## CIVIL REFERENCE.

*Before Kulwant Sahay and Macpherson, JJ.*

DHANESWAR SAHU

*v.*

RAMRUP GIR.*

1928.

*May*, 29.

*Promissory Note—stamp insufficient—suit for recovery of loan—admissibility of evidence other than the note itself —Evidence Act*, 1872 (*Act I of* 1872), *section* 91—*Stamp Act*, 1899, (*Act II of* 1899), *section* 35, *proviso* (*a*).

Where the lending of money and the execution of a promissory note for repayment of it are contemporaneous, the plaintiff, in a suit for recovery of the money, is entitled to adduce evidence other than the promissory note itself, in order to prove the loan.

Therefore, where a handnote bore a one-anna stamp instead of a two-annas stamp and was therefore inadmissible in evidence by reason of proviso (*a*) to section 35 of the Stamp Act, 1899, *held*, per *Kulwant Sahay*, *J.*, (*Macpherson*, *J.*, *dubitante*) that the plaintiff was entitled to prove the loan by other evidence.

*Chhoto Lal Sahu* v. *Gumani Chaudhury* (1) *and Chinnappa Pillai* v. *M. R. C. Muthuraman Chettiar* (2), not followed *Golap Chand Marwaree* v. *Thakurani Mohokoon Kooaree* (3), *Sheikh Akbar* v. *Shaikh Khan* (4), *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5), *Rai Saheb Suraj Lal* v. *Anant Lal* (6), *Balbhadar Prasad* v. *The Maharajah of Betia* (7), *Jacob & Co.* v. *Vicumsey* (8), *Radhakant* v. *Abhaycharan* (9), *Parsotim Narain* v. *Taley Singh* (10) and *Brahmadeo Rai* v. *Ramkishun Mahton* (11), referred to.

Reference by the Subordinate Judge of Chapra.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

*Civil Reference no. 4 of 1927, from Brajendra Prasad, Esq., Subordinate Judge, Chapra, dated the 18th November, 1927.

(1) (1926) 7 Pat. L. T. 589.
(2) (1911) 10 Ind. Cas. 669.
(3) (1878) I. L. R. 3 Cal. 314.
(4) (1881) I. L. R. 7 Cal. 256.
(5) (1896) I. L. R. 23 Cal. 851.
(6) (1920) 1 Pat. L. T. 203.
(7) (1887) I. L. R. 9 All. 331.
(8) (1927) 29 Bom. L. R. 432.
(9) (1880) I. L. R. 8 Cal. 721.
(10) (1904) I. L. R. 26 All. 178.
(11) (1921) 2 Pat. L. T. 184.

1928.

DHANESWAR SAHU v. RAMRUP GIR.

KULWANT SAHAY, J.

*Mr. Harnarayain Prasad*, in support of the reference.

*Mr. S. N. Dutt*, against the reference.

KULWANT SAHAY, J.—This is a reference made by the Subordinate Judge of Chapra in a suit for recovery of money. The plaintiff's case, as made in the plaint, was that the defendant no. 1 as the karta of his family borrowed from the plaintiff a sum of Rs. 350 carrying interest at Re. 1 per cent. per month and executed a handnote, dated the 24th of May, 1925, in favour of the plaintiff. He promised to pay on demand the principal and interest, and all the members of his family were benefited by the loan. The claim was made for the principal amount of Rs. 350 and Rs. 89 as interest, after remission, making a total of Rs. 439. He stated that his cause of action arose on the 24th of May, 1925, the date of the execution of the handnote, and on the 20th of July, 1927, the date of the last demand.

