IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

TUESDAY, THE 01ST DAY OF DECEMBER 2020 / 10TH AGRAHAYANA, 1942

OP(C).No.435 OF 2020

OS 124/2013 OF SUB COURT, MUVATTUPUZHA

PETITIONER:

A.V.RAVI
AGED 56 YEARS
S/O. VELAYUDHAN ACHARI, RESIDING AT XXII/255, 'ASARATHU HOUSE', KUTHUKUZHI P.O., KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN - 686 691

BY ADV. SRI.C.DILIP

RESPONDENTS:

1 **M.M.ABDULKHADAR**
AGED 62 YEARS
S/O. MEERAN, MANNAMKUZHIYIL HOUSE, MUVATTUPUZHA TALUK, MUVATTUPUZHA P.O., PIN - 686 661

2 **A.V. SANTHOSH**
AGED 49 YEARS
S/O. VELAYUDHAN ACHARI, RESIDING AT XXII/165, 'ASARATHU HOUSE', KUTHUKUZHI P.O., KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN - 686 691

3 **A.V. MUTHAYYAN**
AGED 64 YEARS
S/O. VELAYUDHAN ACHARI, RESIDING AT XXII/134, 'ASARATHU HOUSE', KUTHUKUZHI P.O., KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN - 686 691

ADDL.4 **THE STATE**
REPRESENTED BY DISTRICT COLLECTOR ERNAKULAM
IMPLEADED AS ADDITIONAL R4 VIDE ORDER DATED 14/02/2020)

R1 BY ADV. SRI.PEEYUS A.KOTTAM
R3 BY ADV. SRI.M.P.HARIKUMAR
R4 BY GOVERNMENT PLEADER
SRI T KRISHNANUNNI SR ADV, SRI M I JOHNSON SR GP

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 17-11-2020, THE COURT ON 01-12-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

TUESDAY, THE 01ST DAY OF DECEMBER 2020 / 10TH AGRAHAYANA, 1942

OP(C).No.1293 OF 2020

AGAINST THE ORDER IN I.A.NO.885/2019 IN OS 124/2013 OF SUB COURT, MUVATTUPUZHA

PETITIONER:

A.V.RAVI
AGED 56 YEARS
S/O.V ELAYUDHAN ACHARI, RESIDING AT XXII/255, ASARATHU HOUSE, KUTHUKUZHI P.O, KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN 686 691

BY ADVS.
SRI.C.DILIP
SRI.R.PRADEEP

RESPONDENTS:

1 **M.M.ABDULKHADAR**
AGED 62 YEARS
S/O. MEERAN, MANNAMKUZHIYIL HOUSE, MUVATTUPUZHA TALUK, MUVATTUPUZHA P.O, PIN 686 661

2 **A.V SANTHOSH,**
AGED 49 YEARS
S/O. VELAYUDHAN ACHARI, RESIDING AT XXII/165, ASARATHU HOUSE, KUTHUKUZHI P.O, KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN 686 691

3 **A.V.MUTHAYYAN,**
AGED 64 YEARS
S/O.VELAYUDHAN ACHARI, RESIDING AT XXII/134, ASARATHU HOUSE, KUTHUKUZHI P.O, KOTHAMANGALAM VILLAGE, KOTHAMANGALAM, PIN 686 691

R1 BY ADV. SHRI. HRITHWIK D. NAMBOOTHIRI
R1 BY ADV. SRI.PEEYUS A.KOTTAM
R2 BY ADV. SRI.P.VISWANATHAN (SR.)
R2 BY ADV. SRI.AJITH VISWANATHAN
R2 BY ADV. SRI.BALRAM S.A.

R3 BY ADV. SRI.M.P.HARIKUMAR
R3 BY ADV. SRI.R.PRADEEP

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 17-11-2020, THE COURT ON 01-12-2020 DELIVERED THE FOLLOWING:

R.NARAYANA PISHARADI, J

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O.P.(C) Nos.435 of 2020

&

1293 of 2020

Dated this the 1st day of December, 2020

J U D G M E N T

The petitioner is the third defendant in the suit O.S.No.124/2013 on the file of the Sub Court, Muvattupuzha. The first respondent is the plaintiff and the second and the third respondents are the first and the second defendants in the suit.

2. The suit is for realisation of money and other reliefs. The claim for money made in the suit is based on a document (Ext.P4) allegedly executed by the first defendant in favour of the plaintiff.

3. When Ext.P4 document was tendered in evidence, the defendants raised objection to the marking of the document on the ground that it is a bond and it is an insufficiently stamped document.

4. As per the order dated 18.12.2019, the trial court found that the suit document is only an agreement and not a bond. This order is challenged in O.P.(C) No.435/2020 filed under Article 227 of the Constitution of India.

