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substituted service was made for good reasons, and that therefore the application was time-barred.

As the decree was an *ex parte* decree, the court below had jurisdiction to set it aside under Order 9, rule 13, C. P. C., and no illegality or irregularity was committed by it in the exercise of that jurisdiction. The present application therefore has no force.

Thomas,
C. J. and
Ziaul
Hasan,
J.

It was also urged that the Court below should not have awarded costs of the application to the defendants opposite-parties against the plaintiffs; but we do not think that the Court exercised its discretion on the question of costs improperly, seeing that the application of the defendants was allowed in spite of the plaintiffs' contest. We therefore see no reason to interfere with the lower court's order about costs also.

The application is dismissed with costs.

Application dismissed.

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and
Mr. Justice Ziaul Hasan

SHEIKH PUDAI (PLAINTIFF APPLICANT) v. MST. BILASI
AND ANOTHER (DEFENDANTS OPPOSITE-PARTIES)*

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Negotiable Instruments Act (XXVI of 1881), sections 8, and 37—Promissory note—Document promising to pay on demand intended to be a promissory note—Provisions of Negotiable Instruments Act, if apply to it—Attentation, effect of—Promissory note without consideration—Purchaser of note, if can recover its amount from maker.

Where the executant of a document obliges himself to pay the same on demand and though it is attested by witnesses the intention of the executant is to treat it as a promissory note the document is one to which the provisions of the Negotiable Instruments Act apply. *Khetra Mohan Saha v. Jamini Kanta Dewan* (1), and *D. Rozario v. Harballabh Onkarjee* (2), distinguished.

*Section 25 Application No. 94 of 1936, for revision of the order of Babu Raghunath Prasad Varma Saheb, Munsif (as Judge, Small Cause Court) of Kunda at Partabgarh, dated the 27th July, 1936.

(1) (1927) I.L.R., 54 Cal., p. 445. (2) (1927) 100 I.C., p. 794.

Under section 37 of the Negotiable Instruments Act, the maker of a promissory note is liable to its purchaser, who is a "holder" within the meaning of section 8 of the Act, and the latter can recover the amount due on it, even if it was originally made without consideration.

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Mr. *Iftikhar Husain*, for the applicant.

Mr. *Ali Zaheer*, for the opposite-party no. 1.

THOMAS, C. J. and ZIAUL HASAN, J.:—This is an application under section 25 of the Small Cause Courts Act against the judgment and decree, dated the 27th July, 1936, passed by the learned Munsif of Kunda at Partabgarh, decreeing the plaintiff's suit.

The plaintiff brought a suit to recover the sum of Rs.27-2 on the basis of a document, which has been held to be a bond by the trial Court. It was executed by Mst. Bilasi, defendant no. 1. The original creditor was Nageshwar, defendant no. 2, who sold it to the plaintiff. Defendant no. 2, admitted the claim, but defendant no. 1, pleaded want of consideration and denied the sale in favour of the plaintiff. The trial court held that the plaintiff was the purchaser of the bond in suit, that the bond was without consideration and that the question of estoppel did not arise in the case. He accordingly decreed the suit against defendant no. 2, and dismissed it against defendant no. 1.

The sole question for decision in this application is whether the document in question is a promissory note or a bond.

A "promissory note" as defined under the Negotiable Instruments Act (Act XXVI of 1881) is an instrument in writing, containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The "holder" of a promissory note as defined under section 8 of the Negotiable Instruments Act, means any person entitled in his own name to the possession thereof and to receive or recover the

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amount due thereon from the parties thereto. Under section 43 of the Negotiable Instruments Act a negotiable instrument made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

The document in dispute is as follows:

“(I am) Mst Bilasi, wife of Autar Gadaria, resident of Dohri Takia.

Whereas Rs.20, half of which comes to Rs.10, bearing interest at Rs.2 per cent. per mensem, have been borrowed, from Nageshwar, son of Bachchu Murai, resident of Dohri Takia, on account of family necessity with a promise to pay the same on demand, so these few presents by way of *ruqqa* have been reduced to writing to serve as an authority.”

