

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****First Appeal No. 87 of 2010****Reserved on 16-3-2020****Delivered on 23-3-2020**

Sheikh Mohammed Hamid, S/o. Late Sheikh Mohammed Yusuf, aged about 55 years, R/o. Gariyabandh, Distt. Raipur (CG)

-Appellant**versus**

Paras Ram Dev, S/o. Shri Jagannath Dev, age about 52 years, R/o. Village Maroda, Tehsil Gariyaband, Distt. Raipur (CG).

---- Respondents

For Appellant : Mr. B.P. Sharma with Mr. Yogendra Singh Rajput, Adv.
For Respondent : None.

Hon'ble Shri Sharad Kumar Gupta, Judge**CAV JUDGMENT**

1. Appellant has preferred this Appeal against the impugned judgment and decree dated 29-01-2010 passed by Additional District Judge, Gariyaband, District Raipur in Civil Suit No.4-B/2009 whereby and whereunder he dismissed the appellant's suit.

2. This is admitted by respondent that he had taken loan of Rs. 1,23,000 from the appellant without interest in the year 2005. On 13-1-2006 he had given blank stamp paper to the appellant, in the back side of third page of the said stamp paper he endorsed that the amount which he had taken he will repay it by cutting Rabi crop. In the year 2005, he had given 140 quintal paddies, in the year 2006, 65 quintal and 12 kg. paddies, @ Rs.600/- per quintal total worth Rs. 1,23,000/- thus he paid him Rs.1,23,000/-. He had received the notice and did not reply it.

3. In brief, the appellant's case is that in different years and on different dates respondent had taken total loan Rs. 2,46,793/-. On 14-1-2006 he had executed an agreement. On 08-07-2007 he promised in writing to repay the balance amount Rs.1,23,721/- but he did not pay the same.

4. In brief, the respondent's case is that the appellant is money lender, he had not executed any document on 08-07-2007. The appellant told him

that his counsel had sent the notice under misconception and it need not be replied. The suit is barred by limitation.

5. By the impugned judgment and decree the trial Court dismissed the appellant's suit. Being aggrieved the appellant preferred the instant appeal.

6. In brief the appellant's case regarding this appeal is that the trial Court has failed to appreciate the evidence available on record. The trial Court overlooked the entries of account book which was maintained in the regular course of business by him.

7. **Point for determination:-**

There are following points for determination in the case in hand:-

- (i) Whether on 14.01.2006 Rs. 2,46,793/- was due on respondent?
- (ii) Whether on 14.01.2006 respondent had executed an agreement assuring the appellant that he will pay the said amount?
- (iii) Whether respondent had assured appellant on 8-7-2007 in writing that he will pay the balance amount Rs. 1,23,721/- ?
- (iv) Whether the appellant is the money lender, if so then its effect ?
- (v) Whether the appellant is entitled to get balance amount of Rs. 1,23,721/- and notice expenses Rs. 500/- from respondent?
- (vi) Reliefs and costs.

Points for determination No.(i), (ii) and (iii)-Findings with reasons:-

8. The scope of issue No.1 covers the scope of point for determination No.(i).

9. The Trial Court has not framed issues regarding points for determination No. (ii) and (iii), though it ought to have been done by the Trial Court. The evidence available on record shows that the appellant and the respondent have adduced evidence regarding these points for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issues regarding these points of determination does not cause any prejudice to either of the parties. Thus, looking to the provisions of Order 41 Rule 24 of the Civil Procedure Code, 1908 (in brevity 'the CPC'), this Court finds that it may pronounce the judgment in this appeal.

10. Looking to the convenience points for determination Nos. (i), (ii) and (iii) are being disposed off simultaneously.

11. During the statement of P.W. 1 Sheikh Mohd. Hamid Counsel for the respondent objected that Ex. P-1 cannot be marked on agreement because that is unregistered and insufficiently stamped. The trial Court marked on said agreement Ex. P-1 observing that it would be admissible in evidence if it is proved according to law, merely by marking Ex. P-1 the said document would not be admissible in evidence.

12. The Trial Court also marked the diary as Ex. P-2.

13. The provisions of Section 35(a) of the Act of 1899 are relevant in the case in hand which are reproduced below :-

“35. Instruments not duly stamped inadmissible in evidence, etc.

—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instruments is duly stamped:

Provided that—

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;”

14. In the matter of **Ramrattan (dead) by Lrs -v- Bajranglal and others** [(1978) 3 SCC 236] in para 6 and 7 Hon'ble Supreme Court held as under :-

“6. When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objects in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of

marking the document in evidence subject to objection. This, however would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (see *Javer Chand v. Pukhraj Surana*) [AIR 1961 SC 1655] . The endorsement made by the learned trial Judge that “Objected, allowed subject to objection”, clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted.

