IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.150 of 1989

Present: **Mr. Justice Khilji Arif Hussain**
Mr. Justice Muhammad Karim Khan Agha

Dates of hearing: 22.4.2009 and 23.4.2009

Appellant: Millwala Sons Limited through Mr. Qazi Faez Issa, advocate.

Respondents: Messrs Jaymissco and another through Mr. Fazle Ghani Khan, advocate.

JUDGMENT

MUHAMMAD KARIM KHAN AGHA, J., This High Court Appeal arises out of judgment dated 19.4.1989, passed by learned Single Judge of this Court (hereinafter referred to as the "**Impugned Judgment**"). In essence, there are two main points of Appeal, raised by the appellants. Firstly, that the learned Single Judge erred in allowing interest from 09.8.1984 instead of from 09.8.1974. Secondly, that the learned Single Judge found that the alleged guarantee letter, exhibit 5/16 (the Letter), had not been proven in accordance with the law and that even then the Letter, in effect, amounted to a substitution of the debtor, which was not warranted by any provisions of law and as such respondent No.2 could not be legally liable for its commitment made in the Letter.

2. The brief facts of the case are that the appellant sold and delivered to respondent No.1, 500 bales of cotton for the price of Rs.515,461/42. In part-payment of the goods, the respondent No.1 made payment to the appellant through five different cheques. These cheques on presentation were dishonored.

3. As a result the appellant threatened to institute recovery proceedings for the unpaid amount. The respondent No.1, however, offered to ensure payment of the goods and to this end respondent No.2 ,pursuant to a letter dated 25.05.1974 from Respondent No 1, on 28.5.1974 guaranteed the payment of Rs.515,000/- and issued a credit note in favor of the appellant i.e. the Letter. The respondent

No.2 agreed to pay the said amount on or before 28.7.1974. In the event, neither respondent No.1 nor the respondent No.2 made any payment to the appellant bar a payment made by respondent No.1 for a sum of Rs.50,000/-.

4. The upshot was that the appellant filed recovery Suit bearing No.309/1974 against both respondents No.1 and 2. The respondents filed their respective written statements in the said suit, the Court framed the issues at page 4 of the Impugned Judgment and after recording evidence and hearing the parties passed the Impugned Judgment.

5. Learned counsel for the appellant, on the first ground of appeal, has reiterated that the learned Single Judge erred in allowing interest from 09.8.1984 instead of 09.8.1974, which, according to him, was a typographical error as the suit was instituted on 09.8.1974.

6. With regard to the second ground, the appellant's counsel argued that the Letter, was an admissible document under Article 73 of the Qanoon-e-Shahahdat Order, 1984, and since it had not been challenged in cross examination it stood proven under Article 133 of the Qanoon-e-Shahahdat Order, 1984,.

7. Furthermore, according to him by the Letter, respondent No.2 had undertaken to pay to the appellant the sum of Rs.515,000/- after two months. The said Letter had been given by respondent No.2 in consideration of the promise of the appellant not to sue Respondent No 1 and was a guarantee which was enforceable by the appellant against respondent No.2 regardless whether or not it was a substitution of surety. That the learned Single Judge had erred in holding that the substitution of respondent No.2 for respondent No.1 was not warranted by any provision of law.

8. According to the learned counsel for the appellant, under the law, the document amounted to a guarantee and the appellant was entitled to rely upon it and the respondent No.2 was obliged to make payment under it. In support of his arguments, especially that the Letter amounted to a guarantee, he referred to the

Contract Act, 1872 ("**Act, 1872**') and, in particular, he placed reliance on Sections 2-A, 2-B, 2-D, 2-E and Sections 126 and 127 of the Act, 1872.

9. When asked by the Court, learned counsel for the appellant conceded that the Letter could not amount to an indemnity under Section 124 of Act, 1872. Learned counsel for the appellant has placed reliance on the following case law in support of his various contentions:-

