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could not be made otherwise than by endorsement and delivery was not necessary for the decision of the case and moreover I am now convinced that it was erroneous. I was misled by the wording of section 48 of the Negotiable Instruments Act and did not notice that the transfer of a negotiable instrument is not by that section restricted to the operation of endorsement.

KHAJA MOHAMAD NOOR, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

S. A. K. *Rule made absolute.*

APPELLATE CIVIL.

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September, 18.

Before Courtney Terrell, C.J. and James, J.

KRISHNA KUMAR CHATTERJI

v.

MUSAMMAT JAGPATI KUER.*

Stamp Act, 1899 (*Act II of* 1899), *sections* 12, 36, 61 *and* 63—*cancellation of adhesive stamp, if necessary at the time of execution of handnote—cancellation, meaning of—document not properly stamped once received in evidence, whether can be rejected at a later stage.*

A handnote bearing adhesive stamps was admitted in evidence but subsequently it transpired that only one of the stamps had been cancelled at the time of execution. The trial court held that the handnote was not properly stamped and hence inadmissible in evidence under section 36 of the Stamp Act.

Held (*i*) that the document having once been admitted in evidence it could not be called in question at any subsequent stage of the same suit.

*Appeal from Original Decree no. 155 of 1933, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Muzaffarpur, dated the 18th April, 1933.

Nirode Basini Mitra v. *Sital Chandra Ghatak* (1), followed.

(*ii*) It is not necessary that an adhesive stamp should be cancelled at the time of execution of the handnote. It is sufficient compliance with the provision of sub-section 2 of section 12 that the stamp is cancelled before the court looks at it.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

A. K. Mitra, for the appellant.

S. K. Mitra and *R. Misra*, for the respondents.

COURTNEY TERRELL, C.J.—This is an appeal by the plaintiff from a judgment of the Subordinate Judge of Muzaffarpur. The case arose out of the following facts:—

There was a firm of partners who carried on business under the name of Damri Sahu Halkhori Sahu and the partners in that firm were Damri Sahu and Halkhori Sahu respectively. They carried on business at various places and on the occasion of the transaction in question they were negotiating through the plaintiff as their agent for a contract with a certain sugar mill for the purchase of molasses which is one of the by-products of sugar manufacture. They desired to purchase the outturn of molasses by that particular sugar mill. The plaintiff in November of 1926 secured a contract for the firm out of which, if the contract were carried through, he would be paid a remuneration by way of commission. The sugar mill was willing to sell their output of molasses provided that the firm would deposit Rs. 10,000 as earnest money for the molasses they would buy, within one week. The partner Halkhori Sahu came to Muzaffarpur where the sugar mill was, and was told the terms upon which the mill would be willing to conduct the business. He had not the

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necessary sum of Rs. 10,000 with him to make the required deposit and therefore he borrowed from the plaintiff a sum of Rs. 5,000 and with that money made the required deposit with the sugar mill. To secure the loan Halkhori Ram executed a handnote promising to repay the loan together with interest at a reasonable market rate. The loan not being repaid and the partners having since died, the plaintiff began this suit against the widow amongst other persons of the partner Damri Sahu and in his plaint he set forth the story of the loan and claimed to recover upon the handnote. He claimed the Rs. 5,000 principal lent and interest at the rate of 12 per cent. per annum which he said was the reasonable market rate according to the contract, for three years.

When the case came on for hearing before the lower court for some reason the defendants were not represented and judgment for the plaintiff went by default, the plaintiff producing the handnote in question. There was an appeal to the High Court from this decision on the ground that the learned Judge ought not to have given judgment by default but should have given the defendants an opportunity of being heard. The High Court agreed with the contention and remanded the case to be heard upon the merits.

The plaintiff went into the witness-box and towards the end of the cross-examination he was asked questions about the handnote in question, having proved the handnote on the previous day, (when the handnote was endorsed by the Judge with a statement that it was admitted to evidence). The further questions on the following day related to this handnote. He was asked about the cancellation of the stamps which the handnote bears. The handnote bears six adhesive stamps, two of them being one anna each and four others half anna and across the half anna stamp which is in the righthand bottom corner of the group of stamps the signature of the executant of the handnote appears. There also appear two lines

drawn across the stamps, one lying across each row from left to right. He was asked whether those lines came into existence at the time of the execution of the note: he said 'no', the stamps were free at that time from the lines which they now bear and he stated that as a matter of fact that could be demonstrated by a photograph which he had taken after the note was executed for greater caution. An examination of the handnote bears out what he says with the result that it would appear that at the time of the execution of the handnote the righthand bottom corner half anna stamp alone of the six had been cancelled, the horizontal lines drawn across the rows of stamps having been added at some later time and before the note was tendered as evidence.

The learned Judge took a somewhat peculiar course. He held that the stamps had not been properly cancelled and that under the Act this was equivalent to the document not being properly stamped and therefore he refused to consider the suit as one brought on the handnote but on the merits of the question of whether the loan had in fact been granted or not he used the handnote as very good evidence of the loan and gave judgment for the plaintiff for the capital sum Rs. 5,000 of the loan. He held, however, that inasmuch as the contract to pay interest was evidenced by the handnote alone and that inasmuch as it was not properly stamped it could not be used by the plaintiff, and he declined to grant any decree for interest.

