APPELLATE CIVIL

Before Khosla and Falshaw, JJ.

AMIN CHAND,—*Plaintiff-Appellant*

versus

FIRM MADHO RAM-BANWARI LAL,—*Defendants-Respondents*

Regular First Appeal No 139 of 1950

1954

Sept. 16th

Indian Stamp Act (II of 1899)—Sections 31, 32, 35 and Rules 4, 11, 18—Hundis—*Requirement as to stamp, stated*—Hundi *not properly stamped, effect of*—Hundi *inadmissible in evidence under section 35 of the Stamp Act*—*Suit if can be brought on the basis of the original loan forming the consideration of the* Hundi.

Held, that bills of exchange in general, which include *hundis*, are excluded from the instruments in which original mistakes regarding the amount or method of stamping can be subsequently rectified even on payment of penalty, and regarding *hundis* for an amount exceeding Rs. 30,000 or a period of more than one year, the rules regarding the method of stamping are particularly stringent, apparently with the object of entirely precluding the possibility of ante- or post-dating such *hundis*. Rule 18 must be read subject to the provisions of the statute itself and rules 4 and 11. Rule 18 only provides for the validation of an instrument which bears the correct amount of stamp duty but in the wrong form, and it cannot possibly be said that a *hundi* for a sum exceeding Rs. 30,000; even if the stamp duty paid on it is correct, is covered by rule 18 in view of the strict formalities required by rule 11 regarding the stamping of such a *hundi*.

Held further, that unless it can be shown that promissory note (or *hundi*) does not contain all the terms of the contract between the parties, the suit must fail where the instrument is inadmissible for want of proper stamping, and thus the *hundi* being inadmissible in evidence the plaintiff could not be allowed to fall back and sue on the original loan forming the consideration of the *hundi*, and the suit had been rightly dismissed.

Case law discussed.

Parilmal Chettiar v. *Kamakshi Ammal* (1), *Sheikh Akbar* v. *Sheikh Khan* (2), *Firm Tara Chand-Protapmal* v. *Tamijuddin Sheikh* (3), *Indra Chandra* v. *Hira Lal Kong* (4), *Mahatabuddin Mia* v. *Mohammad Nazir Joddar* (5), *Chanda Singh* v. *The Amritsar Banking Company*, etc. (6), *Ram Jas* v. *Shahab-ud-Din* (7), *Sohan Lal-Nihal Chand* v. *Raghu Nath Singh* etc. (8), referred to.

First appeal from the order of Shri D. P. Sodhi, Sub-Judge 1st Class, Moga, dated the 13th April, 1950, dismissing the plaintiff's suit and leaving the parties to bear their own costs.

D. N. AGGARWAL and RAJINDER NATH AGGARWAL, for Appellant.

C. L. AGGARWAL and RAM SARUP, for the Respondents.

JUDGMENT

Falshaw, J.

FALSHAW, J. The appellant before us, Amin Chand, instituted a suit in the Court at Moga against the firm Madho Ram-Banwari Lal and its five partners, Banwari Lal, Ram Parshad, Chanan Ram, Siri Ram and Bholu Ram, for the recovery of Rs. 41,040 on the allegation that the firm through Banwari Lal, defendant, borrowed Rs. 36,000 from the plaintiff on the 3rd of July, 1945, and Banwari Lal executed the *hundi*, P. 1, on behalf of the firm undertaking to repay the

(1) A.I.R. 1933 Mad. 785
(2) I.L.R. 7 Cal. 256
(3) A.I.R. 1935 Cal. 658
(4) A.I.R. 1936 Cal. 127
(5) A.I.R. 1936 Cal. 170
(6) I.L.R. 2 Lah. 330
(7) A.I.R. 1927 Lah. 89
(8) A.I.R. 1934 Lah. 606

sum of Rs. 36,000 after 300 days. The suit was instituted on the 1st of December, 1948, claiming the recovery of Rs. 36,000 as principal and Rs. 5,040 by way of penalty as interest according to the rate customary in the *mandis* of Moga and Kot Kapura.

A written statement was filed by Banwari Lal defendant on behalf of himself and the firm admitting liability, but the suit was contested by the other defendants, who denied liability on the ground that the *hundi* was without consideration and that its execution was a collusive transaction between Banwari Lal and the plaintiff. It was in fact alleged that Banwari Lal had severed his business connections with the other defendants on the 27th of September, 1945, when accounts had been settled between them, and that he had executed the *hundi* sometime thereafter. The preliminary plea was also raised that the *hundi* in suit was inadmissible in evidence and no action could be taken upon it as it was not duly stamped.

The lower Court framed eleven issues on the pleadings of the parties, who led evidence thereon, but the suit has been dismissed without going into the merits at all on the finding that the *hundi* was not properly stamped, a belated application by the plaintiff filed after the case was otherwise finished for obtaining a validation certificate from the Collector under rule 13 of the Indian Stamp Rules being rejected.

