

of the suit in the Court below. If the legal representatives of a deceased partner are not necessary parties to a suit or an appeal, it is obvious that the appeal is a perfectly valid appeal and can proceed, the surviving partners being already on the record as respondents. We do not see any force in these preliminary objections, and we overrule them.

[The remainder of this judgment is not required for the purposes of this report—Ed.]

A. R.

Appeal accepted in part.

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Moti Sugar.

RAHMAT ALI-MUHAMMAD FAIZI

(DEFENDANTS)—Appellants,

versus

DEWA SINGH-MAN SINGH (PLAINTIFFS),—

Respondents.

Civil Appeal No. 24 of 1920.

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Jan. 18.

Cause of action—Suit on a hundi improperly stamped given in lieu of a prior hundi—Whether plaintiff can fall back upon the prior hundi—Indian Contract Act, IX of 1872, section 62.

Held, that where a hundi insufficiently stamped is given in renewal of a prior hundi and a suit on the basis of the subsequent hundi is not maintainable owing to its not being properly stamped the creditor can fall back upon the prior hundi. Section 62 of the Indian Contract Act is no bar to his doing so. The second hundi would have operated as a discharge of the previous hundi only if the second hundi was legally enforceable.

Udho Shah v. Hira Shah (1), *Sundar Das v. Puran Singh* (2), and *Kuttayan v. Palaniappa* (3), followed.

Held also, that the cancellation of the stamp on the prior hundi and the endorsement on it that the defendants had executed another hundi in its stead, having been made under a mistake, would not discharge the defendant from liability on that hundi.

There is nothing in the present case to rebut the presumption that the giving of the second hundi only operated as a conditional satisfaction of the debt and not as a real discharge.

(1) 71 P. R. 1897.

(2) (1922) 67 Indian Cases 856.

(3) (1904) I. L. R. 27 Mad. 540.

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Ch'hanji Saugjibloy, v. Raghowji, (1) and Jambu Chetti v. Pallianappa Chettiar (2), followed.

Second appeal from the decree of A. H. Brasher, Esquire, District Judge, Amritsar, dated the 24th November 1919, varying that of A. Seymour, Esquire, Subordinate Judge, 1st Class, Amritsar, dated the 23rd June 1919, awarding the plaintiffs a decree.

MANOHAR LAL for Appellants.

DALIP SINGH for Ralli, for Respondents.

The judgment of the Court was delivered by—

MOTI SAGAR J.—This is a second appeal against a decision of the District Judge of Amritsar, dated the 24th November 1919, upholding a decision of the Subordinate Judge, dated the 23rd June 1919, awarding plaintiffs a decree for Rs. 1,050 principal and interest on the basis of a *hundi*, dated October the 9th, 1915. The facts of the case, out of which the appeal has arisen, are very simple, and are shortly these :—

On the 9th October 1915, the defendants borrowed a sum of Rs. 1,000 from the plaintiffs, and executed a *hundi* in their favour for that amount. The *hundi* was payable after 150 days. It appears that the defendants were unable to pay the amount due on the *hundi* and they consequently executed on the 5th March 1916 another *hundi* for the same amount in favour of the plaintiffs by way of renewal of the previous *hundi* of the 9th October 1915, and made an endorsement on the back of the latter *hundi* that another *hundi* for Rs. 1,000 had been executed in lieu thereof. On the 23rd June 1917, the plaintiffs brought a suit on the basis of this second *hundi* of the 5th March 1916, but it was dismissed on the ground that the *hundi* was not duly stamped. On appeal this finding was upheld by the District Judge, but it was further held that the plaintiffs could fall back upon the original transaction and sue on the previous *hundi*, dated October the 9th, 1915, in lieu of which the second *hundi* was executed. An appeal was preferred against this decision to the Chief Court, but was dismissed by Mr. Justice Wilherforce by his order, dated the 9th August 1918, who allowed amendment of the plaint, and confirmed

(1) (1904) 1. L. R. 33 Bom. 27.

(2) (1902) 13 Mad. L. J. 252; 1. L. R. 26 Mad. 526.

the order of remand passed by the Lower Appellate Court in favour of the plaintiffs. The plaint was accordingly amended, and the plaintiffs sued on the basis of the former *hundi* of the 9th October 1915. The defendants pleaded that the *hundi* was without consideration and further contended that it had been discharged, and that consequently no suit could be maintained on the basis thereof. They also denied the right of the plaintiffs to claim interest on this *hundi*.

