreciation for the able assistance of the learned counsels for the parties, particularly for the *concise one-page skeleton chronology of key events* which, prepared by the learned counsel for the CDA with toil and sweat, was resultantly accurate enough for the learned counsel for the petitioner to agree with in material particulars, and so it enabled the key controversy to be honed into within two hearings.

Costs

25 Given that the need for this petition arose due to an act of the trial court, each party is to bear its own costs.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

Imran

Approved for reporting