7. Mr Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the court has to impound it as obligated by Section 33 and then proceed as required by Section 35 viz. to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, *stricto sensu* the instrument is not admissible in evidence.

Mr Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial Judge declined to decide the objection on merits and then sought refuge under Section 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial court is bound to impound the document and deal with it according to law.”

15. In the matter of **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple** [2003(8) SCC 752] Hon'ble Supreme Court held in para 20 as under:-

“**20.** Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the

document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.”

16. In the matter of **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities and Ors. vs. Bhaskar Raju and Brothers and Ors.** [2020 SCC Online SC 183] Hon'ble Supreme Court observed in para 19 as under :-

“19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.”

17. Looking to the provisions of Section 35 of the Act of 1899, looking to the aforesaid judicial precedents laid down by Full Bench of Hon'ble MP High Court in the matter of **Sant Singh -v- Madan Das Panika and another**, [1976 MPLJ (FB) 238] and by Hon'ble Supreme Court in the matters of **Ramrattan (dead) by Lrs** (supra), **R.V.E. Venkatachala Gounder** (supra), **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities and Ors.** (supra) , following legal propositions emerge :-

- (i) If there is an undertaking in the instrument to pay sum by maker to another person named in it, which is not payable to order or bearer, and is attested by a witness then instrument is “bond”,
- (ii) There are two types of objection-
 - (a) First type of objection is that document which is tendered in evidence is itself inadmissible in evidence and;
 - (b) Second type of objection is directed towards the mode of proof alleging the same to be irregular or insufficient.
- (iii) In the case where first type of objection mentioned in para (ii)(a) above is raised, and document is marked as “an exhibit” then objection as to its admissibility may be raised at a later stage or even in appeal or revision.
- (iv). In the case where second type of objection mentioned in para (ii)(b) above is not raised before the marking an exhibit then such type of objection cannot be subsequently raised;
- (v). Where an objection is taken at the appropriate point of time, it will enable the party tendering the evidence to cure the defects and resort to such mode of proof as would be regular;
- (vi) When any of the aforesaid objections is raised by opponent party, it is obligatory upon the trial judge to apply his mind and decide such objection in accordance with law,
- (vii) If the document is marked as an exhibit subject to objection, it does not mean that such objection had been judicially decided, actually it is merely postponed,
- (viii) A document is admissible in evidence if sufficient stamp duty is paid under Section 35 of the Act of 1899 or deficient stamp duty with penalty is

paid under Section 35 of the Act of 1899,

(ix) If the document is insufficiently stamped and marked as an exhibit, or a document is marked as an exhibit inadvertently without applying the mind by the court, then it cannot not be said that such document has been admitted in evidence and Section 36 of the Act of 1899 attracts,

(x) If such document which is not duly stamped is marked as an exhibit, then it is not admissible in evidence but court may consider it in evidence,

(xi) In such a situation referred in sub-para (x), such document should be impounded and levied deficient stamp duty along with penalty.

18. In the case in hand, trial Court (Presiding Officer Shri Narendra Singh Chawla) did not decide the aforesaid objection raised by counsel for respondent then and there, and postponed it. Surprisingly, trial Court did not deal with that objection in the impugned judgment and bypassed it. Trial Court chosen to decline to decide aforesaid objection overlooking the legal duty incumbent upon him. The trial Court adopted shortcut method and disposed of the case leaving undecided aforesaid objection.

19. Looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of ***R.V.E. Venkatachala Gounder*** (supra), this Court finds that at this stage, this Court can consider aforesaid objection.

20. First and foremost question for consideration before this Court is as to what is the nature of Ex. P-1 and Ex. P-2.

21. As per alleged agreement Ex. P-1, it was executed and signed by respondent on 14-1-2006, as per Clause 4 and 6 of it Rs. 2,46,793/- was due on respondent, he will pay the same amount after the cutting of paddy of Rabi crop. Ex. P-1 is also attested by two witnesses namely Dhannulal and Mohd. Kalim Javed.

22. As per Ex. P-2 allegedly respondent signed and promised on 8-7-2007 that he will pay Rs. 1,23,721/-.

23. The definition of 'bond' is given in Section 2 (5) of the Indian Stamp Act, 1899 (in brevity 'Act of 1899') which reads as under :-

“2— In this Act, unless there is something repugnant in subject or context,—

(5) *Bond*.—“Bond” includes—

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;”

24. In the matter of **Sant Singh** (supra), the Full Bench of MP High Court has laid down the following judicial precedent :-

“ The essentials of a bond are :--

- (1) There must be an undertaking to pay;
- (2) The sum should be a sum of money but not necessarily certain;
- (3) The payment will be to another person named in the instrument;
- (4) The maker should sign it;
- (5) The instrument must be attested by a witness; and
- (6) It must not be payable to order or bearer.”

