

**ORDER SHEET
HIGH COURT OF SINDH AT KARACHI**

First Appeal No.78 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

**Before:-
Mr.Justice Muhammad Ali Mazhar
Mr.Justice Agha Faisal**

Mohammad Moazam Khan.....Appellant

Versus

Mohammad Iqbal & another.....Respondents

Date of hearing: 19-04-2019

Mr. Akhtar Hussain, Advocate for the Appellant
assisted by Mr. Younus Shaad, Advocate.

None present for the Respondents.

Muhammad Ali Mazhar, J: This First Appeal under Section 96 of the Civil Procedure Code has been brought to challenge the impugned judgment dated 29.01.2013 and decree dated 06.02.2013 passed by the Vth Additional District & Sessions Judge, Karachi-East in Suit No.34/2011.

2. The short-lived facts of the case are that the appellant had filed a suit for recovery of Rs.55,00,000/- under Order XXXVII CPC. The appellant alleged that the respondent No.1 was working as an agent of stock Brokerage. On account of friendly relations, the appellant paid him Rs.55,00,000/- for purchase of shares but neither he purchased the shares nor returned the money back to the appellant. However on constant demand, the respondent No.1 (defendant No.1) issued two promissory

notes in the sum of Rs.43,00,000/- and Rs.12,00,000/-. The copies of promissory notes and the receipts were also filed in the trial court. In order to ensure the timely payment, the respondent No.1 had also issued five post-dated cheques amounting to Rs.42,50,000/- and two post-dated cheques were issued from the account of his mother i.e. the respondent No.2. The details of cheques with amount are mentioned in seriatim. On presentation of the cheques, all cheques were dishonoured. The appellant time and again approached to the respondents but they failed to honour and fulfil their commitment and ultimately the appellant was left with no other option but to file the suit for recovery under Summary Chapter.

3. According to the impugned order, the leave to defend application was filed by the respondents in which they took the plea that the suit does not attract to the provisions of Order XXXVII CPC. They further denied that the appellant ever gave any such amount to them. They also denied the issuance of promissory notes and cheques against such consideration and wrapped up with the plea that the claim of plaintiff/appellant is false, fabricated and based on concocted story with a further request that the suit may be converted into ordinary suit for recovery rather than summary proceedings.

4. After hearing the arguments at leave to defend stage, the trial court dismissed the suit, however, the appellant was permitted to file simple suit for recovery. The relevant portion of the order passed by the trial court is reproduced as under:

“Heard and perused. Perusal of record shows that the suit of the plaintiff is based on the promissory note, perusal of promissory note shows that same is a conditional and the same is not attested by the witnesses. The receipt of payment has also not been attested by any witness. In the case in hand huge amount of Rs. 55,00,000/- has been paid

by plaintiff to the defendant No.1, for purchase of shares and according to plaintiff, defendant No.1 neither purchased the shares nor returned the amount to the plaintiff, he demanded for his money and in the first instance defendant No.1, issued 5 cheques and defendant No.2 issued two cheques in favour of the plaintiff on behalf of the defendant No.1, being the mother of the defendant No.1. The said cheques were encashed consequently same has been dishonoured. Finally the defendant No.1 had issued a promissory note in favour of plaintiff. In such type case the intention of parties is necessary circumstances for determining the question that whether under the circumstances document signed by the defendant is a bond or promissory note. The document which does not unconditional undertaking by the promisor to pay to promise by definite or determinate date would prima facie be a bond and not a pro-note. Here I have been guided from the case law reported in YLR 2000 2927 that:-

“...Unattested promissory note, After enforcement of Qanun-e-Shahadat, 1984 all instruments pertaining to financial or future obligations are required to be attested by at least two witnesses. Where promissory note was not attested by the witness, suit brought on it was dismissed. Moreover, the receipt attached with pronote to be effective must have been attested by two witnesses and the said witnesses should have been produced to prove the same. Such omission on the part of the appellant was fatal in so far as proof pronote, the basis of suit, was concerned.....

In view of the above discussion, reached to the conclusion that the suit of plaintiff is not maintainable, hence the same is dismissed, with no order as to cost. However, the plaintiff is at liberty to file simple suit for recovery before the competent court of law having jurisdiction.”

5. The learned counsel for the appellant argued that the trial court passed the impugned order without application of mind. It failed to consider that the promissory notes were termed with unconditional undertaking to pay the amount in future or on demand. All the essential ingredients of the promissory notes were fulfilled. The trial court also failed to consider that in addition to the promissory notes the plaintiff/appellant also approached against the dishonouring of the cheques but the entire focus of the impugned judgment was on promissory notes while ignoring the factum of issuing cheques also by the same respondents.

6. On 22.09.2014, the learned Judge of this court passed the order to effect the service through courier, pasting, publication in newspaper and on 29.10.2014 the same learned Judge held the service good. Despite service,

nobody appeared for the respondents to defend this appeal and finally the matter was heard by us on 19.04.2019 in their absence.

