APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

S. A. ANANTANARAYANA IYER AND THREE OTHERS (DEFENDANTS), APPELLANTS,

v.

SAVITHRI AMMAL (PLAINTIFF), RESPONDENT.*

1911. December 1 and 14.

Partition—Consideration—Bonâ fide claim for separate allotment for marriages of one brother's daughters—Agreement at or before partition to allot—Execution of promissory-notes by each brother for his share of the amount—Previous suit for partition—Subsequent suit on promissory-note—Sec. 43, Civil Procedure Code (Act XIV of 1882), no bar—Causes of action distinct.

An agreement made between parties to a partition, by which one brother was to pay money for the marriages of his brothers' daughters, whether it is made before the partition and subsequently embodied in the deed of partition or made at the time of partition, is an enforceable contract, as the agreement by the father of the daughters to other terms of the partition is sufficient consideration.

A claim at the time of partition for the allotment of a separate sum of money out of the general funds for the performance of marriages of the daughters of one of the brothers to a partition is not altogether unfounded according to Hindu law. Even otherwise an agreement so to allot would be binding on the persons agreeing as one of the terms of a *bonâ fide* compromise constituting a settlement between the members of a family, if there was a *bonâ fide* claim for the same at the time of partition.

If an agreement so to pay a certain sum made by the other brothers at the time of partition becomes split up into various agreements by the execution of separate promissory-notes by the other brothers, each for his share, the obligation to pay the amounts of the promissory-notes is distinct from the obligation to observe the other terms of the partition; so that a suit first brought for partition against all the brothers (section 43, Civil Procedure Code, Act XIV of 1882), does not bar the institution of a subsequent suit for the sum due from one of the brothers under the promissory-note. "Cause of action" meaning of, explained.

Nanu v. *Raman*, [1893] I.L.R., 16 Mad., 335; *Sesha Ayyar* v. *Krishna Ayyangar*, [(1901) I.L.R., 24 Mad., 96.] *Umed Dholchand* v. *Pir Saheb Jiva Miya* [(1883) I.L.R., 7 Bom., 134.] *Sundar Singh* v. *Bholu*, [(1898) I.L.R., 20 All., 322] and *Moro Raghunath* v. *Bâlâji Trimbak*, [(1889) I.L.R., 13 Bom., 45], followed.

Appasâmi v. *Râmasâmi*, [(1886) I.L.R., 9 Mad., 279] and *Shanmugam Pillai* v. *Syed Gulam Ghose*, [(1904) I.L.R., 27 Mad., 116], distinguished.

Preonath Mukerji v. *Bishnath Prasad* [(1907) I.L.R., 29 All., 256], dissented from.

Per curiam.—If several promissory-notes are executed for portions of the same debt, each promissory-note creates a cause of action, and this would be so

* Second Appeal No. 943 of 1910.

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even if it be assumed that a suit might be instituted for the whole debt on the original cause of action.

SECOND APPEAL against the decree of J. G. BURN, the Acting District Judge of Tanjore, in Appeal Suit No. 392 of 1909, presented against the decree of D. VENKOBA ROW, the Subordinate Judge of Tanjore, in Original Suit No. 5 of 1905.

The facts of this case are sufficiently set out in the judgment.

T. Rangachariar for first and second appellants and *V. Purushothama Aiyar* for the other appellants.

T. R. Venkatarama Sastri for the respondent.

JUDGMENT.—The suit out of which this second appeal arises was instituted on a promissory-note executed in favour of the plaintiff's husband by the first defendant on behalf of himself and as guardian of the second defendant who is his natural son given away in adoption to a brother of his. There were four brothers in an undivided Hindu family, namely, the plaintiff's husband Aiyaswami Aiyar, the first defendant, the second defendant's adoptive father and one Subramania Aiyar. Disputes arose between them in connection with the partition of their family property. Aiyasami Aiyar, the plaintiff's husband, was burdened with six daughters, only two of whom had been given away in marriage, several daughters of some of the other brothers had been married at the expense of the family. Aiyasami Aiyar made a claim that he was entitled to have an allotment towards the expenses of the marriages of his other daughters. The other brothers in settlement of this claim agreed to pay him Rs. 5,000. This agreement is one of the stipulations contained in the partition Karar, Exhibit C, dated the 5th September 1901. According to Exhibit C, they were bound to make the payment within three months by which time apparently the parties intended the partition would be completed. Lists of properties to be allotted to each of the co-parceners were drawn up on the 11th January 1902. As payment of the Rs. 5,000 promised had not been made to the plaintiff, two promissory-notes were executed for the amount. One of them, Exhibit A, for Rs. 3,333-5-4, and the other by Subramania Aiyar for the balance on 10th January 1902. The lower Courts have held the plaintiff entitled to a decree for the amount due on the promissory-note, Exhibit A. The defendants object to the decree on three grounds: (1) that there was no consideration in law for the promise to pay Rs. 5,000, (2) that the promise

was not of such a character as would be binding on the minor second defendant when made by his guardian, the first defendant, and (3) that the suit is barred by section 43 of the Civil Procedure Code.

