

# KERALA HIGH COURT

Mathai Mathew

Vs

Kochukutty Thampi

CRP No. 2716 of 1986F

(K.T. Thomas, J.)

06.12.1988

## JUDGMENT

### **K.T. Thomas, J.**

1. The simple question in this revision is whether the suit document produced by plaintiff is a bond or agreement. Answer to this question will determine the amount of duty and penalty payable thereon. The plaintiff who produced the document in the Trial Court called it a promissory note. The defendant wanted it to be treated as a bond. The lower Court found that it is only as agreement. Hence, the plaintiff was directed to pay duty and penalty accordingly. The Civil Revision Petition, therefore, has been filed by the defendant in challenge of the order as per which the lower Court found that the document is only an agreement.

2. The document is dated 22.11.1983. It is written on a plain paper. It purports to have been executed by the defendant in favor of the plaintiff. The brief recitals contained therein read thus : "The amount of Rupees Fourteen Thousand which I had received from you shall be repaid immediately (within two months) on completion of the sale of the property allotted to my share". If the document is a bond, the stamp duty payable thereon should have been at the rate specified in Article 23 of the Schedule to the Kerala Stamp Act (for short 'the Act') and hence the stamp duty and penalty will come to Rs. 3,479.30. If it is only an agreement the stamp duty, as per Article 5 of the Schedule as it remained in force on the date of execution of the document, would have come to Rupees three only.

3. One of the principles to be followed in the interpreting a taxing statute has been laid down by a Constitution Bench of the Supreme Court as early as in *Empress Mills v. Municipal Committee*<sup>1</sup>, The principle is, if two interpretations are possible effect should be given to that which favours the citizen and not that which imposed a greater burden on him. The aforesaid principle can be followed in construing the provisions of the Act where citizen has to pay stamp duty on the instruments defined therein.

4. The document in question cannot be construed as a promissory note. Section 4 of the Negotiable Instruments Act, 1881, defines a promissory note as "an instrument in writing containing an unconditional undertaking signed by the maker, to pay a certain

<sup>1</sup> AIR 1958 SC 341

sum of money only to, or to the order of, a certain person, or to the bearer of the instrument". Illustration (f) in the illustrations of the Section amplifies that if A signs an instrument in the following terms "I promise to pay B Rs. 500/- seven days after marriage with C," it is not a promissory note. The document in question does not contain an unconditional undertaking and hence it is not a promissory note.

5. Section 2(A) of the Act contains the definition of bond. It is an inclusive definition which reads thus :

"2.(a) "Bond" includes -

- (i) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (ii) any instrument attested, by a witness and not payable to order to bearer, whereby a person obliges himself to pay money to another; and
- (iii) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

In Halsbury's Laws of England, the bond is defined as "an instrument under seal, usually a deed poll, whereby one person binds himself to another for a payment of a specified sum of money either immediately or at fixed future date". (Vide page 329 in Vol. III of the Third Edition). In Broom's Common Law (Page 289 in the 6th Edition) a bond is defined as "an instrument under seal whereby one person becomes bound to another for the payment to a sum of money or in the performance of any other act."

6. In all definitions, either under the statute or in common law, the distinguishing feature of a bond is that the obligations must have been created in the instrument itself. If the obligation was a pre-existing one it does not partake of the character of a bond. The definition in the Act, no doubt, is inclusive in scope. However, the striking common feature in all the three divisions of the definition is the requirement that the obligation must have been created by the document itself. This can be discerned from the following words commonly used in all the three divisions "instrument whereby a person obliges himself". Thus a document which evidences acknowledgement of an antecedent obligation or a pre-existing liability would not normally become a bond. It may be, that a document evidencing an antecedent liability may also become a bond if a new obligation is created by the document despite its reference to any pre-existing obligation.

