

Present : De Sampayo J.

1920.

VAITYLINGAM v. KARUNAKARAR.

98—C. R. Jaffna, 13,870.

Joint promissory note by husband and wife—Death of wife—Must payee sue on note the survivor only—Action on the contract of loan against survivor and administrator of deceased person.

Where a husband and wife granted a joint promissory note and the wife died,—

Held, that the payee may, instead of suing the survivor only on the note, sue the husband and the wife's administrator on the contract of loan.

THE facts appear from the judgment.

Nagalingam, for plaintiff, appellant.

Arulanandan, for defendant, respondent.

August 26, 1920. DE SAMPAYO J.—

The plaintiff sued the first defendant and the second defendant, who is the administrator of the estate of the first defendant's wife, claiming from them a sum of Rs. 250 which he stated he lent to the first defendant and his wife, and which they promised to pay on demand with interest at 12 per cent. As a matter of fact, the first defendant and his wife granted a promissory note to the plaintiff for that sum, but it appears that the promissory note on the face of it was a joint note, and as the wife was dead, the plaintiff found himself in the position that he could only sue the surviving maker, the first defendant, on the note. Accordingly, he gave up his rights on the promissory note and sued the two defendants as

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upon a contract of loan. An objection was raised on behalf of the defendants that it was not open to the plaintiff to waive his claim on the promissory note and sue the defendants as for money lent. This objection was upheld by the Commissioner, and he gave judgment for the plaintiff only as against the first defendant, who was in default, and in effect dismissed the action as against the second defendant.

The learned Judge's view of the matter is stated as follows: "I think," he says, "the plaintiff having accepted the promissory note for the money advanced is bound to sue on it, and should not be allowed to deprive the administrator of his right to claim the benefit of English law which applies to promissory notes and requires the holder to look for payment to the surviving maker only."

The Commissioner refers to no authority for this proposition, and I do not think that any can be found. It is quite clear that a person who obtains a promissory note may, instead of suing on it, sue for the consideration. An instance of this may be found in the case of *Palani Appa v. Saminathan*.¹ I may also refer to the concluding passage in my own judgment in *Mohamadu Bhai v. James*.²

I think the plaintiff should have been allowed to maintain his action for money lent against both the defendants. The only issue stated at the trial and decided by the Commissioner was an issue of law, but I see from the second defendant's answer that the claim is also resisted by a denial of the facts alleged by the plaintiff, and therefore no final judgment can be given in appeal before these facts are investigated.

The judgment appealed from is set aside, and the case sent back for trial of the case as between the plaintiff and the second defendant. The judgment already entered against the first defendant will stand. The plaintiff is entitled to the costs of this appeal.

Sent back.

¹ (1913) 17 N. L. R. 56.

² (1919) 21 N. L. R. 235.