The first contention may be disposed of in a few words. The appellant's argument is that the agreement to pay Rs. 5,000 was not one of the terms of the agreement between the parties for the division of the family properties, but an independent promise; that there was no obligation under the Hindu law on Aiyasami's brothers to contribute towards the expenses of his daughter's marriage and that there was, therefore, no legal consideration to support the promise. We are entirely unable to accede to this argument. Paragraph 13 of Exhibit C says: "As it has been settled that for the expenses of marriages, etc., that have to be celebrated for the daughters of Aiyasami Aiyar, one of us, the other three co-parceners shall pay Rs. 5,000 in a term of three months from now: the said sum of Rs. 5,000 shall be accordingly paid off in cash in the aforesaid term." The natural construction of the clause is that the parties agreed under the instrument, Exhibit C, to pay the sum. But assuming that it had been previously settled that Rs. 5,000 should be paid to Aiyasami Aiyar, that fact would certainly make no difference for the effect of the clause is to make the previous agreement about the payment of Rs. 5,000, part of the agreement of partition which the parties were at perfect liberty to do. Mr. Rangachari attempted to perform the impossible feat of separating the promise contained in clause 13 from the other terms of Exhibit C, and he would regard the statement in paragraph 13 as a mere recital of an independent promise, even if the promise was made at the same time as the other terms in the Exhibit C were agreed to. He contends that the plaintiff himself so treated the matter in the plaint, but we can find nothing in the plaint to support the argument. He also relies on a sentence in Exhibit B, a letter written by the first defendant and Subramania Aiyar on the same day as they executed the promissory-notes, is which they say: "even though other matters relating to partition among us may not be settled, we shall pay off the said amount without raising any objection." But this does not show that the promise was a transaction independent of the agreement of partition. The object of the letter was merely to prevent the executants of the promissory-notes, in case litigation should ensue with regard to the enforcement of the

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agreement of partition, from resisting the payment of the amount of the promissory-notes until the other terms of the partition agreement were also fulfilled by the various parties thereto. In other words, the object was to prevent them from raising the plea that no term of Exhibit C could be enforced prior to the fulfilment of the other terms. This does not show that the promise was not to be enforced as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of the contract of partition, as Aiyasami Aiyar's agreement to the other terms of the contract would then be sufficient consideration.

With regard to the second contention that the first defendant had no right to bind the minor second defendant by such a promise, the argument is that according to Hindu law there is no obligation on the part of co-parceners to provide at a partition for the marriages of the daughters of one of them out of the general family funds, and that it was therefore beyond the powers of the first defendant as a guardian to bind his ward for a purpose which created no legal obligation on the ward. But it is clear that Aiyasami Aiyar made a claim that he was legally entitled to a provision for his daughter's marriages. Three daughters of the first defendant had been married at the expense of the family estate and the only daughter of Subramania Aiyar had been married and provided for out of joint family funds. There is no reason for supposing that Aiyasami did not believe that he had ground for making the claim or that the first defendant did not believe that there were some grounds for the claim. Nor can we assume that the claim was altogether unfounded according to Hindu law, although the plaintiff's pleader in the Court of First Instance seems to have conceded that the claim could not be enforced by a Court of law. Further, it appears from paragraph 12 of the Subordinate Judge's judgment that there were other matters in dispute between Aiyasami Aiyar and his brothers. All of them were settled by Exhibit C, and it is impossible to separate the promise contained in paragraph 13 from the other terms of Exhibit C, and to test its validity by a consideration merely of the abstract legal question which is raised to resist the promise. We must uphold it as one of the terms of a *bonâ fide* compromise constituting a settlement between the members of the family.

