

It is quite clear upon the evidence in this case that no special custom restricting the parties in matters of alienation has been established. I must accordingly hold that the Personal Law applies, according to which the alienation by Muhammad Ghaus could not be challenged by the plaintiffs.

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For these reasons I would accept this appeal and setting aside the decree of the trial Court dismiss the suit with costs.

ABDUL RAOOF J.—I agree.

N. F. E.

*Appeal accepted.*

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### APPELLATE CIVIL.

*Before Justice Sir Henry Scott-Smith and Mr. Justice Martineau.*

DHIAN SINGH AND OTHERS (PLAINTIFFS) Appellants,  
*versus*  
GURDIT SINGH (DEFENDANT) Respondent.

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*Feb. 26*

Civil Appeal No 1445 of 1921.

*Indian Evidence Act, I of 1872, section 114, illustration (i)—Suit on hundis—allegation of loss of documents—plea of discharge—Burden of proof.*

Where plaintiff sued for money due upon *hundis*, but alleged their loss, whilst defendant admitted execution, but pleaded payment and subsequent destruction of the documents:

*Held*, that failing production of the *hundis* by the defendant there is no presumption that the *hundis* have been discharged [Indian Evidence Act, section 114, illustration (i)] and the *onus* is upon the defendant to prove payment.

*Chuni Kuar v. Uday Ram* (1), and *Jagan Nath v. Kamta Singh* (2), followed.

*Kundan Lal v. Begam-un-Nisa* (3), distinguished.

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(1) (1883) I. L. R. 6 All. 73.

(2) (1915) 32 I. C. 349.

(3) (1918) 47 I. C. 337 (P. C.).

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DHARAM SINGH  
v.  
GURDIT SINGH.

*Second appeal from the decree of J. Addison, Esquire, District Judge, Rawalpindi, dated the 8th April 1921, reversing that of Lala Chuni Lal, Senior Subordinate Judge, Rawalpindi, dated the 7th January 1921, and dismissing the claim.*

FAKIR CHAND, for Appellants.

KHAZAN SINGH, for Respondent.

The judgment of the Court was delivered by—

SIR HENRY SCOTT-SMITH J.—In this suit the plaintiff-appellant Dharam Singh sued for Rs. 2,634-5-6, Gurdit Singh as principal and Sant Singh and Makhan Singh as sureties on two *hundis* for Rs. 1,000 each, dated the 28th of January 1916. Plaintiff alleged that his house had been broken into in the year 1917 and these *hundis* along with other property had been stolen. Gurdit Singh, on the other hand, pleaded that the *hundis* were paid off and returned to him, and that he had torn them up. Defendants Nos. 2 and 3 plead ignorance and state that they were not sureties.

The first Court passed a decree for the full sum claimed against Gurdit Singh with costs, but dismissed the suit against defendants Nos. 2 and 3.

Gurdit Singh appealed, and the learned District Judge held that as plaintiff alleged that the *hundis* had been stolen from him he was bound to prove the loss, and that as he had failed to do this or to produce the *hundis* he must presume that they had been paid. He relied in support of this upon the Privy Council case of *Kundan Lal v. Begam-un-Nisa* (1). At the time when Dharam Singh's house is said to have been broken into by burglars there was a police enquiry, and the learned District Judge has attached

great importance to Gurdit Singh's statement before the Inspector of Police on the 16th December 1917. This statement was that the *hundis* had been stolen, and the District Judge says that the plaintiff must have known all this and in spite of it he did not sue until February 1919. His final conclusion is as follows:—

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“ Taking into account the fact that the plaintiff has failed to prove the loss of the *hundis* and that the presumption, therefore, is that they were paid off, together with the evidence on the file, I have no hesitation in holding that it has been sufficiently proved that they have been discharged.”

The trial Court criticised the evidence produced by Gurdit Singh in regard to the payment of the sum of Rs. 1,400. It regarded it as unsatisfactory and disbelieved it. The learned District Judge does not say that he does believe this evidence. In fact he remarks that it may not be satisfactory.

The plaintiff has preferred a second appeal to this Court against Gurdit Singh alone, and it is contended on his behalf that the Privy Council case relied upon by the learned District Judge is distinguishable. In that case it was held that when in a suit on a bond the plea of discharge is set up and the document creating the obligation is produced by the defendant the *onus* of rebutting the presumption of discharge lies in the first instance on the plaintiff. In the present case, however, the documents, *i.e.*, the *hundis* creating the obligations, are not produced by the defendant Gurdit Singh and, therefore, the presumption of discharge does not arise under section 114, illustration (i) of the Indian Evidence Act, and the Privy Council ruling is clearly distinguishable. Counsel for the appellant cites *Chuni Kuar v. Udai Ram* (1)

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where the plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. It was held that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both. This was followed in the case of *Jagan Nath v. Kamta Singh* (1), in which the plaintiff sued for money due upon a bond, but alleged its loss, whilst the defendant admitted execution, but pleaded payment. It was held that the *onus* lay on the defendant to prove payment. Similarly in the present case we consider that the *onus* lay upon Gurdit Singh to prove payment. It is quite clear from the judgment that the learned District Judge was very strongly influenced in his conclusion by his erroneous view that the presumption in this case was that the *hundis* had been paid off, which conclusion is quite vitiated by the view that he took on this point. He should decide whether on the evidence it is proved that the *hundis* had been paid off or not.

We, therefore, accept the appeal and setting aside the decree of the lower appellate Court, so far as it concerns Gurdit Singh, remand the case to it for re-decision under Order XLI, rule 23, Civil Procedure Code. Stamp in this Court will be refunded. Other costs will be costs in the cause.

N. F. E.

*Appeal accepted.*

*Case remanded.*

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(1) (1915) 32 I. C. 349.