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which could be legally enforced, or whether the agreement was altogether invalidated by reason of the daughter's death?

There is evidence that respondent No. 2 was allowed by his family to leave them and go permanently to Ramana's house, taking money with him, and to do service with and for him, and this of itself would constitute consideration. The giving of the daughter of Ramana to respondent No. 2 was part and part only of the consideration moving from Ramana to respondent No. 2, and if the two parties resolved to adhere to their mutual agreement notwithstanding the death of the daughter, and if respondent No. 2 relying thereon continued to work with and for Ramana, we do not see why they should not do so, nor why the contract should be regarded as at an end or incapable of enforcement or performance by mutual consent, nor why it should not be regarded as a fresh contract modified in reference to altered circumstances and acted upon by both parties.

As to the contention that the promises were referred to only in proof of the alleged affiliation we have to observe that in substance they imply a contract, although such contract was not formally set out as one of the grounds on which relief was claimed; at all events the question was distinctly raised by the issues referred by the District Judge, and the appellant cannot be held to have been taken by surprise or in any way prejudiced.

The result is that the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

POTHI REDDI (DEFENDANT), APPELLANT,

and

VELAYUDASIVAN (PLAINTIFF), RESPONDENT.*

1886. Aug. 4. Nov. 5.

Evidence Act, s. 91—Suit for money lent—Unstamped promissory note—Cause of action.

The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed

* Second Appeal 149 of 1886.

later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay :

Held, that plaintiff could not recover.

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, reversing the decree of V. Strinivásácharlu, District Múnsif of Tuticorin, in suit 236 of 1884.

Plaintiff Velayudasivan Pillai sued the defendant Pothi Reddi for Rs. 596-10-10, balance of principal and interest due on account of a loan of Rs. 1,000, made on 28th March 1881, which it was alleged defendant promised orally to repay on the 12th July 1881.

Plaintiff alleged that, on the evening of the same day, defendant gave him a memorandum admitting receipt of the money and promising to repay the same on the 12th July 1881 with interest, and that defendant had paid three instalments amounting to Rs. 600 in 1881.

The Múnsif held that the memorandum was a promissory note, and that, as it was not stamped, it could not be admitted in evidence under s. 34 of the Indian Stamp Act.

Rejecting it as inadmissible, the Múnsif held that plaintiff could not give evidence of the oral promise made in the morning for which the written agreement was substituted in the evening.

The Múnsif held, however, that plaintiff was entitled to prove the payment of consideration which preceded the promise to pay and that he might have recovered had the suit not been barred by limitation, more than three years having elapsed from the date of the loan before the suit was filed.

The suit was dismissed.

On appeal the Subordinate Judge held that the memorandum was not a promissory note but merely additional evidence of the loan; that the oral contract on which plaintiff sued was proved; that the payments made subsequently were payments on account of interest as well as of principal, interest being due according to the contract, and that endorsements of such payment made and signed by the defendant on the memorandum were admissible though not stamped for the purpose of proving part-payment of principal.

The claim was decreed.

Defendant appealed on the grounds—

(1) That plaintiff's claim was barred by limitation.

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(2) That oral evidence was not admissible to prove the contract which was evidenced by a promissory note.

Bhâshyam Ayyangár for appellant.

Subramanya Ayyar for respondent.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT :—We are clearly of opinion that the writing is not simply a memorandum in a ledger as found by the Subordinate Judge, but that it is a promissory note, and being unstamped, it is not receivable in evidence.

It is then urged upon us on the strength of the ruling in *Krishnasámi* v. *Rangasámi* (1) that plaintiff may be permitted to prove the consideration which preceded the contract, and that the suit may be regarded as one for the return "of money lent" to defendant on 28th March 1881.

The ground on which that case was decided was that the cause of action was complete in itself before the giving of the note, and that therefore the case fell in the first class of those described by Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan*.(2) The facts of that case do not appear in the report further than this,—that the money for which the promissory note was given was borrowed for the purpose of paying a debt incurred in family trade. Beyond that we do not know the circumstances of the particular case, and we do not understand the learned Judges to have ruled that in all cases where the original cause of action is the bill or note itself, it is open to the plaintiff—if the note be lost or not receivable in evidence—to frame his suit as one "for money lent" independently of the note. We cannot assent to such a doctrine, and to do so would entirely nullify the provisions of s. 91 of the Indian Evidence Act.

As pointed out by Garth, C.J., there is no doubt as to the principle of the authorities, and the only difficulty is in the determination in individual cases to which class a particular case belongs. A plaintiff may sue on his original cause of action if the promissory note has been given *on account of* the debt, and has not been parted with under such circumstances as will render the debtor liable upon it to some third person,—as for instance, when the promissory note is given in payment for goods sold and delivered, or for an account rendered. But when a loan is made by plaintiff to defendant, and in consideration of that loan the

(1) I.L.R., 7 Mad., 112. (2) I.L.R., 7 Cal., 250.

defendant contracts by a promissory note to pay it with interest at a certain date, there is no cause of action "for money lent" or otherwise than upon the note, and if for want of a stamp the note is not receivable in evidence the plaintiff's claim must fail. This has before been held by this Court in *Muthalagan Ambalam* v. *Ramanadham Chetti*.(1)

It appears to us the present is precisely such a case. The term of the contract were settled in the morning and the rate of interest and the date for re-payment were agreed upon. The money was then handed over and later in the day the promissory note specifying these terms was written and left in the plaintiff's possession.

It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of s. 91 of the Evidence Act.

As pointed out by the learned Chief Justice in *Sheikh Akbar* v. *Sheikh Khan* one very material distinction between the two classes of cases may be found in the investigation of the point on whom lies the burden of proving the note. In the case before us there can be no doubt that the *onus* must fall on the plaintiff.

Upon this ground the suit must fail, though we may further point out that even had it been open for the plaintiff to bring the suit as "for money lent," the receipts for the part-payments being unstamped, would not be receivable in evidence, and the bar of limitation is therefore not removed under s. 20 of the Indian Limitation Act.

The decree of the Lower Appellate Court must be reversed and the suit dismissed. Each party should bear his own costs throughout.

(1) 4 Ind. Jur., 568.