

1942

Present : Jayetileke A.J.
 PIYASENA, *v.* UKKUWA.
 67—C. R. Gampola, 5,416.

Agreement to pay money—Possession of land in lieu of interest—Agreement non-notarial—Action to recover money—Proof of agreement—Prescription.

In an action to recover money lent, an agreement by the borrower to pay the money and to allow the lender to possess a land in lieu of interest may be proved in order to prevent the running of prescription, although the agreement is non-notarial.

Nagamuthu v. Sittambarampillai (33 N. L. R. 151), followed.

A PPEAL from a judgment of the Commissioner of Requests, Gampola.

E. B. Wickremanayake (with him *M. M. Kumarakulasingham*), for plaintiff, appellant.

No appearance for defendant, respondent.

Cur. adv. vult.

July 7, 1942. JAYETILEKE A.J.—

The plaintiff has brought this action to recover from the defendant a sum of Rs. 30, which he alleges he lent to the defendant on a document P 1, together with a sum of Rs. 5 as interest. The document which is in the Sinhalese language has been translated as follows:—

“The purport of the promissory note written and granted on this 7th day of June, 1925, is as follows: I, the under-signed, Udage Ukkuwa of Deluntalamada in Rambode korale, being in need of money have borrowed and received without deficiency the sum of rupees thirty of lawful money of Ceylon from G. M. Piyasena of the said korale and in lieu of interest of the said sum it is agreed that the income and produce of the western one pela paddy sowing extent of the field called Bitterapola belonging to me, the said Ukkuwa, shall be taken by him. If I do not pay the said sum and get this note redeemed I do hereby agree to be bound by the law.

To this effect.

On a six cent stamp.
30.

Ukkuwa.

1925.7.

1. Signed. K. U. G. Gunaratne Vidane
2. Signed. W. P. Hinni Appuhamy.”

Though the body of the document is prefaced by the expression “promissory note”, the plaintiff has treated the document not as a promissory note but as an agreement in writing to pay money. He may have done so because it does not contain an absolute promise to pay money. In the concluding part of the document, the defendant has agreed to be bound by the law if he failed to pay and redeem the note. There is, it seems to me, necessarily implicit in that agreement a promise by the defendant to pay the amount that is due.

The defendant, among other defences, pleaded that the document on which the action was brought was obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance (Cap.57) and that no action could be maintained on it.

The plaintiff, thereupon, amended his plaint and claimed in the alternative the said sum of Rs. 30 as money lent and advanced by him to the defendant. That claim was based on the lenders' right to maintain an action to recover the amount lent by him independently of any writing he may have obtained from the borrower.

At the trial the defendant suggested the following issues:—

- (1) Can the plaintiff maintain this action on the document in question, dated 7. 6. 25?
- (2) Does the document *in question* contravene the provisions of Ordinance No. 7 of 1840?
- (3) Is the document properly stamped?
- (4) Can the document be tendered in evidence in this case?
- (5) Is the claim in the document prescribed?

The Commissioner adopted the said issues and made the following note in the record:—

“At this stage the proctors agree to drop Issue No. 5. They also agree that the case proceed to trial on Issues 1 and 4 and then judgment entered either way”.

The Commissioner and the plaintiff's proctor have apparently lost sight of the issue that arose on the alternative cause of action.

After hearing argument the Commissioner held against the plaintiff on Issues 1 and 2 and dismissed his action with costs. He was of opinion that as P I was not notarially executed no action could be maintained on it. He thought it unnecessary to consider the other two issues that were framed.

It seems to me that the Commissioner has taken an erroneous view of the meaning of section 2 of the Prevention of Frauds Ordinance. That section renders a non-notarial contract or agreement for establishing any interest affecting land or other immovable property unenforceable. If the plaintiff had sought to enforce the agreement contained in P I, that in lieu of interest on the loan he should be given the right to take the produce of the field, section 2 of the Prevention of Frauds Ordinance would have stood in his way. The plaintiff sued in this action to recover the money lent by him to the defendant and relied on P I to prove the loan and the promise to repay it.

In my opinion, P I is admissible for that purpose. It has been held in the case of *Nachchia v. Nachchia*¹, that a kadutham reciting a gift of property, although a non-notarial instrument, and therefore inadmissible as a document of title under Ordinance No. 7 of 1840, may be received in evidence to prove an overt act and a change in the character of possession on which to base a title by prescription.

In order to take the case out of prescription the plaintiff sought to establish by oral evidence that up to the year 1940 he took the income of the field in lieu of interest. That he was entitled to do (see *Nagamuthu v. Sittambarampillai*²). I would set aside the judgment appealed from and send the case back to the Court below for adjudication on Issues 3 and 4. The plaintiff is entitled to the costs of January 9, 1942, and of the appeal.

Appeal allowed.

¹ 1 *Curr. Law Rep.* p. 77.

² 33 *N. L. R.* 151.