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arrives, or the contingency happens, and the ordinary limitation would be three years. But the promise is recorded in writing registered, and the limitation is extended by art. 116 to six years. This is settled by the Full Bench decision of this Court in the case of *Husain Ali Khan* v. *Hafiz Ali Khan* (1). This being so, the suit cannot be said to be barred by limitation, and the plaintiffs were entitled to have it tried on the merits, the suit having been instituted within six years of the date of the execution of the original deed of sale, and therefore of the discovery of the deficiency.

OLDFIELD, J.—I concur in holding that art. 116, sch. ii of the Limitation Act is applicable to this suit, and that the suit is not barred by limitation.

CIVIL JURISDICTION.

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April 4.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BENARSI DAS (PLAINTIFF) *v.* BHIKHARI DAS (DEFENDANT).*

Promise to pay balance found due on accounts stated in instalments—Promissory Note —Note of agreement in account-book—Evidence of terms of agreement—Act I of 1872 *(Evidence Act), s.* 91*—Relinquishment of part of claim—Act X. of* 1877 *(Civil Procedure Code), s.* 43.

In 1876 accounts were stated between *B* and *D*, and a balance of Rs. 800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. *B* at the same time noted in his account-book that such balance was "payable in four instalments of Rs. 200 yearly." In July, 1879, *B* sued *D* upon such instrument for the balance of the first instalment. The Court trying this suit refused to receive such instrument in evidence on the ground that it was a promissory note and as such was improperly stamped. Thereupon *B* applied for and obtained permission to withdraw from the suit with liberty to bring a fresh one for the original debt. In October, 1879, *B* again sued *D*, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account-book. He obtained a decree in this suit for the amount claimed by him. In 1880 *B* again sued *D*, claiming the amount of the third instalment, again basing his claim upon such note.

Held by SPANKIE, J., that the suit last-mentioned was barred by the provisions of s. 43 of Act X of 1877, inasmuch as *B* should in the second suit

* Application, No. 85B. of 1880, for revision under s. 622 of Act *X* of 1877 of a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 23rd August, 1880.

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brought by him against *D* have claimed the balance of the money found due from *D* to him upon the accounts stated between them, instead of claiming the balance of the instalments due.

Held by OLDFIELD, J., that such suit was not so barred, the causes of action therein and in the former suit being different.

Held by the Court that the agreement by *D* to pay the balance found due from him to *B* on accounts stated between them in instalments of Rs. 200 annually could not be proved by the note made by *B* in his account-book, but could only be proved by the promissory note.

THIS was an application for the revision under s. 622 of Act X of 1877 of a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 23rd August, 1880. The facts of the case are sufficiently stated for the purposes of this report in the judgment of Spankie, J.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the applicant, plaintiff.

Mr. *Conlan*, for the defendant.

The Court (SPANKIE, J., and OLDFIELD, J.,) delivered the following judgments:—

SPANKIE, J.—The plaintiff on the 21st July, 1879, sued in the Allahabad Small Cause Court for Rs. 182-4-0, due on a bond as he averred it to be, but which was subsequently held to be a promissory note promising to pay Rs. 800 (which had been found due on an adjustment of accounts between the parties) in four instalments of Rs. 200 a year, with interest at 12 per cent. to be charged in case of default in the payment of any instalment, and to be deducted in the event of any prior payment of any instalment. The Judge, holding the document to be a promissory note, refused to receive it in evidence, as it was not stamped. The plaintiff sought permission, under s. 373 of Act X of 1877, to withdraw the suit with leave to bring a fresh one for the subject matter. The Judge accorded permission to the plaintiff to bring a fresh suit for the original debt. This decision became final. On the 2nd October, 1879, the plaintiff sued to recover Rs. 190-8-0, the balance of two instalments due on a balance of account stated by defendant on the 18th October, 1876, corresponding with Katik

Sudi 1st, Sambat 1933. The books of Prag Das, whom the plaintiff represents, showed that, independently of the promissory note which defendant signed, Prag Das had made a note of the transaction, and the terms of the agreement are also entered in the books as follows: "Balance Rs. 800 payable in four instalments of Rs. 200 yearly." Whether or not the terms of the agreement could be proved by the note referred to made by Prag Das was not considered by the Judge. He accepted, however, the claim and decreed it in favour of the plaintiff against defendant. But there is no doubt that defendant contended that the suit was not cognizable, as the claim on the promissory note had failed, and that the claim was bad, because there was no proof that any balance was struck, and that the debt of Rs. 800 should have been sued for in the Munsif's Court or a portion of it should be abandoned in order to bring the claim within the jurisdiction of the Small Cause Court. An application for review of judgment was presented to Mr. Knox, who had succeeded Mr. Thomson. But Mr. Knox recorded that it was immaterial to consider whether the errors alleged had been legal errors or otherwise, as he was debarred by s. 624 of Act X of 1877 from reviewing his predecessor's judgment. This was on the 18th November, 1879. On the 16th March, 1880, on the petition of defendant, Pearson, J., and Straight, J., held that the second suit was one within the jurisdiction of the Small Cause Court. They therefore declined to interfere under s. 622 of Act X of 1877 as amended by Act XII of 1879. Such is the history of the case up to the suit the subject of the present petition to us under s. 622 of the Civil Procedure Code.