The plaintiff has accordingly appealed on the grounds that the *hundi* was in fact properly stamped, but that even if it were not held so to be, the plaintiff's suit ought not to have been dismissed purely on this technical ground and he should have been allowed to approach the

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Collector under rule 12. The *hundi* is on a Government stamped paper intended for *hundis* bearing an impressed stamp of Rs. 4-8-0 and it may be stated at once that although the lower Court has found to the contrary, the amount of the stamp appears to be correct. The finding of the lower Court that the proper amount was Rs. 36 was based on the finding that it was payable at Kot Kapura in Faridkot State, but this finding is not justified by anything on the record. Admittedly the plaintiff resides at Kot Kapura, but the *hundi* was executed at Moga and it does not state that it was payable at any other place and therefore it must be deemed to have been payable at Moga in British India, for which the stamp duty required was two annas per thousand rupees of the bill. It has, however, been pointed out by the learned counsel for the respondents that the rules regarding the *hundi* in suit required more than the mere execution of the document on a paper containing an impressed stamp of the required sum. Rule 4 of the Indian Stamp Rules reads—

> "(1) *Hundis*, other than *hundis* which may be stamped with an adhesive stamp under section 11, shall be written on paper as follows namely:—
>
> (a) A *hundi* payable otherwise than on demand, but not at more than one year after date or sight, and for an amount not exceeding rupees thirty thousand in value, shall be written on paper on which a stamp of the proper value bearing the word '*hundi*' has been engraved or embossed.

(b) A *hundi* for an amount exceeding rupees thirty thousand in value, or payable at more than one year after date or sight, shall be written on paper supplied for sale by the Government to which a label has been affixed by the Collector of Stamps Revenue, Calcutta, or a Superintendent of Stamps, and impressed by such officer in the manner prescribed by rule 11."

Rule 11 reads—

"(1) The proper officer shall upon any instrument specified in rule 10 being brought to him before it is executed, and upon application being made to him, affix thereto a label or labels of such value as the applicant may require and pay for, and impress or perforate such label or labels by means of a stamping machine or perforating machine, and also a strap or write on the face of the label or labels the date of impressing or perforating the same. * "

It is also contended on behalf of the defendants that although rule 18 provides for the validation by the Collector of instruments bearing stamps of the proper amount but of improper description, and certain provisions in the Act itself permit the rectification of the defects in otherwise improperly stamped documents, certain instruments including *hundis* are specifically excluded from these privileges. Sections 31 and 32 of the Act provide that a person in doubt as to whether an instrument has been properly stamped whether it has or has not yet been completed or not may bring it before the Collector who will determine whether it is properly

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stamped or what is the proper amount payable on it and after the Collector has certified by an endorsement that the instrument is properly stamped it shall be deemed to be duly stamped. Section 32, however, is subject to the following proviso—

> "Provided that nothing in this section shall authorise the Collector to endorse—
>
> (a) * * * * *
>
> *(b) * * * * *
>
> "(c) any instrument chargeable with the duty of one anna or half an anna or any bill of exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped."

Section 35 makes inadmissible in evidence any instrument not duly stamped, and although in proviso (a) an improperly stamped instrument may be admitted in evidence after stamp duty and penalty have been paid upon it, here again we find an instrument chargeable with the duty of one anna or half an anna only or a bill of exchange or promissory note excluded. Section 41 again allows deficiencies of stamp duty to be made on instruments produced voluntarily before the Collector within one year of their execution but excludes the above-named instruments.

From the above provisions it would seem that bills of exchange in general, which include *hundis*, are excluded from the instruments in which original mistakes regarding the amount or method of stamping can be subsequently rectified even on payment of penalty, and regarding *hundis* for an amount exceeding Rs. 30,000 or, for

a period of more than one year, the rules regarding the method of stamping are particularly stringent, apparently with the object of entirely precluding the possibility of ante or post-dating such *hundis*. Quite evidently rule 18 must be read subject to the provisions of the statute itself and rules 4 and 11. Rule 18 only provides for the validation of an instrument which bears the correct amount of stamp duty, but in the wrong form, and it cannot possibly be said that a *hundi* for a sum exceeding Rs. 30,000, even if the stamp duty paid on it is correct, is covered by rule 18 in view of the strict formalities required by rule 11 regarding the stamping of such a *hundi*. I am therefore of the opinion that the learned Subordinate Judge rightly held the *hundi* in suit to be inadmissible although he has not given the proper reasons for doing so.

The only question which remains is whether at this stage, in spite of the fact that the plea was never raised in the lower Court, nor is it even now raised in the grounds of appeal, the plaintiff should be allowed to abandon his claim on the basis of the *hundi* itself and be permitted to base his suit on the original loan which formed the consideration for the *hundi*. There is undoubtedly some conflict of authority on this point but at the same time the weight of authority appears to be decidedly against the plaintiff. A leading case on the point appears to be *Parilmal Chettiar* v. *Kamakshi Ammal* (1). Here the point was considered by five judges regarding a promissory note and the view of four of the Judges, Leach, C. J., Madhavan Nair, Varadachariar and Lakshamana Rao, JJ., is summarised as follows:—

> "If the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit

(1) A.I.R. 1938 Mad. 785

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on the debt will lie. Section 91 of the Evidence Act and section 35 of the Stamp Act bar the way. But if it does not embody all the terms of the contract the true nature of the transaction can be proved; and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the "possibility of the instrument as having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed."

