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*Present:* Pereira J. and De Sampayo A.J.

KISTNAPPA v. RUTNAM.

51—D. C. Colombo, 37,084.

*Instrument admitted in evidence—Cannot be called in question at a later stage on ground that it was not duly stamped—" Guarantee"—Should it be stamped as a promissory note?—Stamp Ordinance.*

When an instrument is once admitted in evidence in a case, the admission cannot be called in question in any subsequent stage of the same case on the ground that the instrument has not been duly stamped.

The expression " promissory note " is, by the Stamp Ordinance, 1909, defined for the purposes of the Ordinance to include, *inter alia*, " a note promising the payment of any sum of money upon any condition or contingency which may or may not be performed or happen."

*Held, per PEREIRA J. (DE SAMPAYO A.J. dissentiente)*, that a document whereby A promised to pay B a certain sum of money at the expiration of a certain time, if within that time the maker of a certain promissory note failed to pay B the amount of that note, although it was in effect a guarantee, was, in terms of the definition above, liable to stamp duty under the Ordinance as if it were a promissory note.

THE facts are set out as follows in the judgment of De Sampayo A.J.:—

" On November 4, 1910, the plaintiff lent to S. L. O. Marikar and P. G. Weerasinghe a sum of Rs. 1,000 on a promissory note payable on demand, and on the same day the defendant granted to the plaintiff the document P 1, which is in the following terms:—

I, the undersigned, do hereby guarantee payment of a sum of Rs. 1,000 only to K. M. N. M. Kistnappa Chetty (the plaintiff) within three months of the date hereof, in the event of S. L. O. Marikar and P. G. Weerasinghe, or either of them, failing to pay the sum of Rs. 1,000 due from them to the said K. M. N. M. Kistnappa Chetty on a promissory note dated the 4th day of November, 1910.

(Signed) V. RUTNAM.

" The plaintiff declared upon this document as upon a guarantee given by the defendant for the payment of Rs. 1,000 by the principal debtors, S. L. O. Marikar and P. G. Weerasinghe. The defendant practically admitted the averments in the plaint, but denied that any cause of action had accrued to the plaintiff on the above agreement, and further pleaded that the plaintiff by extending the time

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of payment by the debtors had discharged the defendant from his liability as guarantor, and that this action was not maintainable without the principal debtors being first sued. At the trial certain issues were framed on these pleadings, and when the plaintiff tendered the document P 1 in evidence it was objected to as not being stamped. The trial, however, proceeded, and the document having been subsequently stamped as an agreement under the provisions of section 36 of the Stamp Ordinance, No. 22 of 1909, the District Judge admitted it in evidence and gave judgment for the plaintiff."

The defendant appealed.

*A. St. V. Jayewardene, E. W. Jayewardene, and Chitty, for defendant, appellants.*

*Bawa, K.C., and Morgan de Saram, for plaintiff, respondent.*

*Cur. adv. vult.*

March 3, 1914. PEREIRA J.—

I think that the District Judge is right in holding that the document P 1 is a "contract relating to a promissory note." The case cited by him supports that view. But I cannot agree with him in thinking that the document is not to be treated as a promissory note for the purposes of the Stamp Ordinance, 1909. No doubt the document is in effect a guarantee; but it is, nevertheless, what is known as a non-mercantile promissory note in terms of the second part of the definition given in section 3, sub-section (21), of the Ordinance and it is liable to stamp duty accordingly, although it may operate as a guarantee. The Ordinance makes a note promising payment of a sum of money on a contingency which may or may not happen a promissory note for the purposes of the Ordinance. Document P 1 is in plain language a promise by its maker (the defendant) to pay Kistnappa Chetty Rs. 1,000 at the expiration of three months, if within that time the makers of the promissory note dated November 4, 1910, fail to pay Kistnappa Chetty the amount of that note. Divested of the contingency the document would clearly be a promissory note. It thus responds to the test laid down in volume II., page 573, of *The Laws of England* as a result of the cases therein cited, namely, "If the document would be a promissory note in all respects save for the contingency affecting the payment in the ordinary mercantile sense, then for stamp purposes it is a promissory note notwithstanding the contingency."

