1932

TOTA RAM
v.
SHIBBAN LAL.

ABDUL QADIR J.

and an appeal to the District Judge from an order of the executing Court was incompetent. This authority has been followed in a decision of this Court in *Munshi Ram* v. *Amin Chand* (1).

I think the contention of Mr. Hem Raj Mahajan must prevail. The District Judge had no jurisdiction to entertain the appeal, and, therefore, the orders passed by him are set aside and the order of the executing Court is restored. The revision is accepted with costs.

N. F. E.

Revision accepted.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

1932

April 11.

HARNARAIN-SAHIB RAM, ETC. (DEFENDANTS) Appellants

versus

BIHARI LAL-CHARANJI LAL (PLAINTIFF) Respondent.

Civil Appeal No. 1907 of 1926.

Indian Stamp Act, II of 1899, sections 36, 75 : Government of India Rule 7—Document admitted by Trial Court—whether objection under the Stamp Act can be raised on appeal—Negotiable Instruments Act, XXVI of 1881, Sections 1, 80 : Instrument in oriental language—Interest on dishonoured hundi—*whether can be allowed at customary rate exceeding the statutory rate—Mercantile usage—proof of.*

The plaintiff sued for principal Rs. 2,429-14-0, Rs. 637-8-0 as charges in connection with the presentation of 17 *hundis* and the balance Rs. 4,432-10-0 on account of interest and compound interest at the rate of 10 annas *per cent. per annum* as from dishonour, pleading that this rate was payable according to mercantile usage at Bombay. The *hundis* in suit were made up of two forms each with an impressed

(1) 1928 A. I. R. (Lah.) 539.

stamp making together the amount required for each instrument, no portion of any of the *hundis* was, however, written on the second sheet so used, as it should have been under rule 7 of the rules framed by the Government of India under section 75 of the Indian Stamp Act. The lower Court, however, held that the *hundis* were admissible in evidence.

Held, that as the trial Court had decided that the *hundis* were admissible in evidence, in view of section 36 of the Stamp Act, this question could not be raised in appeal.

Diwan Lachman Das v. *Dholan Das* (1), and *Jagdip Singh* v. *Firangi Singh* (2), followed.

Held further, that in view of the saving of "any local usage relating to any instrument in an oriental language" from being affected by the Negotiable Instruments Act (*vide* section 1 of the Act) it was permissible to the plaintiff to set up and prove a usage for the payment of interest at a rate exceeding 6 *per cent.* notwithstanding section 80 of the Act. And that the plaintiff had proved that by mercantile custom at Bombay interest was payable at the rate of 10 annas *per cent. per mensem* from date of dishonour, but not compound interest.

First appeal from the decree of Lala *Gulwant Rai, Subordinate Judge, 1st Class, Hissar, dated 8th May, 1926, ordering that the defendant do pay to the plaintiff firm the sum of Rs. 6,980-14-6 with interest.*

AJIT PARSADA and HEM RAJ MAHAJAN, for Appellants.

N. C. PANDIT, CHARANJIV LAL AGGARWAL and J. R. AGNIHOTRI, for Respondents.

MONROE J.—This is an appeal from the decree of the Subordinate Judge, first class, at Hissar, ordering the defendant-firm to pay to the plaintiff-firm a sum of Rs. 6,980-14-6 with interest at the rate of 6 *per cent. per annum* from the date of suit to the date of decree, and 6 *per cent.* on the whole of the decretal MONROE J.

(1) 2 P. R. 1891. (2) (1927) I. L. R. 6 Pat. 765.

1932

HARNARAIN-SAHIB RAM v. BIHARI LAL-CHARANJI LAL.

MONROE J.

amount till the date of realization with proportionate costs of the suit. The claim is for the balance of a sum of Rs. 7,500, principal and interest, such balance being due on foot of seventeen *hundis*, each for Rs. 5,000 payable on different dates and one *hundi* for Rs. 15,000 payable at sight, and a further *hundi* for Rs. 2,500 payable after one year. Of the amount claimed Rs. 2,429-14-0 is on account of principal, Rs. 637-8-0 is for charges in connection with the presentation of the *hundis* and the balance Rs. 4,432-10-0 is on account of interest and compound interest at the rate of ten annas *per cent. per mensem*, which rate is claimed as the rate payable after dishonour.

