

1919.

*Present* : De Sampayo J.

MOHAMADU BHAI *v.* JAMES.

311—C. R. Colombo, 64,658.

*Action to recover loan—Written contract—Must action be based on written only—Evidence Ordinance, s. 91.*

In the case of a contract of loan, the lender is entitled to maintain an action to recover the amount independent of any writing which the debtor may have given. A common instance of such a case is where a plaintiff, in addition to declaring upon a formal document, includes in his plaint what is known as the money counts.

**T**HE facts appear from the judgment.

*E. G. P. Jayatilleke*, for appellant.—The document referred to is not a promissory note, but a mere memorandum of the loan. Even if it is treated as a promissory note, which is inadmissible in evidence because it is unstamped, it is open to the plaintiff to maintain this action as one for the recovery of money lent (see *Sockalingem Chetty v. Kathitha Beeke*;<sup>1</sup> *Valliappa Chetty v. De Silva*.<sup>2</sup>

<sup>1</sup> (1916) 2 C. W. R. 55.

<sup>2</sup> (1916) 5 C. W. R. 251.

February 25, 1919. DE SAMPAYO J.—

1919.

*Mohamadu  
Bhai v.  
James*

The plaintiff, who is an Afghan money lender, has brought this action to recover from the defendant Rs. 200, which he alleged he lent to the defendant. The defendant, in substance, pleaded that he only borrowed and received Rs. 10 in a case of necessity, but that plaintiff had intimidated him and forced him to sign a document for Rs. 200, though the real transaction was that Rs. 10 was borrowed and was to be paid with Rs. 2 as interest. The issue stated at the trial was as to whether the plaintiff lent the defendant Rs. 200 or Rs. 10. The plaintiff got into the witness box and stated that defendant had borrowed this amount from him, and had written down particulars in the plaintiff's book. Thereupon objection was taken that oral evidence of the transaction could not be given since the contract had been reduced to writing. The Commissioner upheld the objection, and dismissed the plaintiff's case, because the writing itself was unstamped as a contract and was inadmissible in evidence. The document referred to is filed in the case, and I am unable to agree that it is a document of the description mentioned in section 91 of the Evidence Ordinance, upon which reliance is placed. It is a mere scrawl, stating the name of the defendant, the amount Rs. 200, the plaintiff's name, and the further legend: "It will be paid Rs. 12." It is not even signed. It is difficult to put a construction on the last words which I have quoted. It may mean that the amount of Rs. 200 was to be paid in instalments of Rs. 12; it may also support the defendant's answer that Rs. 200 is a mere nominal sum, and that his indebtedness was to be fully discharged by the payment of Rs. 10 plus Rs. 2 interest, altogether amounting to Rs. 12. But at the present moment, whatever may be the construction of the document, I am concerned with the question whether this is a document in which the terms of the contract have been reduced to writing in the sense of the section referred to. It seems to me it is a mere memorandum, the purpose of which was to take in defendant's own handwriting an acknowledgment of the receipt of the money. It is in nowise a form of contract of the kind contemplated by section 91 of the Evidence Ordinance. Moreover, in the case of contract of loan, the lender is quite entitled to maintain an action to recover the amount independently of any writing which the debtor may have given. A common instance of such a case is where a plaintiff, in addition to declaring upon a formal document, includes in his plaint what is known as the money counts. The admissibility of the document itself is a different question. But I think the plaintiff is entitled to establish his case, if he could by oral evidence. The decree of dismissal is set aside, and the case sent back for further proceedings in due course. The plaintiff will have the costs of the appeal.

*Sent back.*