ORDER SHEET

# IN THE HIGH COURT OF SINDH AT KARACHI

**SECOND APPEAL NO.13/2012**

| Date | Order with signature of Judge |
|---|---|

1. For hearing of CMA No.536/2012.
2. For hearing of main case.

**06.04.2018**

Mr. Ramzan Tabassum advocate for appellants.
Mr. Abdul Waqar Kalwar advocate for respondent.

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## O R D E R

**Salahuddin Panhwar, J**: Through instant appeal, appellant has challenged judgment dated 30.03.2010 and decree dated 03.04.2010 passed by trial Court in Civil Suit No.1502/2007 and maintained by appellate Court in appeal No.139/2010 vide judgment dated 21.11.2011.

2. At the outset, learned counsel for appellant contends that respondent filed suit for recovery of Rs.500,000/- on the plea that appellant joined respondent (plaintiff) company and signed indemnity bond whereby he was bound to serve in the company for the period of three years; after completing one month's training from Malaysia, he joined the service and served for about eight months, received salary; thereafter he left the job as respondent violated clause 7 of the indemnity bond therefore, the respondent was not entitled for decree. He emphasized over clause 7 of indemnity bond which is that:-

> "The Technical Trainee hereby agrees that on completion of the period of his training in Malaysia he will immediately return to Pakistan as he may be directed by the company; and on his return he will continue to serve the company faithfully and diligently for a period of three years in a grace of service, which in the discretion of the

> company shall be appropriate to his knowledge and efficacy acquired during the training and he then serves under the usual conditions of service of the company, if so required by the company. During this period, his salary will be increased according to both, company and his performance.

3. Whereas counsel for respondent contends that though he is appearing for M/s. Advanced Technology Services, whereas instant appeal is against Muhammad Haroon; he also admits that initially such suit was filed in same title which is mentioned in the plaint of respondent however same was amended. It is admitted position that appellant joined the respondent, got training for one month, signed indemnity bond to work with respondent for a period of three years. However perusal of clause 7 categorically shows that this was agreed between the parties that during this period salary of the appellant would be increased as per performance of appellant and that of the company and both parties signed that agreement. The plea of the respondent that appellant left the job much before *agreed* period of three years hence violated that bond, is disputed by appellant on the plea that in fact clause 7 was not followed by the respondent.

4. At the outset, I would say that ***'contract of indemnity'*** is defined by Section 124 of the Contract Act as:-

> "A contract, by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a **'contract of indemnity'.**

The above definition makes it clear that *indemnity* is to save the indemnity-holder from a (genuine) *loss* likely to be suffered by him

from conduct of promisor or any other person, hence the indemnity-holder would be required to establish the ***loss*** suffered by him in consequence to conduct of indemnifier or that of other person, so promised. Reference may be made to the case of *Variety Traders, Karachi v. Govt. of Pakistan* PLD 1980 Karachi-30.

5. I would add that term *penalty* would not fit into term **indemnity.** The para-9 of the case of *Cavendish Square Holding BV v. Talal EI Makdessi* (2016 SCM 296), being relevant is referred hereunder:-

> 9. The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed: Public Works Comr v Hills [1906] AC 368, 376; Webster v Bosanquet [1912] AC 394; Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, at pp 86-87 (Lord Dunedin); and Cooden Engineering Co Ltd v Stanford [1953] 1 QB 86, 94 (Somervell LJ). This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced. It is a species of agreement which the common law considers to be by its nature contrary to the policy of the law. One consequence of this is that relief from the effects of a penalty is, as Hoffmann LJ put it in Else (1982) Ltd v Parkland Holdings Ltd [1994] 1 BCLC 130, 144, "mechanical in effect and involves no exercise of discretion at all." Another is that the penalty clause is wholly unenforceable: Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [ 1905] AC 6, 9, 10 (Lord Halsbury LC); Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689, 698 (Lord Reid), 703 (Lord Morris of Borth-y-Gest) and 723-724 (Lord Salmon); Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The "Scaptrade") [1983] 2 AC 694, 702 (Lord Diplock); AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170, 191-193 (Mason and Wilson JJ). Deprived of the benefit of the provision, **the innocent party is left to his remedy in damages under the general law**. As Lord Diplock

put it in The "Scaptrade" at p 702:

> "The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract a secondary obligation shall arise on the part of the party in breach to pay to the other party a sum of money which does not represent ***a genuine pre-estimate of any loss likely to be sustained by him*** as the result of the ***breach of primary obligation*** but is substantially in excess of that sum. The classic form of relief against such a *penalty clause has been to refuse to give effect to it*, but to award the common law measure of **damages for the breach of primary obligation instead**."

The para-13 of the said case, further differentiates the *penalty* from a *genuine pre-estimate of loss.* The relevant portion reads as:-

> 13. … There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach.…The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. … And it provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party for his breach.

6. Per the *claimed* indemnity bond, the appellant was to pay a specific pre-estimated sum in case of breach of his *primary* obligation i.e to serve for three years which *pre-estimated* sum has / had no reference of *loss,* likely to be suffered or *genuinely* suffered hence, in my view, such clause does not fulfill the *lust* of Section 124 of the Contract Act. The para-14 of the case of *Cavendish Square Holding BV* helped me in such conclusion which reads as:-

> 14. This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, i.e whether as a conditional primary obligation or a secondary obligation providing a contractual

> alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, ***the obligation to pay the specified sum is a secondary obligation*** **which is capable of being a penalty;** but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

Having chalked the *differences* between an *indemnity* bond and *a penalty rule,* I would revert to merits of the case. Even if, it is believed that the *contract* was one falling within meaning of Section 124 of the Contract Act then it was obligatory upon the respondent to have established *actual* loss, suffered by respondent due to conduct of the appellant i.e leaving company before *agreed* period of three years. Such duty was always upon the respondent *however,* perusal of the record shows that respondent examined only one witness Muhammad Haroon who was not signatory of indemnity bond. The respondent neither examined any witness nor produced any documentary evidence to establish that it (respondent) *actually* suffered any loss due to the act of leaving of the company by appellant before *agreed* period. Perusal of judgment recorded by appellate court and the trial Court shows that only referral was made to indemnity bond and suit was decreed whereas certain conditions were available in that bond but those were not considered. Such approach of Courts below *legally* cannot be stamped. I would say that in absence of establishing loss, actually suffered by indemnity-holder, the claim of respondent / plaintiff *legally* cannot be accepted for decreeing merely for reason that there has been a document, under title of **indemnity-bond'.**

7. Further, perusal of pleadings shows that in plaint it is maintained by the respondent that appellant failed to join the service whereas record reveals that he (appellant) joined service; worked; drew salary and after one year he left the job which too under claim of clause-7 of the document. This makes that respondent / plaintiff had not come with full and complete truth. Even otherwise, as a rule of equity, such joining of service and continue working for one year (more or less) would always be a factor in effecting upon *pre-estimated* loss.

8. Needless to add that even if the relevant clause of document is viewed as *penalty* even then the respondent / plaintiff was required to establish the **damages** suffered by him in consequence of failure of the appellant in performing his *primary* obligations which the respondent / plaintiff never established but only produced the document through one Muhammad Haroon who is neither signatory of document and *even* act of avoiding the performance of *primary obligation* was disputed by appellant with reference to clause-7 of the very document, containing indemnity/penalty clause.

9. In view of above discussion and failure of the respondent/ plaintiff in establishing the *actual* loss, if any, suffered by him, the suit of the respondent / plaintiff was not meriting decree. Accordingly impugned judgment recorded by the trial Court and the appellate Court are not maintainable under the law, same are set aside and suit of the plaintiff is dismissed.

**J U D G E**

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