

(1959) 01 RAJ CK 0001

In the Rajasthan High Court

Case No : Civil Revision Petition No"s. 81, 130 and 156 of 1956

Gordhansingh and Others

APPELLANT

Vs

Suwalal and Kalyanbux and Others

RESPONDENT

Date of Decision : 05-01-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 4, 115
Negotiable Instruments Act, 1881 (NI) — Section 4
Stamp Act, 1899 — Section 2(22), 36

Citation : AIR 1959 Raj 156

Hon'ble Judges : K.L. Bapna, Acting C.J.; Jagat Narayan, J

Bench : Division Bench

Advocate : Shyam Beharilal, for R.C. Sharma, J.P. Jain and C.B. Bhargava, for the Appellant; P.N. Dutta and R.A. Gupta, for the Respondent

Final Decision : Allowed

Judgement

Jagat Narayan, J.—These three revision applications have been filed by the defendants in three suits for the recovery of money. They have been referred to a Division Bench on account of the importance of the question involved in them, namely whether a particular document is a promissory note within the meaning of Section 2(22) of the Stamp Act which runs-

"Promissory Note" means a promissory note as defined by the Negotiable Instruments Act, 1881; it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen:

In Section 4 of the Negotiable Instruments Act "promissory note" is defined as follows-

A "promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the

bearer of the instrument.

The definition is followed by a number of illustrations out of which three may be reproduced here-

(a) "I promise to pay B or order Rs. 500/-."

(b) "I acknowledge myself to be indebted to B in Rs. 1,000/- to be paid on demand, for value received."

(c) "Mr. B. I. O. U. Rs. 1,000/-."

The instruments in (a) and (b) are promissory notes.

The instrument in (c) is not a promissory note.

2. Documents falling within the extended definition given under the Stamp Act are rarely met with in actual practice. The reported cases also deal with only such documents as come under the definition of promissory note as given in Section 4 of the Negotiable Instruments Act. Our observations in this case will also be confined to such documents. It will be seen that in order that a document may fall within the definition of "promissory note" contained in the Negotiable Instruments Act, it is necessary that there should be-

(i) an unconditional undertaking to pay,

(ii) the sum should be a sum of money and should be certain,

(iii) the payment should be to or to the order of a person who is certain, or to the bearer of the instrument, and

(iv) the maker should sign it. (2A) Under the Stamp Act distinct duties are prescribed for different classes of documents but the definitions of these documents have been so widely worded that in actual practice one document may fall within more than one category. Ordinarily it is not of great importance under what category a document falls as most documents can be accepted in evidence on payment of deficit duty and penalty even if they are not properly stamped.

But a promissory note which is not properly stamped cannot be tendered in evidence on payment of deficit duty and penalty in view of the provisions of section 35 of the Stamp Act. The result is that unless the plaintiff can "fall back upon the original transaction, the money which he would otherwise have been able to recover becomes irrecoverable. Courts are often called upon to determine whether or not a document is a promissory note and some tests have been laid down in decided cases. In Mulla's Commentary on the Stamp Act, 1941 Edition, the law which evolves as a result of these decisions has been stated thus at page 35-

3. But besides fulfilling the terms of the definition, the instrument must pass three further tests-

- (1) the promise to pay must be the substance of the instrument,
- (2) there must be nothing else inconsistent with the character of the instrument as substantially a promise to pay, and
- (3) the instrument must be intended by the parties to be a promissory note.

The above statement of law is borne out by English and Indian authorities.

4. In *Ellis v. Ellis* 1820 COW 216 the document ran-

I, Robert Ellis, Jun, do this day Bargain and agree with my uncle, William Ellis, to give him ₹5 for a cart for the use of my father, and do hereby promise and agree to pay him the said William Ellis, without fail in three weeks from the date hereof.

Robert Ellis Jun.

Richardson J. held

"I think the instrument in question is an agreement. If it were to be held a promissory note only, every written memorandum for the purchase of goods, "where payment is stipulated to be made at a future day, would be a promissory note."

