Present: Jayawardene J. 1923.

PATHBERIYA *v.* KACHOHAMY.

181—C. R. Avissawella, 12,100.

Money lent on a promissory note—Action for money lent—Evidence Ordinance, 1895, s. 91—Action against married woman living in separation from her husband without joining her husband—Contract by a married woman living in separation.

Where money has been lent on a note, a claim for money lent can be maintained apart from the promissory note. Section 91 of the Evidence Ordinance is not a bar to such a claim.

A married woman who lives in separation from her husband by private agreement cannot bring or defend an action, unless the husband is a party to the action. Any judgment obtained against her in the absence of her husband is null and void.

A married woman so living in separation cannot enter into a valid contract.

THE facts are set out in the judgment.

Ælian Pereira, for plaintiff, appellant.

E. G. P. Jayatilleke (with him *R. C. Fonseka*), for defendant, respondent.

Cur. adv. vult.

September 18, 1923. JAYAWARDENE J.—

This is an action to recover a sum of money from a married woman. The plaintiff in his plaint alleged that the defendant made a promissory note in his favour for Rs. 100, and he claimed the sum due on the note, with interest. The defendant denied the making of the note, and objected *inter alia*, that even if she had executed it, it could not be enforced against her, as she was a married woman. On this answer being filed, the plaintiff amended his plaint by making

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an alternative claim for money lent. The defendant by her further answer denied that plaintiff lent her any money. At the trial the plaintiff abandoned his claim on the promissory note, and the following issues of law were framed in addition to certain issues of fact:—

(1) Is the plaintiff entitled to sustain this claim ?
(2) Is the defendant liable on the contract sued upon ?
(3) If the defendant is married, can the defendant be sued without her husband being joined as defendant ?

The first issue involved the question whether a claim for money lent can be maintained apart from the promissory note, when the money has been lent on a note. The learned Commissioner decided all these issues in the defendant's favour, and the plaintiff appeals. He held that section 91 of the Evidence Oridinance prevented plaintiff from leading oral evidence of the contract of loan. On the first issue, Mr. Pereira, for the appellant, contends that the Judge was wrong in holding that section 91 of the Evidence Ordinance barred the plaintiff from suing on the contract of loan, and that his only cause of action was on the note. Section 91, it is argued, no doubt, enacts that when a contract has been reduced to the form of a writing, no oral evidence can be given in proof of the terms of such contract, but it has never been held in Ceylon that that rule of evidence prevented an alternative claim being made on " a money count " when money has been lent on a promissory note. He cited *Palaniappa v. Saminathan*,[1] *Sockalingam v. Kathetha Bebe*,[2] *Valliappa Chetty v. Silva*,[3] *Mohamadu Bhai v. James*,[4] and *Vyaitilingam v. Karunakarar*.[5]

Mr. Jayatilleke, for the respondent, seeks to support the ruling of the Commissioner by appealing to certain Indian authorities, particularly to the cases of *Sheikh Akbar v. Sheikh Khan* [6] and *Muthu Sastrigal v. Visvanatha* [7]. These cases seem to support Mr. Jayatilleke's contention, especially the Madras case. In the Calcutta case Garth C.J. drew a distinction between two classes of cases: First, where a cause of action is once complete in itself whether for goods sold or for money lent, or for any other claim, and the debtor gives a bill or note to the creditor for the payment of the money; and, secondly, " where 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's depositing money with B, B contracts by promissory note to repay it at six months' date." In the former case, if the bill is not met at maturity, the creditor may disregard the note and sue for the original consideration, but in the latter case "there is no cause of action for money lent or otherwise than upon

[1] *(1913) 17 N. L. R. 56.*
[2] *(1916) 2 C. W. R. 55.*
[3] *(1918) 20 N. L. R. 340.*
[4] *(1919) 21 N. L. R. 234.*
[5] *(1920) 22 N. L. R. 343.*
[6] *(1881) 7 Cal. 256.*
[7] *(1915) 38 Mad. 660.*

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 the note is not admissible in evidence, the creditor must lose his money."

This judgment was, however, explained by another Chief Justice of the same Court (Sir Comer Petheram) in *Pramatha Nath Sandal v. Dwarka Nath Dey*,[1] where referring to the passage from the judgment of Garth C.J., which I have placed within inverted commas, the learned Chief Justice said:

> "These words, taken alone, may seem to indicate that when a bill or note is taken for a debt, the action must be brought upon the bill or note; and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did *not* mean a loan, as he then says where money is *lent*, and a bill or note given for the loan which is paid at maturity, the creditor may disregard the note and sue on the original consideration. This is in accordance with the case of *Golap Chand Marwaree v. Thakurani Mohokoom Koavee* [2] and with many unreported decisions of this Court, and is, in my opinion, the law in this country as well as in England."

The Judgment of Garth C.J. was also commented upon by a Chief Justice of the High Court of Bombay, who subsequently became Chief Justice of Calcutta and later a member of the Judicial Committee of the Privy Council—Sir Lawrence Jenkins—who said:

> "The latest Calcutta case which I have been able to find is *Pramatha Nath Sandal v. Dwarka Nath Dey* (*supra*), in which the judgment was delivered by Petheram C.J., who had a wide experience and intimate knowledge of commercial law. There it was held, in a case on all fours with the present, that a suit would lie on the consideration. The judgment is further valuable as explaining certain remarks of Garth C.J. in *Sheikh Akbar's case* (*supra*), which was liable to be misunderstood, and probably have influenced the District Judge in this case. It has been suggested that the section 91 of the Evidence Act excludes the operation of these English cases. See illustration (*b*). In my opinion such a contention is not well founded. 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." *Krishnaji v. Rajmal.*[3]

[1] *(1896) 23 Cal. 851.*

[2] *(1878) 3 Cal. 314.*

[3] *(1899) 24 Bom. 360.*

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All these judgments were again referred to in another Calcutta case (*Ram Bahadur v. Dusuri Ram* [1]), where Mookerjee J. attempted to reconcile them. He said:

> "It has been argued, however, by the learned Government pleader that as the promissory note is the foundation of the claim, the effect of the exclusion of the promissory note from evidence is substantially to make the claim incoperative and unenforceable. But this view is not supported by the cases upon which reliance can be placed."

