

APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Zafar Ali.

BUDHU MAL PARMA NAND (PLAINTIFF)

Appellant

versus

GOKAL CHAND AND OTHERS (DEFENDANTS)

Respondents.

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Jan. 7.

Civil Appeal No. 1504 of 1924.

Negotiable Instruments Act, XXVI of 1881, section 76 (d)—Hundi—presentment of—where not necessary—Drawer and drawee same person—Cause of action—Unstamped hundi given, in lieu of prior promissory note, for balance due—whether plaintiff can fall back on original loan.

The defendants executed two promissory notes payable on demand in respect of loans borrowed from the plaintiffs and, after paying a portion of the principal and interest thereon, received back the promissory notes in exchange for the three hundis in suit which were drawn by defendants on a firm owned by themselves, and under which the plaintiffs were to be paid on certain dates sums which were equivalent to the balance of their loans unpaid on the promissory notes. The trial Court dismissed the suit in respect of two of the hundis on the ground that they had not been presented at maturity, and in respect of the third hundi on the ground that it was inadmissible in evidence being unstamped.

Held, that as the drawer and drawee of the first two hundis were the same person and the inability of the defendants to suffer damage thereby was obvious, no presentment was necessary (*vide* section 76 (d) of the Negotiable Instruments Act).

Packkauri Lal v. Mul Chand (1), followed.

Held further, that whether parties intended subsequent hundis to be an absolute or a conditional payment of the original debt is a question of fact to be decided in each case, and that in this particular instance, for the sum entered

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on the unstamped hundi, the plaintiffs could revert to the original loan as the basis of their claim.

Rahmat Ali-Muhammad Faizi v. Dewa Singh-Man Singh
(1), followed.

First appeal from the decree of Lala Dwarka Parshad, Senior Subordinate Judge, Ambala, dated the 30th May 1924, dismissing the plaintiff's suit.

SHEO NARAIN, SHAMAIR CHAND and SAGAR CHAND,
for Appellant.

Nemo, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—The parties to this suit are the firm Budhu Mal-Parma Nand, plaintiffs, and (1) Gokal Chand, (2) Hari Chand, (3) Puran Chand and (4, 5 and 6) the three minor sons of Gokal Chand, defendants. The suit was based on three *hundis*, all dated the 4th June 1922, (1) for Rs. 2,500 due after 245 days, (2) for Rs. 2,500 due after 355 days and (3) for Rs. 250 payable after 300 days. The suit was instituted on the 29th May 1923.

The lower Court dismissed the suit on the grounds that there was no proper presentation of the first two *hundis* on the dates of maturity, that the third *hundi* was not properly stamped and so was inadmissible in evidence, and that the plaintiffs could not fall back upon the original consideration for it because the plaintiffs intended the *hundi* to be an absolute payment of the previous debt.

In appeal it is argued in respect of the first two *hundis* that presentation was not necessary because the drawers were themselves the drawees. These *hundis* were signed by Hari Chand for himself and Gokal Chand and by Puran Chand, and they were

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drawn upon Janki Das-Bishambar Das. The defendants Gokal Chand and Hari Chand pleaded that they themselves were the sole owners of the firm Janki Das-Bishambar Das. Puran Chand's plea was that he signed the *hundis* merely as a witness, a point which, as our judgment will show, is yet to be decided.

We agree with the finding of the lower Court that the *hundis* were not presented, but it was held in *Packkauri Lal v. Mul Chand* (1), that when the drawer and the drawee of a *hundi* are the same person no presentation on due date is necessary, as from the nature of the case the drawer cannot suffer damage from the want of such presentation, and thus section 76 clause (d) of the Negotiable Instruments Act applies. The learned Subordinate Judge has observed in his judgment that the plaintiffs did not rely on section 76 (d), and did not show that the defendants could not suffer any damage owing to non-presentation; but it seems to us that the inability of the drawer to suffer damage is obvious, and that it was not necessary for the plaintiffs to make a specific reference in their pleas to section 76 (d). We hold on the first issue that no presentation of the *hundis* was necessary.

As regards the third *hundi* for Rs. 250 we again disagree with the learned Senior Subordinate Judge who correctly stated that it is a question of fact to be decided in each particular case whether the parties intended the subsequent *hundi* to be an absolute or a conditional payment of the original debt, and that the presumption was that the effect of giving or taking of a bill or note was that the debt was conditionally paid. The learned Subordinate Judge considered that this presumption was rebutted in the present case by the fact that previous promissory notes for the

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original debt were returned to the defendants. According to the plaintiffs' statement in the lower Court which was admitted by the defendants, matters commenced by two loans by the plaintiffs to the defendants as proprietors of the firm Janki Das-Bishambar Das, the first of Rs. 4,000, and the second of Rs. 6,000. Promissory notes were taken and the defendants made certain payments both of interest and of principal. On the 4th June 1922, Rs. 5,250 remained due from the defendants and they received back the promissory notes and executed the *hundis* in suit according to which they were to pay up the amount within the periods fixed in the *hundis*. In our opinion the principles of law applicable are laid down in *Rahmat Ali-Muhammad Faizi v. Dewa Singh-Man Singh* (1), and we think that the learned Subordinate Judge has overlooked the improbability of the plaintiffs' agreeing to take a mere piece of waste paper as an absolute payment of a portion of their debt. The intention of the parties seems to us to have been to grant time to the defendants in lieu of making them liable on promissory notes payable on demand. We hold, therefore, on issue No. 11 that the plaintiffs can revert to the original loan and make it the basis of their claim in respect of Rs. 250 of the third *hundi*.

The suit has been determined by the lower Court on these two preliminary points. We accept the appeal, and setting aside the judgment of the lower Court we remand the suit for a fresh decision on the other issues under Order XLI, rule 23, Civil Procedure Code. The stamp on appeal will be refunded and costs will be costs in the cause. The question whether the suit was premature or unduly precipitate in regard to the second *hundi* payable after 355 days

(1) (1923) I. L. R. 4 Lah. 151.

and the effect of such being the case remains open. The above order applies only to the three defendants, Gokal Chand, Hari Chand and Puran Chand, since before us the plaintiffs have withdrawn their appeal against the three minors Miwan Mal, Brij Lal and Bihari Lal, and so far as they are concerned the dismissal of the suit by the trial Court will stand.

N. F. E.

*Appeal accepted in part;
Case remanded.*

APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Zafar Ali.

SHITAB SINGH AND OTHERS (PLAINTIFFS)

Appellants

versus

HAZARI SINGH AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 2616 of 1921.

Custom—Adoption—by widow—of a collateral one degree higher than her deceased husband—Rajputs of Mauza Bahora Kalan, Gurgaon district—Riwaj-i-am

Held, that the parties being agricultural Rajputs for many generations past were governed by custom and not by Hindu Law.

Held also, that among Rajputs of the Gurgaon district, as stated in the *Riwaj-i-am*, a widow can without any permission adopt one of her husband's male collaterals as her husband's heir.

Held further, that having regard to the other evidence on the record and in the absence of any instances directly bearing on the point, the condition laid down in the *Riwaj-i-am* under the question "who may be adopted?" viz., that the adopted person should be of a lower generation than the person adopting (Wilson's Tribal Custom of the Gurgaon District, page 28), must be taken to be merely indicative and not mandatory.

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Jan. 8.