JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

(1). R.F.A. No.76 of 2009

Amjad Hameed Gondal
Versus
Raja Muhammad Ilyas

(2). R.F.A. No.77 of 2009

Abdul Hameed Gondal
Versus
Raja Muhammad Ilyas

Appellants by	:	Mr. Majid Nadeem Bhatti, Advocate.
Respondent by	:	Qazi Sheharyar Iqbal, Advocate.
Dates of Hearing	:	12.05.2022

ARBAB MUHAMMAD TAHIR,J.:- Through this single judgment, we propose to decide Regular First Appeals No.76 of 2009 and 77 of 2009 since these involve common questions of law and facts and entail common features so also between the same parties.

2. Through Regular First Appeal No.76 of 2009, the appellant, Amjad Hameed Gondal, who is the real son of Abdul Hameed Gondal, the appellant in Regular First Appeal No.77 of 2009, has called in question the judgment and decree dated 22.09.2008, passed by the Court of the learned Additional District Judge, Islamabad, whereby the suit for recovery of Rs.9,10,000/- along with markup at the rate of 2% above the prevailing bank rate from the date of the institution of the suit till the realization of the decreetal amount instituted by the respondent (Raja Muhammad Ilyas) under Order XXXVII, Rule 2 of the Code of Civil Procedure, 1908 ("hereinafter referred to as the **"C.P.C."**), was decreed to the extent of Rs.7,98,000/- with costs as prayed for. Furthermore, the

respondent was held entitled to the interest at the prevailing bank rate from the date of the lending of the amount till its realization.

3. Similarly, through Regular First Appeal No.77 of 2009, the appellant, Abdul Hameed Gondal (since deceased) who is now being represented through his legal heirs and the real father of Amjad Hameed Gondal, the appellant in Regular First Appeal No.76 of 2009, has called in question the same judgment and decree dated 22.09.2008, passed by the Court of the learned Additional District Judge, Islamabad, whereby the suit for recovery of Rs.11,00,000/- along with markup at the rate of 2% above the prevailing bank rate from the date of the institution of the suit till the realization of the decreetal amount instituted by the respondent (Raja Muhammad Ilyas) under Order XXXVII, Rule 2 of the C.P.C., was decreed with costs as prayed for. Furthermore, the respondent was held entitled to the interest at the prevailing bank rate from the date of the lending of the amount till its realization.

4. Amjad Hameed Gondal and Abdul Hameed Gondal, the appellants in both the appeals shall collectively be referred to as the **"the appellants"** whereas Raja Muhammad Ilyas in both the appeals shall be referred to as **"the respondent."**

5. The facts, as enumerated in both the appeals, are that the respondent filed the abovementioned suits under Order XXXVII Rule 2, C.P.C., for recovery of Rs.9,10,000/ and Rs.11,00,000/- against the appellants before the learned District Judge, Islamabad, which was assigned to the Court of the learned Additional District Judge, Islamabad (hereinafter referred to as "**the trial Court**") for disposal according to law. The case of the respondent is that he had cordial relationship with the appellants and they often used to exchange money with each other and as and when the appellants were in need of financial assistance, they had to borrow money from the respondent; that the appellants fell short of money hence, they

contacted the respondent for borrowing some money from him; that the appellants requested the respondent to lend a sum of Rs. 11,00,000/- and 9,10,000/- as debt and the respondent honoured the appellants' said request by giving them the said amounts on different dates in the year 2004. Subsequently, the respondent demanded the said amounts from the appellants and the appellants in return of the said amounts, issued different post-dated cheques under account No.601-02275 drawn on PICIC Commercial Bank Ltd. The said cheque was presented by the respondent in the said Bank for encashment which were dishonored with the memo/slip No.21 "Account closed". The details of the said cheques are as under:-

Sr. No.	**Cheque No.**	**Date**	**Amount (Rs.)**
1	A5650018	14.06.2004	7,00,000/-
2	A5650017	01.12.2004	2,10,000/-
3.	A3767946	05.02.2004	1,00,000/-
4.	A3767944	05.03.2004	5,00,000/-
5.	A3767945	05.06.2004	5,00,000/-

