APPELLATE CIVIL.

Before Suhrawardy and Patterson JJ.

HARKISHORE BARNA

v.

GURA MIA CHAUDHURI.*

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July 30, 31; *Aug.* 14.

Promissory Note—Suit, whether maintainable by any one but the holder —Real owner, if may sue by making holder a defendant—Negotiable Instruments Act (XXVI of 1881), s. 78.

It is the holder of a promissory note who alone is entitled to maintain a suit on the note for the recovery of money due thereon.

A true owner, who is not a holder, cannot maintain a suit on a promissory note, even though the holder is admittedly his *benámdár* and is made a party to the suit.

The property in a promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note.

The Negotiable Instruments Act was enacted for the benefit of trade and commerce and the principle underlying it is that promissory notes, bills of exchange and cheques should be negotiable as apparent on their face without reference to secret title to them.

Akhoy Kumar Pal v. *Haridas Bysack* (1) and *Bawden* v. *Howell* (2) referred to.

Brojo Lal Saha Banikya v. *Budh Nath Pyarilal & Co.* (3) distinguished and dissented from.

SECOND APPEAL by the plaintiff.

The facts appear sufficiently from the judgment.

Narendrakumar Das for the appellant.

Nasim Ali and *Chandrashekhar Sen* for the respondents.

Cur. adv. vult.

PATTERSON J. This appeal arises out of a suit based on a promissory note, payable on demand. The note purports to have been executed by the principal defendant (defendant No. 1) in favour of the

*Appeal from Appellate Decree, No. 1553 of 1929, against the decree of Satishchandra Basu, Subordinate Judge of Chittagong, dated Jan. 11, 1929, affirming the decree of Pratulchandra Ray, Munsif of Patiya, dated Nov. 30, 1927.

(1) (1913) 18 C. W. N. 494. (2) (1841) 3 Man. & G. 638; 133 E. R. 1296.
(3) (1927) I. L. R. 55 Calc. 551.

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pro forma defendant (defendant No. 2), but the plaintiff claimed to have advanced the money and to be the real or beneficial owner of the note. The plaintiff further alleged that *pro forma* defendant was merely his *benâmdâr*, and the *pro forma* defendant himself deposed to this effect.

The trial court did not record any clear finding as to whether it had or had not been proved that the principal defendant had borrowed the money and executed the note, but dismissed the suit on the ground that the plaintiff had no cause of action, as he had failed to prove that the money belonged to him.

The lower appellate court, while expressing some doubt as to the correctness of the view taken by the trial court, dismissed the appeal on another ground, *viz.*, that, under the provisions of the Negotiable Instruments Act, only the holder of the note could sue thereon, and that the plaintiff had, therefore, no cause of action.

Against this decision the plaintiff has appealed, it being contended on his behalf that the lower appellate court erred in holding that only the holder of a promissory note could sue thereon, and that, in the circumstances of the present case, the plaintiff was competent to prosecute the suit, more especially in view of the fact that the holder of the note had been made a party, and had admitted that he was merely the plaintiff's *benâmdâr*.

In my opinion, the view of the law taken by the lower appellate court is correct, and this appeal ought therefore to be dismissed.

One of the most essential characteristics of a promissory note, as defined in section 4 of the Negotiable Instruments Act is *certainty*. It is an unconditional promise by a certain person to pay a certain sum only to, or to the order of, a certain person, or to the bearer of the instrument. Certainty both as regards the amount payable and as regards the persons by whom and to whom payment is to be

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made appears to be insisted on for reasons of public policy, for any uncertainty in such matters would tend to restrict credit and to hamper commerce.

In section 32 of the Act too we find the same insistence on certainty, for that section makes it obligatory on the maker of a promissory note to pay the amount thereof according to the apparent tenor of the note, that is (in the present case), to pay the amount to the *pro forma* defendant, the latter being the "holder" as defined in section 8.

That section defines the "holder" of a promissory note as "any person entitled in his own name to the "possession thereof and to receive or recover the "amount due thereon from the parties thereto." The first part of this definition clearly applies to the person named as the payee (or to such person's endorsee), and to no one else, while the second part seems to me to imply that only the payee or the endorsee of a promissory note is "entitled in his own "name to receive or recover the amount due thereon." That this is so is also suggested by the wording of section 78 which lays down that payment of the amount due on a promissory note must, in order to discharge the maker, be made to the holder, for it is reasonably clear that the proper person to receive or recover the amount due is the person who alone is competent to give a valid discharge, that is to say, the payee or the endorsee, or in other words, the holder of the note.

