GHOUSIAH BEGUM v. RUSTUMJAH.

for so absurd an agreement as that the purchaser is to receive the rents and profits to which he has no legal title and the vendor is not to have interest as he has no legal title to the money can never be implied." The purchaser, it was observed in that case, might have said he would have nothing to do with the estate until he got a conveyance. But that was not the course which he took. "He enters into possession, an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed and thereby agrees that he will treat it as if it was executed." It is true that this general rule is subject to the exception that when the delay in the completion of the contract is imputable to the vendor and the stipulated interest exceeds the rent, the vendor ought not to be enabled to gain by his own wrong and he can only be entitled to the interim rent. Though in this case the appellant did not tender a conveyance before January 1886 owing to the dispute with Vallaba Doss and the respondent might not until then be liable to pay the vendor more than the rent actually received by him, yet there is no evidence to show that the rate of interest which is the rate current in the market exceeded the rent and was excessive.

For these reasons I concur in the decree proposed by my learned colleague.

Branson & Branson, attorneys for appellant.

Champion & Short, attorneys for respondent.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1889. August 29.

RAMAKISTNAYYA

v.

KASSIM.*

Contract Act, s. 135—Negotiable Instruments Act—Act XXVI of 1881, ss. 37, 39, 66—Accommodation maker—Discharge of—Presentment of promissory note.

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favor of the

* Civil Suit No. 231 of 1888.

plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co. to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:

Held, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co. had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Poyose* v. *Bank of Bengal*, I.L.R., 3 Cal., 174, distinguished.

Semble: The maker of a promissory note is not discharged by the holder's failure to present it at due date.

SUIT by the endorsee of a promissory note against the maker. The defendant pleaded that he made the note, as the plaintiff well knew, for the accommodation of Watson and Co., that he was discharged from all liability upon the note by reason of an arrangement entered into between the plaintiff and Watson and Co., and that the note had not been presented to him for payment.

The facts of the case appear, sufficiently for the purpose of this report, from the judgment of the Court.

Mr. *Johnstone* for the plaintiff.

The issue is on the defendant, who admits the plaint note. He must therefore begin.

Mr. *Norton* for the defendant.

The plaintiff cannot succeed, though the defendant admits that he was the maker of the note, for the plaintiff knew that it was made for the accommodation of Watson and Co., and became the endorsee from Watson and Co. with notice of this fact. The admitted consideration from the plaintiff to Watson and Co. cannot alter the circumstances. Defendant must be regarded in equity as the drawer, Watson and Co. as the acceptor, and plaintiff as the holder of an accepted bill of exchange. Defendant is, accordingly, in the position of a surety, the principal debtor being Watson and Co. Therefore sections 39 and 82 (*b*) of the Negotiable Instruments Act apply. For two months after due date the plaintiff obtained from Watson and Co. a mortgage, securing all the debts due by the latter, amongst others the amount of the plaint note. Watson and Co.'s time for repayment was thereby enlarged, and the defendant is therefore discharged under sections 134 and 135 of the Contract Act. See also section 139. Watson and Co. became insolvent, and the defendant was deprived of

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any legal remedy he formerly had against Watson and Co. See Byles on Bills (14th edition), pp. 321, 322; *Seetaram Sahoo* v. *DaCosta*(1); *Smith* v. *Winter*(2); *Cowper* v. *Smith*(3); *Nichols* v. *Norris*(4); *Bailey* v. *Edwards*(5); *Davies* v. *Stainbank*(6); *ex parte Glendinning*(7).

Admittedly there was no presentment of the note in this case. And this is fatal to the plaintiff's case, inasmuch as the plaint note was payable at a specified period after date. Sections 66 and 76 (*c*), Negotiable Instruments Act.

Mr. *Johnstone* in reply cited *Pogose* v. *Bank of Bengal*(8).

cur. ad. vult.