6. Learned counsel for the appellants submitted that the appellants have never received the said amounts from the respondent; that the respondent is an illegal money lender; that impugned judgment and decree are against the facts as well as the law; that the learned trial Court ought to have recorded additional evidence in order to ascertain the factual controversy involved in the matter; that the respondent gave different statements regarding the payment of the loan which he allegedly paid to the appellants; that the respondent was also not sure about the exact time of the alleged transaction; that the respondent could not have been allowed by the learned trial Court to change his own previous version as per the law of estoppel; that the learned trial Court did not take note of the fact that the respondent remained inconsistent during his evidence;

that in the proceedings before the learned trial Court, the learned trial Judge remained biased since he dismissed numerous applications submitted by the appellants for additional documents; that the appellants submitted applications before the learned trial Court for re-examination and re-cross-examination of the respondent, but the learned trial Court in a cursory manner, dismissed the appellants' applications for producing additional evidence; that the learned trial Court did not appreciate that on two consecutive dates, the respondent did not appear and the appellants kept on waiting till the rising of the Court for the orders, but the learned trial Court did not pass any order; that the learned trial Court remained failed to appreciate the evidence produced by the appellants in their defence; that the impugned judgment and decree are the result of non-reading and mis-reading of the evidence; that the impugned judgment and decree are not sustainable in the eye of law; and that the said impugned judgment and decree suffer from material irregularity calling for interference by this Court. Learned counsel for the appellants prayed for the appeals to be allowed in terms of the relief sought by the appellants therein.

7. Conversely, learned counsel for the respondent while controverting the arguments advanced by the learned counsel for the appellants contended that the appellants were legally and morally bound to return the amount to the respondent; that the respondent time and again approached the appellants for the return of the borrowed amount, but they lingered on the matter on one pretext or the other; that the appellants were reluctant to return the amount to the respondent; that the learned trial Court has committed no illegality calling for any interference by this Court; that the appellants failed to produce confidence inspiring evidence; that the appellants tried to deprive the respondent from his hard earned money; that the appellants in return of the amount, gave

two cheques to the appellant, which were dishnoured on their presentation before the concerned bank; that the appellants did not honour their commitment regarding repayment of the loan amount to the respondent; that the impugned judgment and decree are based on correct appreciation of the evidence; that the impugned judgment and decree do not suffer from any material irregularity; and that the appellants under the garb of these appeals, try to protract the execution of the decree and deprive the respondent from his huge amounts. Learned counsel for the respondent prayed for the appeals to be dismissed.

8. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

9. Perusal of the record reflects that on 08.04.2005 and 09.04.2005, the respondent instituted two suits against the appellants one for recovery of Rs.9,10,000/- and the other for recovery of Rs.11,00,000/- along with markup at the rate of 2% above the prevailing bank rate from the date of the institution of the suits till the realization of the decreetal amount under Order XXXVII, Rule 2 C.P.C. before the Court of the learned Additional District Judge, Islamabad. In the said suit, it was *inter alia* pleaded that in the year 2004, the appellants demanded an amount of Rs.9,10,000/- and 11,00,000/- from the respondent as debt. In the said suits, it was further pleaded that the appellants had issued to the respondent the following post-dated cheques bearing:-

1. No.A5650017, dated 01.12.2004 for an amount of Rs.2,10,000/-,
2. No.A5650018 dated 14.06.2004 for an amount of Rs.7,00,000/-

3. No.A3767944 dated 05.03.2004 for an amount of Rs.5,00,000/-
4. No.A3767945 dated 05.06.2004 for an amount of Rs.5,00,000/- and
5. No.A3767946 dated 05.02.2004 for an amount of Rs.1,00,000/-

10. All the said cheques were drawn on PICIC Commercial Bank Limited, and that the said cheques were returned/dishonoured when presented for encashment with the remarks "Account closed". This caused the respondent to institute the aforementioned suits against the appellants. In the suit titled "Raja Muhammad Ilyas Vs. Abdul Hameed Gondal", apparently, on 23.04.2005, the appellant, Abdul Hameed Gondal in R.F.A. No.77 filed an application for grant of leave to appear and defend the said suit. Along with the said application, he also filed an affidavit, which reads as follows:-

> ***"That the contents of the said application , para No.1 to Para No.3 are true and correct to the best of my knowledge and belief and that nothing has been concealed therefrom".***