25. Looking to the contents of Ex. P-1, aforesaid provisions of Act, 1899, and aforesaid judicial precedent laid down by Full Bench of MP High Court in the matter of **Sant Singh** (Supra), this Court finds that though the instruments Ex. P-1 is titled as agreement but actually it is a “bond”.

26. Looking to the contents of Ex. P-2 this Court finds that it is actually an “agreement”.

27. Now second question for consideration before this Court is that whether Ex. P-1 and Ex. P-2 are duly stamped.

28. In Ex. P-1, stamp duty of Rs. 20/- has been paid. No stamp duty is paid for Ex. P-2.

29. As per the Clause 5(b) of Schedule 1(A) of Act of 1899, on 8-7-2007, on agreement or memorandum of an agreement, proper stamp duty was Rs. 50/-. Hence, on Ex. P-2 stamp duty was payable Rs. 50/-.

30. As per Clause (12) of Schedule 1(A) of Act of 1899, on 14-1-2006 on bond proper stamp duty was 4% of the amount or value secured. Hence, on Ex. P-1 stamp duty was payable Rs. $123721 \times 4 / 100 = \text{Rs. } 4,948.84$ (in round figure Rs. 4,949/-).

31. Consequently, this Court finds that Ex. P-1 and Ex. P-2 were not duly stamped.

32. Looking to the recitals of Ex. P-1 and Ex. P-2 this Court finds that no registration is needed for them.

33. Now 3rd question for consideration before this Court is that whether Ex. P-1 and Ex. P-2 can be considered in evidence.

34. Looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Ramrattan** (supra), this Court finds that though trial Court did not discharge his duty incumbent upon him by not deciding the aforesaid objection, this Court cannot decline to consider the matter. Though Ex. P-1 and Ex. P-2 would be inadmissible in evidence as they are not duly stamped, this Court may consider Ex. P-1 and Ex. P-2 in evidence because the trial Court is bound to impound the document and deal with it according to law, and Section 36 of the Act of 1899 is not attracted in the case in hand.

35. Now this Court would consider the remaining part of points for determination No. (i), (ii) and (iii).

36. P.W. 1 Seikh Mohammad Hamid says in para 2,3 and 4 of his statement given on oath that respondent was taking loan from him time to time and in lieu thereof, he was giving paddy. On 14.01.2006 he had taken Rs. 24,309/- and executed a document regarding outstanding amount to Rs. 2,46,793/-, on 08.07.2007 he assured him in writing that he will pay balance amount Rs. 1,23,721/-

37. As per the statements of para 2, 3, 4, 7, 8 and 9 of P.W.2 Dhannu Lal given on oath, he knows about the loan transaction of appellant and respondent, appellant had informed him that document has been reduced in writing regarding the transaction occurred between him and respondent, he has signed on Ex. P/1.

38. As per the para 2, 3, 4, 7 and 8 of P.W.3 Md. Kalim Javed, he knows about the loan transaction of appellant and respondent. He had signed on

Ex.P-1, appellant had given about Rs. 24,000/- to respondent and told that Ex. P-1 is regarding loan transaction.

39. P.W. 4 Toman says in para 2 and 3 of his statement given on oath that there was loan transaction between the appellant and the respondent, he has made entries in account regarding loan transaction. On 8-7-2007 respondent had come for settlement of account, he had reduced in writing the settlement and gave it to respondent.

40. D.W. 1 Parasram says in para 4 of his statement given on oath that appellant had taken his sign on blank stamp paper and some blank paper.

41. As per alleged notice Ex. P-3 on 14-1-2006, Rs. 2,46,793/- was outstanding on respondent, he promised to pay it, he executed an agreement and signed also on it, on 8-7-2007 he assured him in writing that he will pay the balance amount Rs. 1,23,721/-.

42. As per the copies of alleged account Ex. P-5(C), Ex. P-6(C), Ex. P-7(C), Ex. P-8(C), Ex. P-9(C), Ex. P-10(C), Ex. P-11(C) and Ex. P-12(C) there was loan transaction between appellant and respondent from 17-12-2003 to 20-6-2006, and on 8-7-2006 the balance amount was Rs. 1,23,721/-.

43. As per Ex. D-1 in one page the name of appellant is mentioned. As per Ex. D-1 the balance amount is Rs. 1,23,721/-.

44. D.W.1 Parasram Dev says in para 11 during his cross-examination that Ex. P-2 was written and signed by him.

45. In Ex. D-1 there are earlier entries that in the year 2005 he had deposited Rs. 84,000/-, in the year 2006 he had deposited Rs. 39,062/- and thereafter there is an entry of balance amount Rs. 1,23,721/-. In Ex. D-1 there is no entry of deposit after balance amount Rs. 1,23,721/-.

