CIVIL REFERENCE.

Before Nasim Ali and Mukherjea J J.

1937
July 26.

SREE KRISHNA JANA

v.

SEETA NATH BERA.*

Promissory Note—Benâmi—*Suit on original consideration against maker, when maintainable—Code of Civil Procedure (Act V of 1908), O. XLVI, r. 1—Negotiable Instruments Act (XXVI of 1881), ss. 8, 78.*

A creditor taking an "on demand" promissory note from the borrower in the *benâmi* of a third person may, in the event of the promissory note not being paid, recover his dues by suit against the maker of the promissory note upon the original consideration, provided there are no circumstances keeping intact the maker's liability under the promissory note.

Harkishore Barna v. *Gura Mia Chowdhry* (1) and *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (2) discussed.

Where in such a suit the *benâmdâr* payee (*pro forma*) defendant did not appear although duly served with summons,

held that the suit was not maintainable because the liability of the principal defendant, the maker of the promissory note, was not discharged by any payment to the plaintiff.

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This is a reference under O. XLVI, r. 1 of the Code of Civil Procedure by the learned Munsif of Dantan.

The main question was, when is a suit filed by the creditor upon the original consideration against the maker of the promissory note making the payee of the promissory note (who was the *benâmdâr* of the creditor) a *pro forma* defendant maintainable.

The promissory note was neither endorsed nor assigned to the plaintiff. The *pro forma* defendant did not enter appearance although duly served.

*Civil Reference, No. 3 of 1937, made by Mati Lal Chakrabarti, Munsif of Danton, dated Feb. 11, 1937.

(1) (1930) 35 C. W. N. 53. (2) (1927) I. L. R. 55 Cal. 551.

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The learned Munsif of the Court below entertained some doubts in the matter on account of certain observations of Patterson J. in his Lordship's judgment in the case of *Harkishore Barna* v. *Gura Mia Chowdhry* (1).

The material facts in the Reference appear sufficiently in the judgment.

No one appeared at the hearing of the reference.

The judgment of the Court was as follows :—

This is a reference under O. XLVI, r. 1 of the Code of Civil Procedure by the Munsif of Danton arising out of Small Cause Court Suit No. 359 of 1936 now pending before him.

The facts of the case are : The plaintiff in the suit seeks to recover from defendant No. 1 Rs. 30 as principal and Rs. 19 as interest. His case is that the defendant No. 1 borrowed from him Rs. 30 on October 13, 1933, in the house of the defendant No. 2, that he promised to repay the sum with interest on plaintiff's demand and that on that very date the defendant No. 1 executed a promissory note in the name of the defendant No. 2 (plaintiff's father-in-law) embodying the terms of the loan and made it over to him. Plaintiff has filed the hand-note along with the plaint. The suit, however, is not based on the hand-note but on the original consideration, namely, the loan.

Defendant No. 2 has not appeared, though duly summoned. One of the defences of defendant No. 1 is that the suit is not maintainable by the plaintiff.

The hand-note which was executed by defendant No. 1 is payable on demand to defendant No. 2 or order. It has not been endorsed or assigned by defendant No. 2.

The point of law on which the Munsif entertains doubt is whether the suit is maintainable by the plaintiff.

(1) (1930) 35 C. W. N. 53.

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The opinion of the Munsif is that the suit is not maintainable.

The reason for the Munsif's doubt is that although a Division Bench of this Court consisting of two Judges in *Harkishore Barna* v. *Gura Mia Chowdhry* (1) had held that a suit on the hand-note by the real owner is not maintainable and that the suit on the hand-note can be brought only by the holder of the note, one of the Judges composing that Bench in his judgment observed that the real owner could succeed if he based his suit on the consideration and not on the note.

In the case of *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.* (2) the hand-note was taken in the name of one of the partner of the plaintiff's firm. The suit was based on the promissory note as well as on the original consideration. The trial Court decreed the suit. In the appeal by the defendant to this Court, two points were raised before this Court :—

(*i*) that the claim on the hand-note was not maintainable;

(*ii*) that the claim on the original consideration was barred by limitation.

So far as the first point is concerned, Ghose J. held that the suit was maintainable as the holder of the note was a partner of the plaintiff's firm and as the suit was instituted by the firm, it must be taken to be a suit by the holder also.

The learned Judge then observed at p. 559 :—

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, as the question has been very elaborately argued by the learned advocates on both sides. It is contended on behalf of the appellant,.....that s. 78 read with s. 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.

(1) (1930) 35 C. W. N. 53. (2) (1927) I. L. R. 55 Cal. 551.

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The learned Judge then expressed this opinion :— The effect of s. 78 of the Negotiable Instruments Act is that it is not open to the defendant to plead that the holder of the instrument is not entitled to recover the money. That section did not prohibit any person other than the holder to bring a suit if that person was the true owner, and that there was nothing in the Act to show that no person except the holder would be entitled to institute any suit on the instrument.

The second point raised in that case assumed that the claim on the original consideration was maintainable. The question whether a suit based on such a claim is maintainable or not was neither debated in that case nor decided.

In *Harkishore Barna* v. *Gura Mia Chowdhry* (*supra*) the plaintiff who lent the money to defendant No. 1 in that suit took the hand-note in the *benâmi* of the defendant No. 2 as in the present case and based his suit on the hand-note and not on the original cause of action. The question whether such a suit was maintainable directly arose for decision in that case and the learned Judges held that only the holder of the promissory note, *viz.*, defendant No. 2, though merely a *benâmdâr*, could maintain the suit and that the suit by the true owner was not maintainable though the holder was a party thereto and admitted that he was a *benâmdâr*. Patterson J. made the following observations in the concluding portion of his judgment :—

> It may be that the suit would have succeeded if it had been based on the consideration and not on the note.

The question whether a suit based on the original consideration was maintainable did not and could not arise for decision in that case. The observations of Patterson J. are, therefore, *obiter*. There is therefore no decision of this Court on the point raised by the Munsif in his reference.

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As a rule a creditor may always sue for the original consideration if the pro-note is not paid provided there are no circumstances which keep intact the liability of the maker under the pro-note. A debtor cannot be made to pay twice.

"It would be a very good defence to say that unless "the plaintiff in the suit gets him a discharge from "the holder of the instrument he is not bound to pay" per B. B. Ghose J, in *Brojo Lal Saha's* case referred to above.

Payment of the amount due on a promissory note in order to discharge the maker must be made to the holder of the instrument though he may be a *benâmdâr*. So long as that is not done, the liability of the maker continues. It is true that the holder of the note is a party to the suit. He has not, however, appeared in the suit. His conduct in the suit cannot bring about discharge of the maker's liability under the note by raising estoppel against him as the only method of discharge is indicated in s. 78 of the Negotiable Instruments Act and there can be no estoppel against the provisions of a statute. If a decree is passed in favour of the plaintiff in the present suit and the defendant No. 1 pays the money to him, his liability under the pro-note to defendant No. 2 will still continue. The present suit is, therefore, not maintainable.

Let a copy of this judgment be transmitted to the Munsif of Danton through the District Judge of Midnapur.

A. K. D.