The learned Subordinate Judge found that the promissory note should have been stamped with a two-annas stamp, but it bore a one-anna stamp only. The handnote was, therefore, inadmissible in evidence according to proviso (*a*) to section 35 of the Indian Stamp Act. It was, however, argued before him that, if the handnote was inadmissible, the plaintiff was entitled to adduce other evidence in support of his claim. The learned Subordinate Judge was doubtful whether other evidence could be admitted as there was a conflict of rulings on the point in this Court. He has accordingly referred the question to this Court, whether the suit must fail when it is based on an instrument which is inadmissible in evidence, when the transaction of loan and execution of the instrument are contemporaneous and constitute one transaction, his own opinion being that according to section 91 of the Indian Evidence Act other evidence should not be allowed to be adducted in such a case, and the suit must fail. The two rulings of this Court which are in

conflict with each other, and which have been referred to by the Subordinate Judge are the decisions in the cases of *Brahmadeo Rai* v. *Ramkishun Mahton* (1) and *Chhoto Lal Sahu* v. *Gumani Chaudhury*(2). Both these decisions are of single Judges of this Court.

In *Brahmadeo Rai* v. *Ramkishun Mahton* (1) the suit was based on a handnote bearing an adhesive stamp which was, however, not initialled or cancelled as required by the Stamp Act and it was, therefore, deemed to be an unstamped document and inadmissible in evidence. It was held in that case that the document having been admitted by the trial Court, the question of the wrongful admission of the inadmissible document could not be raised in a superior Court under section 36 of the Stamp Act. It was, however, held by this Court that a plaintiff who proved the loan by other evidence is entitled to a decree, although the loan was advanced under a handnote which could not be proved as it was inadmissible in evidence, and that it was immaterial that in the plaint the date of the cause of action was given as the date of the execution of the handnote, and reference was made to several rulings of the Calcutta, Bombay and Allahabad High Courts.

In *Chhoto Lal Sahu* v. *Gumani Chaudhury* (2) the suit was also based on a handnote which was not stamped and could not be received in evidence, and the Munsif held that as the plaintiff had failed to prove the handnote, upon which the suit was brought, the suit must fail. It was held by this Court in that case, that if the suit is founded on an instrument, and that instrument cannot be proved, the suit must fail ; and reliance was placed upon the Madras decision in *Chinnappa Pillai* v. *M. R. C. Muthuraman Chettiar* (3) in which it was laid down that, where a loan and the execution of a promissory note are contemporaneous and constitute one transaction,

(1) (1921) 2 Pat. L. T. 184. (2) (1926) 7 Pat. L. T. 589.
(3) (1911) 10 Ind. Cas. 669.

1928.

DHANESWAR SAHU v. RAMRUP GIR.

KULWANT SAHAY, J.

a suit based on the original consideration, if the promissory note is inadmissible for insufficiency of stamp, is not maintainable.

It must be admitted that the two decisions are conflicting. The attention of the learned Subordinate Judge, however, does not appear to have been called to another decision of this Court which was a decision of two Judges in *Rai Saheb Suraj Lal* v. *Anant Lal* (1). In that case it was held that the law on the subject was clearly and correctly stated in the case of *Sheikh Akbar* v. *Shaikh Khan* (2) ; and their Lordships held that when a cause of action for money is once complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that the debtor is not also made liable upon the note to some third person ; but when the original cause of action is the bill or note itself, and does not exist independently of it, and the said note is inadmissible in evidence, the creditor must lose his money. This decision, therefore, lays it down as a settled point of law that a suit for money does not necessarily fail if the instrument upon which it is based is found to be inadmissible in evidence on account of its being insufficiently stamped or not stamped at all.

A distinction is made between the class of cases where the loan is advanced and the cause of action for the money is complete, and subsequently the debtor gives a bill or a note to the creditor for payment of the money, and the class of cases where the original cause of action is the bill or note itself, and does not exist independently of it. The distinction was clearly brought out by Garth, C. J. in *Sheikh Akbar* v. *Sheikh Khan* (2). The second class of cases, namely, cases

(1) (1920) 1 Pat. L. T. 203. (2) (1881) I. L. R. 7 Cal. 256.

where the original cause of action is the bill or the note itself, was illustrated by Garth, C. J. with reference to a case, when, in consideration of *A* depositing money with *B*, *B* contracts by promissory note to repay it with interest at six months' date, and the learned Chief Justice pointed out that in such a case there was no cause of action for money lent, or otherwise than upon the note itself, because the deposit was made upon the terms contained in the note, and no other, and in such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money. The reason why in that particular class of cases the suit must fail is that under section 91 of the Indian Evidence Act when the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, except the document itself; and *Illustration* (*b*) to the section runs thus :—

"If a contract is contained in a bill-of-exchange, the bill-of-exchange must be proved."