5. In *Sibree v. Tripp* 1846 15 MW 23 the plaintiff deposited with the defendant the sum of ₹500 for the purpose of speculation in foreign stock, and the defendant signed the following memorandum:--

Bristol, August 14, 1843.

Memorandum. Mr. S. has this day deposited with me ₹ 500, on the sale of ₹ 10,300, 31. per cent. Spanish, to be returned on demand:

6. Pollock C. B. said, "It is difficult to lay down a rule which shall apply to all cases, but it seems to me that a promissory note means something which the parties intended to be a promissory note. We cannot suppose that the legislature intended to prevent parties from making written contracts relating to the payment of money other than by bills and notes; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be merely an agreement rather than a promissory note." This case was cited and followed by Rankin C. J. in *Firm Prasanna Kumar Pal Sanatan Kunda Vs. Punaulla Miji and Another*,

7. In *Mortgage Insurance Corporation Ltd. v. Commissioner of Inland Revenue* 1886 21 QBD 352 the instrument was a policy of insurance guaranteeing payment of a fixed sum on a certain date, but there were alternative obligations to pay surrender value if required at rates to be fixed in the future. It was held that the first part of the instrument was not a promissory note. Lindley, L. J. observed:

What, then, is the meaning of the words in Sub-section 1, "any document containing a promise to pay any sum of money?" It has been pointed out by every one who has had to construe the section that those words cannot receive a literal meaning, for, if they did, all sorts of documents as to which it would be absurd to suppose that they would be treated for any purpose as promissory notes, such as bonds, mortgages, etc., which contain a promise to pay, would have to be stamped as promissory notes. To make the section intelligible some rational limitation must be placed upon the words, but the difficulty is to know what limitation. The section speaks of a document containing a promise to pay a sum of money. In my opinion, that means a definite sum of money, not a fluctuating or unascertained sum; and I also think that "containing a promise to pay" must mean that that is the substance of the document, the whole contents; it cannot mean containing a promise to pay forming one of a number of stipulations. If the instrument is not merely a promise to pay but contains a promise to pay in connection with a number of other stipulations, then I think it is not a promissory note within the meaning of the section"".

In *Mohammad Akbar Khan v. Attarsingh* AIR 1936 PC 171 the instrument was in the following terms;

May God protect us. This (one) receipt is herer by executed by Bhai Hirasingh Attar Singh Khar-banda, residents of Hoti, for rupees 43,900 (forty three thousand and nine hundred rupees) half of which amount comes to twenty one thousand nine hundred and fifty, received from the firm of Lala Duni Chand Lala Hari Chand Sethi tor and on behalf of Captain Mohammad Akbar Khan of Hoti- This amount to be payable after 2 (two) years. Interest at the rate of Rs. 5-4-0 (Rs. five annas four); per cent per year to be charged. Dated this 20th. day of Chetar (first month of Hindu Calendar year) Sambat 1974, corresponding to 1-4-1917. Stamp has been duly affixed.

Sd/- Hira Singh Kharbanda.

Sd/- Attar Singh, Kharbanda,

It was held that the document was not a promissory note. Their Lordships observed;

"Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an, agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce, if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced money lenders, did not draw it on paper with an impressed stamp as they would have had to if the

document were a promissory note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to pay, it is not a promissory note. This view of the meaning of a promissory note appears to coincide with the grounds of decision in 1888 21 QBD 352 where the English Courts of Appeal found themselves bound to give a restricted" meaning to the much wider definition in the English Stamp Act. It will have the effect of overruling some decisions in the Indian Courts notably the case of Manick Chand v. Jomoona Doss ILR 8 Cal 645 where the defendant had given a sale note to his customer recording a resale to him of certain rupee paper previously bought from the customer, and bringing out a difference expressed to be payable on a day in the next month. The document was a sale note coupled with an account, and in no way resembled a promissory note, or anything capable of being a negotiable instrument."

The two documents in ILR 8 Cal 645 were in the following terms:

Sree Ramjee help.

