

# IN THE HIGH COURT OF SINDH AT KARACHI

## High Court Appeal No.354 of 2006

Before:

**Mr. Justice Nadeem Akhtar &**

**Mr. Justice Muhammad Iqbal Kalhoro**

Date of hearing : 16.10.2014.

Date of decision : .10.2014.

Appellant Abdul Aleem Butt through Mr. Ch. Abdul Rashid, Advocate.

Respondent M/s. Bahria Foundation through Mr. Muhammad Yaseen Azad, Advocate.

### **JUDGMENT**

**MUHAMMAD IQBAL KALHORO, J:-** By this judgment, we propose to dispose of the instant appeal preferred by the appellant against the judgment and decree dated 13.06.2006 and 19.8.2006, passed in the Suit No.1110/2001 filed by the respondent against the appellant for the Recovery of an amount of Rs.5, 050,000/- under Order XXXVII CPC, whereby the suit of the respondent was decreed with costs.

2. The respondent had filed the above stated suit seeking following relief(s).

- a. *Directing the defendant to pay an amount to Rs.5,50,000/- alongwith 18% interest to the plaintiff.*
- b. *Cost of the suit.*
- c. *Any other relief, which this Honourable Court deem fit and proper under the circumstances of this case.*

3. The facts stated in the plaint briefly are that the appellant/defendant was appointed as special technical and sale advisor for the term of two years commencing from 12<sup>th</sup> January 1998 and in that capacity he was assigned to carry out due and satisfactory execution

of the respondent/plaintiff's contracts with the Government of Pakistan and others. The appellant in order to perform a contract between the respondent and Govt. of Punjab for supply of telecommunication equipments to them received a sum of Rs.5,450,000/- from the respondent. The appellant had supplied the accessories comprising 817 Mobiles Antennas, 120 Base Antennas and 65 power supplies to the Punjab Police at his risk and cost, which were rejected by the Punjab Police, whereafter he undertook to sell the said items to the prospective buyers at his own risk and cost and he also agreed to pay the proceeds of the sale to the respondent against the aforesaid debt of Rs. 5,050,000/- (Rupees Five Million Fifty Thousand only). The averments of the plaint further show that the appellant after receiving the above stated amount in connection with the supply of accessories to the Punjab Police had largely remained absent from his duty since 04<sup>th</sup> April 1998 without any intimation to the respondent, however, after the continuous persuasion the appellant held a meeting with the respondent, wherein he executed a promissory note in favour of the plaintiff dated 13.06.1998 thereby acknowledging his liabilities to the tune of Rs. 5,050,000/- and additionally executed an acknowledgment on a stamp paper undertaking to repay his liabilities on or before 12<sup>th</sup> August 1998. It is further mentioned in the plaint that due to appellant's uncooperative behavior in respect of his liabilities his service was finally terminated on 17<sup>th</sup> June 1998. The appellant's failure to pay back the aforesaid amount within the stipulated period prompted the respondent to make an enquiry into the affairs, whereupon it transpired that the accessories which were in possession of the respondent (after the same being rejected by the Punjab Police ) were substandard and were not of the required specification which the appellant was required to observe in performance of the

contract and he knowingly, deliberately and intentionally in order to cheat the respondent had supplied the defective accessories to the Punjab Police and thus had misappropriated the funds provided to him, resultantly an F.I.R. was registered against him by the respondent. The appellant inspite of the repeated demands and reminders badly failed to pay back the above stated amount to the respondent, hence the suit for the recovery of the said sum was filed against him.

4. The record reflects that the summons were served upon the appellant and he vide CMA No. 6629/2001 applied for the leave to defend the suit unconditionally wherein he, inter alia, contended that the alleged promissory note was not a negotiable instrument and competent but was only a written document which was not a promissory note according to law and the suit filed on the basis of that document was not maintainable and the provisions contemplated under Order XXXVII CPC were not attracted. The said application was disposed of vide order dated 30.03.2004, by the learned Single Judge after hearing both the parties, whereby conditional leave to defend the suit subject to furnishing surety in the sum of the suit amount was granted to the appellant. The appellant instead of furnishing the requisite surety filed a CMA No.2537/2004 seeking the review of leave granting order. The said review application was disposed of vide order dated 17.5.2004 as not pressed, resultantly two weeks' time was extended to the appellant to furnish the required surety. Nonetheless, he failed to furnish the same and ultimately the matter came up for the arguments/final disposal. The learned Single Judge, after attending to the contentions raised by the learned counsel for the respective parties before him, decreed the suit as stated above vide impugned judgment and decree. The appellant

however, being dissatisfied with the said judgment and decree has filed the instant appeal.