11. It is not known as to whether Amjad Hameed Gondal, the appellant in R.F.A. No.76 had filed an application for leave to appear and defend the suit or not since the said application is not on the record. However, in the impugned judgment dated 22.09.2008, it has been mentioned that the appellant I.e. Abdul Hameed Gondal filed an application for leave to appear and defend the suit. The operative part of the impugned judgment is reproduced herein below:-

> ***"Defendant appeared in the said suit, filed application seeking leave to appear and defend the suit. Said application was accepted vide order dated 18.05.2005, by the then learned predecessor of this Court, which order has been challenged before the Honourable High Court. On 06.06.2008, the honourable Chief Justice, Islamabad High Court, Islamabad, directed this Court to decide this case before 31.07.2008, which order was received on 18.06.2008. Inspite***

of hectic efforts, due to filing of different applications, suit could not ve decided within the direction period. A letter of request for extension in time limit was sent and the Honourable Chief Justice, has been pleased to grant further one month extension in time limit to decide the suit, vide letter dated 13.08.2008."

12. Apparently, the respondent had filed a reply to the application for leave to appear and defend the suit. In the said application, it has been pleaded that the said application was not maintainable in its present form; and that the same ought to be dismissed by invoking the provisions of Order VII, Rule 11 C.P.C. It has been mentioned in the impugned judgment that the application for leave to appear and defend the suit was accepted on 18.05.2005, but the said order dated 18.05.2005 is not on the record. Furthermore, the application for leave to appear and defend the suit is said to have been conditionally accepted against which the appellants preferred Civil Revision Petition No.394/2005 before the Hon'ble Lahore High Court at Rawalpindi Bench. The said Civil Revision Petition is also said to have been accepted vide order dated 30.05.2005 and the appellants were allowed to appear and defend the suits unconditionally and the matter before the learned trial Court was stayed by the Hon'ble Lahore High Court, Rawalpindi Bench. It is quite astonishing to note that the appellants neither bothered to file the order dated 18.05.2005 accepting the application for leave to appear and defend the suit conditionally nor the order dated 30.05.2005 whereby the Hon'ble Lahore High Court, Rawalpindi Bench allowed the appellants to appear and defend the suit unconditionally. The respondent is also said to have filed an application (i.e. C.M. No.543/C/2005) before the Hon'ble Lahore High Court, Rawalpindi Bench for vacation of the stay order, but the said application is also not on the record.

13. In the pleadings of R.F.A. No.76/2009, it has been mentioned that after staying the proceedings by the Hon'ble Lahore

High Court, Rawalpindi Bench, the matter was then transferred to this Court.

14. As discussed above, the application for leave to appear and defend the suit was accepted on 18.05.2005, which order was further subjected to a challenge before the High Court and this Court vide order dated 06.06.2008 directed the learned trial Court to decide the matter before 31.07.2008. Since the learned trial Court did not decide the matter within the said deadline, a request seeking an extension in time limit to decide the matter was made by the learned trial Court. The said request was allowed by this Court vide letter dated 13.08.2008. All the said correspondences/orders dated 06.06.2008 (directing the learned trial court to decide the matter before 31.07.2008), request of the learned trial court seeking an extension in time and the letter dated 13.08.2008 allowing the said extension request are not on the record.

15. The appellants contested the said suits by filing a written statement on 28.06.2008 taking a plea that the suits filed by the respondent were not maintainable as no cause of action arose to him. The appellants in defence had contended that neither any loan was obtained from the respondent nor any amount of the respondent was due against the appellants. From the divergent pleadings of the parties, the learned trial Court framed the following issues on 01.07.2008:-

1. *Whether the suit is false, frivolous, hence the same is liable to be dismissed? OPD.*
2. *Whether the plaintiff is stopped by his words and conduct to file the present suit? OPD*
3. *Whether the plaintiff has not come to the court with clean hands, hence the suit is liable to be dismissed? OPD*
4. *Whether the plaintiff has no cause of action qua the defendant? OPD*
5. *Whether the suit is not maintainable in its present form? OPD*

6. *Whether the plaintiff is entitled for recovery of Rs.11,00,000/- along with mark-up at prevailing bank rate? If so, for what period? OPP.*
7. *Relief.*

16. On 09.07.2008, an application under Order XIV Rule 5 C.P.C. was filed for framing of the following additional/proposed issues:-

5-a Whether the suit cheques and the undertakings on stamp papers is the result of undue pressure and coercion and the same were obtained from defendant under duress without consideration? OPD

5-b Whether the plaintiff is a money-lender without valid licence, if so, its effect? OPD.

