SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SHAHID WAHEED
MS. JUSTICE MUSARRAT HILALI

Civil Appeal No.317-L of 2011
(On appeal against the judgment dated 31.03.2008 passed by the Lahore High Court, Bahawalpur Bench, Bahawalpur in RFA No.10 of 1997)

Mehr Noor Muhammad ...Appellant(s)

Versus

Nazir Ahmed ...Respondent(s)

For the Appellant(s) : Mrs. Tabinda Islam, ASC

For the Respondent(s) : Mian Shah Abbas, ASC via video link from Lahore

Date of Hearing : 06.11.2023

JUDGMENT

Shahid Waheed, J. One swallow does not a summer make. This case is illustrative of this adage.

2. This appeal arises in this way. The appellant before us is the plaintiff, who by a summary suit had sued upon a promissory note claiming that the defendant, respondent herein, owed him Rs.800,000. The defendant traversed the claim and posited that he used to purchase pesticide from the plaintiff and as he was illiterate, some blank papers thumb-marked by him were obtained by the plaintiff in business dealing, which he had now made a promissory note. He specifically denied making any promissory note and receiving Rs 800,000 thereunder from the plaintiff. On these assertions, issues were settled, and parties were called upon to produce evidence. During evidence, the objection was raised that the promissory note was not admissible in evidence: for, firstly, some of its revenue stamps were not cancelled, and secondly its second marginal witness in terms of Articles 17 and 79 of the Qanun-e-Shahdat, 1984, was not produced before the Court. These objections were counted

against the plaintiff. The facts pleaded by the plaintiff were also found to be disproved. The suit failed and was dismissed. The plaintiff could not succeed in appeal either. Now, with our leave, the plaintiff is before us.

3. We have to first decide on the admissibility of the promissory note and, secondly, whether, in the given circumstances, the promissory note had been proved. The first question has two facets, and the law applicable to each is misconstrued and misapplied. We will explain how. The second question will illustrate the prefatory adage.

4. So far as the question of admissibility is concerned, the first objection was that since two witnesses attested the promissory note and one of them was not produced in Court, in terms of Article 79 of the Qanun-e-Shahadat, 1984, it had to be excluded from evidence. This statement is not correct. It may be noted that as per Section 4 of the Negotiable Instruments Act, 1881, a promissory note is required to contain four essential ingredients: (i) an unconditional undertaking to pay, (ii) the sum should be the sum of money and certain, (iii) the payment should be to or to the order of a person who is certain, or to the bearer, of the instrument, and (iv) the maker should sign it. If an instrument fulfils these four conditions, it will be called a promissory note, and the requirement of attestation of a document provided under Article 17(2)(a) of the Qanun-e-Shahdat,1984, does not apply to a promissory note.[1] That apart, two more things also need to be clarified here. First, if an instrument, notwithstanding the provisions of Section 4 of the Negotiable Instruments Act,1881, is attested by witnesses, the nature and character thereof shall not be affected. It shall remain a promissory note and shall not be converted into a bond within the meaning of section 2(5)(b) of the Stamp Act, 1899.[2] Secondly, if a promissory note is not witnessed, it does not appear that any third person saw it signed, in which case, the best evidence is the handwriting of the parties. But if it is

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[1]Shiekh Muhammad Shakeel v. Shiekh Hafiz Muhammad Aslam (2014 SCMR 1562);
[2] Muhammad Ashraf v. Muhammad Boota (PLJ 2016 SC 169).

witnessed, then it appears, on the face of the promissory note, that there is better evidence behind it; and the best evidence that the nature of the case admits of, the law requires.[3]

5. There is no denying that in this case, two persons, namely Khalil Ahmed and Ghulam Hussain, were shown as witnesses of the promissory note, but only Ghulam Hussain (PW.2) was produced in the witness box. As stated above, the attestation of the promissory note was not a requirement of law; the non-appearance of the second witness could not be made a ground for excluding the promissory note from evidence. It follows, therefore, that the courts erred in law in holding that the promissory note was not admissible in evidence.

6. The second objection to the admissibility of the promissory note was that some of its adhesive stamps were not cancelled. A perusal of the record reveals that Bashir Ahmad (PW-1), stamp vendor and deed writer, tendered the promissory note in his examination-in-chief, and immediately after his tender, counsel for the defendant objected that all its stamps were not cancelled and, thus, it was not admissible in evidence. The Trial Court, after noting this objection, held that it would be decided while making a final judgment, marked the promissory note as Ex.P.1and proceeded with the trial. The promissory note was then used by the parties in examination and cross-examination. The record shows that the Trial Court, in its final judgment, after reviewing the evidence, held that the objection of non-admissibility of the promissory note was valid and dismissed the suit. This leads us to consider whether the procedure adopted by the Trial Court was correct and whether, in such circumstances, the promissory note could not be held to be admissible in evidence. To find the answer to these questions, a quick but careful look at Section 36 of the Stamp Act, 1899, will be helpful. Section 36 is in these terms:

