

APPELLATE CIVIL.

1914
March, 4.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

JAGAN PRASAD AND OTHERS (DEFENDANTS) v. INDAR MAL AND OTHERS
(PLAINTIFFS)*

Act No. I of 1872 (Indian Evidence Act), section 91—Hundi—Renewal of hundis given as security for debt—Hundi sued on inadmissible for want of proper stamp—Right of creditor to fall back on previous hundis.

The defendants borrowed money from the plaintiffs and in return therefor drew four *hundis* in their favour. As these *hundis* became due the interest on the loan was paid and the *hundis* were renewed, the old *hundis* being on each occasion handed over to the defendants. Ultimately the plaintiffs sued on a set of renewed *hundis*, but it was found that these particular *hundis* were insufficiently stamped and could not be admitted in evidence.

Held that the plaintiffs were entitled to fall back upon the last preceding set of *hundis*, and, as these were in the possession of the defendants, to give secondary evidence of their contents.

THE facts of this case were as follows :—

The plaintiffs carried on business in the name and style of Mohan Lal Indar Mal at Kosi, and the defendants carried on business at Raya. The defendants took loans from the plaintiffs on the 4th of July, 1908, and subsequent dates, and executed four *hundis* payable after sixty-one days. The *hundis* were renewed from time to time, and Rs. 136-8-0 interest were paid on each renewal. The last renewal was made on the 4th of July, 1910. The last *hundis* were written on paper insufficiently stamped. The present suit was brought for recovery of the money due on these *hundis*. Among the defences to the suit was the defence that the *hundis* being insufficiently stamped were not admissible in evidence and the suit could not be maintained as no other cause of action was set forth. The Subordinate Judge held that the *hundis* were not admissible in evidence, but that the plaintiffs could fall back upon the original debt of 1908, and subsequent dates which were kept alive by the payment of interest on each renewal. The defendants appealed to the High Court.

Mr. A. P. Dube (with him Babu Jogindro Nath Chaudhri), for the appellants :—

The *hundis* cannot be admitted in evidence and the suit is not maintainable. The other side say that the previous *hundis* were

* First Appeal No. 198 of 1912 from a decree of Bans Gopal, First Additional Subordinate Judge of Agra, dated the 9th of March, 1912.

1914

JAGAN
PRASAD
v.
INDAR MAL.

properly stamped ; if so, the debt was discharged by giving these *hundis* and no suit on a money count is maintainable. The cases where a plaintiff was allowed to fall back on the original debt are not in point, inasmuch as in those cases the documents originally given were defective documents. Where a valid *hundi* is given in lieu of the debt, the intention of the parties is that the *hundi* is to be the only cause of action, and there is no cause of action on a money count: Pollock on Contracts, 8th Ed., 241. If the plaintiffs had brought their suit before the *hundis* matured their suit would have been dismissed. When fresh *hundis* are given in lieu of the previous *hundis*, the previous *hundis* become inoperative and no suit lies on those *hundis*. Reference was made to *Ram Sarup v. Jasodha Kunwar* (1) and *Sri Nath Das v. Angad Singh* (2). In this case the suit is based on the last *hundis* and there is no claim on a money count. The pleadings cannot be changed: Bullen and Leake on Pleadings, 2nd Ed., 1863. Even if the plaintiffs are allowed to fall back upon the original debt, the date of advance is the date from which limitation will run. From that date the suit is barred unless the renewal of *hundis* and payment of *hundiawan* save limitation. I submit that renewal of *hundis* does not save limitation, inasmuch as it is not shown that the old *hundis* were executed on properly stamped paper. *Hundiawan* is not paid by the drawer, but is deducted by the lender when the advance is made, and it cannot, therefore, operate as an acknowledgment or payment of interest within the meaning of sections 19 and 20 of the Limitation Act.

Mr. M. L. Agarwala (with him The Hon'ble Dr. Tej Bahadur Sapru and Munshi Narain Prasad), for the respondents:—

The *hundis* executed in 1908 became payable after sixty-one days. The money due on them became a debt and the suit could be brought on the *hundis* or for the debt. If fresh *hundis* are given we cannot sue during their currency, but as soon as they become due the original debt revives and so on. One may put the case in another way. Receiving another *hundi* in lieu of an existing *hundi* means that the debtor pays up the money and then takes it back again. Each renewal is a fresh loan. The last *hundis* being not admissible in evidence we can fall back upon

(1) (1911) 1 L. R., 34 All., 158.