A promissory note is, moreover, negotiable by the holder by endorsement and delivery (*vide* section 48), and such endorsement and delivery have the effect of transferring to the endorsee the property in the note, with the right of further negotiation (*vide* section 50). It would, therefore, appear that the property in a promissory note, including the right to recover the amount due thereon, is vested by statute in the holder of the note. Section 137 of the Transfer of Property Act, which exempts Negotiable Instruments from the operation of the provisions of that Act relating to

the transfer of actionable claims, may also be referred to in this connection. It is also perhaps worthy of remark that the term "holder" appears to be used synonymously with the term "plaintiff" in the rules contained in Order XXXVII of the Code of Civil Procedure, which provide for an alternative summary procedure to be followed in certain courts in suits based on negotiable instruments.

On a careful consideration of the above provisions of the law, I have no hesitation in coming to the conclusion that only the holder of a promissory note can sue thereon, and in this view of the matter I am supported by the decisions of the Madras High Court in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (1) and of the Allahabad High Court in *Reoti Lal* v. *Manna Kunwar* (2). The judgment of the Madras High Court in the case of *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (3) also lends support to the view of the law indicated above, and although the observations on the point under consideration contained in that judgment are in the nature of *obiter dicta*, they are of considerable interest and importance.

A contrary view of the law on the point was taken by a Bench of this Court in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (4). The circumstances in that case were, however, somewhat different, the suit being based not only on a promissory note, but also on the consideration, the holder of the note being a member of the plaintiff firm. The opinion expressed in that case on the point now under consideration was, moreover, purely an *obiter dictum*, and for the reasons already indicated, I find myself constrained to take a different view.

In my opinion, the plaintiff in the present case is not competent to prosecute the suit, not being the holder of the note, and the fact that the holder of the note has been made a party and has admitted that he

(1) (1904) I. L. R. 28 Mad. 205.
(2) (1922) I. L. R. 44 All. 290.
(3) (1906) I. L. R. 30 Mad. 88.
(4) (1927) I. L. R. 55 Calc. 551.

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is only the plaintiff's *benâmdâr*, makes no difference. The property in the note, including the right to receive or recover the amount due thereon is vested in the holder, and cannot be transferred to the plaintiff except by the process prescribed by law, *viz.*, by endorsement and delivery.

It may be that the suit would have succeeded if it had been based on the consideration and not on the note, but being based on the note, it is, in my opinion, necessarily governed by the provisions of the Negotiable Instruments Act, and under the provisions of that Act, as I understand them, only the holder of a promissory note is competent to sue thereon.

The result is that the appeal must, in my opinion, be dismissed with costs.

SUHRAWARDY J. I agree with my learned brother in the view that he has taken of the law on the subject. I should have felt no difficulty in deciding the matter on the sections of the Negotiable Instruments Act, to which reference has been made by my learned brother in his judgment, but for a decision of this Court in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (1). In that case the judgment of the Court was delivered by Mr. Justice B. B. Ghose, who held that a true owner may bring a suit upon a promissory note even though he is not the payee or the holder but his *benâmdâr* is. It would have been necessary to refer this matter to a Full Bench because we have ventured to differ from the view taken in that case, but for the fact that the decision on this point was not necessary for the decision of that case and the observations made by the learned Judge are, therefore, *obiter*, though entitled to great weight. The learned Judge decided the case against the appellant on the first of the two points raised before him and then proceeded to observe "This is sufficient for the purpose of "deciding the case. But I think it is right that I "should express my opinion with regard to the point "which has been dealt with by the Subordinate Judge,

(1) (1927) I. L. R. 55 Calc. 551.

"as the question has been very elaborately argued by "the learned advocates on both sides. It is contended "on behalf of the appellant, as I have already said, "that section 78 read with section 8 of the Negotiable "Instruments Act bars any suit brought by a person "other than the holder for the recovery of any money "due on a promissory note." There is another reason why the decision on this point should be considered unnecessary on the facts of that case and that is that the holder of the promissory note in that case was one of the plaintiffs, being a member of the firm in whose name the suit was brought, which, according to the learned Judge's decision on the first point, should be held as brought by all the members of the partnership firm. But, as Mr. Justice Ghose has gone into this point rather elaborately, it is necessary to notice some of the reasons given by that learned Judge in support of his view.

There is no doubt that the payee or the holder of a promissory note, though a *benâmdâr*, is entitled to maintain a suit on it. *Sarat Chunder Dutt* v. *Kedar Nath Dass* (1). Under section 78 of the Negotiable Instruments Act, the maker of a promissory note can obtain discharge of the debt by payment to the holder only and to no one else. It makes no difference whether the holder is a *benâmdâr* or is the true owner. The English law on this point is quite clear. Under it, as has been conceded in *Brojo Lal's* case (2), no one can maintain an action against the maker of a promissory note except the holder thereof. In *Pease* v. *Hirst* (3), Bayley J. made the following observation "It is said that the note was considered "by all parties to be for the benefit of the new house; "and, therefore, that the persons who are now "partners in the banking house must sue. It seems "to me that the action has been rightly brought in the "names of the members of the firm to whom the note "was given. If the note had been endorsed to the

(1) (1898) 2 C. W. N. 286. (2) (1927) I. L. R. 55 Calc. 551.
(3) (1829) 10 B. & C. 122 (126) ; 109 E. R. 396 (398).