5-c Whether the present suit has become infructuous after institution and dismissal at the instance of plaintiff, of the suit for specific performance of agreement of sale of shop, titled "Muhammad Sarwar vs. Raja Muhammad Ilyas etc. against defendant, in the Court of Mr. Zafar Iqbal Tarar, Civil Judge, Islamabad? OPD."

17. The said application was taken up for hearing on 17.07.2008 and to the extent of proposed issue No.5-A, the same was allowed and accordingly the said issue was framed. Moreover, to the extent of issue No.5-b, the said application was too allowed but the said proposed issue was modified in that:-

5-b Whether plaintiff is a money lender, or the defendant borrowed money from the plaintiff due to relationship? OP Parties.

18. However, the application to the extent of framing of proposed issue No.5-c, was dismissed.

19. After perusal of the record and hearing the arguments, the point for consideration before this Court is whether the cheques in question were validly given to the respondent for their encashment and the respondent was entitled for the decree as prayed for. Before going into details, we would add that a *'cheque'* is normally expected

to remain in the safe hands of the *'account holder'* as the result of the relationship between the account holder and the bank. It is a matter of fact that cheque is generally issued by the bank directly to the *'account holder'* with a clear understanding that whenever a cheque, duly signed, is presented shall normally be honored by the bank if amount, so mentioned in the cheque, is sufficient for such encashment. Such a cheque, in law, has been given the status of *'negotiable instrument'*, which however, cannot be engineered or fabricated as other document (s), declared or qualified as *'negotiable instrument'*. Proper execution normally requires only two parties i.e., taking out the cheques from the cheque-book, which is believed to be in the safe hands of the account holder, and signing/execution thereof. The first part is exceptional, which no other person can perform except by, stealing; defrauding, or finding a lost one, which claims shall always upon the person who otherwise is expected to keep it in safe hands.

20. As per the contents of the plaint, the respondent took a stance that the appellants issued the abovementioned disputed cheques against getting a loan from him, which was presented for encashment before the concerned Bank, but the same were returned with the remarks “Account closed”. To prove his stance, the respondent appeared in the witness box as PW-1 and narrated the same stance contemplated in the plaint. He produced two *iqrarnamas* Exh.P-1 and P-2. He also produced three cheques Exh.P-3 to P-5 and two cheques Exh. P-3 and P-4, respectively and produced dishnoured slips Exh.P-5 to Exh.P-7 and Exh.P-6 to Exh.P-11. Whereas on the other side, both the appellants appeared as DW-1 in the said suits. On the application of the appellant, Abdul Hameed Gondal, an official of the Soneri Bank along with record was summoned and the statement of Muhammad Zubair Siddiqui, Officer Grade-III, Soneri Bank, G-9 Markaz, Islamabad in RFA No.77 was recorded as DW-2.. In the statement of the said DW, the cheque Exh.D-1 and Statement

of Account were exhibited as Ex. DB. In R.F.A. No.76, Javed Iqbal Janjua, Bank Officer of NIB Bank appeared as DW-3. Whereas in RFA No.77, Waheed Khan, Bank Officer of Muslim Commercial Bank, Zeeshan Haider, Bank Officer of Askari Bank and Javed Iqbal Janjua, Bank Officer of NIB Bank were given up by the defence. During the trial, the appellants in their evidence had categorically admitted that on different occasions, they used to receive different amounts from the respondent, but had maintained that the said amounts were lent on interest basis and that the respondent used to deduct the amount of his interest from the amount borrowed from him by the appellants.