The main question in the case is whether it is open to the defendant in appeal to contend that the document has not been duly stamped. The document has been, rightly or wrongly, admitted in evidence in the Court below, and section 37 of the Stamp Ordinance enacts that "when an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the

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same suit or proceeding on the ground that the instrument has not been duly stamped." This provision is subject to an exception which need not be mentioned here, because it has no application to a case like the present, except perhaps to the extent of showing that the admission of a document in evidence, as in the present case, is not to be called in question, even in the Supreme Court, on an appeal from any order in the case. The words of the section are too clear to admit of any discussion, and I do not think that, in the circumstances, it is open to the appellant to contend that the document in question has not been duly stamped. I may say that the decisions of the Indian Courts cited by the respondent's counsel (*Lall v. Jungle Singh*,<sup>1</sup> *Shidapa v. Irava* <sup>2</sup> appear to support this view.

I would dismiss the appeal with costs.

DE SAMPAYO A.J.—

His Lordship stated the facts, and continued:—

The point of the objection, which is repeated in appeal, is that a "promissory note" as defined in the Stamp Ordinance is, among other instruments, excluded from the operation of section 36, and it is argued that the document P 1 is a promissory note within the meaning of the Stamp Ordinance. A promissory note as a mercantile instrument must, of course, contain an absolute promise to pay, and must not be payable out of a particular fund or upon a condition or contingency; but for the purposes of the stamp duty the Stamp Ordinance defines a promissory note so as to include "a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen." The English Stamp Act contains a similar provision and has the same object in view. It is plain that, even for the purposes of the Stamp Ordinance, the instrument must be such as would, but for the reference to any particular fund or to a condition or contingency, constitute a promissory note under the law merchant. I cannot think that the document P 1 is such an instrument. The expression "guarantee payment" no doubt in a sense implies a promise to pay, but "guarantee" is a technical term, and only implies a promise that the guarantor will pay if the principal debtors whose debt is so guaranteed do not pay. This is exactly what the defendant did in this case. The document can only be construed as if the defendant had said, "I guarantee to you the payment of Rs. 1,000 by S. L. O. Marikar and P. G. Weerasinghe," in which case the idea of a promissory note would be wholly absent. For the purpose of determining the nature of a document the whole of it should be read, and so reading it I think that the document P 1 is, as it was intended

<sup>1</sup> 3 Cal. 787.

<sup>2</sup> 18 Bom. 737.

to be, and as the defendant himself in his answer construed it, a contract of guarantee and not a promissory note in any sense. Moreover, if S. L. O. Marikar and P. G. Weerasinghe paid any part of the Rs. 1,000, it will surely not be contended that the defendant would still be liable under the instrument to pay more than the balance, and it is of the essence of a promissory note that the promise should be to pay a definite sum and not a fluctuating and unascertained amount. See the judgment of Lindley L.J. in *Mortgage Insurance Corporation v. Commissioners of Inland Revenue*.<sup>1</sup> In this connection I may also refer to *Dickinson v. Bower*<sup>2</sup> cited in the *Laws of England* (vol. II., p. 574), in which it has been held that an instrument which, though it specifies a definite sum, shows on its face that the payment is to be by way of indemnity, and therefore only for the amount that might at maturity turn out to be unpaid by the principal debtor, does not fall within the definition of promissory note in the Stamp Act. I therefore think that the plaintiff was entitled to have the document P 1 stamped under the provisions of section 36, and that it was rightly admitted in evidence.

Even if this were otherwise, I agree that the order of the District Judge admitting the document in evidence cannot be reviewed in appeal in view of the provision in section 37 (1) of the Stamp Ordinance, which enacts that such admission shall not be called in question at any stage of the same suit on the ground that the instrument has not been duly stamped. The following sub-section no doubt vests a special jurisdiction in the Supreme Court in appeal, but that is for the purpose only of impounding the document with a view to a criminal prosecution, and proviso (2) proceeds expressly to enact that "except for the purposes of such prosecution no declaration made under this section shall affect the validity of any order admitting any instrument in evidence." The reason for the conclusive effect of an order admitting a document is, I think, easily understood. The matter of stamps concerns the revenue principally, and the parties only so far as they are affected by the laws enacted for the protection of the revenue, and if the interests of the revenue are conserved by any order by the Court to which a document is first tendered, there is no object in allowing the parties to continue the contentions over the matter of stamps.

I also think that this appeal should be dismissed with costs.

*Appeal dismissed.*

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<sup>1</sup> (1888) 21 Q. B. D., at pp. 356 and 357.

<sup>2</sup> (1897) 14 T. L. R. 146.