

1936

THAKUR
RAB
PRASAD
SINGH
v.
CHHOTAY
MUNWAN

*Nanavutty
and Ziaul
Hasan, JJ.*

granting that she is the *avarudh stree* of Amar Singh, that she is a Hindu and not a Mahomedan and that she is still in Amar Singh's keeping—facts which are disputed on behalf of the plaintiffs-respondents—we hold that she is not entitled to get anything from Amar Singh. We cannot accept the argument of the learned counsel for the appellant that as under Hindu law an *avarudh stree* is entitled to maintenance after the death of her paramour, a transfer to her of a small portion of his property by the latter in his life-time should not be objected to by his sons. Whatever moral obligation there may be on a Hindu to provide for his concubine in his life-time, it cannot by any stretch of imagination be said that there is any legal necessity for making such a provision and without legal necessity no father in a joint Hindu family can transfer the family property.

The appeal has, in our opinion, no force and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice H. G. Smith*

1936
September, 9

LALLU RAM (PLAINTIFF-APPELLANT) v. DEPUTY COMMISSIONER, KHERI, MANAGER, COURT OF WARDS, MAHEWA ESTATE AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Negotiable Instruments Act (XXVI of 1881), section 28—Promissory note executed by servant—Money borrowed by master—Master's name not appearing on pronote—Suit against master on promissory note, if maintainable—Claim on original consideration, if maintainable against master—Limitation—Appeal—Appellant, if entitled to time occupied in obtaining copies of both judgment and decree—Memorandum of appeal accompanied by copy of judgment only—

*Second Civil Appeal No. 358 of 1934, against the decree of Babur Gopendra Bhushan Chatterji, District Judge of Sitapur, dated the 9th of October, 1934, reversing the decree of S. Abid Raza, Additional Subordinate Judge of Kheri, dated the 7th of February, 1934.

1936

Copy of decree filed before expiry of limitation—Appeal, if properly presented.

LALLU RAM
v.
DEPUTY
COMMISSIONER,
KHERI,
MANAGER,
COURT OF
WARDS,
MAHEWA
ESTATE

In an action on a bill of exchange or a promissory note against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Where, therefore, a loan is taken by a person through his servant, who executes the promissory note, the master cannot, in a suit based on the promissory note, be held liable under the instrument, inasmuch as his name does not appear as a party on the face of the instrument. If, however, the plaintiff bases his claim on the original consideration and in the first instance claims a decree only against the master, the real debtor, he is entitled to a decree against him. *Sadasuk Janki Das v. Sir Kishan Pershad* (1), relied on.

Where applications for copies of the judgment and decree are made at different times the appellant is entitled to the time occupied in obtaining the copies of both the judgment and the decree.

Where the presentation of an appeal is defective inasmuch as the memorandum of appeal is accompanied only by a copy of the judgment, and not by the copy of the decree, but the copy of the decree is filed before the expiration of the period of limitation and the defect is removed, the objection based on Order XLI, rule 1, of the Code of Civil Procedure must fail.

Mr. *Radha Krishna Srivastava*, for the appellant.

The Government Advocate (Mr. *H. S. Gupta*) and Mr. *Harish Chandra*, for the respondents.

SRIVASTAVA, C.J., and SMITH, J.:—This is a second appeal by the plaintiff arising out of a suit for recovery of money.

The first question raised in the appeal is one of limitation. It is argued that there was no proper presentation of the appeal by defendant No. 1 in the lower appellate court within limitation. We are of opinion that the plea has no substance. The decree was passed in favour of the plaintiff by the Additional Civil Judge of Kheri on the 7th of February, 1934. An application for copy of the judgment was made on the 14th of February, 1934, and notice of the copy

(1) (1918) I.L.R., 46 Cal., 663.

