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MONMOHINEE DASSEE v. KHETTER GOPAUL DEY.

But I find nothing in the judgment which affirms this Court's power to hear an appeal as to any other matter than those which are connected with the propriety or otherwise of an order made granting a certificate, and there is nothing as it seems to me in the decision that in any way conflicts with the two previously quoted.

I think therefore that we must dismiss this appeal. I should have been willing to interfere if we could have done so, for the Judge's order seems to make it impossible for the widow ever to be able to take out the certificate, and without it she cannot draw the interest on the Government promissory note, which is said to be and probably is her sole means of living.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

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REMFRY AND ANOTHER *v.* SHILLINGFORD AND ANOTHER.

Bills of Exchange Act (V of 1866)—Suit on Promissory Note payable by Instalments.

Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V of 1866 (1).

SUIT to recover the principal amount with interest on a promissory note made by the defendants in favor of the plaintiffs in the following form:

"We jointly and severally promise to pay Messrs. Hamilton and Co. at their office in Calcutta the sum of Rs. 1,778-6-9, with interest thereon at the rate of 12 per cent. per annum, by two equal instalments, on 1st July 1875 and 1st September 1875,

(1) See on the similar point arising on a petition to enforce a specially registered agreement, under s. 53 of the Indian Registration Act, 1866, *In the matter of Lachmipat Singh*, 2 B. L. R., O. C., 151; *In the matter of Ganpat Manihji*, 6 Bom. H. C. R., O. C., 64; and *Venithithan Chetty* v. *Moothiroolandi Chetty*, 6 Mad. H. C. R., 4.

for value received, and we agree that in case of our failing to pay the first instalment, the whole amount of this note shall become immediately payable.

J. L. SHILLINGFORD.
M. H. SHILLINGFORD."

The plaintiffs were the members of the firm of Hamilton & Co. The defendants made default in payment of the first instalment, and on 13th July 1875 the plaintiffs instituted this suit under Act V of 1866 for the whole amount of the note with interest, stating in their plaint the making of the note and the fact of default in payment of the first instalment. A decree was now asked for on proof of the service of summons and on the usual certificate of the Registrar that no leave to defend the suit had been obtained.

Mr. *Macrae* for the plaintiffs.

The Court remarked that there was no evidence of the non-payment of the first instalment, and, as no evidence could be given under Act V of 1866, it did not appear that the whole amount was due, and therefore the decree asked for could not be given.

Mr. *Macrae* contended, first, that there was nothing in Act V of 1866 to prevent such a suit from being brought under the Act on a note in the present form; second, that no further evidence was necessary here than was required in a suit on a note in the ordinary form, not payable by instalments. In such a case there is nothing on the face of the note to show that anything is due on it: and the Court accepts the fact that the amount claimed is due from the statement in the plaint that it is so, and the non-appearance of the defendant, after summons had been duly served on him, to deny the statement. So here the defendants undertaking by their note that if the first instalment is not paid on due date the whole amount is to become payable, the plaint states that the first instalment was not paid on due date, and the defendants do not deny that statement.

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It is submitted that a decree can therefore be given for the whole amount without further evidence.

Cur. adv. vult.

PHEAR, J.—I think the Act was only intended to apply to those cases in which the bill itself together with mere lapse of time is sufficient to establish for the plaintiff a *primâ facie* right to recover.

In this case the plaintiff is obliged to allege the occurrence of another fact besides the lapse of time since the making of the bill, namely, that the first instalment has not been paid, which fact is necessary according to the terms of the bill in order to complete the plaintiffs' right to sue. There is no evidence before the Court of this fact, and I do not think the Legislature intended that the summons served in the forms prescribed by Act V of 1866 should have the effect of enabling the plaintiffs' statement of the fact in his petition to prevail without evidence.

It is argued that the day for the payment of the first instalment being past, it would be incumbent on the defendant to prove payment in answer to any claim for that alone; and that therefore this instalment must be taken to be unpaid until the defendant proves the contrary, which he is not allowed to do in these proceedings. But this argument I think involves a slight error. The lapse of time alone suffices to establish that the first instalment is due to the plaintiff: but it does not give rise to any presumption either way as to payment: only in a suit for that instalment, the money being shown due, the burden of proof on the contest is shifted. There being then no presumption that the instalment is not paid, *a fortiori* there is no presumption that the second instalment is due. In short, there is no ground of presumption or evidence on which the contingency required to complete the plaintiff's right of action has happened, and I don't think, as I have already said, that the procedure of Act V of 1866 was intended to enable the plaintiff to succeed on his own allegation merely.

I cannot give the plaintiff a decree as the case now stands, but a fresh summons as under Act VIII of 1859 may issue.

Attorneys for the plaintiff: Messrs. *Orr* and *Harris*.