From that decision the plaintiff appealed and his appeal is before us. There is also a cross-objection by the defendants to which I will presently refer. The contention on behalf of the appellant is based upon section 36 of the Indian Stamp Act which provides—

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

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In this case the learned Judge had on the first day of the trial admitted the handnote to evidence and had marked it as an exhibit. It was not until the second day when the defendant made the discovery by cross-examination of the fact that the cancellation of five out of the six stamps had not been effected at the date of execution that the point for consideration by the Judge arose. In my opinion, at the time that the Judge entered into this matter the instrument had already been admitted in evidence and that is proved by the endorsement on the note and further it is conclusively proved by the fact that the Judge in considering whether the plaintiff could recover upon a contract apart from the note definitely took the note into evidence as cogent evidence of the contract. It is therefore not open to objection from the point of time of admission. The section has been discussed in many cases but I do not think I can do better than quote from the judgment of Sir George Rankin in *Nirode Basini Mitra* v. *Sital Chandra Ghatak*(1):

"On the merits of the appeal, it appears to me that section 36 of the Stamp Act makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure-holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that, under section 36, it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. These stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made up by the trial court, there it might be rejected, if not, the matter stopped there."

(1) (1930) 128 Ind. Cas. 187.

In my opinion this point is conclusive against the respondent.

There is a further objection to the argument of the respondent. The section which deals with the cancellation of stamps is section 12. By the first paragraph of the first sub-section it is provided—

"Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again."

The second sub-section is the sub-section which really is used by the respondent in this case—

"Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

Now by section 63 of the Act any person required by section 12 to cancel an adhesive stamp and failing to cancel such stamp in the manner prescribed by that section shall be punishable with fine which may extend to Rs. 100. By this means a penalty is provided to enforce the provisions of the first sub-section to section 12. It is argued on behalf of the respondent that there is a further penalty on persons who do not cancel the stamp at the time of affixing, namely, that if it should turn out that the cancellation, however effective, was effected at some later time than the affixing of the stamp, the document is not receivable in evidence. In my opinion that construction is unsound. The wording of sub-section (2) makes it clear that a document is to be deemed unstamped if when the Court looks at the same it finds that it has not been cancelled so that it cannot be used again and the criterion of cancellation is the appearance of the stamp. If the stamp is in such a condition that it cannot be used again then it has been cancelled and the document cannot be treated as unstamped. The sub-section has nothing to do with the penalties for failing to cancel the stamp. That is provided by section 63 and I cannot find anything in this section which prevents the document from being used in evidence if, when it is presented to the Court, it is in

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fact cancelled within the meaning of sub-section (2) and that does not mean that it must have been cancelled at some particular time anterior to its presentment in evidence but merely refers to the condition of the stamp at the time it is so presented.

Mr. S. K. Mitra on behalf of the respondent would have us believe that the object of the legislature would by such a construction be defeated. That is not so. The object of the legislature is to protect the revenue. If when the Court comes to examine the document the stamps are intact the danger of a second use of the stamp has not yet occurred and if cancellation is, before it is presented in evidence, effected, no danger arises as to the second use of the stamps in the future. On these two grounds, therefore, the document should properly be considered as having been properly stamped and should have been received in evidence by the Judge and no other question as to the authenticity of the handnote has been presented to us.

The appeal of the plaintiff therefore should succeed.

We have now to consider the contentions of the defendant on her cross-objection. Defendant no. 1 is the widow of the deceased partner Damri Sahu. The debt was incurred on the 6th November, 1926, that is to say, the 16th Kartick, 1334. It is said that the partner of whom defendant no. 1 is the widow died on the 30th October, 1926, that is to say, the 9th of Kartick, 1334, and therefore his estate cannot be liable under his partnership contract for debts incurred by another partner after his death. If that fact had been pleaded and established by the respondent she would have been entitled clearly to succeed, but she did not plead it. An examination of her written statement, involved as it is, discloses no hint whatever of such a point being taken in her favour. Furthermore, in the depositions given before the Court there is no evidence whatever that her late

husband died after the debt was incurred. It is said that there were certain Land Registration proceedings in which the death of the husband was mentioned and the judgment in those proceedings has been put before us; but needless to say the judgment is no evidence of the facts therein stated, more particularly as the litigation was not between the same parties. The only witness who deals with the question of the date of death merely mentions that it took place in Kartick, 1334, which is consistent with the death either being after or before the date of the debt in question. Having failed to plead or indeed to argue the point in the lower court it is clear that it is too late at this stage of the matter to consider its merits and there is no evidence before us upon which it could be supported.

A further argument was addressed to us on behalf of the defendant that there are no materials upon which we could grant interest at other than some purely nominal rate. There was evidence, however, before the Subordinate Judge as to the rate at which the deceased partner, when he borrowed money, was able to borrow from his bank by way of overdraft and the rate was at 12 per cent. It must be remembered that this was an entirely unsecured loan and in the circumstances the rate of interest at 12 per cent. is by no means unreasonable and it certainly could not be obtained in the market for less than that rate.

I would allow the appeal and direct that the decree of the lower court be varied by adding to the decree for Rs. 5,000 interest at the rate of 12 per cent. per annum from the date of the handnote up to the date of the decree and thereafter at 6 per cent. until realisation. The defendant must pay the costs in this Court and in the Court below.

Appeal allowed.

JAMES, J.—I agree.

J. K.