5. Learned counsel for the appellant mainly argued that the document which is the base of the claim made by the respondent in his suit for the recovery of the alleged sum was not a promissory note, but mere a bond as it contains signatures of two attesting witnesses and the relief under such document can be pressed in a long cause suit and not in the summary proceedings visualized under Order XXXVII CPC and in order to bring home his such contention, he referred to sections 2 (5 ) and 2 (22 )of the Stamp Act, 1899, in addition to section 4 of the Negotiable Instruments Act, 1881 and relied upon the case laws reported in AIR 1925 Patna188, AIR 1962 Patna 325, PLD 1963 K 926, PLD 2007 Lahore 114 and 2011 SCMR 1559. He further contended that when the base of the suit filed by the respondent was weak and untenable, the same could not have been decreed against the appellant. He lastly prayed for dismissing the suit in view of the legal position expounded by him in his arguments.

6. As against it, the learned counsel for the respondent contended that definition of promissory note as propounded by the counsel for appellant is not in accordance with the law and mere signing of a document by two witnesses would not change its status from being a promissory note to a bond, particularly when the claim of the respondent in respect of money, subject matter of the suit, has not been denied by him. He further contended that the appellant had filed a review application against the conditional leave granting order but the same was not pressed by him later on, meaning thereby he had materially agreed to fulfill the condition for defending his suit which he however, failed to perform despite extension of the time granted by the trial court leaving

no option to the Court but to decree the suit in favour of the respondent. He in support of his contentions relied upon the case laws reported in 1996 SCMR 1530, PLD 2005 SC 322, PLD 1987 K 76, 1991 CLC 164, AIR 1978 Madras 712, AIR 1968 Rangoon 45 and PLD 1995 SC 362.

7. We have given due attention to the contentions raised by the counsel and gone through the material available on the record including the decisions cited by them at bar.

8. To appreciate the subtle difference between a bond and a promissory note and to determine as to whether the document relied upon the respondent in his suit filed for the recovery of the amount is either a bond as contended by the counsel for the appellant or a promissory note as urged by the respondent's counsel, we would like to examine the definitions of the bond and the promissory note provided under the Stamp Act 1899 and the Negotiable Instruments Act 1881

**Section 2 (5) of the Stamp Act, 1899.**

***Bond***—“bond” includes—

(a) *any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ;*

(b) *any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another ; and*

(c) *any instrument so attested, whereby a person obliges himself to deliver grain or other agriculture produce to another.*

9. Essentially a bond appears to be an instrument whereby a person binds himself to pay money to another person conditionally as is envisaged in clause (a) of the definition; however the obligation so binding the person would become void on performance or non-performance of a specified act. The bond could be without any condition as is provided in clause (b) whereby a person binds himself to pay

money to the other through a document attested by a witness but not payable to order or bearer and per clause(c) it could be an instrument committing a person to deliver agricultural produce to another. The litmus test to find out about a document as to whether it is either a bond or not would be to examine the whole document itself coupled with intent of the parties therein, other than the stipulations contained in section 2 (5) of the Stamp Act. Additionally if it speaks about a liability or a right in existence between the parties prior to the execution of such instrument, it would not be bracketed as a bond, however, the document which creates the obligation for the first time would be deemed to be a bond and the concomitant prerequisite would be that it should not be payable to the order or bearer. Therefore, mere fact that a document, which is a purported promissory note, has been attested by the witnesses would not make it a bond unless all the essentials discussed above stand fulfilled. Whereas on the analysis of the relevant provisions of law, we have found that the promissory note primarily is a document in writing which contains an unconditional undertaking or a promise to pay on demand or at the fixed or future time which is determinable, a certain sum of money only and the payment should be to or to the order of a certain person or to the bearer of the instrument. The document is necessarily required to be signed by its maker to make it a promissory note. It is always considered independent of other dealings between the parties. The question whether a document is a promissory note or not can be determined by the words used therein. It is certainly not a bank-note or a currency note. Where a document is executed encapsulating a promise by its maker to pay the money and, so long as the words used themselves express a promise the same would be construed to be a promissory note. The definition of a promissory note provided in section

2 (22) of Stamp Act has to be conjunctively seen and read with section 4 and section 13 (1) of Negotiable Instrument Act to identify a pro- note which certainly is distinct from the bond. For ready reference the sections 2 (22) of the Stamp Act and sections 4 and 13 (1) of the Negotiable Instrument Act are reproduced herewith:

**Section 2 (22) of the Stamp Act**

***Promissory note – XXV of 1881.*** – “Promissory note” means a promissory note as defined by the Negotiable Instruments Act, 1881.