After referring to the English cases on the point and to some Indian cases, the case from VII. Calcutta among others, he continued:—

> "It may be conceded that at first sight there does appear to be a conflict of judicial opinion upon this question; but upon a closer examination of the cases it will appear that they may be reconciled if we recognize the principle that the true question in cases of this character is, whether the promissory note has been taken in discharge of the claim, or whether it is merely taken on account of the debt; in other words, if the claim is founded on the original consideration, it can be enforced, provided that the original consideration has not merged in the bond or promissory note (*Chenbasapa v. Lakshman* [2]). This in fact is the principle which was recognized by Sir Richard Garth in *Sheikh Akbar v. Sheikh Khan* (*supra*) and by Sir Lawrence Jenkins in *Krishnaji v. Rajmal* (*supra*). In the case before us, the claim is substantially based on the original consideration; when the promissory note was given, it did not furnish any additional security for the loan. The loan itself implied a promise to repay, and if the promissory note be treated merely as evidence of the loan, although such evidence may be excluded by operation of law, there is no good reason why the plaintiff should not be permitted to sue on the original consideration."

The effect of these later Indian decisions is to reduce the authority of the judgment of Garth C.J. to a shadow, and it must be regarded as a decision on the particular facts of that case. There remains, however, the Madras case (*Muthu Sastrigal v. Visvanatha* (*supra*)). In that case, Sadasiva Ayyar J. practically adopted the reasoning of Garth C.J., on which a previous Madras case (*Pothi Reddi v. Velayudavisan* [3]) was based, and held that where the contract in the case of a loan and a simultaneous promissory note has been reduced to writing in the form of a note, which contains the definite

[1] *(1912) 17 Cal. L. J. 399.*
[2] *(1887) 10 Mad. 94.*
[3] *(1893) 18 Bom. 369.*

terms of the contract, an inconsistent or consistent implied contract cannot be resorted to because the contract as entered in the promissory note cannot be admitted in evidence:—

> "To import," he added, "the doctrine laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify section 91 of the Indian Evidence Act . . . . To treat the money paid at the very time of the execution of the promissory note inadmissible in evidence, as giving rise to an independent contractual or other obligation, seems to me to be inadmissible."

Spencer J. did not disagree with the view expressed by Sir Lawrence Jenkins in *Krishnaji v. Rajmal* (*supra*), but agreed with Sadasiva Ayyar J., as he was not prepared to dissent from the view taken repeatedly by the High Court of Madras. It cannot be denied that there is great force in the view expressed by Sadasiva Ayyar J., but, on the other hand, there is the high authority of Sir Lawrence Jenkins who thought that the contention that section 91 excluded the operation of the English cases which he followed was not well founded. See also *Banarsi Prasad v. Fazal Ahmad*,[1] where the Allahabad High Court took the same view.

In this state of the authorities, it cannot be said that the Indian decisions entirely support Mr. Jayatilleke's contention. They rather support the view taken in the Ceylon cases which Mr. Pereira cited on behalf of the appellant. It must also be remembered that section 91 did not enact any new rule of evidence, it merely embodied a principle which has always existed under the English law and which prevailed in Ceylon long before the Evidence Ordinance gave its statutory force. Courts in Ceylon have always allowed alternative claims for money lent to be made in cases in which money has been lent on a bill or note, and there has arisen a *cursus curiæ* which has acquired the force of law and which it is now too late to disturb. This rule is clearly laid down by De Sampayo J. in *Mohamadu Bhai v. James* (*supra*) where he said:

> "In a 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."

[1] *(1905) 28 All. 298.*

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I therefore hold that the plaintiff is entitled to maintain his claim on the alternative cause of action, and that the decision of the learned Commissioner, on the first issue, is wrong.

The other two issues might be dealt with together. It has been proved that the defendant is a married woman, whose husband is still living. She has lived apart from him for about twenty-five years, and is now the mistress of one Loparis. During the trial the husband's name and address were disclosed, but no application was made to add him as a party. Under the Roman-Dutch law, which applies here, the wife is under the perpetual guardianship of the husband, and is not entitled to bring or defend an action, unless the husband is a party to such an action. If the husband cannot be joined as a party, the Court may authorize her to proceed on with the action. Any judgment obtained against her in the absence of her husband is null and void. The fact that the parties have separated and are living apart by private agreement does not deprive the husband of his right to act on her behalf. This applies whether the parties are married in community or not. (*Voet 5, 1, 14-19.*) It is also contended that a married woman living in separation can enter into a valid contract so as to bind herself to others. No authority has been cited for this proposition, but Voet lays down (*24, 2, 19*), that where married persons live apart by mutual agreement, without a decree of separation *a mensa et thoro*, the marriage still exists, and all the results of marriage continue exactly as if there had been no such mutual agreement and living apart. One of the results of marriage is that the wife cannot enter into a contract without the express or implied consent or ratification of her husband, and if she does contract without such consent, the contract is null and void. There are certain cases in which the wife can enter into contracts, but the contract in question in this case does not fall within any of those exceptions. The learned Judge has rightly held against the plaintiff on the second and third issues. The plaintiff cannot, therefore, maintain this action, and it must be dismissed. The judgment of the Commissioner is affirmed, with costs.

Dismissed.