1936

LALLU RAM
 v.
 DEPUTY
 COMMISSIONER,
 KHERI,
 MANAGER,
 COURT OF
 WARDS,
 MAHEWA
 ESTATE

*Srivastava,
 C.J. and
 Smith, J.*

being ready was posted on the 21st of February, 1934. But no application for copy of the decree was made until the 10th of March, 1934. The defendant filed the appeal in the court of the District Judge on the 7th of March, 1934. He filed with the appeal a copy only of the judgment and undertook to file a copy of the decree later. The copy of the decree was actually filed on the 16th of March, 1934. It is not disputed that in a case like the present where applications for copies of the judgment and the decree are made at different times the appellant is entitled to the time occupied in obtaining the copies of both the judgment and the decree. The thirty days' time allowed for the appeal expired in this case on the 9th of March, 1934. The appellant was further entitled to eight days spent in obtaining the copy of the judgment. Therefore any appeal filed by the appellant on or before the 17th of March would be within time. The application for copy of the decree was made within this period, and the copy of the decree was actually filed one day before the 17th of March. Reference has been made to Order XLI, rule 1, of the Code of Civil Procedure, and it has been argued that there was no proper presentation of the appeal on the 7th March because the memorandum of appeal was accompanied only by the copy of the judgment and not by the copy of the decree. As we have already noted, this defect was removed when the copy of the decree was filed on the 16th of March, 1934. If, therefore, the presentation of the appeal on the 7th March was defective, the defect having been removed before the expiration of the period of limitation the objection based on Order XLI, rule 1, of the Code of Civil Procedure must fail.

Turning now to the merits of the appeal, the facts are that on the 2nd of September, 1929, a promissory note for Rs.1,500 was executed by Prag Din, defendant No. 2, in favour of the plaintiff. Prag Din at the time of his executing the promissory note was in the service

of defendant No. 1, Thakur Jai Indar Bahadur Singh, taluqdar of Mahewa. Subsequent to the execution of the promissory note Thakur Jai Indar Bahadur Singh created a trust of his estate, and on the 2nd of September, 1932, the trustees passed a resolution acknowledging the liability of the estate in respect of the aforesaid debt, and directing the Secretary to pay Rs.25 towards the interest of the promissory note and to make an endorsement on the back of it in order to save limitation. It appears that the trust was afterwards cancelled by Thakur Jai Indar Bahadur Singh, and thereafter his estate was taken by the Court of Wards under its management. The facts so far stated are no longer in dispute.

The plaintiff sued both the defendants on the allegation that the loan had been taken by defendant No. 1 through his treasurer defendant No. 2, who had executed the promissory note. As the suit was instituted on the 11th of December, 1933, more than three years after the execution of the promissory note, the plaintiff sought to save limitation by relying on the payment of interest made by the Secretary of the aforesaid trust on the 2nd of September, 1932. The defence raised on behalf of defendant No. 1, the taluqdar of Mahewa, was that he had not executed the promissory note, and the suit was therefore not maintainable against him. He also denied the power of the trustees to extend the period of limitation. The Additional Civil Judge disallowed the pleas raised in defence and decreed the plaintiff's claim against defendant No. 1. He treated defendant No. 2 as a "pro forma" defendant, and did not pass any decree against him.

During the pendency of the appeal in the court of the District Judge, the Deputy Commissioner of Kheri, as Manager, Court of Wards of the Mahewa estate, was substituted as appellant in place of defendant No. 1. The learned District Judge held that the plaintiff's suit

1936

LALLU RAM
v.
DEPUTY
COMMISSIONER,
KHERI,
MANAGER,
COURT OF
WARDS,
MAHEWA
ESTATE

*Srivastava,
C. J. and
Smith, J.*

1936

LALLU RAM
v.
DEPUTY
COMMISSIONER,
KHERI,
MANAGER,
COURT OF
WARDS,
MAHEWA
ESTATE

was not maintainable against defendant No. 1. He was further of opinion that the endorsement made on the back of the promissory note on the 2nd of September, 1932, could not extend limitation against defendant No. 2. As a result of these findings he allowed the appeal and dismissed the plaintiff's suit against both the defendants.

*Srivastava,
C. J. and
Smith, J.*

In *Sadasuk Janki Das v. Sir Kishan Pershad* (1), it was held by their Lordships of the Judicial Committee that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. The result therefore is that as the name of the defendant No. 1 does not appear as a party on the face of the promissory note in suit, he cannot be held liable under the instrument. It has, however, been argued on behalf of the plaintiff-appellant that his suit was in the main based on the original consideration and that in the first instance he claimed a decree only against defendant No. 1. It was only in the alternative that he claimed relief against defendant No. 2. This aspect of the case does not seem to have been considered by the learned District Judge, and was not, perhaps, presented before him. However, having examined the plaint we are of opinion that the contention is sufficiently borne out by the terms of the plaint. It is stated in para. 1 that defendant No. 1 took a loan of Rs.1,500 through his treasurer, the defendant No. 2, and got the promissory note executed by the latter. The further reference to the endorsement of the payment of Rs.25 on account of interest by the Secretary of the trust, and the reliance placed on it for extending the period of limitation, also point in the same direction. Lastly, para. 9 of the plaint shows that the relief claimed is a decree for recovery of princi-

(1) (1918) I.L.R., 46 Cal., 663.