Auspicious letter to brother Manikchand Keerut Chand, from Jomoona Dass, whose compliments you read, that the paper for rupees 25,000 (41/2) four and half interest, which I purchased from you at 8 annas discount, that I sell to you at (1.5) one rupees five annas, which, at the difference rate of (13 ans) thirteen annas per cent. is rupees (203-2-0) two hundred and three, annas two, due to you and payable on 15th, 16th July.

Signature of Jomoona Dass, the entire writing written above is admitted, dated 3rd Assar light-side, Sumbut 1935 (should be 1936) 22nd June, 1879.

_____ | Stamp | Jammuna Das Khettry | one anna | | 2.7.79 | |
 _____ | Shree Ramji help Auspicious letter to brother Manikchand Keerut Chandjee, from Jomoona Dass, whose compliments you read, that the paper for rupees 125,000) twenty-five thousand, (41/2) four-and half interest, which I sold to you at 3-13, due dates for delivery of the same were 3rd, 4th August, 1879, which I contracted. That paper I could not hold, and made up with you by making the difference at the rate of rupees 2.1, by which the loss amounts to rupees (515.10) five hundred and fifteen, and annas ten, for which I gave you this chitta (writing) the whole amount of which will be paid up in full of this bill on 3rd, 4th August, and to which no objection will be made. Dated 6th Assar darkside., Sumbut year 1935 (should be 1936), 10th June, 1879.

Signature of Jomoonadas Khettry 10th June 1879. _____ | Stamp | |
 One anna | | 10th June | | 1879 | _____

In Pandit Sushil Chander Chaturvedi Vs. Wali Ullah and Others, the document was in the following words:--

We, Abdul Hamid-Mohammad Said, residents of M. Armora, promise to pay on demand with interest at 2 per cent. per mensem to firm Hanuman Glass Works the sum of Rs. 1,781 due from us as per accounts regarding glass.

8. It was held on a consideration of the facts and circumstances of that particular case that the document was a promissory note and reference in the document to payment of interest and that under accounts the sum which was acknowledged was due were not vital matters. There was a finding that the parties themselves regarded the document as a promissory note. It was observed:--

"The main question in deciding whether a document is a promissory note is to consider not whether the instrument is negotiable or not, though ordinarily negotiability of an instrument is a good test to determine whether a document is a promissory note or not; but to consider whether in substance and in primary intention of the parties, the document was or was not a promissory note and whether it contained necessary recitals or whether it was intended to record a different kind of transaction altogether.....It is a question of fact in each case whether a particular document is to be regarded as an acknowledgment or promise, and in order to decide this question, the primary intention of the parties and the real characteristics of the document must be looked to."

The Privy Council case of AIR 1936 PC 171 was relied upon.

9. Our attention was drawn only to two Division Bench cases of this Court on the subject namely Chiranji Lal and Others Vs. Ramnath and Others, decided by Sharma and Dave JJ. on 22-9-52 and Sahu Brijraj Sharan v. Sahu Raghunandan Saran RLW 1956 33: (AIR 1955 Raj 85) decided by Wanchoo C.J. and Shar-ma J. on 26th November, 1954.

10. In Chiranji Lal and Others Vs. Ramnath and Others, relying on AIR 1936 PC 171 it was observed:

In order to find out whether the document in question is a promissory note or not, the intention of the parties at the time of the execution of the document is to be looked into. Thus, where a balance was struck in the khata of the debtor in the account books of the creditor, and it was stated that "rupees will be paid when they will be demanded by the owner adding interest at the rate of one pice per rupee," it was held that the parties cannot be held to have intended that the document in question was to operate as a promissory note. All that they can be said to have intended was to furnish an evidence of the balance-due against the debtor with stipulation to pay interest at a certain rate.

11. In RLW 33 1956 : (AIR 1955 Raj 85) the only question which arose for decision was whether the payee was certain. Their Lord-ships after reproducing the definition of a "promissory note" as given in Section 4 of the Negotiable Instruments Act observed that

In order therefore that a document should be a promissory note it is necessary that there should be (i) an unconditional undertaking to pay. (ii) the sum should be a sum of money and should be certain, (iii) the payment should be to or to the order of a person who is certain, or to the bearer of the instrument, and (iv) the maker should sign it. If these four conditions are present, a document

becomes a promissory note."