21. It is Abdul Hameed Gondal's version that the respondent obtained signatures of his son (Amjad Hameed Gondal) on blank papers; that the respondent wrote some writing of his willing and mentioned witnesses of his own choice. He further deposed that he was admitted in the hospital and all the proceedings were conducted in his absence. It is the respondent's case that in December, 2003, Amjad Hameed Gondal approached him and demanded an amount of Rs.11,00,000/- on the pretext that their business is not running properly and he had to send his brother abroad; that he (the respondent) on the surety of the said appellant obtained the said amount from his friend and handed over to the appellants on 12.12.2003. The appellant, Amjad Hameed Gondal, executed Exh.P/1 and P/2 (i.e. *iqrarnamas*) and issued three cheques (Exh.P-3 to Exh.P-5) which were dishonoured on presentation before the concerned bank vide dishonoured slips (Exh.P-11 to Exh.P-16). During the cross-examination, he admitted that the plaintiff/respondent did not issue any receipt regarding receiving of any interest nor has he issued any receipt regarding receipt of any profit. The appellant Abdul Hameed Gondal admitted during his examination that he had issued cheques Exh.P-3 to Exh.P-5 and that the said cheqeus are in his handwriting and bear his signatures. He further admitted that Exh.P-1 and Exh.P-2 (which are *iqrarnamas)* are also in his handwriting and bear

his signatures. During the cross-examination, the appellant in R.F.A. No.77 admitted that he did not file any suit or issue any legal notice against the appellant (i.e. the respondent herein) for return of Exh.P-1 and Exh.P-5 neither he got registered any FIR.

22. The appellants have taken a plea that they never received any amount from the respondent nor had they been paid by the respondent. The appellants further stated that the said cheques were actually issued by them to the respondent by use of undue pressure, coercion and threats of imprisonment. The relevant portion of the written statement filed by the appellants reads as under:-

> *"that para-2 is false hence denied in toto. In fact the Plaintiff has neither paid nor the defendant has every (sic) received the suit amount as stated. The Plaintiff deals in illegally money lending, having no valid Licence, who in the year 2002 had advanced to the defendant certain loan at exorbitant rate of interest. Bulk of such loan has already been returned to Plaintiff by defendant.* ***However, the Plaintiff, slily (sic) and fraudulently inflated such loan to the tune of Rs.11 Lacs and by use of under pressure, coercion and threats of imprisonment against defendant compelled him to issue suit cheques under duress without consideration.****"*

23. Since the appellant, Abdul Hameed Gondal, himself admits that Exh.P-1 and Exh.P-2 (i.e. *iqrarnamas)* are in his own handwriting and bear his signatures and moreso when he categorically admits that the cheques (Exh.P-3 to Exh.P-5) so issued to the respondent also bear his signatures and are in his handwriting then exertion of the undue pressure and duress by the respondent would not appeal to reason. Patently, such stand of the appellants is contradictory to their own very stance taken by themselves, i.e. their admission in the written statement in terms that:-

> *The Plaintiff deals in illegally money lending, having no valid Licence,* ***who in the year 2002 had advanced to the defendant certain loan at exorbitant rate of interest. Bulk of such loan***

has already been returned to Plaintiff by defendant. However, the Plaintiff, slily (sic) and fraudulently inflated such loan to the tune of Rs.11 Lacs*"*

(Underline is ours for emphasis)

24. On the one hand, the appellants deny the receiving of the said loan amounts from the respondent, but on the other hand, they took a stance that the respondent ***advanced to them certain loan at exorbitant rate of interest.*** Furthermore, they go on to say that "***Bulk of such loan has already been returned to Plaintiff by defendant"***. We are of the humble opinion that one cannot make someone compelled to issue a cheque without his consent and that too without any consideration. It may not be out of context to mention that the cheque is the ownership of the account holder and it cannot be used/enchased without the express consent of the account holder. Ordinary, the banks do not encash the cheques, which do not bear the signatures of the account/cheque holder. In such a scenario, it is not possible and does not stand to reason that how the cheque, without the consent of its maker, was in possession of the respondent. No cogent evidence has been produced by the appellants that they had not issued the said cheques nor had they signed them. Furthermore, it is not on the record that the said cheques were not torn out of the appellants' cheque book, and they do not pertain to the account maintained by them in the bank. There are almost five cheques in both the appeals, which were issued by the appellants and were dishonoured on their presentation due to the fact that the account from which the said cheques belonged, were closed and non-operational. It does not appeal to a prudent mind that how five cheques were got issued under duress or threat. What was the elements of the duress/pressure that had been used by the respondent in procuring the said cheques, the record is silent about such fact. Had there been any element of undue pressure/coercion on the part of the respondent, the appellants could have instituted separate proceedings under criminal law against the respondent.

Since no criminal proceedings were initiated by the appellants against the respondent regarding obtaining of the said cheques through means of coercion, the stance of the appellants to this extent is not worthy of consideration.

