

## APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and  
Mr. Justice J. J. W. Allsop

BHRIGU DATT AND ANOTHER (DEFENDANTS-APPELLANTS) v.  
GAYA PRASAD, PLAINTIFF AND ANOTHER, DEFENDANT (RESPONDENTS)\*

1933  
October, 31

*Evidence Act (I of 1872), section 91—Promote insufficiently stamped—Advance of money, if can be proved by other evidence—Interest—Covenant as to interest contained in the promote, whether can be proved by other evidence—Evidence relating to interest, admissibility of—Interest as interest, if can be awarded—Compensation for deprivation of the use of money—Party lending money, if can be awarded interest by way of compensation.*

In a case where a promissory note, being insufficiently stamped, cannot be produced in evidence, there is nothing in section 91, Evidence Act, which prevents the party who has lent money from proving by evidence, other than the promissory note, that he did advance a certain sum to the other party, inasmuch as that section does not say that no other evidence may be given of facts set forth in the recitals in a document, but the covenant for interest alleged to have been contained in the promissory note cannot be proved because that is definitely a term of the contract between them. *Kunwar Bahadur v. Suraj Bakhsh* (1), relied on.

Where a promissory note is not admissible in evidence, being insufficiently stamped, the covenant for interest alleged to have been contained in the promissory note cannot be proved and the party lending money cannot be granted interest as interest, but he is entitled to some compensation for being deprived of the use of his money and the amount of compensation can best be calculated in the same manner as interest is calculated. *Hamira Bibi v. Zubaida Bibi* (2), relied on.

Mr. H. D. Chandra, for the appellant.

Mr. Hyder Husain, for the respondents.

HASAN, C.J. and ALLSOP, J.:—This is a second appeal against the appellate judgment of the Additional Subordinate Judge of Unao, dated the 29th of February, 1932.

\*Second Civil Appeal No. 164 of 1932, against the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 29th of February, 1932, confirming the decree of Babu Girish Chandra, Munsif of Purwa at Unao, dated the 13th of August, 1931.

(1) (1932) I.L.R., 7 Luck., 666.

(2) (1906) I.L.R., 28 All., 589.

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The suit which has given rise to the appeal was originally decided by the Munsif of Purwa. It was a suit for the recovery of Rs.500, with interest, on the allegation that the defendant-respondent Dwarka Nath and the father of the defendants-appellants, Bhirgu Datt and Jamna Prasad, had borrowed a sum of Rs.500 from the plaintiff-respondent, Gaya Prasad. It was said that Ram Nath, the father of the defendants-appellants, Bhirgu Datt and Jamna Prasad, and Dwarka Nath had executed the promissory note in respect of this sum of money but the promissory note was insufficiently stamped and could not be produced in evidence. The suit was, therefore, based merely on the averment that the plaintiff-respondent had in fact lent a sum of Rs.500 to Dwarka Nath and Ram Nath and that he was entitled to recover it.

The first question which arises is whether the plaintiff is entitled to prove the transaction by other evidence in the absence of the promissory note. According to the rule which has been laid down in this Court he can certainly do so. We may refer to the case of *Kunwar Bahadur v. Suraj Bakhsh* (1). Section 91 of the Evidence Act lays down that the terms of a contract or of an agreement or of other disposition of property may not be established by oral evidence when they have been reduced to the form of a document, but it does not say that no other evidence may be given of facts set forth in the recitals in a document. There is nothing in this section which prevents the plaintiff from proving by evidence, other than the promissory note, that he did advance the sum of Rs.500 to Ram Nath and Dwarka Nath. It might perhaps be argued that the covenant to repay cannot be so proved but that is not the question in issue between the parties. The question at issue is whether the sum of money passed from the plaintiff to Ram Nath and Dwarka Nath. It is not contended by anybody that, if it did pass, it passed by way of a gift in some such other way that the defendants were not

(1) (1932) I.L.R., 7 Luck., 666.

bound to return it when the plaintiff claimed it. It has been urged that the evidence is not sufficient to establish that the money did pass. That is a question of fact which does not arise in second appeal. It has been held by both the courts below that Ram Nath and Dwarka Nath executed a receipt for the money which is upon the record. The genuineness of this receipt was questioned but there was the evidence of two attesting witnesses which both the courts believed. We must proceed upon the assumption that the money did pass and we hold that the defendants were bound to pay it back. This brings us to the remaining question of interest. It is clear that the covenant for interest alleged to have been contained in the promissory note cannot be proved, because that was definitely a term of the contract between the parties. We cannot grant interest, as interest, in the absence of a contract but we cannot overlook the fact that the defendants have been in possession of this sum of Rs.500, which the plaintiff was entitled to claim from them, and that they have deprived the plaintiff of the use of his money. We consider that the plaintiff is entitled to some compensation and the amount of compensation can best be calculated in the same manner as interest is calculated. We may refer to the remarks made by their Lordships of the Privy Council in *Hamira Bibi v. Zubaida Bibi* (1).

The learned Munsif allowed the full claim which was based on a calculation of interest at Rs.1-8-0 per cent. per mensem from the date when the money was advanced up to the date of the institution of the suit. The learned Subordinate Judge dismissed the appeal. The rate of interest allowed by the learned Munsif was the rate of interest alleged to have been set forth in the promissory note. We cannot uphold the decision of the courts below on this point, but we allow the plaintiff-respondent a sum of Rs.500 on account of principal and a sum to be calculated on that principal at the rate of six per cent. per annum from the date when the money

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was advanced up to the date of institution of the suit by way of compensation for deprivation of the use of his money. The decree will be amended accordingly. Parties will get proportionate costs throughout.

*Appeal partly allowed.*

### FULL BENCH

*Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith*

1933  
November, 1

MUZAFFAR HUSAIN (PLAINTIFF) v. SHARAFAT HUSAIN  
AND OTHERS (DEFENDANTS)\*

*Stamp Act (II of 1899), section 2(15)—Compromise decree in partition suit—Decree effecting partition, whether chargeable as a partition deed under section 2(15)*

Where by a compromise-decree passed in a partition suit a specific portion of the property is allotted to a party as his share and possession is also directed to be delivered, the decree should be treated as a final order for effecting a partition and is chargeable as a partition deed under section 2(15) of the Stamp Act. Being made by consent of parties, it is also an instrument whereby co-owners have agreed to divide property in severalty, and falls within the first part of section 2(15) and is chargeable with stamp duty under Article 45 of schedule I of the Stamp Act. *Thiruwengadathamia v. Mungiah* (1), relied on.

The Government Advocate (Mr. G. H. Thomas), for the Crown.

Mr. *Iqbal Ali*, for the plaintiff.

Mr. *K. N. Tandon*, for the defendants.

RAZA, SRIVASTAVA and SMITH, JJ.:—This is a reference under section 57 of the Stamp Act (II of 1899). The facts of the case are as follows:

Muzaffar Husain brought a suit against Sharafat Husain and others for partition of his half-share in certain houses in Pihani, in the district of Hardoi. His allegation was that the property was the joint property of the parties.

\*Civil Reference No. 1 of 1933, made by Pandit Tej Narain Misra, Chief Inspector of Stamps, United Provinces.