

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

FAO No. 146 of 2019

Lodhi Law Associates and others

versus

M/s Ericsson Pakistan (Pvt.) Ltd. and others.

Appellants by: Mr. Farhat Nawaz Lodhi, Advocate.

Respondents by: Syed Hassan Ali Raza, Advocate for respondents
No.1, 2, 3 & 5.
Respondent No.4 *Ex-parte*.

Date of Decision: 15.09.2020.

MOHSIN AKHTAR KAYANI, J:- Through this FAO, the appellants have assailed the order dated 03.10.2018, passed by learned Additional District Judge (West), Islamabad, whereby plaint was returned in terms of Order VII Rule 10 CPC for want of jurisdiction.

2. Brief facts referred in the instant appeal are that appellants filed suit in terms of Order XXXVII CPC for recovery of Rs.14,462,560/- against respondents before the Court of Additional District Judge (West) Islamabad on the ground that respondent No.1/M/s Ericsson Pakistan (Pvt.) Ltd. entered into agreement/power of attorney for legal services dated 13.11.2015 with appellant No.1/Lodhi Law Associates against the professional fee for service, however, when the amount was not cleared legal notice dated 15.07.2017 was served upon respondents, in response thereto respondents company offered to pay an amount of Rs.92,00,000/- in lump sum as full and final settlement of the claim, the same was not accepted by the appellants, later on different correspondence took place but the appellants constrained to file the suit. Respondents Company filed application for leave to appear and defend the suit, whereby relationship was

denied and it has been alleged that fraud and misrepresentation has been made by execution of the said document and even agreement itself is not a negotiable instrument within the meaning of Negotiable Instruments Act, 1881. Similarly, it was also alleged in the leave application that a person who has signed the document was not authorized by the Ericsson Company and matter could only be settled by way of evidence in the ordinary court of law. Trial Court after hearing the parties passed the impugned order, whereby leave was granted unconditionally to the respondents and similarly the plaint was returned in terms of Order VII Rule 10 CPC to be filed before the competent court.

3. Learned counsel for the appellants contends that agreement dated 13.11.2015 referred as Annexure A is also power of attorney as well as falls within the definition of negotiable instrument, whereby respondents undertook to pay the amount unconditionally; that part payment was made through unconditional leave granted to the respondents which is contrary to record; that the question of legal jurisdiction in terms of Order XXXVII CPC was not settled by the trial Court unless evidence has to be recorded and even the basic construction of the document in question reflects that same was a negotiable instrument; that there is overwhelming evidence available on record to prove the plea raised by the appellants in the instant matter.

4. Conversely, learned counsel for the respondents No.1, 2, 3 & 5 contends that the person who executed the document in favour of appellants is unauthorized and same document cannot be construed against respondent No.1/company and even said document does not fall within the definition of negotiable instrument as there was no requisite stamps affixed or crossed on the said document, nor the same was signed by two attesting witnesses, hence, the same would have been proved through independent evidence before the ordinary Court as the document has lost its character.

5. Arguments heard, record perused.

6. Perusal of record reflects that entire dispute revolves around the agreement/power of attorney for legal services dated 13.11.2015 allegedly executed between Lodhi Law Associates and Saif Abbas, head of supply of M/s Ericsson Pakistan (Pvt.) Ltd. The subject document was executed for provision of professional services to the M/s Ericsson Pakistan (Pvt.) Ltd. before the custom adjudication authorities. The terms & conditions of the said document reflect that it is an agreement as well as power of attorney at the same time which is claimed to be a promissory note by the appellants. The document itself is silent qua unconditional terms of payment, whereby in terms of Section 4 of the Negotiable Instruments Act, 1881 "the promissory note is an instrument in writing (not being bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments" as such for the purpose of deciding the question as to whether document relied upon by the appellants/plaintiffs was negotiable instrument covered under Order XXXVII CPC could only be considered justified if the same fulfills the other requirement mentioned in Section 13 of the Negotiable Instruments Act, 1881 but all these questions, which are questions of fact could only be determined after recording of evidence if defendant/respondent has denied the execution of the document. In the present case respondents have specifically denied the execution of the said documents on the ground that same was not signed by an authorized person who has committed fraud and misrepresentation and as such the M/s Ericsson Pakistan (Pvt.) Ltd. has never executed this document/instrument.