5. Subsequent to the order dated 18.12.2019, when the plaintiff filed an application (I.A.No.885/2019) to receive Ext.P4 document in evidence, the defendants again raised objection contending that the document is a mortgage deed and that it is compulsorily registrable.

6. As per the order dated 13.08.2020 in I.A.No.885/2019, the trial court reiterated that the suit document is only an agreement. This order is challenged in O.P.(C) No.1293/2020.

7. Heard learned counsel for the petitioner and the respondents and also the learned Government Pleader.

8. Section 2(a) of the Kerala Stamp Act, 1959 (for short 'the Act') defines a bond as follows:

> *"(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 or 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;"

9. The definition above is identical to the definition of bond in Section 2(5) of the Indian Stamp Act, 1899. It is an inclusive definition and not an exhaustive definition at all. It includes not only the three types of instruments mentioned but it may be applicable to other instruments as well.

10. According to the learned senior counsel for the petitioner, the suit document comes under Clause (ii) mentioned above. But, learned counsel for the first respondent would contend that, in order to attract Clause (ii) of Section 2(a) of the Act, the obligation created by the document shall be to pay a definite or specified amount and not something to be determined

by the Court. Learned counsel would submit that, the document in the instant case does not create obligation to pay a definite or specified amount and therefore, it is not a bond but only an agreement.

11. In order to attract Clause (ii) of Section 2(a) of the Act, the instrument shall be attested by a witness and it shall not be payable to order or bearer. Further, as per the instrument, a person should have obliged himself to pay money to another.

12. The suit document is styled as an agreement. But, for finding out the true character of the instrument, one has to read the instrument as a whole and then find out the dominant purpose. The test is not what the document calls itself or what form it adopts but what is the true meaning and effect of the terms contained therein.

13. In the matter of **Hamdard Dawakhana (Wakf)** (**AIR 1968 Delhi 1**), a Full Bench of the Delhi High Court considered the distinction between a bond and an agreement. The Full Bench observed that it is trite to say that every bond is an agreement and so is the case with a mortgage or sale or exchange but what

the court has to see is whether that agreement has acquired the character of a "bond". After referring to the decision of the Calcutta High Court in **Gisborne and Company v. Subal Bowri** reported in (1881) ILR 8 Cal 284, the Full Bench pointed out that the test laid down therein for distinguishing a 'bond' from an 'agreement' was that in the case of a 'bond', 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, whereas in an 'agreement', the quantum of damages would be fixed by the Court.

14. The distinguishing feature of a bond is that the obligation to pay money is created by the instrument itself. The obligation must arise from the document. A document which evidences acknowledgment of an antecedent obligation or a pre-existing liability would not normally become a bond. 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 acknowledgment of a pre-existing liability. If the

document is merely an acknowledgment of a pre-existing liability, which could have been enforced apart from the document itself, then it is not a bond. 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. Where the obligation is a pre-existing one, the subsequent document or the document executed subsequently, giving the nature of the obligation or the terms and conditions of the contract, shall be a mere agreement (See **West Coast Electroplating Company v. Sreedharan : 1971 KLT 383** and **Mathai Mathew v. Thampi : 1989 (1) KLT 138**).

15. In **State of Kerala v. McDowell and Company : AIR 1995 SC 1445**, the question for consideration was whether the bond executed under Section 7 of the Kerala Abkari Act for deferred payment of duty on export by the manufacturers of Indian made Foreign Liquor in Form VI was a bond or an agreement within the meaning of the Kerala Stamp Act. This decision was rendered on interpretation of Clause (i) of Section 2(a) of the Act. Yet, this decision is relevant since it interprets

the expression "whereby" used in the definition of bond. In this case, it has been held as follows:

> *"In our view, the definition of bond in sub-clause (1) of clause (a) of Section 2 of the Kerala Stamp Act is clear and unambiguous. It must be read as it stands, nothing may be read in or implied. The word 'whereby' must be read as meaning what it ordinarily does, namely, 'by which'. An instrument, therefore, by which a person puts himself under an obligation to pay a sum of money to another on condition that the obligation shall be void if some specific act is, or is not, performed is a bond. The only question to pose is, has the executant of the instrument put himself under an obligation, or bound himself, to pay a sum of money to another, the obligation to be void under specified circumstances? If the executant can be sued for that sum of money only upon the strength of the instrument, the instrument is a bond".*

16. The principles to be kept in mind in interpreting whether a document is a bond or an agreement have also been stated in the following decisions: (1) **The Secretary, Board of Revenue v. Sellwell Tea Agencies (1984 KLT 955)**, (2) **Sreedharan v. Gopi : (2003 (2) KLT 372)**, (3) **Thomas v. Subordinate**

Judge's Court (2004 (2) KLJ 153) and (4) **Radha v. Sankaranarayanan (2007 (1) KLT 20)**.

