

# **BOMBAY HIGH COURT**

Patel Stone Trading

Vs.

Ramsing

Civil Revn. Appln. No. 21 of 1974

(Dharmadhikari, J.)

22.02.1974

## **JUDGEMENT**

### **Dharmadhikari, J.**

1. The plaintiff filed a suit for recovery of the amount on the ground that the non-applicant committed a breach of agreement and also for damages for wrongful removal of the truck. In that suit the plaintiff also claimed a mandatory injunction requiring the non-applicant to place the truck in his possession till the amount is satisfied. The claim of the plaintiff was denied by the defendant on various grounds. Thereafter the issues were framed and the case was fixed for evidence. During the course of evidence it seems that the plaintiff referred to document dated April 21, 1971. At this stage the defendant objected to this document being proved stating that it is insufficiently stamped. In view of the objection raised by the defendant, the parties were heard and the learned Civil Judge (Senior Division), Nagpur, by his order dated December 12, 1973, found that the instrument dated April 21, 1971 is a bond and should have been executed on a stamp paper of Rs. 397.50 as per Schedule I, Article 13 of the Bombay Stamp Act. The learned Judge found that it was written on a stamp paper of Rupees 3.50 only. The said instrument was impounded and the plaintiff was directed to deposit an amount of Rs. 4,334 being the amount of deficit stamp duty as well as penalty if he desires that the document should be admitted in evidence. The learned Judge further directed that in case the plaintiff does not pay the said stamp duty and penalty, the document should be sent to the Collector for recovery of the stamp duty and penalty. Against this order passed by the Civil Judge (Senior Division), Nagpur, the present revision has been filed.

2. Sri Potey, the learned counsel for the applicant contended before me that the document in question is not a bond but is merely an agreement providing for a payment of pre-existing debt. If the document is read as a whole, it will be clear that after acknowledging the amount payable, the document further directed the mode of payment of the amount which was to be adjusted from

the truck charges. The document further provides that Rs. 50 per week were to be paid to the defendant for his maintenance and the truck was to remain in custody of the plaintiff till the payment was made. The document further provides that all other expenses will be incurred by the plaintiff about repairs etc. of the truck, which will be debited to the account of the defendant. According to Sri Potey, by this document the defendant has only acknowledged the pre-existing liability. The liability as such has not been created by the document and therefore, it cannot be termed as a bond within the meaning of Section 2 (c) of the Bombay Stamp Act. Sri Potey further contended that the true test to decide whether a document is a bond or not is to find out as to whether the document has created a liability in itself. If the document does not create any obligation or a liability, then it cannot be styled as a bond but will have to be construed as an agreement or in the alternative a security bond. According, to Shri Potey, in any case, as the document provides that the truck should be placed in the custody of the plaintiff. The said arrangement was arrived at between the parties by way of security and, therefore, in any case, it will be a security bond and not a bond simpliciter as defined in Section 2 (c) of the Bombay Stamp Act.

3. For this proposition, Shri Potey has relied upon *Radha Swami v. Raj Narain*<sup>1</sup> and *Hindustan Sugar Mills Ltd. v. State of U. P.*<sup>2</sup>. On the other hand, it is contended on behalf of the defendant by Shri Munawarbai and Shri Mor, Assistant Government Pleader, that the said document cannot be termed as an agreement because there is not only an acknowledgment of an obligation of an ascertained amount but further there is an express obligation incorporated in the document itself regarding the payment of the amount. There is an express promise to pay the balance itself coupled with the interest. In view of this, the document is a bond within the meaning of Section 2 (c) of the Bombay Stamp Act. In support of their contention, they have relied upon the following decisions in *In the matter of Hamdard Dawakhana (Wakf) Delhi*, (AIR 1968 Delhi 1), *Jaikumar v. Motilal*<sup>3</sup>, *Munna Lal v. Maula Bakhsh*<sup>4</sup>, *Lakshmandas v. Rambhau*<sup>5</sup> *L. H. Sugar Factory v. Moti*<sup>6</sup>, and *Gulabchand v. Bhama*<sup>7</sup>, For properly understanding the controversy involved in this suit, it will be useful to refer to the relevant provisions of the Stamp Act. The bond has been defined by Section 2 (5) of the Act as under:-

"Bond" includes-

- (a) 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;
- (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

Similar is the definition in Bombay Stamp Act. It is the contention of the non-applicant before this Court that the present document is a bond as the said document has been attested by witnesses and is not payable to order or bearer and by this document the defendant has obliged

himself to pay the money to the plaintiff. Therefore, according to the non-applicant, the present document is a bond within the meaning of Section 2 (c) (ii) of the Act. As to what is the distinction between an agreement and bond has been considered by the Delhi High Court in (AIR 1968 Delhi 1) (FB). The Full Bench of the Delhi High Court, observed that for finding out the true character of an instrument, one has to read the instrument as a whole and then find out its dominant purpose. A single instrument may embody several purposes. But what is relevant for the purpose of the Act

<sup>1</sup>(AIR 1943 All 218)

<sup>3</sup>(AIR 1973 Bom 27)

<sup>5</sup>((1896) ILR 20 Bom 791)

<sup>2</sup>(AIR 1972 All 8) (SB)

<sup>4</sup>ILR 1939 All 229

<sup>6</sup>(AIR 1941 All 243)

<sup>7</sup>(AIR 1972 Mad Prad 54)

is the dominant purpose of the instrument. Then after referring to the contents of the bond, the test is laid down by the Delhi High Court. In this context the Full Bench made a reference to a decision of the Calcutta High Court in *Gisborne and Co. v. Subal Bowri*<sup>8</sup>. and the observations made by Garth, Chief Justice, therein. After referring to the said observations, ultimately, it was found by the Delhi High Court –

"The test laid down by the learned Chief Justice for distinguishing a "bond" from an "agreement", is : In the former case, in the event of breach, the party to the instrument, who had obliged to pay money to the other, is liable to pay the sum stipulated in the instrument. In the latter case, the quantum of damages has to be fixed by the Court."

