APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

1905. August 1, 2, 16.

MUTHAR SAHIB MARAIKAR (PLAINTIFF), APPELLANT,

v.

KADIR SAHIB MARAIKAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negotiable instruments—Assignee of a negotiable instrument otherwise than by endorsement may sue—Parol evidence to show nature of a negotiable instrument.

Endorsement is not the only mode by which negotiable instruments may be transferred. They may be otherwise assigned, and the assignee may sue in his own name. He will however have only the right title and interest of the assignor while the indorsee of a negotiable instrument will have all the rights of a holder in due course.

Pattat Ambadi Marar v. *Krishnan*, (I.L.R., 11 Mad., 290), not followed.

Abboy Chetty v. *Ramachandra Rau*, (I.L.R., 17 Mad., 461), not followed.

Negotiable instruments are choses in action, and the rules in regard to them prior to the passing of the Negotiable Instruments Act continue to apply to them, to the extent that they are not expressly or impliedly affected by any provisions of the Act.

The indorser of a promissory note paying off his immediate indorsee and obtaining possession of the note is entitled, without a re-indorsement to himself to sue and recover on the note.

Negotiable instruments are subject to much the same rules as other written contracts in regard to the reception of parol evidence. Evidence of usage and intention of parties is admissible to show that a promissory note executed by an individual was executed on behalf of a firm.

THE facts necessary for this report are fully set out in the judgment.

Mr. *N. Subrahmaniam* and *R. Kuppuswami Ayyar* for appellants.

V. Krishnaswami Ayyar for first, fifth and sixth respondents.

JUDGMENTS—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The plaintiff's case in short is as follows. The defendants Nos. 1 to 6 traded in Ceylon under the name and style of S.M.P.M.K., and, while so trading, the firm obtained 25 negotiable promissory

* Second Appeal No. 728 of 1903 presented against the decree of W. W. Phillips, Esq., Acting District Judge of Tinnevelly in Appeal Suit No. 371 of 1902 presented against the decree of M.R.Ry. P. S. Sesha Ayyar, District Munsif of Srivaikuntam in Original Suit. No. 297 of 1901.

notes from different persons and indorsed the same to one Meyyappa Chetty, who again indorsed them to the Bank of Madras at Colombo. On the presentation of the notes on behalf of the bank to the makers the notes were dishonoured. The said Meyyappa Chetty paid the bank and obtained a return of them The defendants' firm gave to the said Meyyappa Chetty three other promissory notes payable to him or to his order which were indorsed by Meyyappa Chetty in favour of the bank and similarly returned to him on his payment to the bank after they also had been dishonoured. Subsequently, in consideration of Rs. 1,500 paid by the plaintiff to him, Meyyappa Chetty assigned in Ceylon his right to the notes by an instrument, dated the 9th April 1901. The defendants on demand failed to pay the amount due by them upon the notes. The present suit is for the recovery of the amount due in respect of five out of the promissory notes made payable to the firm and one out of those made by the firm itself.

Various defences were raised which it is not necessary now to state. The District Munsif gave a decree to the plaintiff. On appeal, the District Judge reversed the decree and dismissed the suit on the technical ground that the notes not having been indorsed over to the plaintiff he could not sue on them.

The *ratio decidendi* involved in the actual decision in *Pattat Ambadi Marar* v. *Krishnan*(1) and *Abboy Chetti* v. *Ramachandra Rau*(2), which the District Judge followed, has not been accepted as sound in subsequent cases. In *Ramachandra Rao* v. *Abeeb Rowthan*(3) Shephard and Moore, JJ., held that there was nothing in the Negotiable Instruments Act to restrict the transfer of negotiable instruments to transfer by indorsement only, that such choses in action may be otherwise assigned, and that an assignee under an assignment of the latter class may sue in his own name. This was followed in *Mahomed Khumar Ali* v. *Ranga Rao*(4) and the authorities in support of this view of the law will be found referred to and considered in the judgment of Bhashyam Ayyangar, J., in that case, where it is pointed out that "the important difference between transfer by indorsement and transfer otherwise than by indorsement of a negotiable instrument is that

(1) I.L.R., 11 Mad., 290. (2) I.L.R., 17 Mad., 461.
(3) I.L.R., 21 Mad., 657, (note) Appeal No. 175 of 1897 (unreported).
(4) I.L.R., 24 Mad., 654.