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"new firms, then the action must have been brought "in the names of the endorsees; but not having been "so endorsed, the action is properly brought in the "names of the original payees for the benefit of the "parties interested." Mr. Justice Ghose objects to adopt the English law on the ground that the law merchant on which the English law of negotiable instruments was founded is not applicable in the *mofussil*. It may be so, but the English law of negotiable instruments is founded upon the law merchant in force in England and the Indian Negotiable Instruments Act has been moulded upon the English Act with some slight modifications. Besides, if it has not been expressly enacted in the Negotiable Instruments Act that no one except the holder of a negotiable instrument can maintain an action thereon, or the contrary, the question has to be decided according to justice, equity and good conscience and the English law is a sure guide in such a matter [*Mehrban Khan* v. *Makhna* (1) and *Waghela Rajsanji* v. *Shekh Masludin* (2)]. Mr. Justice Ghose further continues that if the legislature intended that no one but the holder of a promissory note could maintain a suit on it, it would have been quite easy for it to say so in the Act in express words. In my opinion, the legislature has said so in express words in section 78 of the Act. To say that payment to no one except the holder of the note will discharge the debt is tantamount to saying that no one can recover the debt from the maker of the promissory note except the person in whose favour it is made or who is the holder thereof. Then, as to the absence of direct enactment on the point, the same objection can be taken with reference to the view expressed by the Judicial Committee in *Sadasuk Jankidas* v. *Kishan Pershad* (3), where it was held that an action against the real debtor is not maintainable, if he is not a party to the promissory note, but it must be maintained

(1) (1930) L. R. 57 I. A. 168.
(2) (1887) I. L. R. 11 Bom. 551; L. R. 14 I. A. 89.
(3) (1918) I. L. R. 46 Calc. 663; L. R. 46 I. A. 33.

against the person who made it, though he describes himself as the superintendent of the real debtor. There is no express enactment to that effect in the Negotiable Instruments Act, but the whole tenor and purpose of the Act go to show that a person who makes a promissory note is the person who is liable to be sued and no one else; and, on the same reasoning, the person in whose favour it is made or who is the holder of it is the person who is alone entitled to demand payment of it and no one else. The Negotiable Instruments Act was enacted for the benefit of trade and commerce and the principle underlying it is that promissory notes, bills of exchange and cheques should be negotiable as apparent on their face without reference to secret title to them. There is a decision of this court to which reference may be made in this connection. In *Akhoy Kumar Pal* v. *Haridas Bysack* (1), the holder of the promissory note had made a gift of it to the plaintiff in that suit without endorsing the promissory note to him. Mr. Justice Carnduff held that the Act of 1881 "declares—see section 78—that payment of "the amount due on such a note must, in order to "discharge the maker, be made to the 'holder.' The "petitioner is certainly not the 'holder' and he cannot, "therefore, give the opposite party a valid discharge. "How, then, can he obtain a decree in his own name? "He might be entitled to the money promised, but, "before he could recover it, he would have to obtain "the endorsement of the legal representative of the "deceased promisor." See also, in this connection, *Bawden* v. *Howell* (2). If the view taken in *Brojo Lal's* case (2) be adopted, the result will be that the maker of a promissory note would be liable to pay the amount to the true owner, but he would not obtain discharge under section 78 and would still remain liable on the promissory note to the holder even though he is a *benâmdâr*. Further, to hold that the beneficial owner, though not the holder, can maintain

(1) (1913) 18 C. W. N. 494. (2) (1841) 3 Man. & G. 638; 133 E. R. 1296.
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an action on a promissory note will do away with the necessity of endorsement which is the only mode of transfer of title to it under section 48 of the Act.

The fact that the *benâmdâr*, in the present case, is a party and is estopped from claiming payment on the promissory note from the debtor by his conduct is another matter and has nothing to do with the statutory law as enacted by the Negotiable Instruments Act. It is further observed in this connection in *Brojo Lal's* case (1) that there is no harm if a decree is made in favour of the true owner. That may be so, but you cannot ignore a statutory law in favour of justice and equity. Mr. Das, appearing on behalf of the appellant, has laid great stress upon the particular feature of this case that defendant No. 2, who is the payee under the promissory note, has deposed in this case on behalf of the plaintiff and said that the money which he had advanced belonged to the latter. The plaintiff may be, in justice, entitled to a decree, but in my humble judgment he is not entitled to one under the law.

This appeal accordingly must be dismissed with costs.

Appeal dismissed.

A. A.

(1) (1927) I. L. R. 55 Calc. 551.