7. Heard the arguments. The Negotiable Instruments Act is intended to lay down the whole law regarding cheques, bills of exchange and promissory notes. The negotiability can be attached to documents by mercantile usage. The Negotiable Instruments Act is a statute dealing with a particular form of contract and the law laid down for special cases must always overrule provisions of general character. According to interpretation clause of the Negotiable Instruments Act, “*issue*” means the first delivery of a promissory note, bill of exchange or cheque complete in form to a person who takes it as a holder; “*delivery*” means transfer of possession, actual or constructive, from one person to another; “*bearer*” means a person who by negotiation comes into possession of a negotiable instrument, which is payable to bearer; and “*banker*” means a person transacting the business of accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, and includes any Post Office Savings Bank. According to Section 4 of the Negotiable Instruments Act, 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. An instrument which fulfils all the conditions mentioned in Section 4 of the Negotiable Instruments Act would be termed as promissory note. To determine the nature of an

instrument where there is a promise to pay, the best way is to see what is the intention of the parties and what is the instrument in the common acceptance of men of business or persons among whom it is commonly used. Ordinarily in order to amount to a promissory note, an instrument must simply contain a promise to pay and nothing else. The true import of the words '*on demand*' is that the debt is due and payable immediately. The endorsement does not mean that it is not payable immediately or without any demand.

8. A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer usually named on the document. It can serve to convey value constituting at least part of the performance of a contract, albeit perhaps not obvious in contract formation, in terms inherent in and arising from the requisite offer and acceptance and conveyance of consideration. The instrument itself is understood as memorializing the right for, and power to demand, payment, and an obligation for payment evidenced by the instrument itself with possession as a holder in due course being the touchstone for the right to, and power to demand payment. A promissory note typically contains all the terms pertaining to the indebtedness, such as the principal amount, interest rate, maturity date, date and place of issuance, and issuer's signature. The difference between a promissory note and a bill of exchange is that the latter is transferable and can bind one party to pay a third party that was not involved in its creation. Bank notes are common forms of promissory notes. Bills of exchange, orders a debtor to pay a particular amount within a given period of time issued by the creditor. The

promissory note is issued by the debtor and is a promise to pay a particular amount of money in a given period. A bill of exchange must clearly detail the amount of money, the date, and the parties involved (including the drawer and drawee). The following are some points of differences between promissory notes and bills of exchange, a) A promissory note generally involves two parties, i.e. a maker (debtor) and a payer (creditor). On the other hand, bills of exchange include a drawer, a drawee and a payee; b) As the bills of exchange introduction above shows, a bill orders the drawee to pay as per the drawer's directions. A promissory note, however, is not an order but a promise to pay; c) The liability of maker of a promissory note is absolute, while that of the drawer of a bill is conditional; d) Notes cannot be payable to their makers, while the drawer and the payee in bills can be the same person. So far as the niceties of the cheques are concerned, according to Section 6 of the Negotiable Instruments Act, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. A cheque is a peculiar sort of instrument in many ways resembling a bill of exchange, but entirely different. A cheque is not intended for circulation but it is given for immediate payment and not entitled to days of grace and thus it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. A cheque whether payable to bearer or to order is not rendered void by post-dating it and is admissible in evidence in an action brought after the date of the cheque by the holder although he took with knowledge of the post-dating.

9. We have minutely examined both the promissory notes and in our resolute view, all the prerequisites required to be followed and fulfilled at the time of issuing promissory notes were see through and persevere with. The trial court erroneously and without any lawful justification held that the promissory notes demonstrate that these were conditional. Another slipped-up and error manifesting from the record that the trial court avowed that the promissory notes were not attested by the witnesses. Moreover the dishonouring of cheques was also not taken into consideration but in a slipshod manner the suit was dismissed at leave to defend stage. If the trial court was of the view that leave to defend application deciphered some triable issues then the trial court could have granted leave to defend conditionally or unconditionally and after settlement of issues the suit could have been decided on merits rather than non-suiting the appellants on misconceived notion.

10. The trial court relied on the judgment in the case of Muhammad Nawaz vs. Abdul Sattar reported in 2000 YLR 2927. The head note produced in the judgment is also not correctly reproduced. The judgment in the case of Muhammad Nawaz (supra) is not focused on the controversy raised in the case in hand and moreover, the judgment is not grounded on correct exposition of law. The promissory notes are not required to be attested by the witnesses. Under Article 17 of the Qanun-e-Shahadat Order, 1984, it is clearly provided in Sub-Article (2) that unless otherwise provided in any law relating to the enforcement of Hudood or any other special law, (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may

remind the other, if necessary, and evidence shall be led accordingly. The condition laid down in Sub-Article (2) by attestation of an instrument does not apply to the promissory note which is basically provided under the provisions of Negotiable Instruments Act as a fragment and segment of a special law. In the matching context, and milieu, the hon'ble Supreme Court in the case of **Sheikh Muhammad Shakeel vs. Sheikh Hafiz Muhammad Aslam reported in (2014 SCMR 1562)** in paragraph 9 articulated 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.”**

11. Since the impugned judgment was based on erroneous reasoning and incorrect exposition of law therefore we had set aside the impugned judgment and decree vide our short order dated 19.4.2019 and remanded the matter to the trial court for deciding the suit on merits. Above are the reasons of our short order.

Judge

Judge

Karachi.
Dated.22.5.2019