1936

LALLU RAM
 2.
 DEPUTY
 COMMISS-
 SIONER,
 KHERT,
 MANAGER,
 COURT OF
 WARDS,
 MAHEWA
 ESTATE

*Srivastava,
 G. J. and
 Smith, J.*

pal and interest against defendant No. 1. An alternative prayer is also made that if for any reason a decree cannot be passed against defendant No. 1, then a decree be passed against defendant No. 2. Thus, taking all the allegations of the plaint as a whole, we have no doubt that the suit was based primarily on the allegation of the advance of a loan of Rs.1,500 to defendant No. 1; in other words, it was based on the original consideration. It may be pointed out that in *Sadasuk Janki Das v. Sir Kishan Pershad* (1) their Lordships of the Judicial Committee seem to have recognized the right of a creditor in the position of the plaintiff to base a claim on the original consideration, though in that case they were of opinion that the suit was confined to an action based upon the "hundis" themselves, and was not based even in the alternative upon the consideration of the loan. As we are of opinion that the plaintiff in the present suit on a proper construction of the plaint must be held to have based his claim on the original consideration, he is entitled to a decree against defendant No. 1, who is the real debtor. As already stated, if the plaintiff's suit were treated as a suit under the Negotiable Instruments Act based on the promissory note, he could not succeed against defendant No. 1, whose name did not appear on the promissory note, and who was in the position of an undisclosed principal. But the position is quite different when the claim is regarded as one based on the original loan, which on the facts proved it is amply clear was actually borrowed by Prag Din, defendant No. 2, for the use of his master, defendant No. 1. It is not denied that if defendant No. 1 is made liable no question of limitation arises in respect of him, because the endorsement of payment of interest made by the Secretary of the trust which was created by defendant No. 1 is sufficient to extend limitation against him.

(1) (1918) I.L.R., 46 Cal. 663.

1936
 LALLU RAM
 v.
 DEPUTY
 COMMISS-
 IONER,
 KHERI,
 MANAGER,
 COURT OF
 WARDS,
 MAHEWA
 ESTATE

Srivastava,
G. J. and
Smith, J.

The result is that the plaintiff is entitled to Rs.1,500 principal and Rs.750-4 interest, total Rs.2,250-4. Deducting Rs.25 paid on account of interest from this amount, the balance due is Rs.2,225-4. The plaintiff is given a decree for this amount against defendant No. 1, with costs in all the courts. The suit stands dismissed against defendant No. 2, who will, however, bear his costs throughout since he executed the pronote, and was therefore a necessary party and is in the circumstances somewhat fortunate not to have had a decree passed against him.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,
 and Mr. Justice H. G. Smith*

1936
 September, 9

JAGANNATH PRASAD (PLAINTIFF-APPELLANT) v. MUNNU
 LAL (DEFENDANT-RESPONDENT)*

Contract Act (IX of 1872), section 65—Contract of marriage between plaintiff's son and defendant's niece—Breach by plaintiff—Defendant's liability for return of ornaments presented by plaintiff to defendant's niece.

Where the plaintiff brings a suit against the defendant in consequence of an alleged breach of contract on the part of the defendant to marry his niece to the plaintiff's son, for the recovery of the ornaments presented by him to the proposed bride but it is found that the breach has been committed by the plaintiff and there is nothing to show that the defendant has or ever had any of the ornaments in his possession, then the presumption is that the girl has them and therefore the defendant cannot be made liable to the plaintiff either for the return of the ornaments in question or for the value of them. *Shambhoo Shukul v. Dhaneshar Singh* (1), *Salgur Prasad v. Har Narain Das* (2), *Mulji Thakersey v. Gomti* (3), *Rambhat*

*Second Civil Appeal No. 353 of 1934, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Lucknow, dated the 23rd of August, 1934, setting aside the decree of S. Akhtar Ahsan, Munsif, Haveli, Lucknow, dated the 23rd of March, 1933.

(1) (1927) 4 O.W.N., 256.

(2) (1932) I.L.R., 7 Luck., 64.

(3) (1887) I.L.R., 11 Bom., 412.