The sale of this document (Ex. 1) in favour of the plaintiff was effected by means of a sale deed.

The contention of the learned counsel on behalf of the applicant is that the document in question is a promissory note though it is attested by witnesses, while the contention of the other side is that it is a bond because it is attested by witnesses. The word “bond” is not defined in the Negotiable Instruments Act but is defined under section 2(5) of the Indian Stamp Act (Act II of 1899). It means that it 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.

Under clause 22 of the said section a promissory note is defined to mean a promissory note as defined by the Negotiable Instruments Act, 1881.

It is contended on behalf of the opposite party that the document (Ex. 1) contains an unconditional undertaking, signed by the maker, to pay on demand to the person, in whose favour it is executed, a certain sum of money and it is attested by witnesses and is not payable to order or bearer, and therefore it is a bond and not a promissory note.

Reliance is placed on the case: *Khetra Mohan Saha v. Jamini Kanta Dewan* (1). Reliance is also placed, on the case: *D. Razario v. Harballabh Onkarjee* (2), in which it was held that if an instrument, whereby a person obliges himself to pay money to another, is attested by a witness and the amount due thereunder is not payable to order or bearer, it is a bond as defined in section 2(5) of the Indian Stamp Act and not a promissory note as defined in section 2(22) of the Act. It was urged that the document was not "negotiated" but a sale deed was executed. The above two cases relied on by the learned counsel on behalf of the opposite party are under the Indian Stamp Act with which we have nothing to do in the present case.

The words in Ex. 1 are "with a promise to pay the same on demand." We have not the slightest doubt that the intention of the executant was to treat the document as a promissory note in spite of the fact that it was attested by witnesses.

We are, therefore, of opinion that the document, though attested by witnesses, is one to which the provisions of the Negotiable Instruments Act, apply. This being so under section 37 of the Negotiable Instrument Act, the maker of the promissory note is liable to its purchaser, who is a "holder" within the meaning of section 8 of the Act, and the latter can recover the amount due on it, even if it was originally made without consideration.

(1) (1927) I.L.R., 54 Cal., p. 445. (2) (1927) 100 I.C., p. 794.

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We are further of opinion that the purchaser can recover the amount on the principle that whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself.

We, therefore, allow the application and decree the plaintiff's suit with costs against both the defendants.

Application allowed.

MISCELLANEOUS CIVIL

*Before Mr. Justice Ziaul Hasan and
Mr. Justice A. H. deB. Hamilton*

BADRI NATH (APPELLANT) v. RAM CHANDRA
AND ANOTHER (RESPONDENTS)*

1939

January,
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Provincial Insolvency Act (V of 1920), section 41—Application for discharge, if can be rejected absolutely—Civil Procedure Code (Act V of 1908), section 115—Official receiver's application to sue in forma pauperis rejected—Revision against the order, whether lies.

An absolute refusal to grant an order of discharge is not justified by section 41 of the Provincial Insolvency Act. An application by an insolvent for an order of discharge should not ordinarily be entirely rejected, and if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge should not be passed or whether an order of discharge, with a provision that its operation be suspended for a specified time should not be made. *Bhag Mal v. Parshotam Singh* (1), relied on. No revision lies against an order refusing permission to an official receiver of the Estate of an insolvent to sue in *forma pauperis* for when a Court has jurisdiction to decide a question and decides it whether rightly or wrongly, there can be no revision under section 115, C. P. C., as even if the Court decides the question wrongly it does not exercise its jurisdiction illegally or with material irregularity. *Raja Amir Hasan Khan v. Sheo Baksh Singh* (2)

*Miscellaneous Appeal No. 66 of 1936, against the order of Babu Gopendra Bhushan Chatterji District Judge of Gonda, dated the 6th July, 1936, and section 115 Application No. 207 of 1936, for revision of the order of S. Abid Raza, Civil Judge of Gonda, dated the 12th September, 1936.

(1) (1935) A.I.R., Lahore, 919.

(2) (1888-84) L.R., 11 I.A., 237.