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in the latter case the assignee will acquire in the bill or note, as a chattel, nothing more than the right title and interest of his assignor, whereas in the former case the assignee by indorsement will have all the rights and advantages of a holder in due course of a negotiable instrument" (at page 656). Story also states the law on the point thus:—"If a promissory note is originally payable to a person or his order, then it is properly transferable by indorsement. We say 'properly transferable' because in no other way will the transfer convey the legal title to the holder so that he can at law hold the other parties liable to him *ex directo*, whatever may be his remedy in equity. If there be an assignment thereof without indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a note not negotiable" (Story on 'Promissory Notes,' 7th edition, section 120, page 153).

Mr. Krishnasvami Ayyar on behalf of the respondents, in effect, contended not only that the provisions of the Negotiable Instruments Act do not permit of any kind of transfer other than by indorsement, but went the length of urging that in cases like the present we are precluded from travelling beyond the four corners of the Act. Before proceeding to examine the provisions of the Act, it is best to point out the fallacy underlying such an extreme contention—a contention possible only when the true nature of the instrument is overlooked. Now, a promissory note, whether negotiable or not, is nevertheless a chose in action and is subject to the incidents attaching to it in that aspect, so long as the rules of the law merchant are not departed from. Choses in action have been held assignable in this country, and it has been held that a non-negotiable promissory note may be assigned so as to enable the assignee to sue upon the note in his own name. See *Kanhaiya Lal* v. *Domingo*(1). The fact that the note is negotiable does not make any difference except that it carries with it certain peculiar incidents attached to it by the law merchant. The rules in regard to these choses in action prior to the Act do not cease to be any the less applicable to them by the passing of the Act unless its provisions expressly or impliedly affect those rules. If we now turn to the Act, so far as one can see, no provisions there constrain one to come to any other

(1) I.L.R., 1 All., 732.

conclusion. The only provision of the Act which could, with any plausibility, be relied on in support of the contention under consideration is the definition therein of the term 'holder': and Mr. Krishnasvami Aiyar did lay stress on it. But the real import of this definition is that, to come within it, the party should be the owner *at law* of the negotiable instrument, *i.e.*, according to the law merchant, whatever such party's position and liability in equity may be. But this in no way interferes with the due application of rules which are unaffected by that law and which are not to be ignored simply because the Negotiable Instruments Act does not refer to them. The observations of Mr. Chalmers with reference to the English Bills of Exchange Act, 1882, may very well be applied to the Negotiable Instruments Act. He says at page 123 of his book on 'Bills of Exchange' that "the Act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched the rules of general law which regulate the transmission of bills by act of law and their transfer as choses in action or chattels according to the general law" (6th edition, page 128). No doubt, section 97, clause 2, in the English Act expressly says that "the rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques"; and section 31, clause 4, enacts that "where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor." These, of course, are provisions inserted by way of caution only and do not mean that, but for them, the rules of law referred to in those sections would have been unenforceable though there was nothing in the other provisions of the Act itself to forbid their application. And surely the absence of similar provisions in the Indian Act does not warrant that view that the Act abolished rules previously established, even though they are in no way inconsistent with any of its provisions. This was undoubtedly the reason for Shephard and Moore, JJ., upholding the assignment in question in the case already cited. It is thus clear that the absence of an endorsement to the plaintiff is no bar to the suit and the ground on which the decision of the District Judge rests is unsustainable.

