THAKDI HAJJI v. BUDRUDIN SAIB.

If the present case is to be regarded as one in which the onus is on the defendant, we are of opinion that he discharged that onus.

Upon the short ground stated above we allow the appeal and set aside the decree. In the circumstances we direct that each party pay his own costs in this Court and in the Court of first instance. Memorandum of objections is dismissed.

Messrs. *Branson & Branson*—Attorneys for appellant.

Messrs. *Short & Bewes*—Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1905 November 30. December 1, 7.

SOMASUNDARAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

NARASIMHA CHARIAR AND OTHERS (DEFENDANTS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF THE DECEASED SECOND DEFENDANT), RESPONDENTS.*

Promissory note—Collateral covenant not to sue for limited time no bar to suit on—Indorsee with notice of covenant may sue.

A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note.

Thimbleby v. *Barron*, (3 M. & W., 210), referred to and followed.

Ray v. *Jones*, (9 C.B.R. (N.S.), 416), referred to and followed.

The payee of a promissory note executed an agreement in the following terms:—"You will aver from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving jivanamsam (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law."

Held, that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an indorsee with notice of the agreement.

---

* Appeal No. 101 of 1902, presented against the decree of M.R.Ry. T. M. Ranga Chari, Subordinate Judge of Madura (West), in Original Suit No. 13 of 1901.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyangar* for appellant.

The Hon. Mr. *V. C. Desikachariar* for first respondent.

K. Kuppuswami Ayyar for third respondent.

W. Ramakrishna Lal for fourth and fifth respondents.

SUIT to recover the amount due on a promissory note. The facts necessary for this report are fully set out in the judgment.

JUDGMENT.—The second defendant, a Hindu widow, who is now dead, sold to the first defendant on the 31st March 1900 some property inherited by her from her husband for the sum of Rs. 15,000. Of this amount, Rs 5,000 were left in the hands of the first defendant, who gave for it the promissory note sued on which was made payable on demand to the payee, or order, with interest at 9 annas per cent. per annum. At the same time the second defendant handed to the first defendant the letter (Exhibit IX) which runs as follows :— "You will ever from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving jivanamsam (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law."

The interest due on the promissory note was paid up to the end of October 1900. On the 25th December of that year the note was endorsed to the plaintiff, a Nattukottai Chetti, by the second defendant, the endorsement being as follows :—"As I have received "the principal sum of this note (Rs. 5,000) five thousand, and the "interest (due) from the month of November of this year from "Devakottai A. R. P. Somasundaram Chettiar Avargal on the 25th "December 1900, the said principal sum of Rs. 5,000 and the "subsequent interest from the month of November aforesaid should "be paid to the said Somasundaram Chettiar Avargal or the order "of the said person."

The Subordinate Judge dismissed the suit being of opinion that the plaintiff paid no consideration for the endorsement to him and that the plaintiff was aware of the arrangement between the defendants evidenced by the letter (Exhibit IX). In this appeal these findings were impeached, and it was further contended that, there being no question about the consideration for the promissory

SOMA-SUNDARAM CHETTIAR v. NARASIMHA CHARIAR.

note itself, the plaintiff, even if not as the holder in due course of the note, was entitled to recover in spite of the findings of the Subordinate Judge, inasmuch as the promise on the part of the second defendant was a covenant not to sue for a limited time only and therefore no defence to such an action as the present. Apart from the presumption in favour of the plaintiff under section 118 of the Negotiable Instruments Act, the evidence as to the payment of consideration for the endorsement is all one way. He himself says he paid Rs. 5,000 in currency notes and silver coin. Chidambaram Chetti, a very well-to-do trader and a relation of the plaintiff, supports that evidence and proves that the money paid by the plaintiff to the second defendant was lent by him to the plaintiff for the purpose. He adds that the said amount had been received by him in Madras four days previously from his branch place of business in the Coimbatore District and produces his codjan account containing entries regarding the receipt of the money and the payment thereof to the plaintiff. Srinivasa Aiyangar, gumastah of Chidambaram Chetti, who brought the money from Coimbatore, gives evidence to the same effect as that of Chidambaram Chetti and of the plaintiff, and proves his attestation to the endorsement. S. Gurusami Chetti, another attesting witness to the endorsement, who was a friend of the second defendant and who apparently brought about the negotiation of the note, also testifies to the payment to the second defendant. As against this the first defendant adduced no evidence on this point. The second defendant, who was alive at the time of the trial, was cited on behalf of the plaintiff but was unfortunately not examined, the Subordinate Judge having refused either to issue a commission for her examination or to compel her appearance as a witness though the plaintiff applied for the issue of a warrant for her production, when she, on the Subordinate Judge's refusal to issue the commission for her examination out of Court, declined to appear as a witness in Court.