7. It is also necessary for appellants to justify that the maker of the said instrument was duly authorized to execute the same as a result whereof right has been accrued and the instrument was attested in presence of witnesses. The un-

conditionality of payment is a key factor to consider any document as promissory note, however, at this stage, any view given on the document in question might affect the case of either party, however, *prima-facie* the Court has to consider the said instrument as negotiable instrument while granting unconditional leave through impugned order, although respondents' side has highlighted certain legal defects in the instrument which made basis of entire issue triable and leave to appear and defend was granted unconditionally. Reliance is placed upon PLD 1963 SC 163 (Fine Textile Mills Ltd., Karachi Vs. Haji Umar), 2009 CLC 308 (A.B.L Vs. Khalid Mahmood), PLD 2004 Karachi 399 (Federation of Pakistan Vs. Syed Ali Murad Shah). However, at this stage, it is necessary to settle the question as to whether the grant of leave unconditionally covers under those orders which are appealable in terms of Section 104 CPC read with Order XLIII Rule 1 CPC.

8. In order to settle this proposition, I have gone through Section, which deals with the orders from which appeal lies, by scanning the above mentioned provisions, there is no cavil to the proposition that grant of unconditional leave on the application of respondents is not appealable. Reliance is placed upon 1982 CLC 1625 (Dur Muhammad Piracha Vs. Judge, Special Court Banking), which is considered to be interlocutory order and only revision is competent in terms of Section 115 CPC if discretion has been exercised arbitrarily. Reliance is placed upon 1992 SCMR 718 (National Security Insurance Company Ltd. Vs. Hoechst Pakistan Ltd.) and as such final decree is appealable in terms of Section 96 CPC, hence, appeal to the extent of unconditional grant of leave is not maintainable.

9. The only question left for determination of this Court is as to whether learned Additional District Judge (West), Islamabad has rightly returned the plaint in terms of Order VII Rule 10 CPC for settlement of *lis* by the ordinary court, while considering this aspect from the arguments rendered by both the

parties there is no cavil to the proposition that when leave was unconditionally granted in a suit under Order XXXVII CPC, it has been considered as ordinary suit, although in this case it appears that learned trial Court has considered the document in question as an agreement instead of negotiable instrument/ promissory note and on this score suit has been returned.

10. I have attended the document with the able assistance of learned counsel for the parties and general reading of the said document reflects that it is an agreement as well as power of attorney, however, un-conditionality and undertaking to pay if considered coupled with insufficiently stamped and non-attestation of two witnesses being its minimum requirement document, would only be considered inadmissible in evidence and the same could have been impounded at the time of its presentation. Reliance is placed upon 2005 CLD 1864 (Chaudhry Khalid Mahmood Vs. Chaudhry Sajid Muhammad) and as such the fact that deficient stamps is purported to be settled in terms of Section 35 of the Stamp Act, 1899, which itself is a matter of revenue. Reliance is placed upon 2013 CLD 435 (Noor Ahmad Vs. Muhammad Shahid Parvaiz), therefore, at this stage, when documents do not fulfill other requirements of negotiable instrument including insufficient stamps it could not be considered in terms of Order XXXVII CPC. In such eventuality the suit might be not maintainable. Reliance is placed upon 2007 CLC 70 (Altaf Ahmad Vs. Khalid Umar).

11. The other characteristic of promissory note is the acknowledgment of debt or an amount on the part of respondent and as such the acknowledgment is yet to be proved, therefore, trial Court has rightly returned the plaint to be filed before the ordinary court. The impugned order has been passed on the application of Order VII Rule 10 CPC, which is appealable in terms of Section 104 CPC read with Order XLI Rule 1 CPC, although the appellants are under obligation to issue notice and as such acknowledgement of claim by the

appellants is subject to fulfillment of certain obligations on their part though the respondents' side raised the question of fraud and misrepresentation, hence, the required pleas are yet to be proved, therefore, trial Court has rightly returned the plaint to be filed before the ordinary court.

12. The impugned order has been passed on the application of order VII Rule 10 CPC, which is appealable in terms of Section 104 CPC read with Order XLIII Rule 1 CPC although the appellants are also required and under obligation to issue notice before presentation of the appeal U/O XLIII Rule 3 CPC, which is not visible on record, hence, appeal is not maintainable.

13. Besides the above referred position the appellants have also conceded that separate suit titled Lodhi Law Associates and others Vs. Ericsson Pakistan (Pvt.) Ltd., etc. has been filed before the Civil Court at Islamabad on 13.11.2018 after passing of the impugned order, hence, in these change circumstances, instant appeal is meritless although appellants have taken the plea that suit has been filed as under abundant caution, such aspect did not change the principle of Estoppel, which comes into play against the appellants, therefore, instant appeal is hereby **dismissed** with direction to the learned civil court seized with the matter to conclude the pending civil suit within period of six (06) months in accordance with law. However, any observations passed by this Court in the instant matter shall not be considered or prejudice the rights of either party in the pending matter.

(MOHSIN AKHTAR KAYANI)
JUDGE