(2) (1910) 7 A. L. J., 459.

the previous *hundis* which we say are written upon properly stamped paper. The other side have got them and have not produced them. Secondary evidence can, therefore, be given of those *hundis*, although the other side have not been served with a notice to produce them. The written statement of the defendants being a total denial of all previous *hundi* transactions they could not have produced them in this case, and there was no use in giving a notice to them. Evidence Act, sections 65 (a), 66 (2) Proviso.

Mr. A. P. Dube replied.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for money. The plaintiffs allege in their plaint that they had a shop, and that the defendants had another shop, and that money dealings had taken place for a long time between them. With their plaint they filed a copy of their books, so far as it related to their alleged dealings with the defendants, and from this it would appear that the transactions commenced about the 6th of July, 1908, and the 12th of March, 1909, when sums of money were advanced; that from these dates *hundis* were, from time to time, given and renewed. Assuming the entries to be correct, they show that *hundis* were given for the principal sum of Rs. 9,100; that when the time came for a renewal discount or interest was paid, and the *hundis* were renewed for the same principal amount. Jagan Prasad, defendant, met this by a denial of the plaintiff's right and by a special defence, contained in paragraph 12 of his written statement, in which he alleged that the *hundis*, which were alleged to be the last renewals by the plaintiffs, were in fact fictitious; and that the plaintiffs being short of money had asked them to draw these *hundis* upon them. In the court below the defence of the other defendants was more or less confined to a denial that Jagan Prasad had any right to take loans on behalf of the joint family. In the court below the books of the plaintiffs were produced and proved, and we have no doubt that the books are genuine. The last renewal of the *hundis* could not, however, be given in evidence on account of a deficiency in stamps. Notwithstanding this the court below has granted a decree to the plaintiffs for the amount claimed.

It is now contended on behalf of the defendants appellants that the plaintiffs must be confined to their claim upon the last renewals of the *hundis*, and since these were insufficiently stamped,

1914

JAGAN
PRASAD
v.
INDAR MAL.

1914

JAGAN
PRASAD
v.
INDAR MAL.

the suit must necessarily fail. It was proved on behalf of the plaintiffs that the old notes were from time to time handed over to the defendants and were in their possession. We can see no reason why the plaintiffs could not fall back upon the *hundis* that were given prior to the last renewals. There was a change in the Stamp Act just about this time, which probably explains the deficiency in the stamp on the last renewals. We do not think that any good purpose would be served by sending back the case to the court below for more formal proof of the *hundis* before the last. We believe that they were in the possession of the defendants. They could not, having regard to the nature of the defence, have produced them, and the plaintiffs would be entitled to give secondary evidence of them. We think that secondary evidence was in fact given in the court below by the witnesses for the plaintiffs and by the proof and production of their books. Under all the circumstances of the case we think that the decree of the court below was correct and ought to be confirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v. RAMESHWAR AND OTHERS *

Criminal Procedure Code, sections 112 and 167—Security—Remand—Jurisdiction of Magistrate.

Where a magistrate, in a case sent up by the police for action to be taken by the magistrate under chapter VIII of the Code of Criminal Procedure, passed an order remanding the persons concerned to police custody under section 167, it was held that his action was *ultra vires*. Even if section 167 applied at all to proceedings under chapter VIII of the Code, no order could be passed under that section until the magistrate had recorded an order under section 112.

Empress v. Babua (1), *In the matter of Daulat Singh* (2) and *King-Emperor v. Paimal Nai* (3) referred to.

THIS was a case called for on perusal of the quarterly statement by Knox, J.

The facts thereof sufficiently appear from the order of the Court:—

* Criminal Revision No. 1215 of 1913.

(1) (1881) I. L. R., 6 All., 132.

(2) (1889) I. L. R., 14 All., 45.

(3) (1912) 10 A. L. J., 351.