17. The relevant portion of the order dated 18.12.2019 passed by the trial court reads as follows:

> *"8. I may straight away read the document in dispute, which is to the effect that the defendants had borrowed an amount of Rs.35 lakhs from the plaintiff for the purpose of business with an agreement to repay the amount within one year along with 1/3rd of the profit from the business or 1/10th of the borrowed amount whichever is higher. There is nothing in the document which attracts that, the disputed document created liability on the petitioner to pay any fixed amount to the respondents, so that it falls within the purview of a bond as defined under S.2 of the Stamp Act. From the above, I am of the view that document in dispute is only an agreement, which was not a bond as claimed by the petitioner."*

18. The finding made by the trial court that the suit document is not a bond is merely based on the conclusion reached by it that the liability created by the document is not in respect of any fixed or definite amount. However, the trial court

has not taken into consideration the fact that, as per the terms of the document, a liability is created for a fixed amount, that is, the amount borrowed and 10% of that amount. The trial court has not considered whether this stipulation in the document is sufficient to treat it as a bond. The trial court has also not considered the fact that the amount claimed in the suit, based on Ext.P4 document, is definite and specific. Further, the trial court has not adverted to the principles mentioned in the relevant decisions of this Court and the Apex Court, to ascertain whether the document is a bond or an agreement. In these circumstances, the matter requires reconsideration by the trial court.

19. Learned counsel for the first respondent heavily relied upon the decision in **Viswanathan v. Leslie Philip : 2010 (4) KHC 54 : 2010 (4) KLT 277** in support of his plea that the suit document is only an agreement and not a bond. The document involved in that case was a service contract. This Court held that the document did not create any unconditional obligation to pay amount for the first time and it was only an agreement. I express

no opinion as to whether this decision has any application to the facts here lest it may influence the decision to be taken by the trial court after remand. The question whether this decision has any application to the facts of the present case is to be decided by the trial court.

20. Learned counsel for the first respondent also relied upon the decision in **Chamiyappa Mannadiar v. Danavan : 2007 (1) KHC 683 : 2007 (1) KLT 733**. It was a case in which the document was interpreted on the basis of Clause (i) of Section 2(a) of the Act. It was held therein that the definition of Section 2(a)(i) of the Act provides that by the instrument the person must oblige himself to pay money and that money has to be a fixed sum and cannot be a sum which has to be ascertained at a later point of time depending on other contingencies. The trial court will also have to consider whether the decision in **Chamiyappa Mannadiar** (supra) is applicable to the facts of the present case. But, then the trial court has also to consider the contention of the petitioner that the principal amount claimed in the suit, on the basis of the suit document, is definite, certain

and specific and that no share of profit is claimed in the suit. Moreover, in **McDowell** (supra), the Apex Court has held that the definition of bond 'must be read as it stands, nothing may be read in or implied'.

21. Consequently, the original petition is allowed. The order dated 18.12.2019 (Ext.P7 in O.P.(C) No.435/2020) and the order dated 13.08.2020 (Ext.P5 in O.P.(C) No.1293/2020) of the trial court are set aside. The trial court shall reconsider the question whether the suit document is a bond or an agreement. Based on the finding made on that question, the trial court shall consider afresh the application I.A.No.885/2019 filed by the plaintiff and dispose of it in accordance with law.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1	**TRUE PHOTO COPY OF PLAINT DATED 07.09.2013 IN O.S. NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA**
EXHIBIT P2	**TRUE PHOTO COPY OF WRITTEN STATEMENT DATED 19.02.2015 FILED BY THE FIRST DEFENDANT IN O.S.NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA**
EXHIBIT P3	**TRUE PHOTO COPY OF WRITTEN STATEMENT DATED 15.03.2013 FILED BY DEFENDANT 2 & 3 IN O.S. NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA**
EXHIBIT P4	**TRUE PHOTO COPY OF AGREEMENT DATED 05.05.2012 PRODUCED BY THE PLAINTIFF IN O.S. NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA**
EXHIBIT P5	**TRUE PHOTO COPY OF I.A. NO.949/2019 IN O.S. NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA DATED 04.09.2019**
EXHIBIT P6	**TRUE PHOTO COPY OF WRITTEN OBJECTION DATED 26.11.2019 FILED BY THE PLAINTIFF / FIRST RESPONDENT CHALLENGING EXHIBIT P5 APPLICATION**
EXHIBIT P7	**TRUE PHOTO COPY OF ORDER DATED 18.12.2019 IN I.A. NO.949/2019 IN O.S. NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA**

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EXHIBIT P5 : TRUE PHOTOCOPY OF ORDER DATED 13.08.2020 IN I.A.NO.885/2019 IN O.S.NO.124/2013 ON THE FILE OF SUB COURT, MUVATTUPUZHA.

RESPONDENTS' EXHIBITS : NIL

TRUE COPY

PS TO JUDGE