> ***36. Admission of instrument where not to be questioned****: Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the*

[3] January v. Goodman [1 U.S 2008 (1787)]

> *same suit or proceeding on the ground that the instrument has not been duly stamped.*

This section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called into question at any stage of the suit or in proceedings, on the ground that the instrument has not been duly stamped. The only exception the section recognizes is the class of cases contemplated by Section 61, which is not material to the present moot. Section 36 does not admit other exceptions. It is now well settled that where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, it has to be decided there and then when the document is tendered in evidence. Once the Court, rightly or wrongly, admits the document in evidence and allows the parties to use it in examination and cross-examination, so far as the parties are concerned, the matter is closed. It is, therefore, essential that parties to litigation, where such a controversy is raised, must be cautious, and the party challenging the admissibility of the document must be alert to see that the document is not admitted in evidence by the Court. The Court is also required to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. On the contrary, the record in this case discloses that, notwithstanding the defendant's objection, the promissory note was marked as Ex.P.1 under the signature of the Court. It is not, therefore, one of those cases where a document had been inadvertently admitted. So, once the promissory note had been marked as an exhibit and the trial had proceeded along the footing that the promissory note was made an exhibit, and had been used by the parties in the examination and cross-examination of their witnesses, then Section 36 of the Stamp Act, 1899, will come into operation. Inasmuch as the promissory note had been admitted in evidence, as aforesaid, it was not open to the Trial Court to exclude it from consideration while writing the final judgment, nor to the appellate Court. It is clarified that the admission of the document in terms of Section 36 of the Stamp Act, 1899, cannot be reviewed or revised by the same Court or a Court of

superior jurisdiction.[4]So, we hold that the approach was incorrect, and the Courts below had erred in law in refusing to admit the promissory note in evidence.

7. It is clear from the above discussion that in the present circumstances of the case, the promissory note was admissible and could not be excluded from evidence. But was this enough for the plaintiff's claim to succeed? In our opinion, this was not sufficient, and he had yet to discharge another burden, and that was to prove that the promissory note was valid. This was because the defendant had pleaded *non est factum* to the promissory note. He had stated in his written statement that he had neither borrowed any money from the plaintiff nor executed any promissory note to repay the alleged amount. Explaining this, the defendant said that he was an illiterate person, the plaintiff was in the business of lending pesticides at double cost, and he thumbed several blank papers while procuring the pesticides from him, and it could be that the plaintiff had used these documents to make a promissory note. This statement indicates that the matter to be resolved here is not one where one person knowingly signs and delivers to another paper stamped in accordance with the law, either wholly blank or having written thereon an incomplete negotiable instrument, in order that it may be made or completed into a negotiable instrument. Therefore, the principle governing such cases, explained in different case law,[5] would be inapplicable here.

8. On the stance of the defendant stated above, the Trial Court framed issue No.1, by which it was to prove whether the promissory note in question was a forged document. The initial onus to prove issue No.1 was upon the defendant. He discharged the onus to prove this negative fact and substantiated his allegations by making a statement, on oath,

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[4]Javer Chand and others v. Pukhraj Surana (AIR 1961 SC 1655);
Rehmat Ali v. Wahid Bux (NLR 1979 Civil (SC) 809); and Union Insurance Company of Pakistan Ltd. v. Hafiz Muhammad Siddique (PLD 1978 SC 279).
[5]Mian Rafique Saigol v. Bank of Credit & Commerce (PLD 1996 SC 749); Muhammad Arshad v. Citibank N.A. (2006 SCMR 1347); and Muhammad Azizur Rehman v. Liaquat Ali (2007 SCMR 1820);

while appearing before the Trial Court as DW-4. The onus was then shifted to the plaintiff to prove that the transaction was bona fide and that the promissory note was legal[6]. The plaintiff appeared before the Trial Court as PW-2 and stated that he accompanied the defendant and the witnesses to the Court premises, where at the instance of the defendant, a deed writer named Bashir Ahmad scribed the promissory note, upon which the defendant had thumb-marked, and the witnesses had signed, and then he gave Rs.800,000 to the defendant in the presence of the witnesses. However, in his cross-examination, he admitted that he had no business relationship with the defendant or family ties with him. This statement causes eyebrows to be raised and gives a fillip to ponder how the plaintiff could lend a considerable amount to a stranger. This necessitates examining the circumstances of this case more carefully. Here, it must be noted that circumstantial evidence is sufficient when it enables the Court to make reasonable inferences about the ultimate facts in issue; it must be more than mere conjecture, speculation, or guess.[7] With this principle in mind, we proceed. It is a matter of common knowledge that in the course of the ordinary conduct of such a transaction, a two-step procedure is followed. Firstly, the document is written on a paper (or the blanks of the printed document are filled in, as happened in the present case) and then it is signed or thumb-marked. This is a standard mode of deed writing. According to the plaintiff, the same procedure was adopted; however, the defendant alleges that the plaintiff, while giving him pesticides, had obtained his thumb mark on some blank papers on which he had made the promissory note, so what is to be seen whether the promissory note (Ex.P-1) was written on a paper on which the thumb-mark was already present. This can be easily deciphered by having a look at the promissory note. It is visible to the naked eye that the blanks of a printed form of a promissory note (Ex.P.1) are filled in with black ink, names of