25 Furthermore, it is not one cheque that can be said to have been issued under duress or threat rather they are five in numbers, which are allegedly said to have been issued under duress. So, the mere denial that the appellants had not issued the cheques would not be sufficient and they seem to have taken the plea just to get rid of the payment outstanding against them. The burden heavily lies upon the appellants, as in case of negotiable instrument, it is the defendant who is duty-bound to prove contrary, because the presumption is attached to the negotiable instrument, but even then the respondent has successfully proved, and there is nothing in rebuttal on behalf of the appellants. The story cooked up by the appellants has not been supported with any cogent evidence. For the facility of reference, Section 118 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "**the Act**") is reproduced as under:-

> *"118. Presumptions as to negotiable instruments Until the contrary is proved, the following presumption shall be made:-*
> *(a) of consideration that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;*
> *(b) as to date that every negotiable instrument bearing a date was made or drawn on such date;*
> *(c) as to time of acceptance that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*
> *(d) as to time of transfer that every transfer of a negotiable instrument was made before its maturity;*
> *(e) as to order of endorsements-that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*
> *(f) as to stamps-that a lost promissory note, bill of exchange or cheque was duly stamped;*
> *(g) that holder is a holder in due course-that the holder of a*

> *negotiable instrument is a holder in due course; provided that, where the instrument has been contained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him".*

26. From the plain reading of Section 118 of the Act, it evinces that there is an initial presumption that a negotiable instrument/cheque is made, drawn, accepted or endorsed for consideration. Although the presumption is rebuttable, the onus is on the person denying consideration to allege and prove the same. Therefore, under Section 118 of the Act, where the execution of the negotiable instrument was admitted, the burden of proof of non-payment of consideration would lie on the executant, which is lacking in this case. The appellants failed to rebut the statutory presumption raised under Section 118 of the Act in that they did not lead evidence in disproof of the assertions made in the plaint, and proved by the respondent by adducing confidence inspiring evidence.

27. Additionally, there is no cavil with the legal proposition that suit under Order XXXVII, Rule 2, C.P.C. can be filed in respect of negotiable instruments which includes promissory notes. The promissory note is defined under Section 4 of the Act, 1881, which reads as follows:-

> *"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".*

28. The plain reading of the above definition shows that a document shall be regarded as promissory note, if it fulfills the following requirements:-

(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,

29. If all aforementioned four conditions are present, the document becomes a promissory note under Section 4 of the Act. Perusal of the documents/*iqrarnamas* dated 12.12.2003 (Exh-P-1 and Exh.P-2) shows that Abdul Hameed Gondal, the appellant in R.F.A. No.77/2009 unconditionally undertook to pay the amount to the respondent borrowed from him by 05.03.2004 and 05.06.2004 respectively. The asaid *iqrarnamas* are also duly signed by Amjad Hameed Gondal, the appellant in R.F.A.No.76/2009 and one Haji Muhammad Sarwar. The documents/*iqrarnamas* dated 12.12.2003 (Exh-P-1 and Exh.P-2) on the face of it are an unconditional undertaking by the appellant, Abdul Hameed Gondal to pay certain amount of money to the respondent and being also duly signed by the witnesses, undoubtedly fulfills the essential pre-requisites of promissory note under Section 4 of the Act *ibid.* Apart from these two *iqrarnamas* (Exh-P-1 and Exh.P-2), the appellants also gave post-dated cheques (Exh.P3 to Exh.P5) to the respondent in order to discharge their liability to pay the due amount to the respondent, meaning thereby the appellants had unconditionally undertook to pay certain money and that too particularly when these cheques were signed by the account holder. Hence, the pre-requisites of the promissory note as defined in Section 4 of the Act stand satisfied in the case in hand. It is our view that a money decree could be passed on the basis of the promissory note or mortgage deed. In holding so, we are fortified by the law laid down by the learned Division Bench of the Hon'ble Sindh High Court in the case of **Hatimbhai Vs. Karimbhai (1993 MLD 988)** where the plaintiff had sought a decree on the basis of promissory note and mortgage. The learned Single Bench proceeded to decree the suit in accordance with the provisions of Order XXXVII, C.P.C. The learned Division Bench upheld the said