We now proceed to the consideration of the last question whether the suit is barred by section 43 of Act XIV of 1882. The defendant's contention is that the plaintiff should have included the present claim in the Suit No. 31 of 1904 on the file of the Additional Subordinate Court of Tanjore instituted by the plaintiff's husband against the defendants and Subramania Aiyar for division of the family properties. The learned vakil for the appellants contends that the cause of action was the same in both suits, namely, the agreement of partition, Exhibit C, and that the suit is therefore barred by section 43. The argument is fallacious for several reasons. In the first place the present claim is one against the first and second defendants only, while the right to division of the properties was against all the members of the family including Subramania Aiyar. [See *Nanu* v. *Raman*(1).] Secondly, the parties agreed to execute separate promissory-notes for the sum of Rs. 5,000, Exhibit A, being executed by defendants Nos. 1 and 2 and another promissory-note by Subramania Aiyar for the remainder of the amount. The original agreement to pay Rs. 5,000 was thus split up into two contracts. In Exhibit B, the letter already referred to, the first defendant and Subramania Aiyar say : " As we have not found it convenient to settle it now (that is, the payment of Rs. 5,000) according to the aforesaid arrangement " (that is, to pay the amount within three months from the date of Exhibit C), " we have on this date separately executed promissory-notes to you for the said amount and thereby the said matter has been settled." In other words, the obligation created by Exhibit C is regarded as discharged by the execution of two different promissory-notes. There can therefore be no doubt that the promise contained in paragraph 3 of Exhibit C became separate from the other obligations contained in that instrument and was split up into two different obligations by two promissory-notes. Each promissory-note therefore furnished a separate cause of action different from the obligation existing under Exhibit C. Thirdly, even apart from the effect of Exhibit B, we have no doubt that although the original obligation may be single and entire, if the parties agree to execute a separate document for a part of the obligation that document will constitute a distinct cause of action. In

(1) (1893) I.L.R., 16 Mad., 335; (1890) Punjab Rep., 32.

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Sesha Ayyar v. *Krishna Ayyangar*(1) a sum of Rs. 10,500 was found due by a debtor, and for this amount two mortgage bonds were executed by him, one for Rs. 10,000, and the other for Rs. 500 on the same date. It was contended that a suit instituted on the bond for Rs. 10,000 was barred by a previous suit on the one for Rs. 500. SHEPHARD and DAVIES, JJ., held that it was not. The learned Judges say: "It may be true that the term 'cause of action' is used in that section in a peculiar way, but we do not think that when parties, for whatever reason, choose to agree that there should be two instruments and two obligations, the Courts are justified in saying that there is only one obligation." The same view was held in *Umed Dholchand* v. *Pir Sāheb Jiva Miya*(2). Therefore for the amount due on a previous bond, two different bonds were executed by the debtor. SARGENT, C.J., and MELVILL, J., held that the bonds furnished different causes of action for purposes of section 43. Their Lordships say: "There can be no doubt that the two bonds and the default in payment of them constitute, in any view of the expression 'cause of action,' two distinct causes of action and there is nothing, we think, in the language of the section (which would appear to have been mainly designed to discourage multiplicity of suits) which would justify the Court in going behind the bonds to consider the circumstances out of which they sprung, albeit those circumstances might themselves at the time have constituted a cause of action" [see also *Sundar Singh* v. *Bholu*(3) and *Moro Raghunath* v. *Bālāji Trimbak*(4)]. It is immaterial, as pointed out by the Bombay High Court, for the decision of an objection under section 43 to consider whether a suit could have been instituted on the original indebtedness, apart from the promissory-notes. It is often the case, no doubt, where a promissory-note is executed for a previously existing debt that an action may be maintained on the debt, apart from the promissory-note. And it is sometimes necessary to do so, as when the promissory-note is unenforceable for defect of stamp or otherwise. But this does not show that the promissory-note itself is not a cause of action. There are two causes of action in such a case on either of which a suit may be maintained. The presumption would, ordinarily, be that the cause of action for the debt is merged in the promissory-note. But there would be

(1) (1901) I.L.R., 24 Mad., 96 at p. 109. (2) (1883) I.L.R., 7 Bom., 134.
(3) (1898) I.L.R., 20 All., 322. (4) (1889) I.L.R., 13 Bom., 45.