(i) NUR JEHAN BEGUM v. MUJTABA ALI NAQVI (1991 SCMR 2300)
(ii) SHERAZ TUFAIL V. STATE (2007 SCMR 518),
(iii) STATE ENGINEERING CORPN. LTD. v. NATIONAL DEVELOPMENT FINANCE CORPN. (2006 SCMR 619),
(iv) GHULAM RASOOL v. NAZIR OF THE SINDH HIGH COURT (1992 CLC 2490),
(v) NATIONAL BANK OF PAKISTAN v. ALAM INDUSTRIES LTD. (PLD 1992 Karachi 295),
(vi) RAFIQUE HAZQUEL MASIH v. BANK ALFALAH LTD. (2005 SCMR 72),
(vii) BRIJRAJ v. RAGHUNANDAN (AIR 1955 RAJASTHAN 85 (Vol. 42, C.N.28),
(viii) ADAM ALI AGARIA v. ASIF HUSSAIN (1996 MLD 322),
(ix) HABIB BANK LIMITED v. SHALIMAR SILK MILLS LTD. (1993 CLC 1295),
(x) GOPALDAS v. RAMDEO (AIR 1957 Rajasthan 360 (V 44 C 138 Nov.)
(xi) FARID AKHTAR HADI v. MUHAMMAD LATIF GHAZI (1993 CLC 2015), and
(xii) RAHIM BAKHSH v. ALLAH JIWAYA (1992 CLC 2433)

10. On the other hand, learned counsel for respondent No.2 has refuted the arguments of the appellant, in particular, he has contended that the Letter was not a guarantee. This was because, according to him, a guarantee needed to be made between three parties but in this case it had only been made between two parties i.e. the appellant and Respondent No 2.

11. He contended that this was simply a business transaction between the parties and had nothing to do with the law of guarantee. He agreed with the findings of the learned Single Judge that, in essence, the respondent No.1 had simply passed on its liability to respondent No.2 and the Letter was not enforceable against respondent No.2 by the appellant. In support of his contention that the Letter could not amount to a guarantee he placed reliance on the case of RAMCHANDRA v. SHAPURJI (AIR 1940 Bombay 315).

12. Furthermore, he contended that even if the Letter could be regarded as a guarantee this had been frustrated by the subsequent payment of Rs.50,000/- by respondent No.1 to the appellant which the appellant admitted receiving in its Plaint. In support of this contention he placed reliance on Section 135 of Act, 1872.

13. We have reviewed the file in detail and carefully considered the submissions of learned counsel for the respective parties.

14. The first point of appeal regarding the error in the year when payment for interest should start, would seem to be a typographical error since the Court record shows that the institution of the proceedings was on 09.8.1974 rather than on 09.8.1984. The respondents' counsel in his submissions has not addressed this point. We, therefore, find that the date from when interest should run in the Impugned Judgment was incorrectly mentioned as 09.8.1984 and should have been read as 09.8.1974.This point of appeal is, therefore, allowed.

15. The second point of appeal revolves around the interpretation of Exhibits 5/17 and 5/16. For convenience sake both these exhibits are set out as under:-

Exhibit 5/17

"May 25, 1974

Messrs Al-Ata Textile Mills Ltd.,
Adamjee House
I.I. Chundrigar Road
Karachi – 2.

Dear Sirs,

Please refer to the discussions that the writer had with your Chairman the other day when it was agreed as under:

That there is an amount of Rs.10,48,099.84 (Rupees ten lakhs, forty eight thousand, ninety nine and eighty four paisas only) as due and payable by you to us being the 100% payment of the raw cotton supplied to you by us.

That a sum of Rs.5,15,000/- (Five lakhs and fifteen thousand only) out of the above amount is payable by us to Messrs Millwalla Sons Ltd as the cost of the part of the goods supplied to you.

That you will kindly issue a formal credit letter to Messrs Millwalla Sons Ltd., Karimji Musabhai Bldg., Opp. Sind Madressah, Frere Road, Karachi, for the amount of Rs.5,15,000/- debiting the same to our account.

We would, therefore, request you kindly to issue the necessary credit letter as approved by the Chairman.

Thanking you,

Yours faithfully,
For JAYMISSCO"

cc: Messrs Millwalla Sons Ltd.,
Kasimji Musabhai Bldg.,
Opp; Sind Madressah,
Frere Road, Karachi.

Exhibit 5/16 (the Letter)

"28th May, 1974

Messrs Millwala Sons Ltd.,
Kasimji Musabhai Building
Opp. Sindh Madressah,
Frere Road
KARACHI.

Dear Sirs,

As per instructions of M/s JAYMISSCO, we hereby issue you a credit letter for the amount of Rs.5,15,000/- (Rupees five lac fifteen thousand only) which amount shall be payable by us to you after two months from the receipt thereof.

Yours faithfully,

(SYED MOINUL HAQUE)
General Manager"

16. The preliminary point arises whether or not these documents, in particular, Exhibit 5/16 (the Letter), stands proven. According to the Impugned Judgment, Exhibit 5/16 was found not to be proven.