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It was next urged by Mr. Krishnaswami Ayyar, if his argument in this respect was correctly understood, that upon the plaint allegations themselves the property in the notes should be taken as still residing in the last indorsee, the Bank of Madras, and, therefore, that the instrument of the 9th April 1901, relied on by the plaintiff, conferred on him no right whatever to the notes. The fallacy of this argument is in the assumption that, notwithstanding the payment to the Bank of Madras of all that was due to it by Meyyappa Chetty as indorser, an indorsement back to Meyyappa Chetty from the Bank was, in point of law, necessary to revest the title in the notes in him. This contention is but a repetition in different words of the argument that transfer of a negotiable promissory note can be effected by indorsement only and in no other way, which has already been sufficiently refuted. It is true that there is no averment in the plaint of an express re-transfer by the Bank to Meyyappa Chetty. But it may be pointed out that, when a prior indorser, in the technical language of the law, 'takes up a note' (see *Ellsworth* v. *Brewer*(1)), on payment to his immediate indorsee and discharges his liability under the contract arising by the indorsement, there is no provision either in the Negotiable Instruments Act or elsewhere prescribing the mode in which such 'taking up' of the note is to be established. As laid down in section 452 of Story on 'Promissory Notes,' "the possession of a note by the maker or by the payee or by any subsequent indorser is *primâ facie* evidence that he is the true and lawful owner thereof and that he has acquired the full title thereto." The proposition thus laid down is, it scarcely needs to be added, supported by numerous authorities of which the leading one is the decision of the Supreme Court of the United States in *Dugan* v. *The United States*(2), where LIVINGSTONE, J., delivering the opinion of the Court, said that 'if any person who indorses a bill of exchange to another whether for value or for purposes of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees whose names

(1) 11 Pickering, *per* Shaw, C.J., at p. 320. (2) 3 Wheaton, 172 at p. 183.

he may strike from the bill or not as he may think proper" (3 Wheaton, 172 at p. 183, reprinted in Book IV, Lawyers' edition, p. 362—see also *ibid.*, p. 672 for Rose's notes of other cases on the same point).

A further point taken by Mr. Krishnaswami Ayyar was that the payee and first indorser in five of the notes as well as the maker of the sixth was not the firm, and, consequently, that the members of the firm, not parties to the notes, are not liable. As already stated, the plaintiff's case was that it was the firm that was liable on all the notes. Assuming that such an objection was distinctly raised before the lower Courts, the question is, having regard to the fact that the name of the payee or the indorser or the maker is preceded by the letters S.M.P.M., and to the practice of native merchants to indicate firm transactions by such prefixes, one of fact to be decided with reference to the evidence in the case. Of course the reception of parol evidence in regard to such a matter is subject to much the same rules as govern written contracts generally. In *Subba Narayana Vathiar* v. *Ramasami Ayyar*(1), some of the points relating to the admissibility of such extrinsic evidence with reference to a negotiable promissory note were considered; and it may not be superfluous to call attention to what the Judicial Committee said in *Castrique* v. *Buttigieg*(2), in dealing with a case of indorsement which was on its face unqualified. There, a person acted as agent in Malta for another person residing in England for the purpose of buying and remitting to him in England bills on England on account of money received by him in Malta. In the course of the agency he purchased bills in Malta and indorsed them to his principal. It was held with reference to what the Committee referred to as "the law merchant common to all civilized countries" that the agent was not liable on the bills being dishonoured, though the indorsement was without any restriction of his liability and the principle of the decision was explained thus:—"The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement and which is indeed necessary to the existence of the contract in question but that contract arises out of the written endorsement itself, the delivery

(1) I.L.R., 28 Mad., 244. (2) 10 M.P.C., 94.

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of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, spoken or written, of the parties and the circumstances (such as the usage at the place, the course of the dealing between the parties and their relative situations) under which the delivery takes place; thus a bill with an unqualified written indorsement may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser or to enable the indorsee to raise money for his own use or on the credit of the signature of the indorser or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only and not against the indorser who agrees to sell his claim against the prior parties but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee and they are all in conformity with the general law of contracts which enables parties to them to limit and modify their liabilities as they think fit provided they do not infringe any prohibitory law" (at pages 108 and 109).

The decree of the District Judge is set aside and the appeal remanded for disposal according to law. The costs will abide and follow the result.

BODDAM, J.—I agree entirely.