It cannot be inferred from the last sentence of the observation that every document which satisfies these four conditions is necessarily a "promissory note" as their Lordships did not purport to deal with the subject of promissory note exhaustively in that judgment. The observations which they made in that judgment, should therefore be taken to be confined to the facts of that particular case.

12. The state of law therefore which emerges as a result of the review of the above authorities-is the same as has been given in Mulla's Commentary on the Stamp Act.

It is a question of fact in each case whether a particular document is to be regarded as an acknowledgment or promise and in order to decide the question the primary intention of the parties-and the real characteristics of the document must be looked into.

We shall now proceed to apply the Law to each of the three cases before us. It may be broadly stated that the disputed document in each of these cases fulfils the terms of the definition of a "promissory note" given in the Negotiable Instruments Act.

Civil Revision No. 81/56

13. In this case Suvalal and Kalyan Bux have brought a suit against Gordhansingh for the recovery of sum of Rs. 1,743/- on the allegation that they and the defendant ran an oil mill in partnership for some time on certain terms mentioned in the plaint and that this partnership was dissolved on 24-5-52, and an accounting took place between the parties as a result of which a sum of Rs. 1290/14/3 was found due to the plaintiffs against the defendant for which the latter gave the following writing:

Jh lsB lkgc Jh lqckyky th dY;k.kpUn th vejlj okys ls xkso/kZuflag dh tSjketh dh ekywe gks vijUp pkSgku vk;y fey dk tks ltk Fkk mls vkt rd dk le>dj 1290 ? A vads gh ckjg lkS uos lok pksng vkuk gekjs tqEes ckdh jgs lks ge vkids ikl tek dj k nsaxsA rk- ?24&5&52

n% xkso/kZu flag pkSgku

izks-&Jh pkSgku vk;y ehy "kkgiqjkA

(In respect of the partnership in Chauhan Oil Mill Z have understood the accounts upto date and Rs. 1290/14/3 are due against me which I shall deposit with you).

14. This writing does not bear any stamp. Gordhansingh denied all the allegations made in the plaint including the execution of this writing. In the alternative, he has pleaded that the above writing amounts to a promissory note and being unstamped is inadmissible in evidence.

15. A preliminary issue was framed by the trial court as to whether the above writing amounted to a promissory note. After hearing the parties, it held that there was no intention to create a promissory note, that all that the parties intended was to record the fact that the partnership had come to an end, that the accounts were settled and that a sum of Rs. 1290/14/3 was found due against the defendant and that the document amounted to an agreement. The court ordered that the duty and penalty could be paid on the document. Against the order this revision application was filed.

16. A preliminary objection was taken on behalf of the respondents that duty and penalty having been paid on the document in the trial court, it should be deemed to have been admitted in evidence within the meaning of Section 36 of the Stamp Act, and such a document cannot be called in question in the present revision application. Reliance was placed on a Single Bench decision of this Court in *Moonlal v. Sampatlal* RLW 1953 389.

17. It does not appear from the judgment in that case that the document had been formally proved and tendered in evidence. For it has been observed that a preliminary objection was taken that the document having been admitted in evidence, it was not open to be called in Question in revision on the ground that it was not duly stamped. In the case before us, the document has not been formally proved and tendered in evidence as no evidence has yet been recorded. A document can only be said to be admitted in evidence when it is formally proved and tendered in evidence. There are two stages relating to documents filed in court. One is the stage when all the documents are filed by the parties in court, The next stage is when the documents are formally proved and tendered in evidence. It is after the document is formally proved that the endorsement referred in Rule 4 of Order 13 of the CPC is to be made. We accordingly find that the preliminary objection has no force.