17. Only one witness gave evidence in this case and he was PW-1, Noor Bhai, who, in his evidence, stated that the respondent No.1 provided them a guarantee letter and he produced two such letters in this context from respondent No.1 as Exhibits 5/16 and 5/17. No objection to the admission of these documents was made at that time. During cross-examination neither of the above two exhibits were ever brought into question. No witness appeared for the Defense refuting either the admissibility or proof of the documents.

18. Article 73 of the Qanoon-e-Shahahdat Order, 1984, provides for the admissibility of primary evidence through documentary form. Under this Article both exhibits were admissible.

19. Under Article 133 of the Qanoon-e-Shahahdat Order, 1984, it is well settled law that if any evidence is not disputed in cross-examination then it is deemed to be an admitted fact. Reliance is placed on the case of SHERAZ TUFAIL v. STATE (2007 SCMR 518).

20. In the case of NUR JEHAN BEGUM v. MUJTABA ALI NAQVI reported as 1991 SCMR 2300 it was held as under:-

> "The principle enunciated in the commentaries and rulings is that where on a material part of his evidence a witness is not cross-examined it may be inferred that the truth of such statement has been accepted. Statement of a witness which is material to the controversy of the case particularly when it states his case and the same is not challenged by the other side directly or indirectly, then such unchallenged statement should be given full credit and usually accepted as true unless displaced by reliable, cogent and clear evidence."

21. Accordingly, we find that the learned Single Judge in the Impugned Judgment erred in finding that documents, Exhibits 5/16 and 5/17, were not proven. We find both of these documents to be proven.

22. The next issue is what actually is the status of the Letter. The appellant's counsel has argued that by virtue of various sections of Act, 1872, which he has cited above, the Letter amounted to a guarantee. In order to appreciate the appellant's arguments that under Act, 1872, the Letter amounted to a guarantee, it is helpful to reproduce Sections 126 and 127 of Act, 1872:-

> "126. A "contract of guarantee" is a contract to perform the promise, discharge the liability of a third person in case of his default. The person, who gives the guarantee, is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."
>
> 127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee."

23. In support of his contention that the document is a guarantee, learned counsel for the appellant has in particular placed reliance on the following cases:-

(i) STATE ENGINEERING CORPN. LTD. v. NATIONAL DEVELOPMENT FINANCE CORPN. (20067 SCMR 619);
(ii) RAFIQUE HAZQUEL MASIH v. BANK ALFALAH LTD. (2005 SCMR 72);
(iii) UNITED BANK LTD. v. PAKISTAN INDUSTRIAL CREDIT 7 INVESTMENT CORPN. LTD. (2002 CLD 1781)

24. We are, however, not persuaded by the arguments of the appellant's counsel that the Letter amounts to a guarantee under the above cited sections and case law. A guarantee needs the involvement of three parties, however, it seems that the Letter only involves two parties, therefore, it cannot fall within the definition of a guarantee. This is more so since the Letter was given by respondent No. 2 after the contract of sale between the respondent No.1 and the appellant had already been breached by respondent No.1.

25. We are of the considered view that the learned Single Judge rightly found that the effect of the Letter was a substitution of liability from respondent No.1 to respondent No.2 and was not a guarantee. Reliance is placed on the case of BAGHA CO-OPERATIVE SOCIETY v. DEBI MANGAL PRASAD (AIR 1937 Patna 410) and the case of RAMCHANDRA v. SHAPURJI (AIR 1940 Bombay 315). In the latter case it was held as under:-

> ".....A contract of guarantee involves three parties, the creditor, the surety and the principal debtor and a contract to which those parties are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible to work out the rights and liabilities of the surety under the Contract Act....."

26. During his arguments, learned counsel for the appellant had submitted that if the Letter was not a guarantee then in the alternative it could amount to a

promissory note, in which case he could rely on it in that context. This is supported by his Memo of Appeal, which sets out at ground "B" as follows:-

> "B. That the learned Single Judge failed to appreciate that the letter of the respondent No.2 dated 28.5.74 (Exhibit 5/16) was an admitted document which clearly established that the respondent No.2 had undertaken to pay to the plaintiff the sum of Rs.5,15,000 after two months. The said document having been given by the respondent No.2 in consideration of the promise of the plaintiff not to sue the respondent No.1 was in the nature of a guarantee. *In any event, and without prejudice to the above contention, the said letter clearly amounted to an acknowledgment of debt owed by the respondent No.2 to the plaintiff of an amount of Rs.5,15,0000."* (italics added)

27. In our view it is open to the appellant to argue in the alternative that the Letter is, in fact, a promissory note, which is enforceable against Respondent No.2. Furthermore, there is authority that where a document can be construed to fall within a number of categories then it is up to the court to determine the category/nature of the document and that its labeling is not critical. Reliance is placed on the case of MUHAMMAD RAFIQUE v. MUHAMMAD NAWAZ (2001 CLC 318), where it was held as under:-

> ".....It is the contents of the document which bring such document within the definition of a promissory note. The heading given to such document is not legally relevant.....".