In that case the plea had apparently been taken in the trial Court that even if a promissory note was inadmissible, the suit could be decreed on the basis of the loan, and the trial Court had in fact decreed the suit on the ground that the loan was a transaction independent of the promissory note because the money had been lent one and a half hours before the promissory note was executed. The four learned Judges were of the opinion summarised above and the effect of their order was to remand the suit to the trial Court for reconsideration in the light thereof. In other words, the suit was to be dismissed unless the plaintiff could prove that the promissory note did not embody all the terms of the contract between him and the defendant. Only the fifth Judge who was a member of the Bench was of the opinion that he could see no difference in principle between a case where the promissory

note embodied the whole of the terms of the contract between the parties and a case where it was executed by way of collateral security or conditional payment.

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The earliest case appears to be *Sheikh Akbar* v. *Shaikh Khan* (1) in which Sir Richard Garth, C. J., and McDonell, J., held as follows:—

> "When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money."

(1) I.L.R. 7 Cal. 256

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In this case also the question of whether the debt could be proved independently of the promissory note was raised in the trial Court. This decision was followed by R. C. Mitter, J., in *Firm Tarachand Protapmal* v. *Tamijuddin Sheikh* (1), in a case in which it was proved that part of the consideration had been taken beforehand and part of the money was advanced at the time of the execution of the promissory note. In *Sheo Nath* v. *Sarjoo Nonis and another* (2), all five of the learned Judges, Collister, Bajpai, Hamilton, Dar and Mathur, JJ., are agreed that when a promissory note embodies all the terms of the contract between the parties but is not admissible in evidence for want of proper stamp, the suit cannot proceed on the basis of the loan, but the suit can proceed where all the terms of the contract have not been embodied in the promissory note. There was, however, some disagreement among them on the facts of that particular case as to whether the promissory note in suit did embody all the terms of the contract.

There are undoubtedly some cases which appear to support the case of the present plaintiff For instance, the same learned Judge R. C. Mitter, who had followed *Sheikh Akbar* v. *Sheikh Khan* (3), in *Firm Tarachand Protapmal* v. *Tamijuddin Sheikh* (1), expressed a contrary view more or less similar to that of Stodart, J., in the Madras Full Bench case in two cases, *Indra Chandra* v. *Hiralal Rong* (4), and *Mahatabuddin Mia* v. *Mohammad Nazir Joddar* (5). In the first of these cases he did not even refer to *Sheikh Akbar* v. *Sheikh Khan* (3), but in the second, while mentioning that decision, he apparently preferred to follow

(1) A.I.R. 1935 Cal. 658
(2) A.I.R. 1943 All. 220
(3) I.L.R. 7 Cal. 256
(4) A.I.R. 1936 Cal. 127
(5) A.I.R. 1936 Cal. 170

the decision in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (1), in which Petheram, C. J. and Rampini, J., held in a suit regarding a pronote that plaintiff had a cause of action independently of the document. The earlier Calcutta decision was referred to therein but it was distinguished on the, to my mind, somewhat unsubstantial ground that the pronote in that case was executed with regard to a simple loan, whereas the pronote in the earlier case was executed on receipt of what was called a 'deposit'. I can only say regarding this decision that I do not consider that the earlier decision was properly distinguished.

It will thus be seen that as far as other High Courts are concerned, there is a very decided preponderance of opinion in favour of the view that unless it can be shown that promissory note does not contain all the terms of the contract between the parties the suit must fail where the instrument is inadmissible for want of proper stamping. As regards the Lahore High Court, there does not seem to be any wavering side upon this proposition. The first decision is by Chevis and Harrison JJ., in *Chand Singh* v. *The Amritsar Banking Company etc.* (2). They held even in a case where the execution of the *hundi* had for certain reasons been postponed for some time after the loan had been advanced, that the loan, having been granted on the security of the *hundi*, the plaintiff had no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence and section 91 of the Evidence Act forbids secondary evidence, the plaintiff's suit must fail. A similar decision was given with regard to a promissory note by Broadway and Fforde, JJ., in *Ram Jas* v. *Shahab-ud-Din* (3). In *Sohan Lal*

(1) I.L.R. 23 Cal. 851
(2) I.L.R. 2 Lah. 330
(3) A.I.R. 1927 Lah. 89

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Nihal Chand v. *Raghu Nath Singh etc.* (1), Shadi Lal, C. J., and Rangi Lal, J., went so far as to hold that a decree cannot be passed on the basis of a pronote which is inadmissible in evidence even if the defendant admits his liability on it.

In the light of these authorities I am of the opinion that the plaintiff in the present case cannot be allowed to fall back on the loan which formed the consideration for the *hundi* in suit. and in the circumstances it does not seem necessary to express any opinion on the question whether, even if he could have been allowed to fall back on the original consideration, he should be allowed to do so at this stage, after the point had been raised for the first time in the course of arguments without having been raised in the trial Court or even in the grounds of appeal. I would accordingly dismiss the appeal but in the circumstances leave the parties to bear their own costs.

Khosla, J.

KHOSLA, J.—I agree.