18. Coming to the merits of the case so far as the language of the document is concerned, it cannot [be said merely on the basis of] it that the primary intention of the parties was necessarily to record a promise and not to acknowledge the balance remaining due after settling the accounts, but when we take into consideration the pleading of the plaintiffs with regard to the fact we are driven to the conclusion that the primary intention of the parties was to record a promise, For in para 4 of the plaint it is asserted:

"After understanding the partnership accounts, the defendant found a balance of Rs. 1290/14/3 due against him in favour of the plaintiffs and handed over a writing about it to the plaintiffs at Shah-pura. This writing was written by him with his own hand and a promise to pay in clear words was entered in it. In this writing dated 24-5-52 the defendant admitted the balance due against him and wrote a Ruqqa which has been filed along with the plaint.

19. In the face of this assertion, it does not lie in the mouth of the plaintiffs to argue that the primary intention of the parties was not to create a promissory

note.

20. Further, the above writing was made on a separate piece of paper and not in the account book of the plaintiff. The mere fact that no stamp was affixed to the document is not sufficient to rebut the above evidence of the intention with which the writing was taken from the defendant. The facts of tin's case are similar to the facts in Pandit Sushil Chander Chaturvedi Vs. Wali Ullah and Others,

21. On behalf of the respondents our attention was drawn to a single judge decision of the Calcutta High Court in Ambalal Purusottamdas and Co. Vs. Jawarlal Purusottam Dave and Others, The document in that case was described as a promissory note by the executant. The learned Judge who decided the case however held on a construction of the document that it did not fulfil the statutory requirements of the definition of promissory note inasmuch as the person to whom or to the order of whom the payment was to be made was not certain. It was in these circumstances that it was observed that the mere description of an instrument as a promissory note will not make it a promissory note if it fails to satisfy the statutory requirements of Sections 4 and 13 of the Negotiable Instruments Act. We would like to observe with all respect that we are unable to accept the construction put by the learned Judge on the document which ran as follows:

We two brothers on behalf of Messrs. Pranshanker Purshottam Dave of 8/3/4, Harnson Road, Calcutta (shop address) and of Nadiad dt. Kaira (Gujrat) (Residential address) declare hereby Messrs. Ambalal purshottamdas and Co. of 1, Rupchand Street, Calcutta as our creditor for the amount mentioned below on d/- 17-8-52 (Gujarati Sambat 2008 Shrawan Wadi 12 Sunday)
Cr Dr

We the undersigned promise to pay the amount of Rs. 16129/12/6 (rupees sixteen thousand one hundred twenty nine annas twelve and pies six only) on demand and we as well as our successors are bound herewith to fulfil your dues whenever and wherever you or your successors ask or demand the said sum. We are giving you this in writing wholeheartedly and willingly as promissory note.

For Pranshankar P. Dave,

Sd/- (1) Jawaharlal Purshottam Dave.

4as.

Revenue Stamp

(2) Shankerlal or Prabha

Shan-ker Purushottam Dave

on 17-8-52.

22. In our opinion, the document is similar to illustration (b) -- "I acknowledge myself to be indebted to B in Rs. 1000/- to be paid on demand, for value

received."

23. We accordingly allow civil revision No. 81/ 56 and hold that the writing is a promissory note and being insufficiently stamped, it is inadmissible in evidence. As the question involved is one not free from difficulty we direct that parties shall bear their own costs.

Civil Revisions No. 130/56 and No. 156/56.

24. Smt. Savitri Devi respondent has instituted a suit for recovery of money against Balabux and Keshardev applicants on the allegations that the defendants borrowed Rs. 13,000/- from the plaintiff on 29-8-52 and executed a writing in her favour on a revenue stamp for one anna, which runs as follows:

Jh jketh

iq- guqeku cDlth cgw lkfo=h ls rks fy[kh ckyk cDI dsljnso eksj dk ikok /kksd cpuk vijUp :i;k 13000 vadbZ :i;k rsjgk gtkj rqEgkjs ikl ls rks fy;k th.kk :i;k dk c;kt ferh dkrhZ onh 15 lEor 2009 rkbZ c;kt nsok ugha lEor 2009 dkrhZ lqnh 1 ls c;kt nj 7 vkuk vdsbZ lkr vkuk lSdM+k dk fglkc lw :i;k c;kt nslk ferh dkfr lqnh 1 l? 2010 dk isyh isyh ns[kkA fefr Hkknok lqnh 9 okj lqdjokj l? 2009 rk- 29&8&52-

n- ckyk cDI dslj nso eksj

c- ckyk cDI eksj

(We have taken Rs. 13,000/- from you. We shall not pay any interest upto Kartik Badi 15, -Section 2009. We shall pay interest from Kartik Sudi 1, Section 2009 at -/7/- p. c. p. m. and shall repay the money with interest "before Kartik Sudi 1, Section 2010).