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The following issues were framed :—

- (1) Has the *hundi*, dated the 9th October 1915, for Rs. 1,000 been discharged ?
- (2) If discharged, can it now be sued upon ?
- (3) Did defendant not receive full consideration for the *hundi*, dated 9th October 1915 ?
- (4) To what interest is plaintiff entitled on the *hundi*, dated 9th October 1915 ?
- (5) Is plaintiff entitled to costs on the suit as it now proceeds ?

The Trial Court found against the defendants on all these issues, and decreed the plaintiffs' suit. On appeal the learned District Judge upheld the findings of the Trial Court, and dismissed the appeal preferred by the defendants. He further held that the plaintiffs were entitled to claim interest till realisation, and he accordingly accepted the cross-objections filed by the plaintiffs on this point.

The defendants have now preferred a second appeal against this decision through Mr. Manohar Lal, while Mr. Dalip Singh has appeared on behalf of the respondents. The sole question for determination involved in this appeal is whether the previous *hundi* of the 9th October 1915 was completely discharged by the execution of the second *hundi*, dated the 5th March 1916. On this question we have no hesitation in holding that the judgment of the Lower Appellate Court is right, and that the *hundi* was not discharged. In our opinion the giving of the second *hundi* would have operated as a discharge of the previous *hundi* only if the second *hundi*

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was legally enforceable. As already observed, a suit was brought on the second *hundi*, but failed owing to its not being properly stamped. It could not have been contemplated between the parties nor, as observed by Mr. Justice Chatterjee in *Udho Shah v. Hira Shah* (1), could plaintiffs have agreed that they were to take a piece of waste paper for a security legally enforceable and to place themselves entirely at the mercy of the defendants thereafter as regards the payment of their debt. In *Kuttayan v. Palaniappa* (2) it was held that the giving of a *hundi* in payment of the price of goods sold operates as a payment, only if the *hundi* is honoured, and that if the *hundi* is dishonoured the right to sue on the original cause of action is revived. In *Sandar Das v. Puran Singh* (3), which is a case exactly in point, it was held that where an insufficiently stamped *hundi* is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is not maintainable, the creditor can fall back upon the prior *hundi*, and that section 62 of the Contract Act is not a bar to his doing so.

It is urged by Mr. Manohar Lal that when the second *hundi* was given, the stamp on the former *hundi* was cancelled, and that an endorsement was made on its back that the defendants had executed another *hundi* for Rs. 1,000 in its stead. It is contended that the effect of this cancellation and endorsement was that the *hundi* ceased to be a negotiable instrument any longer, and that this circumstance alone was sufficient to indicate that the *hundi* had been completely discharged. We are unable to agree in this contention. In our opinion the question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and we do not think that the liability of the drawer of a bill of exchange is in any way affected by the document being negotiable or otherwise. Nor do we think that mere cancellation can have the effect of discharging a party from liability unless it is made with the express intention of discharging that party, for if it is made unintentionally or is made under a mis-

(1) 71 P. R. 1897.

(2) (1904) I. L. R. 27 Mad. 540.

(3) (1922) 67 Indian Cases 856.

take it will be inoperative. This rule is laid down in a series of cases in England, and being a rule founded on equity, justice and good conscience, must be held equally applicable to India.

Now, the only circumstances relied on by the defendants in support of this intention are the endorsement on the back of the *hundi*, to which reference has already been made, and the fact that another *hundi* was executed in substitution of the former; and the question for decision is whether these circumstances are sufficient to raise a presumption that the original contract was entirely put an end to, and that it was replaced by another contract which may or may not have been legally capable of enforcement. In the case of *Cullianji Sangjibhoy v. Raghovji* (1) Mr. Justice Chanda Varkar, following the rule laid down in *In re Romer and Haslam* (2), held that the negotiable security by a debtor to his creditor operated as a conditional payment only and not as a satisfaction of the debt. In *Jambu Chetty v. Pallianappa Chettiar* (3), a case cited with approval in *Cullianji Sangjibhoy v. Raghovji* (1) it was held by the Madras High Court that whether it was a note or a bill, it was a question of fact in either case whether the parties intended the same as absolute or conditional payment, and the presumption was that the effect of giving or taking a bill or note was that the debt was conditionally paid. We are in entire accord with the view expressed in these authorities, and hold that there is nothing in the present case to rebut that presumption, and that the giving of the second *hundi* only operated as a conditional satisfaction of the debt and not as a real discharge.

The result is that the appeal fails and is dismissed with costs.

A. N. C.

Appeal dismissed.

(1) (1904) I. L. R. 30 Bom. 27.

(2) (1893) 1 Q. B. 236.

(3) (1902) I. L. R. 26 Mad. 526; 13 Mad. L. J. 252.

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