It is admitted that these *hundis* were dishonoured on the due dates, and it is also admitted that all the balance of principal now claimed was not paid. The questions which arise are (1) whether the case can be considered as established by reason of the fact that the *hundis* did not comply with the provisions of the Stamp Act; (2) whether it has been established that by mercantile custom payments are made on presentation when the *hundis* are dishonoured and (3) whether it has been established that by custom interest is payable at the rate of ten annas *per cent. per mensem*, notwithstanding the provisions of section 80 of the Negotiable Instruments Act which provides that the rate of interest in such circumstances should be 6 *per cent*.

Each of these *hundis* is a document made up by pasting together two forms with an impressed stamp of Rs. 2-4-0. The amount of Rs. 4-8-0 is the proper amount to be represented by the stamp on the instrument, but it is argued that rule 7 of the rules framed by the Government of India under section 75 of the

Indian Stamp Act which provides that "where two or more sheets of paper on which stamps are engraved or embossed are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used," has not been complied with because in this case the entire matter of the *hundi* appears on only one of the sheets. It has been decided by the learned Subordinate Judge that this document is admissible in evidence, and in my opinion in view of section 36 of the Stamp Act this question cannot now be raised—*Diwan Lachman Das* v. *Dholan Das* (1) and *Jagdip Singh* v. *Firangi Singh* (2).

On points (2) and (3) the plaintiff has put forward the evidence of three witnesses, P. Ws. 4, 6 and 8, who agree that after dishonour the rate of *nakrai shakrai* is at Bombay Re. 1-8-0 *per cent.*, and that the rate of interest after *nakrai shakrai* is ten annas *per cent. per mensem* so long as the money is not paid. These witnesses are persons engaged in mercantile pursuits, and from their evidence, particularly on cross-examination, they appear to be familiar with the practice in respect of *hundis*, not only at Bombay but at other large towns, and while if a somewhat difficult or obscure custom had to be set up the evidence of three witnesses might be considered insufficient, in my opinion, in such cases as this when all that we have to ascertain is the rates fixed by usage, the evidence of three persons familiar with the usage is sufficient, and I see no reason for doubting the accuracy of these witnesses' statements. No attempt has been made by the defendant-appellant to meet this evidence. It stands on the record uncontradicted.

(1) 2 P. R. 1891. (2) (1927) I. L. R. 6 Pat. 765.

1932

HARNARAIN-SAHIB RAM
v.
BIHARI LAL-CHARANJI LAL.

MONROE J.

The final question is whether this custom as to payment of interest at ten annas *per cent. per mensem* can prevail in view of section 80 of the Negotiable Instruments Act. The section provides that "when no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six *per centum per annum* from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs." It is beyond question that this section would apply to the ordinary negotiable instrument and that in the case of such an instrument this Court would have no power to allow interest at the rate of ten annas *per cent. per mensem*. It is, however, made quite clear by the Act in section 1, that the Act does not apply to *hundis*. The pertinent words of that section are "nothing herein contained affects any local usage relating to any instrument in an oriental language." It was, therefore, permissible to the plaintiff to set up and prove a usage for the payment of interest at a rate exceeding 6 *per cent. per annum*, and this has been done.

Finally, it has been urged by the defendant appellant that at the time of payment of a sum of money, which was the proceeds of war bonds for Rs. 10,000 transmitted by the defendant to the plaintiff for sale and for credit of the proceeds to his account, the words used by the defendant clearly showed that the plaintiff should appropriate the whole of this sum in payment of the money due on the *hundis*, the subject of the present suit; while in fact what the plaintiff

did was to appropriate only to the debt on the *hundis* a part of the money, the remaining part being applied to wipe out the other debt. There is no evidence whatever on the record, to which our attention has been directed, given by the defendant to suggest that he directed any such appropriation as he alleges. Nor has our attention been directed to any circumstances indicating that there was an appropriation by the defendant The plaintiff states definitely that after he had actually received the war bonds he had a discussion with the defendant in which he stated to him that he required that the money should be applied first in discharging the second debt due to him, allowing the balance to go in discharge of the sum due on the *hundis*. In my opinion there was no appropriation by the defendant and the plaintiff was entitled to appropriate the money as he did.

There is a cross-appeal by the plaintiff in which he claims that interest after default should have been allowed at the rate of ten annas *per cent. per mensem* and that the interest should have been compound interest His witnesses to prove the custom do not suggest that there is a custom of paying compound interest, and we are, therefore, left without any evidence showing that there was a custom of paying compound interest. Accordingly the lower Court was justified in refusing to allow compound interest.

For these reasons I would affirm the decree of the lower court, and dismiss both appeals with costs.

TEK CHAND J.—I agree. TEK CHAND J.

N. F. E.

Appeals dismissed.