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[6] Johnson v. The Duke of Marlborough (2 Stark. Rep 313); Henman v. Dickinson (5 Bing. 183); and Simpson v. Stackhouse (9 Barr. 186)

[7] Galloway v. United States (319 US 372); and Popken v. Formers Mut. HomesIns. Co. (180 Neb.250).

the parties and witnesses are also written with black ink, while the ink of the thumb mark is purple. It is also clear that black ink superimposes the purple ink of the thumb mark, and this depiction elucidates that the paper was first thumb-marked and then written upon. In case otherwise, the purple ink of the thumb mark would have overlapped the black ink of the writing. From such a circumstance, we can fairly and reasonably draw the only conclusion that the stance of the defendant that blank documents thumb-marked by him had been converted to a promissory note is correct. It is trite law that the witness may lie, but circumstances/documents do not. There is nothing on record to suggest that the defendant had, expressly or impliedly, authorized the plaintiff to use the said blank papers as promissory note. We are, therefore, poised to hold that the promissory note was not executed in the manner described by the plaintiff, and the probable inference is that the promissory note was the result of knavery on the part of the plaintiff.

9. We now focus on another aspect of the matter and examine whether the preponderance of evidence brought on record suggest a probability to conclude that any amount was paid to the defendant. Be it noted here, no doubt, special rules of evidence are provided for under the Negotiable Instrument Act, 1881. Its section 118 says that until the contrary is proved, inter alia the presumption that every negotiable instrument was made for consideration shall be drawn. Such a presumption is only a prima facie, and may be displaced by raising a probable defence. Since the circumstantial evidence discussed above gave rise to a probable defence and created a reasonable doubt regarding the valid execution of the promissory note (Ex.P.1), the burden was shifted to the plaintiff to prove the payment of consideration of Rs.800,000[8] and as such, we have to examine the plaintiff's evidence. The deed writer (PW-1) was one of the plaintiff's material witnesses. He, in his statement, admitted that though he wrote the amount of Rs.800,000, but this fact was reflected in his register by pencil. He was confronted with the

[8] Reverend Mother Marykutty v. Reni C. Kottaram and another (2013) 1 SCC 327

various entries made in his register in black ink and asked as to why he wrote the amount of Rs.800,000 with pencil and not black ink that he had used for the promissory note, and he had no plausible explanation to give in his cross-examination. This statement created the first reason for suspicion. The next witness in the row was the plaintiff himself. He was PW.2. He, in his cross-examination categorically stated that he had no relation with the defendant, and neither was he in the business of selling pesticides. This statement reflects some awkward transactions and raises another severe doubt in the mind as to how the plaintiff could lend a huge sum of money to a person with whom he had no relation or acquaintance. The last witness of the plaintiff was Ghulam Hussain (PW.3). This witness stated that a sum of Rs.800,000 was given to the defendant in the form of notes having denominations of 500 and 1000 in the Court premises. Again, this is an unusual act and is another factor for wariness because, normally, such dealing would take place in private, where money can safely and securely be handed over and counted by the other party; this clearly cannot be done in Court premises, on the stall of a stamp vendor. The last but not least aspect of the matter is that two persons were named as witnesses in the promissory note (Ex.P.1), but only Ghulam Hussain (PW.3) was produced, while the other witness, Khalil Ahmad, was not produced in the Court. No explanation was made available for the atypical circumstances described above. Such evidence that draws a veil over truth or does not explain the true intent and purpose of that transaction, which does not take place in the manner in which it is done in the ordinary course of human conduct, never inspires confidence and, thus, does not serve to persuade the court to tip the scales in favour of a person who is burdened to prove the fact. Given this scenario, we return our findings against the plaintiff and declare that the payment of any amount to the defendant has not been proved. And so, as the prefatory adage suggests, the only fortune that the plaintiff had was to get the thumb mark of the defendant on the blank papers, but his ploy could not set sail in Court.

10. The above discussion concludes that the plaintiff had failed to prove that the promissory note was not forged; consequently, he was not entitled to the decree as he sought in his plaint, for contemporaneous payment was also not proved. Therefore, we are not inclined to disturb the dismissal of the suit, not for the reasons given by the Courts below, but for what we have stated above.

11. This appeal fails, and accordingly, it is dismissed.

Judge

Judge

Judge

Announced in open Court on ____/____/2023 at Islamabad.

Judge

B-III
Islamabad, the
06.11.2023
"Approved for reporting"
Sarfraz Ahmad& Agha M. Furqan, L/C