25. The above writing was sought to be proved by Murlidhar plaintiff's witness No. 2 on 14-9-55 when an objection was taken on behalf of the defendants that it was a promissory note which was inadmissible in evidence being insufficiently stamped. The trial court held in its order which was passed on the same date that the document was an agreement which was admissible in evidence on payment of duty and penalty. Civil Revision No. 130/56 against the above order was filed in this Court on 28-8-56 that is 349 days after the order was passed.

An application for a copy of the order was made on 15-9-55 and the copy was delivered on 10-11-55. A preliminary objection was taken that the revision application being belated should be rejected on that very ground. Ordinarily this Court does not entertain a revision application if it is filed beyond 90 days after excluding the time required for obtaining necessary copies. But in the present case, the plaintiff had not paid the duty and penalty on the document upto 28-8-56, which was accordingly not admitted in evidence despite the fact that the proceedings in the suit had not been stayed till then. This was an exceptional circumstance in the present case on account of which this revision was admitted despite the great delay in filing it and we consider it proper to decide it on merits.

26. It is more convenient to deal with this application along with civil revision application No. 156/56, which arises out of a suit filed by Ramesh-warlal and Omprakash against Balabux and Kesardev for the recovery of money. It is mentioned in the plaint of the second suit that the parties are members of a joint Hindu family amongst whom a partition took place on 27-8-52 in which both movable and immovable properties were completely partitioned. After the partition had taken place a memorandum was drawn up in writing relating to it. It is alleged that on 29-8-52 the defendant borrowed Rs. 10,000/- from the plaintiffs and executed a writing by way of a receipt. This writing was executed on a revenue stamp of one anna and runs as follows:

Jh jketh

HkbbZ jkesljyky vkse izdk" k ls rks ckyk cDI dsljnso eksj dsudh jke jke cpuk vijUp :i;k 1???? vdbZ :i;k nl gktj rqEgkjs du lq fy;k th.kk dks c;kt ferh dkrh cnh 15 lEor 2??9 rkbZ c;kt nsok ugha ferh dkrh lqnh 1 lEor 2??9 c;kt nj 7 vkuk vdsbZ lkr vkuk lSdM+k dk fglkc lq :i;k c;kt ns; nslk :i;k pwdrh ns; nslk ferh Hkknok lnh lEor 2??9 rk- 29&8&52

n% ckyk cDI dsljnso eksj

c- cky cDI eksj

(We have taken Rs. 10,000 from you. We shall not pay any interest upto Kartik Badi 15, S. 2009. We shall pay interest from Kartik Sudi 1, S. 2009 at -/7/- p. c. p. m. and shall repay the money with interest before Kartik Sudi 1, Section 2010.)

27. When it was sought to prove the above writing by Shiv Bhagwan plaintiffs' witness No. 1 an objection was taken on behalf of the respondents that it was inadmissible in evidence as it amounted to a promissory note, which was insufficiently stamped. This objection was overruled by the trial court which held that the writing amounted to an agreement. Civil Revision Application No. 156/56 was filed against this Order.

28. Some evidence has been recorded in both the above cases. This evidence and the pleadings of the parties go to show that a partition took place between three brothers Bala Bux, Rameshwarlal and Shiv Bhagwan and Smt. Savitri widow of fourth brother Hanumanbux on 27-8-52 in which both movable and immovable properties were divided completely. As a result of this partition, the business of the firm Sheodutt Rai Hanumanbux fell to the share of Balabux.