SHEPHARD, J.—The plaintiff sues as the endorsee of a promissory note for Rs. 5,000, made by the defendant on the 9th August 1886 and payable ten months after date. The note was made in favor of Richard Watson and Co., and was admittedly endorsed to the plaintiff for value. There is no evidence that the note, which fell due in June 1887, was presented to the defendant for payment, and it is contended on defendant's behalf that he is, therefore, discharged from liability, inasmuch as section 66 of the Negotiable Instruments Act is imperative in requiring presentment. According to English law there is no doubt that presentment for payment is not generally necessary in order to charge the maker of a note (Byles on Bills, 14th edition, p. 290), and this general rule, with specified exceptions, is recognized in the Bills of Exchange Act, 1882, s. 87. It is contended that the Act of 1881, which regulates the law of negotiable instruments in this country, has introduced a new rule with regard to promissory notes payable at a specified period after date, and that on failure to present such a note at maturity the maker is discharged. That Act is in the main at least a reproduction of the English rules on the subject, and apart from section 66 the provisions with regard to default of presentment appear to be the same as those laid down by the English cases. Comparing the language of section 66 with that of other sections in the same chapter, I do not think the defendant's contention can be maintained. Section 61 deals with a bill of exchange payable after sight, and after requiring

(1) 12 W.R., 294.
(2) 4 M. & W., 454.
(3) 4 M. & W., 519.
(4) 3 B. & Ad., 41.
(5) 4 B. & S., 761.
(6) 6 DeG. M. & G., 679.
(7) Buck's Ca, in Bankruptcy, 517.
(8) I.L.R., 3 Cal., 174.

presentment for acceptance, enacts that in default of such presentment no party thereto is liable thereon to the party making such default. Section 62 makes, *mutatis mutandis*, a similar provision for promissory notes payable at a certain period after sight. Sections 68 and 69 make provision for negotiable instruments payable at a certain place, requiring presentment at that place in order to charge any party thereto in the one case and the maker or drawer thereof in the other. Section 64 declares of all negotiable instruments indifferently that they must be presented for payment to the maker, acceptor, or drawer thereof by the holder as hereinafter provided, and then enacts that "in default of such presentment, the other parties thereto are not liable thereon to such holder." Seeing that in all these sections the penalty that is to be entailed by default in presentment is expressly declared, I think the inference may be fairly drawn that express language would have been used if the same penalty was intended to ensue on default of the presentment which section 66 enjoins. In my opinion there was no intention to alter the pre-existing law, and the language of the Act does not justify the contention that the maker of such a note as the present is discharged by the holder's failure to present it at due date.

The defence raised by the written statement was in substance that the defendant to the plaintiff's knowledge received no consideration for the note, and that the plaintiff, after the note fell due, by taking a mortgage from the principal debtor and giving him time, has discharged the defendant. It is for the defendant to show that he is not, as he *primâ facie* appears to be, the principal debtor. I think he has sufficiently proved this, and it is also I think clear that the plaintiff knew perfectly well that the defendant gave the note for the accommodation of Watson and Co. Watson and Co., whose real name is Muttusami, and the defendant on the one hand and plaintiff on the other are the witnesses who speak to the circumstances under which the note was made. Both the plaintiff and defendant had in 1876 large dealings with Watson and Co. The plaintiff appears to have been a sort of banker to Watson and Co., while, the defendant carrying on business in Bangalore, had constant supplies of fish and ice from Watson and Co., and they had constant monetary transaction. Both were interested in keeping his business afloat. That business was wholly or to a large extent carried on under a

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contract with the Ice Company and funds were needed for payment of arrears due to the company and for a deposit to be made by Watson and Co. with the company.

The three parties were present when the note was drawn up and then and there endorsed to the plaintiff. The plaintiff knew that Watson and Co. was in want of funds. He knew that the deposit had to be made with the Ice Company and Watson and Co. had even applied to him for money. The defendant and his witness, Muttusami, say that he was fully aware that Watson and Co. was also indebted to the defendant, and knew that the note was not made for the defendant's benefit. I think their evidence must be accepted, and must therefore find that the plaintiff knew the note was an accommodation note. Evidence was gone into by the plaintiff to show that after the note was made the defendant made payments towards it on the footing of one liable as principal debtor, and the plaintiff in his plaint gives credit for Rs. 1,500 said to have been so paid. His case is that there was an agreement between him and defendant that the note should be paid off by monthly instalments of Rs. 500, and that accordingly three instalments were paid in two payments of Rs. 500 and Rs. 1,000 each. There is only the plaintiff to speak to this arrangement; the defendant denies it, and it is not explained why the defendant should have engaged to make payments in anticipation of the time when the note fell due. The defendant's case is that these two sums have nothing to do with the promissory note. (His Lordship, after a discussion of the evidence of this part of the case, proceeded as follows.)