The plaintiff in the present suit seeks to recover the third instalment due under the agreement after adjustment of accounts. The defendant contended that when the former suit was brought the claim should have been for the Rs. 800, and not for a portion of it, as the contract in consequence of the inadmissibility of the promissory note could not be proved, and plaintiff had been allowed to bring a fresh suit for the original debt; as he had omitted to sue for the whole s. 43 of Act X of 1877 barred the suit. The present Judge, Mr. Alexander, holds this contention to be unanswerable: the instalments were fixed under the contract

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reduced to writing and were part and parcel of it: the document could not be received in evidence and so disappears entirely: the plaintiff had to fall back upon the original debt itself, for the payment of which there was no agreement to pay by instalments: s. 43 of the Act clearly barred the claim: the words of ss. 91 and 92, but not the provisos, apply to the suit: the rejected document was not silent as to the instalments, and there was no separate oral agreement specifying any contingency which might occur before the document could operate as it was intended to do: nor was there any subsequent oral agreement as to these instalments, nor if there had been would it have recorded or modified the previous written agreement; it would simply have reiterated it: when the promissory note could not be used, the plaintiff had to prove the fact of the debt due by defendant to him: the conditions of the promissory note as to repayment by instalments and as to interest disappeared, and plaintiff was in the position of a man to whom another owes a sum of money which the law presumes to be payable at once: the Judge therefore dismissed the suit.

It is contended that the Judge acted irregularly in the exercise of his jurisdiction in refusing to admit in evidence the plaintiff's account-book, on which the claim was founded: on the entry in that account-book the plaintiff could not have sued for the entire debt found to have been due by defendant: s. 43 of Act X of 1877, therefore, does not bar the suit: the decision in the former suit could not be questioned, and the plaintiff's account-book accepted then should have been accepted in the present suit.

I do not think that we are called upon to interfere under s. 622 of Act X of 1877. The Judge, on reviewing the whole case in regard to its former and present history, considers that s. 43 of the Act bars the present claim. It appears to me that the Judge is right, and I do not consider that, because in the second suit the Judge then in office decreed the instalments, the Judge now is debarred from considering what was the effect of that suit. In that suit the plaintiff ought to have sued for Rs. 800 the original debt, but chose to sue for that portion of it covered by an instalment. When the adjustment of accounts occurred a balance was struck against the defendant to the amount of Rs. 800. This

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was demandable at once had the creditor been disposed to make the demand. But an arrangement was made between the parties that Rs. 800 should be payable in four yearly instalments, and a provision was added in regard to interest in case of default. The agreement come to was expressed in writing in the form of a promissory note, whereby the defendant acknowledged Rs. 800 to be due to defendants, and promised to pay the sum by yearly instalments of Rs. 200, and to pay interest in the event of default. The debt that was demandable at once no longer was so, but under the terms of the agreement or engagement could only be recovered as the instalments fell due. Default occurred and interest became chargeable. The plaintiff sued on the promissory note, but could not recover on it, as the document being unstamped could not be put in evidence. He was allowed to bring a new suit for the original debt. I cannot doubt that he could have sued then for Rs. 800, the sum found to have been due. But he did not do so, but sued for the instalments. For myself, I think that the decision then passed was wrong, because the entry made by Prag Das in his own books, to the effect that the balance was payable by instalments, is simply an entry and nothing more in his account-books, and could not charge the defendant with liability. It was necessary to establish the terms of the agreement under which instalments were payable. Was the plaintiff entitled to the sum claimed, being the balance of two instalments, which the defendant had agreed to pay by the written engagement which he had signed? This was the issue, and the terms of the agreement could be proved only by the document. It was not a case in which the statement of any fact in a document other than the facts referred to in s. 91 of the Evidence Act had to be proved. If it had been, oral evidence of that fact would have been admissible. But in this case the promise to pay the sum of Rs. 800, acknowledged to be due, by yearly instalments of Rs. 200, and interest in event of default, recorded the terms of the agreement. It is not as if *A.* gives *B.* a receipt for money paid by *B*, and oral evidence is offered of the payment; such evidence is admissible. It is a fact stated in a document, but it is not evidence of the terms of a written contract. But if a contract is contained in a bill of exchange, a negotiable instrument, the bill itself must be proved. This written instrument, according to Taylor (6th

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ed., vol 1, p. 405), is to be regarded in some measure as the ultimate fact to be proved, and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. We are, however, guided by our Law of Evidence, and s. 91 seems clearly to apply. It is quite clear too that in asking for interest, as it was agreed to be paid under the conditions of the promissory note, the plaintiff is suing for something outside the debt that was found to be due on the adjustment of accounts. It is equally certain that he sues to recover instalments upon a book debt, though the balance constituting the debt was not payable by instalments, but was demandable at once. It was contended before us that there was a separate oral agreement to pay instalments. As to this the Judge now, if the contention was worth anything, finds in the case that there was no oral agreement whatever, and that there was no other agreement but that reduced to writing. Upon the facts found the account-book of Prag Das cannot help the plaintiff, for it proves no agreement to pay the debt of Rs. 800 by instalments. Under the circumstances I would not interfere, but would dismiss the petition with costs.

OLDFIELD, J.—The present suit does not appear to me to be barred by anything in s. 43 of the Civil Procedure Code, for the causes of action in this suit and in that previously brought are different. The plaintiff now sues for recovery of instalments which had not fallen due at the time he instituted the former suit. But it may be that the plaintiff is not in a position to maintain this suit without producing the "*satta*," and that being unstamped or insufficiently stamped is inadmissible in evidence. The terms of the agreement between the parties were embodied in the "*satta*," and are facts in issue in this suit, on the determination of which the decision depends, and they can only be proved by production of the document. I concur in rejecting the petition with costs.

Application rejected.