

(1937) 10 BOM CK 0014
In the Bombay High Court
Case No : Second Appeal No. 107 of 1934

Somabhai Naranbhai Patel	Vs	APPELLANT
Kalyanbhai Kashibhai Patel		RESPONDENT

Date of Decision : 06-10-1937

Acts Referred:

Evidence Act, 1872 — Section 91

Citation : AIR 1938 Bom 286 : (1938) 40 BOMLR 174

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rangnekar, J.—This case has been exhaustively argued by Mr. Thakor, but notwithstanding his argument, I am satisfied that the appeal must fail. The facts are that the plaintiff brought a suit to recover Rs. 500 and interest due thereon, alleging that he had lent that sum to the defendant, on April 25, 1931. The defendant, by his written statement, admitted that he had received from the plaintiff the sum of Rs. 500 on the day in question. But he pleaded that that sum was paid to him in order to be paid over to a certain person on behalf of the plaintiff. He further pleaded that he had passed, at the time of the loan, a promissory note, and that the loan and the promissory note formed the same transaction and that the promissory note was not properly stamped. He contended that, under these circumstances, the promissory note was not admissible in evidence and the whole suit must fail. The trial Court disbelieved the defendant, as regards the first defence, on the merits, and held that the defendant had received Rs. 500 from the plaintiff as a loan. But the learned trial Judge came to the conclusion that as the loan and the promissory note formed the same transaction, that is to say, the loan was made simultaneously with the execution of the promissory note, and as the promissory note was not properly stamped and therefore inadmissible in evidence, it was not open to the plaintiff to sustain the suit against the defendant; and he, therefore, dismissed the suit.

2. The plaintiff appealed to the District Judge of Kaira. The learned District Judge raised the following issue :-

Whether the plaintiff is entitled to sue on the factum of consideration, quite apart from the promissory note which is inadmissible in evidence for want of stamp, and obtain relief ?

The learned Judge found that issue in the affirmative, reversed the decree of the trial Court and passed a decree in favour of the plaintiff.

3. It is from that judgment that the present second appeal is taken, and the question is, whether, in the circumstances, it was open to the respondent to being a suit on the original consideration, and whether the decree made by the lower appellate Court is right. Now, it is clearly established by authorities, to which no reference is necessary, that when a negotiable instrument is not duly stamped, secondary evidence to prove the contents of the instrument is not admissible, and that is because to allow secondary evidence of the terms of a contract, which requires to be properly stamped, would be contrary to the policy of the law as contained in the Stamp Act, having regard to the clear and explicit language of Section 35 of the Stamp Act. The question, however, is, where there is a promissory note not duly stamped and therefore not admissible in evidence, whether a suit will lie on the original consideration. I quite agree with the learned advocate of the appellant that the decisions on this point are conflicting and that, if I may say so respectfully, is because the" true principles are not always borne in mind in deciding such cases. The leading case on the subject is Sheikh Akbar v. Sheikh Khan ILR (1881) Cal. 256 and the question which arises in the present appeal has been fully discussed by Garth C.J. in that case. He laid down two propositions. The first is (p. 259) ;

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration.

The second proposition the learned Chief Justice laid down was in these: terms (p. 260) :

But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties,

and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money.

It is the second proposition which has not been properly understood in some of the decisions on this question and that has been pointed out by Sir Lawrence Jenkins in *Krishnaji v. Rajmal*. ILR (1899) Bom. 360 : 2 Bom. L. R. 25. The case of a loan of money falls under the first proposition. It is said that the independent cause of action must be antecedent in time to the note and this principle has been laid down because of the word " then " in the first proposition in *Sheikh Akbar v. Sheik Khan*. In my opinion, however, the principle is unsustainable. If there is a loan, it does not matter whether the promissory note is taken at the time or at some later time. It is the loan which constitutes the cause of action and gives rise to it, and it is separate from the note itself, and the fact of a loan can never be a term of the contract contained in the promissory note, and therefore it is open to a person to prove that there was a loan independently of Section 91 of the Indian Evidence Act. All the High Courts in India seem to be agreed that if the independent cause of action is antecedent to the making of the promissory note, then there is nothing to prevent the creditor from maintaining a suit on the original cause of action. But there is a conflict of judicial opinion when the loan and the promissory note are simultaneous. All the High Courts except the Madras and Allahabad High Courts are agreed that the position would be the same, whether the loan is anterior to the promissory note, or they are simultaneous, and hold that a suit on the original consideration will lie. In Lahore the position does not appear to be clear. I am not concerned with the other High Courts. This Court has always held that a suit can lie on the original consideration even if the loan and the promissory note formed part of the same transaction. The leading case is *Krishnaji v. Rajmal*, where the learned Chief Justice observes at p. 362 as follows :

Stated generally, it may be said that the holder of a bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.

This was a case of a hundi, and dealing with it, the learned Chief Justice observed (p. 364) :

It is perfectly true that the terms of the contract contained in the hundi can, apart from the conditions which permit secondary evidence, only be proved by the hundi, but this does not prevent proof of the loan independently of the note. In the view, therefore, that I take of the law, the plaintiff is entitled to a decree, for there is no dispute that there was an advance of money by way of loan, and that it still remains unpaid.

It seems to me, on principle, the distinction made by some of the cases is unsustainable. As I have pointed out, if there is a loan, that itself gives a cause of action, and the fact that there is a loan, cannot be a term of the contract. It

does not, therefore, matter whether the loan was made at the same time as the document, which is the evidence of it, and the document is not properly stamped and therefore inadmissible in evidence. Supposing the loan is made at 10 o'clock, and parties separate and five minutes after that the creditor comes to the debtor and says " I want a promissory note," and the debtor executes a promissory note, then it can be said, that the loan was independent of the promissory note. But if the loan is made at ten o'clock, and exactly at ten o'clock the promissory note is taken, then it is said that it is a simultaneous transaction and therefore if you cannot sue on the promissory note, because it is not properly stamped, then your suit must fail, as both formed part of the same transaction. I am unable to appreciate the distinction.

4. Apart from this, it seems to me that in this case, no such question arises. Here, the suit was brought on the original cause of action. True that it transpired in the case that there was a promissory note, which was not duly stamped, given by the debtor to the creditor. But the debtor admitted the loan. I have referred to the actual admission made by him. It is true that, as argued by Mr. Thakor, the admission must be considered as a whole. But the admission was this, that he had received Rs. 500 from the plaintiff, but he said that the payment was made because he had to hand over that sum on behalf of the plaintiff to a third party. That allegation, however, was held to be false. It must follow, therefore, that the plaintiff paid Rs. 500 to the defendant. It is not the defendant's case that it was a gift, and in the absence of any other allegation made by the defendant, the receipt of Rs. 500 constituted a debt, and the debt remains unpaid.

5. In my opinion there are no merits in this case, and I think the view taken by the learned District Judge is correct, and the appeal must be dismissed with costs.