7. An agreement is not, as such, defined in the Act. But, Article 5 of the Schedule of the Act indicates that an instrument may fall in the category of agreements as distinguished from bonds. Article 5 consists of three Clauses. First Clause pertains to agreement for sale of a bill of exchange. Second Clause relates to sale of Government Security etc. The last Clause is worded in such a manner that it has a wide sweep as though it is a residuary Clause. When a document cannot be put under any other Article it can be brought under the aforesaid category since it says "if not otherwise provided for". But the document must have the feature of an agreement. What is meant by an agreement ? The definition of the word "agreement" given in the Indian Contract

Act, 1872 is the following, "Every promise and every set of promises forming the consideration for each other is an agreement." Though all agreements are not contracts, every contract would contain an agreement because an agreement which is enforceable in law is a contract. For every agreement, there must be a promisor and a promisee. When a promise is made and accepted, an agreement is created. It is immaterial whether the promise relates to any pre-existing liability or obligation. In the absence of any other definition in the Act, an agreement can be understood as one envisaged in the Contract Act. Thus a bond can be distinguished from an agreement on the aforesaid promise.

9. It was held by a Division Bench of the Lahore High Court more than half a century ago in *Dewan Chand v. Punjab & Kashmir Bank*<sup>2</sup>, that the essential feature for construing a document as a bond is that it must create an obligation to pay and that no such obligation can be inferred from a mere acknowledgement of a previous balance. An implied obligation cannot therefore convert an acknowledgement into a bond. The said decision was referred to by Sadasivan, J. in *West Coast Electroplating Co. Ltd. v. Sreedharan*<sup>3</sup>, and held that "no document can be a bond within the relevant Section unless it is one which by itself creates an obligation to pay money." (Emphasis supplied)

10. Learned Counsel for the petitioner has cited the decisions in *Jgeshar v. Collector of Jaunpur*<sup>4</sup>, *Hamdard Dawakhana (Wakf) Delhi's case*<sup>5</sup>, *Pergal Paper Mills v. Collector*<sup>6</sup>, and *Mahmood Hassan Khan v. C.C. Revenue Authority*<sup>7</sup>. The documents involved in all those decisions have the special nature that the obligation to pay the sum had been created in the documents themselves. Those documents were hence created as bonds. The Calcutta High Court has, in the decision mentioned above, made a reference to one decision of the Bombay High Court reported in *Patel Stone Trading Co. v. Ramsing*<sup>8</sup>, Dharmadhikari, J. has stated in the Bombay decision thus : "the real test to decide whether a particular document is a bond or not, is to find out, after reading the document as a whole, whether an obligation is created by the document itself or whether it is merely an acknowledgement of a pre-existing liability. If there is merely an acknowledgement of a pre-existing liability which could have been enforced apart from the document itself, then the matter stands on a different footing. But if the document creates an obligation in itself with an express promise for payment of an amount, such a document will have to be termed as a bond within the meaning of Section 2(c)(ii) of the Bombay Stamp Act". Mathur, J. has observed in *M.D. Gupta v. Board of Revenue*<sup>9</sup>, as follows : "Where the obligation is a pre-existing one, the subsequent document or the document amounted subsequently, giving the nature of the obligation, or the terms and conditions of the contract, shall be a mere agreement." The said decision considered the scope of the definition of the word "bond" contained in the Indian Stamp Act. There is no difference between that definition and the definition in the Act. Emphasis was given to the expression "obliges himself to pay money" and it was held that the expression makes it clear that the obligation in so far as the debtor and the creditor are concerned is not a pre-existing one. In order to determine the stamp duty payable on a document, it is necessary to read the document as a whole and then to decide under which

<sup>2</sup> AIR 1937 Lah 220

<sup>4</sup> AIR 1966 All 392

<sup>6</sup> AIR 1976 Cal 416

<sup>3</sup> 1971 KLT 383

<sup>5</sup> AIR 1968 Del 1

<sup>7</sup> AIR 1977 And Pra 1

<sup>8</sup> AIR 1975 Bom 79

<sup>9</sup> 1966 All Law Journal 333

category it falls, because stamp duty shall be payable on the document and not on the transactions which would have preceded or succeeded the execution thereof.

11. When the document in question is read as a whole it would reveal that it acknowledge a pre-existing liability and recites a promise to pay it within the time mentioned therein. It partakes of the character of an agreement as distinguished from a bond. In this view of the matter, no interference is called for with the impugned order. CRP is hence dismissed without any order as to costs.

Petition dismissed.