28. For a document to be regarded as a promissory note, it must fulfill the definition as set out in Section 4 of the Negotiable Instruments Act, 1881, ("**Act, 1881**"). Section 4 of Act, 1881 is reproduce herein below:-

> "4. "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."

29. The ingredients of a promissory note, as set out in Section 4 of Act, 1872, have been affirmed in the cases of GOPALDAS v. RAMDEO (AIR 1957 RAJASTHAN 360 (V 44 C 138 Nov.)) and BADHAVA SINGH v. CHARAN SINDH (AIR 1955 RAJASTHAN 85 (Vol. 42, C.N. 28)). In the latter case it was held as under:-

"(2) The question is whether the document, with which we are concerned, is a promissory note or not. It is in the following words:

"Shriman Sahu Raghunandan Sharanji,
Sambhar Lake,

In your account Rs.4,668/15/- are due from my son Mahesh Chandra. I shall pay that amount by December, 1948. You rest assured.

Brijraj Sharan."
6/8/48,

The definition of a promissory note is given in S. 4, Negotiable Instruments Act, in these words:

"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 a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument."

(3) In order therefore that a document should be a promissory note, it is necessary that there should be
(i) an unconditional undertaking to pay,
(ii) the sum should be a 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.

If these four conditions are present, a document becomes a promissory note. We have, therefore, to see whether in this document all these four conditions are present. We may mention that the Court below has held that his document is not a promissory note because it is not certain to whom the money is to be paid. The other three conditions, namely,

(i) that there should be an unconditional undertaking to pay,
(ii) that the amount should be an ascertained sum of money, and
(iii) that the document should be signed by the maker, are present in this case. Now all that has to be seen is whether the person to whom the payment is to be made is certain or not."

30. The question, therefore, arises, whether based on the requirements of Section 4 of Act, 1881 the Letter can be construed as a Promissory Note.

31. It is important to read Exhibits 5/16 and 5/17 together. Exhibit 5/16 cannot be construed without reference to Exhibit 5/17. When read together, these documents show that the learned Single Judge has rightly held that the respondent No.1 has passed on his liabilities to respondent No.2. In accepting this liability, respondent No.2, pursuant to respondent No.1's letter dated 25.5.1974, on 28.5.1974 issued the appellant a credit letter for the amount of

Rs.515,000/-, which was to be payable by respondent No.2 within two months from receipt thereof.

32. In our view, the Letter itself was the credit letter. There was no other additional credit letter, which had to be issued. In our interpretation of the Letter read in context with Exhibit 5/17 the final word in the paragraph ought to have read as "hereof" instead of "thereof". This was a minor technicality which could not in our view defeat the intention of the Letter which was to oblige respondent No.2 to pay the appellant the sums mentioned in the Letter. Reliance is placed on Maxwell on the Interpretation of Statutes, Twelfth Edition, on page 212, which states as under:-

> "On the general principles of avoiding in-justice and absurdity, any construction will, if possible, be rejected (unless the policy of the Act requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. A man may not take advantage of his own wrong. He may not plead in his own interest self-created necessity."

33. Although the above citation is said to be applicable to Statutes we see no reason why it should also not be used as an aid to interpretation with respect to other documents such as (in this case) the Letter. In our view it would cause an injustice if we do not interpret the final word as "hereof" as opposed to "thereof", which may cause the intention of the letter to be defeated. In our view a liability which is properly payable should not be defeated by a legal technicality.

34. Based on our interpretation of the Letter, we consider that it contains:

(i) an unconditional undertaking to pay;
(ii) a sum of money which is certain;
(iii) a payment that is to be made to a person;
(iv) a signature on behalf of Respondent No 2 .

35. As such the Letter meets all the requirements of a promissory note. The position, therefore, is that the Letter is a promissory note. It is correct that the promissory note has not been stamped, however, this will not exclude it from being enforceable. Reliance is placed on the case of FARID AKHTAR HADI v.