order and held as under:-

> *"The claim in the suit was based on the said mortgage as well as the said promissory notes, as is evident from the plaint filed in the suit. The prayer clause in the plaint further indicates that the decree sought by the respondent was a money decree, or in the alternative, a decree based on the said mortgage.* ***Thus, there were two distinct and separate claims made by the respondent in the plaint which could be dealt with by the Court by following different procedures, one embodied in Order XXXIV and the other in Order XXXVII of the C.P. Code. The judgment, dated 29-9-1986, shows that the learned Single Judge by following the procedure laid down in Order XXXVII, C.P.C. decreed the suit in favour of the respondent. The decree passed by the learned Single Judge in the suit was a simple money decree, which was not based on the mortgage, but the same was based on the claim under the promissory notes, notwithstanding the reference by the learned Judge to the mortgage as well. However, it is clear that only the part of the claim which was based on the promissory notes was considered by the learned Judge which resulted into passing of the said decree.*** *Rule 14 of Order XXXIV would be applicable only when a claim arises under a mortgage, which obviously does not appear to be the case in the case in hand, as just pointed out by us. Consequently, we are unable to agree with Mr. SA. Samad Khan that the order passed by the learned Judge is liable to be recalled as the order passed by the learned Single Judge is unassailable: H.CA. No. 107/1990 is therefore, liable to be dismissed".*

30. In like manner, in the case of **Sindh Engineering and Bangle Works Hyderabad and others v. Habab Bank Ltd. (PLD 1993 Karachi 38),** the High Court of Sindh held that merely because the appellants had secured the repayment of the loan by mortgage in addition to promissory note, would not deprive the respondent to enforce the recovery of the loan on the basis of the promissory note. The relevant observation is reproduced hereunder:-

> ***"Merely the fact that the appellants had secured the repayment of the loan by mortgage in addition to promissory note, would not deprive the respondent to enforce the recovery of the loan on the basis of the promissory note.*** *The only bar in this regard is contained under Order XXXIV, Rule 14, C.P.C. which provides that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the*

mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. Under such circumstances the creditor would be required to file a separate suit for recovery of the amount from the mortgaged property on the basis of the mortgage. ***The law thus provides dual protection to the creditor****."*

31. Similarly in the case of **Messrs Nagina Cotton Industries and others v. Cotton Export Corporation of Pakistan (1994 CLC 2281),** the Hon'ble High Court of Sindh held that reliance on additional supporting documentary material other than the promissory note will not take the suit out of the jurisdiction of the Court under Order XXXVII, C.P.C.

32. From the above discussion, it is evident that suit on the basis of promissory note will be filed under Order XXXVII, C.P.C. and suit on the basis of mortgage will be governed under Order XXXIV, C.P.C. The above case law also established beyond doubt that the suit, filed by the respondent on the basis of the promissory note i.e. the *iqrarnamas* dated 12.12.2003 (EX-P-1 and Exh.P-2), whereby the appellants undertook to pay the loan amount as well as the post-dated cheques (Exh.P-3 to Exh.P-6) a self-executable documents, was maintainable under Order XXXVII, Rule 2, C.P.C., and mere fact that the *Iqrarnamas* (Exh.P-1 and Exh.P-2) have been executed as an additional security in respect of the same loan amount, will not render the suit liable to be returned under Order VII, Rule 10, C.P.C.

33. Furthermore, it is well settled preposition of law that the procedure prescribed by Order XXXVII, C.P.C. is that the defendant is not, as a matter of right, entitled to appear or to defend, but if he deserves to be heard, he must apply to the Court for permission to appear and defend within 10 days of service of summons as envisaged by Article 159 of the Limitation Act. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the

transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them (the defendants) in favour of the plaintiffs.

34. In view of what has been discussed above, we are of the considered opinion that the respondent has established his claim against the present appellants through the production of convincing and cogent evidence, whereas the appellants miserably failed to controvert the respondent and as such, the learned trial Court has rightly decreed the suit against the appellants and impugned judgments and decrees dated 22.09.2008 being based on sound reasons, do not call for any interference by this Court. Consequently, both the appeals, being devoid of merits, are hereby **dismissed** with no order as to costs.

(MIANGUL HASSAN AURANGZEB) JUDGE **(ARBAB MUHAMMAD TAHIR) JUDGE**

Announced in an open Court on ___08.2022.

JUDGE **JUDGE**

ISLAMABAD |___.08.2022
APPROVED FOR REPROTING

//*Kamran*//