Out of a sum of Rs. 27036/11/3 which fell to the share of Smt. Savitri Devi a sum of Rs. 14036 /11/3 was paid to her in cash and a sum of Rs. 13,000/- was credited in her name in the account books of the firm Sheodutt Rai Hanumanbux, The above writing in respect of the sum of Rs. 13,000/- oxccutcd by Balabux was also handed over to her Further a sum of Rs. 16592/5/6 fell to the share of Rameshwarlal out of which a sum of Rs. 6592/5/6 was paid to him in cash and he was credited with a sum of Rs. 10,000/- in the account books of the firm

Sheodutt Rai Hanumanbux. At the same time the above writing for Rs. 10,000/- executed by Balabux was handed over to Rameshwarlal.

29. The contention of the applicants is that these writings constitute promissory notes and cannot be regarded merely as agreements. On behalf of the respondents, it was argued that there was no intention to create negotiable instruments. The intention only was to execute agreements containing an acknowledgment of liability and the terms on which the money was to be repaid. The circumstances urged in support of this argument are that the documents were executed on one anna stamp and were not stamped as promissory notes and that they were left in the custody of one Laxminarayan from which we are asked to infer that there was no intention to create negotiable instruments.

30. We are firmly of the opinion that in these two cases the two writings were made with the intention of creating negotiable instruments. The partition of the properties had been separately concluded. The cash had also been separately divided and a record had been made in writing in the account books of the firm Sheodutt Rai Hanumanbux showing how much was due to each party, how much had been paid in cash and how much remained to be paid. The only intention of the parties in creating the above writings could have been to create negotiable instruments, which could be handed over to Smt. Savitri Devi and Rameshwarlal respectively by way of collateral security for the repayment of the money, which remained due to them. It was held in *Smith v. Dean* 1900 LJQB 331 that if the transaction is separately concluded and then a note is given for payment of the consideration, the promise to pay is the substance of that note and it is a promissory note.

31. Shiv Bhagwan's statement in Rameshwarlal's case makes it doubtful if the writings were handed over to Laxminarayan immediately after they had been executed. The amounts were not payable forthwith according to the terms of the writings. They were payable after a certain period mentioned therein. (Section 5 of the Negotiable Instruments Act provides that a promise or order to pay is not conditional within the meaning of Section 4 by reason of the time for payment being expressed to be on the lapse of a certain period.)

Even if it is assumed that the writings were handed over to Laxminarayan immediately after they had been executed all that can be inferred is that there was no intention to negotiate them immediately. Further, there is a distinction between an intention to negotiate an instrument and an intention to create an instrument which can be negotiated. It is rarely that in actual practice one comes across a promissory note which has been negotiated. But such promissory notes are frequently created with the intention of creating a document to which the presumption u/s 118 of the Negotiable Instruments Act might apply so that a suit for recovery of money may be based on it.

32. The fact that the documents were executed on a one anna stamp only is not sufficient to rebut the presumption raised by the circumstance that a transaction

had been separately concluded and then a note was given by way of collateral security.

33. Another argument advanced on behalf of the respondents was that as the documents contained an agreement about payment of interest, it cannot be said that they are promissory notes, for, to use the words of Lindley, L. J. in 1888 21 QBD 852 " "containing a promise to pay" must mean that that is the substance of the document, the whole contents." These words are to be read along with the words which follow them namely "it cannot mean containing a promise to pay forming one of a number of stipulations. If the instrument is not merely a promise to pay but contains a promise to pay in connection with a number of other stipulations, then I think it is not a promissory note within the meaning of the section." What is obviously meant is that the promise to pay must be the substance of the instrument and there must be nothing else inconsistent with the character of the instrument as substantially a promise to pay. These documents, in our opinion, fulfil these requirements. The promise to pay interest contained in the documents is not so vital. A similar view was taken by the Allahabad High Court in Pandit Sushil Chander Chaturvedi Vs. Wali Ullah and Others, which has been cited above.

34. In the result, we hold that the documents in Civil Revision Applications Nos. 130/56 and 156/56 are promissory notes and are inadmissible in evidence being insufficiently stamped. We accordingly allow these applications and set aside the orders of the trial court. In the circumstances of the case, we direct that parties shall bear their own costs of these revision applications.