46. There is no plausible explanation for not replying Ex. P-3 by respondent.

47. In Ex. P-1 on the back of 3rd page there is no specific mention that allegedly respondent had received on 14-1-2006 Rs. 1,23,000/- .

48. As per Ex. P-10(C) on 14-1-2006 respondent had taken Rs. 24,309/- from appellant.

49. D.W. 1 Parasram Dev says in para 11 that in Ex. P-2 date 8-7-2007 was not written by him.

50. Looking to the above mentioned facts and circumstances of the case, looking to the concerned admitted facts, this Court finds that aforesaid statement of para 11 of D.W. 1 Parasram Dev that he had not written date 8-7-2007 on Ex. P-2 is improbable, thus this Court disbelieves said statement of D.W. 1 Parasram Dev that he had not written date 8-7-2007 on Ex. P-2.

51. There is no such material available on record on the strength of which it can be said that aforesaid statements of P.W. 1 Sheikh Mohd. Hamid, P.W. 2 Dhannulal, P.W. 3 Mohd. Kalim Javed, P.W. 4 Toman, Ex. P-1, Ex. P-2, Ex. P-5(C), Ex. P-6(C), Ex. P-7(C), Ex. P-8(C), Ex. P-9C, Ex. P-10C, Ex. P-11C, Ex. P-12C, are not simple, not natural and not normal.

52. Looking to the facts and circumstances of the case, looking to the concerned admitted facts and Ex. D-1, this Court believes on aforesaid statement of P.W. 1 Sheikh Mohd. Hamid, P.W. 2 Dhannulal, P.W. 3 Mohd. Kalim Javed, P.W. 4 Toman, Ex. P-1, Ex. P-2, Ex. P-5(C), Ex. P-6(C), Ex. P-7(C), Ex. P-8(C), Ex. P-9(C), Ex. P-10(C), Ex. P-11(C), Ex. P-12(C) and disbelieves aforesaid statement of para 4 of D.W. 1 Parasram Dev.

53. After appreciation of the evidence discussed herebefore, this Court finds that, on 14.01.2006 Rs. 2,46,793/- was due on respondent and on very day he had executed Ex. P-1, assuring the appellant that he will pay the said amount and he had assured him on 8-7-2007 in writing by Ex. P-2 that he will pay the balance amount Rs. 1,23,721/-. Thus this Court decides points for determination No. (i), (ii) and (iii) accordingly.

POINT FOR DETERMINATION No. (iv) : FINDING WITH REASONS :-

54. D.W. 1 Parasram Dev says in para 1 says that appellant was engaged in business of money lending.

55. There is no such material available on record on strength of which it can be said that appellant had given the loan to some other persons in regular course of business. Hence, this Court disbelieves aforesaid statement of D.W. 1 Parasram Dev.

56. After the appreciation of the evidence discussed herebefore, this Court finds that respondent failed to prove that appellant was a money lender and in this situation, there is no question arises about its effect. Thus, this Court decides the point for determination No. (iv) accordingly.

POINT FOR DETERMINATION No. (v) : FINDING WITH REASONS :-

57. This has been earlier decided that Rs. 1,23,721/- was due on respondent on 8-7-2007.

58. The notice expenses Rs. 500/- is a just and reasonable.

59. Looking to the facts and circumstances of the case, this Court finds that the appellant is entitled to get balance amount of Rs. 1,23,721/- and notice expenses Rs. 500/- from respondent. Thus, this Court decides point for determination No. (v) accordingly.

POINT FOR DETERMINATION No. (vi) : FINDING WITH REASONS :-

60. After complete and full appreciation of the evidence discussed herebefore, this Court find that appellant has succeeded to establish his appeal. Trial Court committed illegality while dismissing the suit of appellant. Consequently, the appeal is allowed and impugned judgment and decree of the trial Court is set aside so far as it relates to the dismissal of the suit of the appellant.

61. The trial Court is directed to proceed for impounding Ex. P-1 and Ex. P-2, and levying deficient stamp duty with penalty taking recourse of provisions of Section 33, 35 and 38 of the Act of 1899.

62. Respondent is ordered to pay balance amount Rs. 1,23,721/- (Rs. One lac, twenty-three thousand, seven hundred and twenty-one) and notice expenses Rs. 500/- (Rs. Five hundred), total Rs. 1,24,221/- (Rs. One lac, twenty-four thousand, two hundred and twenty-one).

Looking to the facts and circumstances of the case, parties shall bear their costs.

A decree be drawn accordingly. (Decree shall be enforceable only after the Ex. P-1 and Ex. P-2 are impounded as mentioned above).

63. A copy of this judgment be circulated to all the Judicial Officers of the State after obtaining necessary approval of Hon'ble Chief Justice.

Sd/-
(Sharad Kumar Gupta)
Judge