

1978 Present : Samarakoon, C.J., Ismail, J. and
Gunasekera, J.

KANAPATHIPILLAI RAJADURAI, Defendant-Appellant

and

AMBIKAPATHY MAHADEVAN and ANOTHER, Plaintiffs-
Respondents

S. C. No. 318/74 (F)—D. C. Jaffna No. 4898/MS

Promissory Note—Case presented on basis that document is a promissory note—Need for consideration and for delivery of note to payee—Enforceability—Bills of Exchange Ordinance (Cap. 82) sections 85, 86.

Where a case was presented to Court on the basis that a writing (P1) was a promissory note and action had been instituted under Chapter LIII of the Civil Procedure Code, but it was found at the trial that there had been no consideration on the alleged document nor any delivery thereof to the payee—

Held : That the plaintiff had failed to prove that the document sued upon was a promissory note and the action could not succeed. The finding of the learned District Judge that judgment could be entered for the plaintiffs on the basis that the said document P1 together with another deed produced at the trial created an enforceable family settlement could not be supported.

Cases referred to :

Jinadasa v. Silva, (1932) 34 N.L.R. 344.

Sendirigapitiya v. Demalamane, (1913) 16 N.L.R. 478.

Parumpalam v. Arunachalam, (1927) 29 N.L.R. 289.

APPPEAL from a judgment of the District Court of Jaffna.

C. Thiagalingam, Q.C., with K. Kanag-Isvaram, for the defendant-appellant.

No appearance for the plaintiffs-respondents.

Cur. adv. vult

July 27, 1978. SAMARAKOON, C.J. ✓

The plaintiffs-respondents (husband and wife) sued the defendant-appellant for the recovery of a sum of Rs. 10,000. The action was instituted under the provisions of Chapter LIII of the Civil Procedure Code. The plaint is dated 10th August, 1972. It alleged that by Deed No. 6425 dated 9th June, 1962, (D2) S. M. Kanapathipillai the father of the 2nd plaintiff-respondent and the defendant transferred to the defendant his business known as "Pillaiyar Vilas" for cash to be paid to the father and the father's brother in instalments. Para 3 of the plaint alleged that "in fact the consideration for the said transfer was in addition to the cash agreed to be paid by the defendant to the said Kanapathipillai in instalments and by the defendant to his full brother Sivalingam was the writing No. 2328 dated 9th October 1966 (P1)"

whereby the defendant promised and undertook to pay to the second plaintiff and three others Rs. 10,000 each at the age of majority or on marriage. The plaint went on to state that though the Deed stated it to be a Deed of Agreement "it is in fact a Deed of Promise to pay money". The plaintiffs alleged that the defendant failed to honour the promise when they married. The defendant denied that there was such promise and denied liability to the plaintiffs-respondents. At the trial it was admitted that the said Deed No. 6425 was in fact a transfer though purporting to be a donation. The learned Judge held that D1 and P1 taken together create enforceable family settlements and entered judgment for the respondents as prayed for. The defendant has appealed against this order.

P1 recites that in consideration of the Deed of Donation D2 and in consideration of the love and affection the defendant bears unto his father and the father's three daughters he agrees and covenants that he will pay Rs. 10,000 to each of the daughters on their attaining majority or on their marriage. The issue raised was on the basis of a promise by the defendant to pay money to the 2nd plaintiff and her two sisters. This is not a contract for the benefit of third parties as known to the Roman Dutch Law (see Wessels—Law of Contracts, Ed. 2 page 513 section 1753) and the Law of Sri Lanka, *Jinadasa v. Silva*, 34 N.L.R. 344. It was conceded at the trial that P1 was not a donation or gift as there was no acceptance. The case that was presented to Court was that P1 was a promissory note, a position that was not presaged in the plaint. Counsel for the respondent relied on the Bills of Exchange Ordinance (Cap. 82). A promissory note is defined in section 85 of that Ordinance. No doubt a particular form of words is not necessary for the validity of the note but the form must be such as to show an intention to make a note. *Sendirigapitiya v. Demalamane*, 16 N.L.R.^o 478. This document P1 is notarially attested, it is termed a covenant and agreement, it mentions the method of recovery, and it provides for a succession should anyone of the persons be non-existent. Furthermore, there is no consideration. The deed of donation referred to is P2, but it was agreed at the outset between parties that it was in fact a deed of transfer on which money was paid. This consideration therefore was non-existent. "Love and affection" is not consideration under the English Law (which governs the case) to support a promise, and therefore P1 was not enforceable. *Parampalam v. Arunachalam*, 29 N.L.R. 289 at 293. There was no delivery of the note to the alleged payee (*Vide* section 86 of the Bills of Exchange Ordinance). The plaintiffs do not appear to have even known of its existence at the

time it was executed because they pleaded that it was executed in Jaffna but, after a copy of it was obtained, it was discovered that the place of execution was Pungudutivu. The Plaintiffs have therefore failed to prove that P1 was a promissory note. The learned Judge's finding of a settlement cannot be supported. This was not the contention of the plaintiffs. I would therefore allow the appeal. However, there will be no costs of appeal or in the District Court.

ISMAL, J.—I agree.

GUNASEKERA, J.—I agree.

Appeal allowed.