I am unable, for these reasons, to believe the plaintiff's story with regard to the payment of Rs. 500 and Rs. 1,000 for which he gives credit.

In the view I take of the case, it is not necessary to say much about the promise alleged in the first paragraph of the written statement to have been made by the plaintiff about the return of promissory notes. There is evidence of such a promise, and I think it is very probable that the defendant did ask to have his notes back. On the other hand there is the fact that the defendant did not pursue the matter nor obtain from the plaintiff a written undertaking such as Muttusami's brother got. If there was such a promise, there was no consideration for it, and the fact of its being made would only be important to show that plaintiff looked to

Watson and Co. as the principal debtor. In the result I find, having regard to the evidence of what took place at the time of the making of the note, that the note was, as the plaintiff knew, made for Watson and Co.'s accommodation; and further looking to the subsequent dealings of the parties, that there is nothing to show that the defendant was treated as principal debtor on the note.

The remaining question is whether there has been a contract between the plaintiff and the principal debtor which should have the effect of discharging the surety under the provisions of section 135 of the Contract Act. That section has to be read with the provisions of the Negotiable Instruments Act; and as here there was —within the meaning of the Negotiable Instruments Act, s. 37— a "contract to the contrary" making defendant a surety instead of principal debtor, the defendant is entitled to be discharged if he can bring the case within the terms of section 135 of the Contract Act. (See Negotiable Instruments Act, s. 39). It is an admitted fact that on the 4th August 1887 a mortgage was executed by Watson and Co. in favor of plaintiff and another creditor, in which mortgage the amount then due on the note was included in the sum secured. It is admitted that defendant was no party to the transaction, and was not cognizant of it till after it had taken place. There is no evidence that he assented to the transaction either at the time or subsequently, for I do not believe the plaintiff's evidence as to any statement made by the defendant of his willingness to pay the money if plaintiff did not succeed in realizing it under his mortgage. There is evidence that the defendant was annoyed when he heard of the mortgage, and I think it is not improbable that, as defendant's witnesses say, he asked to have any promissory notes of his in the plaintiff's hands returned to him. The defendant could not help acquiescing in the mortgage, but there is nothing to show that he consented to any arrangement whereby time should be given to Watson and Co. In fact it was not suggested that he did so. Under the mortgage the plaintiff and his co-mortgagee practically took over the whole business of Watson and Co., and it was intended that they should work it for Watson and Co.'s benefit till the 4th August 1888, crediting the balance of profits after payment of various charges, first to the interest and then to payment of the principal sum of Rs. 21,035-9-9 expressed to be due to the mort-

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gagees. There was a covenant by the mortgagors to pay that sum with interest at 12 per cent. on the 4th August 1888, and on the other hand a power of sale reserved to the mortgagees on default being made.

The plaintiff and his mortgagee took possession under the mortgage and carried on the business till January 1888 when the Ice Company cancelled the contract with Watson and Co. and Watson and Co. filed a petition in the Insolvency Court. I think there can be no doubt that plaintiff did, by accepting the mortgage, promise to give time to Watson and Co. and thus render it impossible for him to sue Watson and Co. had the defendant as surety called upon him so to do. *Bailey* v. *Edwards*(1).

Mr. Johnstone referred to *Pogose* v. *Bank of Bengal*(2) and argued that here also there was nothing to show that the eventual remedy of the surety was prejudiced; but in that case the question turned upon section 139 of the Contract Act and it did not appear that time had been given in such a way as to make section 135 applicable.

Upon the question whether the defendant is discharged by the contract between plaintiff and Watson and Co., I must find in the defendant's favor. The result is that I dismiss the suit with costs.

Grant & Laing, attorneys for plaintiff.

Tyagarajayyar, attorney for defendant.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

1889. August 13. December 20. 1890. January 8.

RAMASAMI (PLAINTIFF), PETITIONER,

v.

KURISU (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 623, 624, 626—*Review—Provincial Small Cause Courts Act —IX of* 1887, *s.* 17—*Deposit of costs.*

On 23rd February 1888 the Subordinate Judge of Tinnevelly dismissed a small cause suit on the ground that the plaintiff had not secured the attendance of his

(1) 4 B. & S., 761. (2) I.L.R., 3 Cal., 174.

* Civil Revision Petition No. 201 of 1888.