Similar test seems to have been laid down by the Allahabad High Court in (ILR (1939) All 229) . In this context the Allahabad High Court held that

"An instrument, in the form of an agreement between two parties, reciting that a certain sum is due from the first party to the second covenanting that the first party will pay the same with interest in certain installments, and being attested by witnesses and not being payable to order or bearer, conies within the definition of a bond as given in Section 2 (5) of the Stamp Act, and the stamp duty payable thereon is that for a bond, although the instrument appears to be in the form of an agreement."

In ((1896) ILR 20 Bombay 791), an instrument which was in the nature of a bond, was not the less a bond because it did not come into operation unless and until the hundi with respect to which it was passed has been dishonoured. In this context it was observed by this Court :

"An instrument, which is in the nature of a bond is not less a bond because it does not come into operation unless and until the hundi with respect to which it is passed has been dishonoured."

4. The real test to decide as to whether a particular document is a bond or not, is to find out after reading the document as a whole as to whether an obligation is created by the document itself or it is merely an acknowledgment of a pre-existing liability. If there is merely an acknowledgment

of 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, in my opinion such a document will have to be termed as a bond within the meaning of Section 2 (c) (ii) of the Bombay Stamp Act.

5. In (AIR 1972 Madhya Pradesh 54), the Madhya Pradesh High Court has drawn a distinction between an acknowledgment and a bond. After observing that the word "acknowledgment has not been defined in the Act, but it would be pertinent to refer to Article 1 of the Act, which gives its description and thereafter reading the proviso, it was observed by the Madhya Pradesh High Court :

<sup>8</sup>((1882) ILR 8 Cal 284)

"Thus, on reading the aforesaid description in Article 1 with sub-section (5) of Section 2 of the Act, it would appear that where an acknowledgment contains a promise to pay, it is not to be stamped as an acknowledgment, but will have to be stamped as a bond, where it is attested by a witness and is not payable to order or bearer."

In substance, therefore, if an express stipulation regarding the payment of an amount is incorporated in the document itself, in my opinion, the document will have to be construed as a bond because it creates an obligation in itself. So far as the present document is concerned, the defendant has acknowledged the liability for an amount of Rs. 24,596.30 and had expressly promised to repay the same and such a promise has been incorporated in the document itself. In the said document, there is an acknowledgment of an ascertained amount with a further promise to pay the amount with interest and the document is attested by witnesses.

6. The decisions to which a reference has been made by Shri Potey are not applicable to the facts of the present case. In (AIR 1943 Allahabad 218), the facts were altogether different. In that case, on construction of a document, it was found by the Court that the intention of the parties was not to extinguish the old promissory notes but to keep them alive and the document only provided for the method of payment and for reduction of interest under certain contingencies. In the said case, a reference was also made to the earlier decision reported in ILR 1939 Allahabad 229 and it was observed :

"In the authority to which reference has been made by us there was no preexisting loan and if there was any preexisting liability that was wiped out by the document executed by the debtor in favour of the creditor. There was either a fresh contract without any antecedent contract at all or there was a novation of the contract and the old contract was extinguished."

After referring to this principle, on the facts of that case it was held by the Allahabad High Court that in the case before them, four promissory notes remained outstanding and in fact three suits were filed on the basis of those promissory notes. In these circumstances, it was held that it is not

the intention of the parties to extinguish the old promissory notes but on the contrary, they wanted the said promissory notes to keep alive and the document only provided for the method of payment and reduction of interest under certain contingencies. On these facts, it was held that the said document was not a bond. In my opinion, the said decision instead of helping Shri Potey helps the other side. By the present document an obligation is created with an express promise to pay an ascertained sum. Therefore, in my opinion, the said decision, viz., reported in (AIR 1943 Allahabad 218) is not applicable to the facts of the present case. Similar is the case with the decision of another decision of the Allahabad High Court in (AIR 1972 Allahabad 8). From the facts of the said decision it is quite clear that there existed a liability under the Sales Tax Act relating to the payment of the amount and the liability was not created under the instrument itself but it was already a pre-existing liability. The document contained only an undertaking to meet the liability which was pre-existing under the Sales Tax Act and in that context it was observed by the Allahabad High Court that merely because an undertaking to meet the liability is incorporated in the instrument, it will not make it a bond.

7. In the present case, either in the statute or common law there was no preexisting right or liability between the parties. For the first time a liability is created by the document whereby the defendant has agreed to pay an ascertained sum to the plaintiff and an express promise about the repayment was incorporated in the document. Under these circumstances, in my opinion, the present document will have to be termed as a bond as defined in Section 2 (c) (ii) of the Bombay Stamp Act.

8. In the alternative, it was contended by Sri Potey that the present document should be held to be a security bond within the meaning of Article 54 of the Bombay Stamp Act. The said Article reads as under :

"Security-Bond or mortgage-deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract :-"

In the present case, such a security has not been created as such. If the document is read as a whole, it is quite clear that this document was executed for the purpose of creating an obligation whereby the defendants have agreed to pay to the plaintiff an amount of Rs. 24,596/- and also interest thereon. This was the dominant purpose and intention of the document. The other clauses of this document are ancillary and are meant to fulfil the main object of the express obligation created by the document. If the document is read as a whole, in my opinion, it cannot be construed to be a mere security bond as contemplated by Article 54 of the Bombay Stamp Act.

9. In the result, the revision petition, therefore, fails and is dismissed. However, in the circumstances of the case, there will be no order as to costs.  
Revision petition dismissed.