no effective legal merger where the promissory-note cannot be sued on. If several promissory-notes are executed for portions of the same debt, each promissory-note creates a cause of action, and this would be so, even if it be assumed that a suit might be instituted for the whole debt on the original cause of action. If the creditor neglecting one of the promissory-notes institutes a suit for the amount secured by it on the original cause of action, then no doubt he would not be entitled to maintain another suit for the remaining amount on the original debt. But no difficulty can arise under section 43 where the former suit was instituted on one of the promissory-notes. In such a case he could claim no more than the amount secured by the particular promissory-note. That promissory-note is not a cause of action on which he could claim the balance of the debt. Section 43 compels a person only to include the whole of the claim arising from the same cause of action. It does not require him to include what he could claim on a cause of action distinct from that which he sues on. Mr. Rangachari has referred to three cases in support of his contention: *Appasāmi* v. *Rāmasāmi*(1), *Shanmugam Pillai* v. *Syed Gulam Ghose*(2) and *Preonath Mukerji* v. *Bishnath Prasad*(3). In the first of these, *Appāsami* v. *Rāmasāmi*(1) upon a settlement of accounts a sum of money was found due to a creditor which the debtor agreed to pay. He gave the creditor an order on his agent to pay a portion of the amount from the profits of certain land and promised to pay the balance within a month. The agent having failed to make payment, two different suits were instituted on the same day against the debtor for the amount which he had directed the agent to pay and for the balance, respectively. It was contended that both suits were barred by sections 42 and 43. BRANDT and PARKER, JJ., held that the giving of the order on the agent was not similar to the execution of a promissory-note so as to give the creditor a separate cause of action for the amount of the order, and that the cause of action for the whole amount remained the same. They distinguish the case from *Umed Dholchand* v. *Pir Sāheb Jiva Miya*(4) and hold that one of the suits must be held to be barred. That case is clearly not analogous to the present one where a distinct source of obligation was created by the execution of the promissory-note. In the second case *Shanmugam*

(1) (1886) I.L.R., 9 Mad., 279. (2) (1904) I.L.R., 27 Mad., 116.
(3) (1907) I.L.R., 29 All., 256. (4) (1883) I.L.R., 7 Bom., 134.

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Pillai v. *Syed Gulam Ghose*(1). An inamdar obtained separate muchilikas from the occupying ryot of his land for two different years. He first instituted a suit for rent for the later year and subsequently instituted another for the rent of the earlier year. BENSON and BHASHYAM AIYANGAR, JJ., held that the second suit was barred. The judgment was based on the ground that the muchilikas did not furnish the cause of action for rent. They apparently regarded a muchilika as merely evidence of the terms of the tenancy between the landholder and the ryot. They observe that "though there were separate muchilikas for faslis 1306 and 1305, yet there was but one cause of action, viz., non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very similar to the case where several articles are sold in succession by *A* to *B*. If the vendor sues for the price he must sue for the price of all the goods sold up to the date of his suit and cannot sue separately first for one and then for another." In the third case *Preonath Mukerji* v. *Bishnath Prasad*(2) "*A*, a doctor, agreed with *B* to accompany *B* to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B* gave *A* a promissory-note for Rs. 700, representing seven days' fees. *B*, who was a vakil, also promised to assist *A* professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued *B*'s son upon the promissory note first, and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares." It was held that the second suit was barred by the provisions of section 43 of the Civil Procedure Code so far as the fees for attendance at Hardwar were concerned though not in respect of the other fees claimed. The learned Judges, STANLEY, C.J., and BURKITT, J., say that the cause of action for medical fees was the same in both cases and that it was in reality the breach of the agreement to pay a fee of Rs. 100 per day for attendance on the deceased. They observe: "It is true that Raghunath Prasad executed a promissory-note to secure the payment of Rs. 700 on account of fees for seven days, but the fact that this security was given does not take the case out of section

(1) (1904) I.L.R., 27 Mad., 116.
(2) (1907) I.L.R., 29 All., 256.

43 because of the proviso to that section which is in the following terms:—'For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.' The contention, therefore, that the cause of action on the promissory-note is one cause of action, and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action, is not well founded." With all deference we are unable to agree with the learned Judges that a promissory-note executed for payment of a debt is ordinarily to be regarded merely as a collateral security for the debt. The deposit of title-deeds or mortgage as security is only an accessory right to secure the rendering of the main right, namely, the debt. But a promissory-note is *primâ facie* to be regarded as the record intended by the parties of the obligation to pay the debt. The decision is not in accordance with the cases already referred to above including the judgment of the Allahabad High Court in *Sundar Singh* v. *Bholu*(1) which is not referred to in the judgment.

For the reasons mentioned above we hold that the present suit is not barred by section 43 of the Civil Procedure Code. We dismiss the Second Appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

In re B. VENKATA ROW (FIRST PRISONER), APPELLANT.*

1911. December 4, 5 and 29.

Evidence—Expert in handwriting, value to be attached to evidence of—Corroboration of such evidence.

An accused should not ordinarily be convicted of forgery upon the uncorroborated testimony of a handwriting expert.

The value to be attached to the evidence of handwriting experts discussed.

APPEAL against the decree of V. VENUGOPAUL CHETTI, the Sessions Judge of the South Canara division, in Calendar Case No. 19 of 1910.

The facts of the case are fully set out in the judgment of SUNDARA AYYAR, J.

Messrs. *Kunjunni Nair* and *G. Annaji Rao* for the appellant.

The Public Prosecutor opposing.

(1) (1898) I.L.R., 20 All., 322.

* Criminal Appeal No. 324 of 1911.