It is, however, to be noticed that section 91 merely lays down that the terms of the contract between the parties must be proved by the document itself, and by no other evidence. When money is lent, and a promissory note is given by the borrower to the lender, the terms of the contract between the parties will ordinarily refer to the contract of repayment by the borrower, and the contract as regards the rate of interest. As was pointed out by Petheram, C. J. in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (1), an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to

(1) (1896) I. L. R. 23 Cal. 851.

1928.

DHANESWAR SAHU v. RAMRUP GIR.

KULWANT SAHAY, J

repay it. It follows, therefore, that, apart from the instrument, viz., the promissory note, there is always a contract to repay a loan, and such contract can be proved independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. I am, therefore, of opinion that even in cases where the lending of the money and the execution of the promissory note are contemporaneous, the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence, other than the instrument or the promissory note itself, in order to prove the loan. It may be that ordinarily the plaintiff may find it difficult to prove the loan apart from the promissory note, but, if he is able to do so, there is no reason why the suit should fail and why the plaint should not be entertained. It was held so long ago as the year 1878 in *Golap Chand Marwaree* v. *Thakurani Mohokoon Kooaree*(1) that the plaintiff, in a suit on a promissory note written on unstamped paper, is not debarred from giving independent evidence of consideration ; and this view has been consistently followed in the Calcutta High Court and was also accepted by this Court in the case of *Rai Saheb Suraj Lal* v. *Anant Lal* (2). The Madras High Court appears to have taken a different view ; but the Bombay and the Allahabad High Courts are in agreement with the Calcutta High Court, vide *Balbhadar Prasad* v. *the Maharajah of Betia* (3); and the recent decision of the Bombay High Court in *Jacob & Co.* v. *Vicumsey* (4) where it was pointed out that the transaction may be one of three kinds : either the contract may be considered as contained wholly in the promissory note or bill-of-exchange as in *Illustration* (*b*) to section 91 of the Indian Evidence Act, in which case if the plaintiff could not sue on the promissory note he could not sue at all ; or, secondly, the promissory note may be regarded

(1) (1878) I. L. R. 3 Cal. 314.
(2) (1920) 1 Pat. L. T. 203.
(3) (1887) I. L. R. 9 All. 331.
(4) (1927) 29 Bom. L. R. 432.

as a conditional payment of the amount of the loan in which case, if the promissory note is insufficiently stamped, it is only a worthless piece of paper and the plaintiff can sue on the loan ; and, thirdly, the promissory note may be passed as a security for the loan in which case there is no necessity for the plaintiff to sue on the promissory note at all and whether it is properly stamped or not he can bring a suit on the loan.

I am, therefore, of opinion that this reference should be answered by saying that the suit giving rise to the reference is maintainable, and if the plaintiff can prove the loan by other evidence he will be entitled to a decree. He cannot give any other evidence as regards the rate of interest, but he may be entitled to a reasonable amount as compensation by way of interest apart from the contract contained in the handnote.

Macpherson, J.—I agree to the answer proposed. In so doing I make a concession to the principle of stare decisis, the authorities in the Calcutta High Court prior to 1916 and the authorities in this Court thereafter, including unreported cases, being all in favour of that answer with the exception of a recent decision of a single Judge of this Court who followed the Madras view without discussing the Calcutta and Patna decisions. Had the point been open, I should have experienced considerable hesitation in rejecting the opposite view. In particular I am not confident that the decision of Sir Richard Garth in *Sheikh Akbar* v *Sheikh Khan* (1), as explained by the learned Chief Justice himself in *Radhakant* v. *Abhaycharan* (2) has been correctly interpreted in the subsequent Calcutta and Patna decisions [compare *Parsotam Narain* v. *Taley Singh* (3)].

(1) (1881) I. L. R. 7 Cal. 256. (2) (1880) I. L. R. 8 Cal. 721.

(3) (1904) I. L. R. 26 All. 178.