*It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen.*

**Section 4 of the Negotiable Instrument Act**

***“Promissory note”.*** A “promissory note” is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or the bearer of the instrument.

**Section 13(1) of the Negotiable Instrument Act**

***“Negotiable instrument”.*** (1) A “negotiable instrument” means a promissory note, bill of exchange or cheque payable either to order or to bearer.

*Explanation (i).* A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

*Explanation (ii).* A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

*Explanation (iii).* Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly or it may be made payable in the alternative to one of two, or one or some of several payees.

10. The case of the appellants concerning the status of the document does not stand on any firm footing, if seen in the light of above

provisions of law, and we are not hesitant to hold, the contention of the learned counsel that a purported promissory note signed by the witnesses would metamorphose into a bond, is without any force and cannot be sanctified under the law. The same issue came up for hearing before the learned Single Judge of this Court in the case of Farid Akhtar Hadi Vs. Muhammad Latif Ghazi and another (1988 CLC 2397), wherein it has been observed as under:

*“I have heard Mr. Faiq Hussain Rizvi, learned counsel for the applicant and the respondent in person, and I have also perused the original document on the basis of which the suit is filed. The impugned order of the learned IVth Additional District Judge is very short. He has not given detailed reasoning as to why he prima facie considered the document to be a bond. The document no doubt is attested by two witnesses but that fact alone may not be sufficient to hold, that it is a bond. Bond has been defined in section 2(b) of Stamp Act. Clause (b) of the said section would be relevant which reads as under:-*

*“2(5) Bond includes . . . .*

*(a) . . . . .*  
*(b) . . . . .*

*One of the prerequisites of the document, that can be considered as a bond is, that it should not be payable to order or the bearer. The instrument in question provides, that the amount would be payable to the promisee or to any other person whom he authorizes. Thus, prima facie the amount under this instrument is payable to order or to the bearer. In order to determine as to whether a particular document is a promissory note or a bond, the intention of the parties is a very necessary circumstance to be taken into consideration and it must be seen, whether the parties intended that the document should be negotiable or that it was merely to serve as evidence of the debt”. (Underlining is ours)*

13. We have examined the promissory note, available at page 63 of the file, which is reproduced herein below.

#### **PROMISSORY NOTE**

*I, Abdul Aleem Butt son of Abdul Wahid Butt, residing at House No.177-T, Block 2, PECHS, Karachi hereby promise to pay on demand the sum of Rs.5.05 million (Five Million and Fifty thousand only) to Bahria Foundation, 6<sup>th</sup> Floor, Bahria Complex-II, M.T. Khan Road, Karachi for value received.*



June 13<sup>th</sup>, 1998

Sd/-  
 ABDUL ALEEM BUTT  
 S/O. ABDUL WAHID BUTT  
 N.I.CNO.517-52-108712

WITNESSES

Sd/-

1. MUHAMMAD YUNUS

Sd/-

2. M. ILYAS

The promissory note ibid contains an unconditional undertaking on the part of the appellant to pay on demand a sum of Rs.5.05 million to Bahria Foundation and it is signed by him. All the four conditions highlighted by the Hon'ble Supreme Court in the case of Sheikh Muhammad Shakeel Vs. Sheikh Hafiz Muhammad Aslam (2014 SCMR 1562), which a promissory note is required to contain, ex-facie, appear to stand fulfilled, therefore, bare attestation of the said document by two witnesses would not exclude it from its status of being a promissory note, as there appears no language therein that the payment is not payable to order or bearer, which is a primary prerequisite of a bond. For ready reference, we find it pertinent to reproduce the august observations of the Hon'ble Supreme Court in the above case, cited at bar by the learned counsel for the appellant, wherein the Hon'ble Supreme Court has held that the requirement of attestation of a document as contained under Article 17(2)(a) of the Qanun-e-Shahadat Order is contrary to the definition given by Section 4 of the Negotiable Instruments Act. However, in our view, it does not mean that if a purported promissory note has been advertently or inadvertently signed by two witnesses, it would cease to be a promissory note. Para-9 of the above judgment reads as under:

*“9. We have heard the learned Counsel for the parties and have perused the record. The appellant filed a suit in terms of Order XXXVII, Rule 2, C.P.C. on the basis of a Promissory Note executed by the respondent on 25-5-2001. The learned High Court has held that the Promissory Note was not attested in terms of Article 17(2)(a) of the Order, therefore, it was not a valid*

*instrument. This finding of the learned High Court is contrary to the language of section 4 of the Act, which defines a Negotiable Instrument. In terms of section 4 of the Negotiable Instruments Act, a Promissory Note is required to contain the following ingredients:--*

- (i) An unconditional undertaking to pay,*
- (ii) the sum should be the sum of money and should be certain*
- (iii) the payment should be to or to the order of a person who is certain, or to the bearer, of the instrument,*
- (iv) and the maker should sign it”.*

In para-10 of the above cited judgment, the Hon'ble Supreme Court has further observed as under:

*“10. If an instruments fulfills the above four conditions it will be termed as Promissory Note within the meaning of section 4 of the Act. The requirement of attestation of a document t as contained under Article 17(2)(a) of the Order is contrary to the definition given by section 4 of the Act. Therefore, we are of the considered view that the Promissory Note Exh.P.2 produced by the appellant in evidence contains all the ingredients of a valid Promissory Note as defined in section 4 of the Act.*

11. Another aspect of the case which does not skip our attention is, the appellant had taken the plea in his application for leave to defend the suit that the document was not a promissory note, which was duly adverted to by the learned Single Judge in his leave granting order dated 30.03.2004 whereby he observed that *“the defense appears to be that it is not a promissory note in accordance with law. The controversy as to the legality or otherwise of the promissory note could only be determined when the evidence in the backdrop of the pending dispute between the parties is examined”*. After having held such view, the Learned Single Judge granted the conditional leave to the appellant to defend his claim against which order he filed a petition for review, however, it appears that he did not press it subsequently and resultantly the same was disposed of on 17.05.2004. The same order has attained finality having never been challenged by the appellant. By conducting

himself in such a way, the appellant agreed to defend the suit conditionally and was estopped from raising the same plea subsequently without first fulfilling the condition subject to which he was granted leave to defend the suit. The failure of the appellant to comply the order had left no option with the Court but to decree the suit. For reliance the judgments of the Hon'ble Supreme Court of Pakistan in the cases of Haji Ali Khan & Company, Abbottabad and 8 others Vs. M/s. Allied Bank of Pakistan Limited, Abbottabad (PLD 1995 Supreme Court 362) and Murtaza Haseeb Textile Mills Vs. Sitara Chemical Industries (2004 SCMR 882) are cited. In para-10 of the former judgment, the Hon'ble Supreme Court has observed as under:

*“10. The ratio decidendi of the above-referred cases seems to be that if a Defendant fails to appear or fails to obtain leave to defend in response to a summons served in Form No.4 provided in Appendix B to the C.P.C. or fails to fulfill the condition on which leave was granted or where the Court refuses to grant leave, the Court is to pass a decree. It may further be observed that in sub-rule (2) of Rule 2, C.P.C., it has been provided that if a Defendant fails to appear or defaults in obtaining leave, the allegations in the plaint shall be deemed to be admitted and the Plaintiff shall be entitled to a decree, but no such consequences are provided for in Rule 3 of the above Order in a case where the Court refuses to grant leave or the Defendant fails to fulfill the condition on which leave was granted. In our view, notwithstanding the above omission in Rule 3, the effect of refusal of the Court to grant leave or failure on the part of the Defendant to comply with the condition of the leave, will be the same i.e. the Defendant shall not be entitled to defend the suit on any ground and the Court would pas a decree in favour of the Plaintiff”.* (Underlining is ours).

12. The above discussion has firmly led us to conclude that the appellant has miserably failed to prove his case; resultantly the instant appeal is dismissed with no order as to cost.

JUDGE

JUDGE