MUHAMMAD LATIF GHAZI (1993 CLC 2015), where at page 2020 it was held as follows:-

> ".....However, section 36 of the Stamp Act provides that the document once admitted in evidence although not admissible by virtue of section 35 of the Act could not be challenged at any subsequent stage of the same suit or proceedings on the ground that the same had not been duly stamped....."

36. The two letters i.e. Exhibits 5/16 and 5/17 when read together clearly show that respondent No.1, on the basis of past and current business transactions with respondent No.2, with the consent of respondent No.2, had passed on his liability to respondent No.2. The appellants were aware of this arrangement as the letter from respondent No.1 to Respondent No 2 (Exhibit 5/17) was copied to them and agreed to it as pursuant to Exhibit 5/17 the Letter by respondent No.2 was sent to them (and was thereafter relied upon by them as can be seen by them sending a legal notice for payment to respondent No.2). According to the appellant, respondent No 2 even initially accepted his obligation by asking for time to make payment

37. This correspondence (Exhibits 5/16 and 5/17) converted respondent No2 into the principal debtor, who was liable to the appellant under a promissory note.

38. In our view, respondent No.2 had full knowledge and was well aware of his obligation to pay the appellant by virtue of the Letter but has deliberately tried to wriggle out from his obligation to make payment on technical grounds.

39. As mentioned earlier, technicalities should not be used in order to circumvent the true intention of the agreement between the parties or as an excuse to avoid genuine liability properly and willingly incurred.

40. In this regard, we rely on the cases of RAHIM BAKHSH v. ALLAH JIWAYA (1992 CLC 2433) and UNITED BANK LTD. v. PAKISTAN INDUSTRIAL CREDIT INVESTMENT CORPN. LTD. (2002 CLD 1781). In

the latter case, it was held by the Hon'ble Supreme Court on the point of technicalities as under:-.

> ".....The guarantor in this case particularly the bank cannot avoid its liability on all these technicalities. Reference in this regard is made to Manager, Jammu and Kashir, State Property in Pakistan v. Khuda yar and another (PLD 1975 SC 678) where the learned Judges of this Court stated that mere technicalities unless offering insurmountable hurdle should not be allowed to defeat the ends of justice."

41. The contention of respondent No.2 that the guarantee had been frustrated and his reliance on Section 135 of Act, 1872 is, therefore, no longer relevant as we have found the Letter not to be a guarantee but a promissory note. In any event, with regard to the alleged new arrangement that had been put in place by the appellant, there is no evidence on record to prove the existence of any such arrangement. The respondent No.2 may be correct in asserting that this was a business arrangement between the two parties. Nevertheless. if a party issues a promissory note to another party then he is bound by such obligations contained therein.

42. The fact that a document, like the Letter, was unclear in its labeling and its legal effect of passing on liability from respondent No.1 to respondent No.2 was not fully appreciated by the appellant at the time should not debar the appellant from seeking to recover money rightfully owed to him.

43. Whether you call the Letter a guarantee, a promissory note, an indemnity or by any other nomenclature its intention, as evidenced by the correspondence (and with the consent of respondent No.2), was to create an obligation on respondent No.2 to make payment to the appellant. In our view, based on the facts and circumstances of this particular case, it would not meet the ends of justice to allow the respondent No.2 to wriggle out of his obligation to pay the appellant under the Letter simply because the appellant bona fide, based on an unclearly labeled and worded letter but which intention was clear at the time, sued him as the guarantor as opposed to the judgment debtor. In this regard we

place reliance on the case of RAHIM BAKHSH (supra), wherein it was held as under:-

> ".....Written documents which appear to have been executed without tinge of fraud and compulsion are entitled to great respect, in order to confer security on human dealings. If on the mere allegations of persons interested in destroying a transaction, the transaction is destroyed, faith of people in the sanctity of written agreements will be shaken, and there will be no assurance to the parties to the agreement that it will survive baseless attacks and will remain effective. It will be tyranny to the people if they are made to live in a state of affairs, under which solemn human dealings are deprived of security of survival....."

44. Accordingly, based on the facts and circumstances relating to this appeal, we set aside the findings of the learned Single Judge in the Impugned Judgment that respondent No.2 cannot be held legally liable under Exhibit 5/16 and hold that Exhibit 5/16 was a Promissory Note and can be relied upon by the appellant against the respondent No 2.

45. As such, we allow this High Court Appeal No.150/1989 for the foregoing reasons and decree the suit against the respondents Nos.1 and 2, jointly and severally, with interest from 09.8.1974 till realization. however, with no order as to costs.

Karachi,
Dated: .05.2009

order issue on 20/5/09

Announced in Court today.

11/5/09

11/5/09.