In the argument before us Mr. Desika Chariar for the first defendant sought to support the view of the Subordinate Judge that the real promoter of the suit was Chidambaram Chetti, that the plaintiff was a tool in his hands and that both were endeavouring to recover the money for the benefit of the second defendant, who had bound herself by the letter (Exhibit IX). This view does not seem to have been suggested by the first defendant in his written

statement but is a surmise of the Subordinate Judge unsupported by any evidence on behalf of that defendant or otherwise. The sole basis for the surmise is the improbability that Chidambaram and still less the plaintiff would have parted with so large a sum as Rs. 5,000 in consideration of the endorsement of a promissory note by a party who had bound herself by the letter (Exhibit IX), not to claim payment except on one or other of the contingencies therein mentioned. This improbability may suggest that the whole of the money said to have been paid to the second defendant as consideration for the endorsement was not paid. It is not sufficient to support the view that both the Chetties have embarked upon this litigation for the simple purpose of helping the second defendant in the way supposed. It is not said that the plaintiff and the second defendant had any previous acquaintance or dealings which would induce him to carry on this litigation for her benefit. As regards Chidambaram Chetti that is even less credible, inasmuch as months before the endorsement in question, the second defendant had failed to repay him the sum of Rs. 500 she had borrowed from his place of business in Madura through his witness Srinivasa Aiyangar, and the necessity for a suit by him against her had become manifest, at the time of the endorsement, the suit itself being instituted in January 1901 and being actually pending at the time the present action was brought against both the defendants. In the course of the cross-examination of Gurusami Chetti, it was suggested that he had given a guarantee to the Chetties with reference to the endorsement of the promissory note. This, in a way, implied that there was consideration for the endorsement. It is quite unlikely that the second defendant who was already in debt to Chidambaram Chetti would have parted with the promissory note without receiving any consideration from the plaintiff or Chidambaram Chetti.

It is probable, as already hinted, that she did not receive all the five thousand rupees stated to have been paid to her, though as to what she actually received, the matter is one for conjecture only. It is difficult to avoid the conclusion that there was consideration for the endorsement and that the plaintiff entered into the transaction in the hope of being able to make a profit, having regard to the fact that the first defendant's indebtedness for the amount of the promissory note was undeniable and that he was a solvent man.

SOMA-SUNDARAM CHETTIAR v. NARASIMHA CHARIAR.

As regards the question whether the plaintiff had notice of the agreement entered into by the second defendant with the first defendant under Exhibit IX, no doubt the plaintiff denies it. On the other hand, the first defendant's witness Subbaraya Aiyar states that he himself told the plaintiff of the letter before the note was endorsed to the latter. The Subordinate Judge has not placed any reliance upon this witness's evidence. Nevertheless it is altogether difficult to believe that the plaintiff was ignorant of the agreement. The second defendant had previously endeavoured to negotiate the note with a firm of jewellers in Madras, but had failed owing to the objection of the first defendant. Shortly afterwards the first defendant got a notice published in the local official gazette referring to the letter and warning people against the risk they would run in taking the note from the second defendant. Considering the previous dealings between Chindambaram Chetti and the second defendant it is altogether unlikely that the Chetties had not heard of the existence of the agreement at the time the endorsement was made. We are therefore unable to say that the Subordinate Judge's conclusion in regard to this point is erroneous.

The further question is whether, assuming that the plaintiff was aware of the agreement before the note was endorsed to him, such knowledge on his part disentitles him to sue for the money due under the promissory note. The first defendant admitted in his evidence that when he and the second defendant were entering into the arrangement the second defendant would not consent to what is stated in the letter finding a place in the same document that was to contain the promise on the part of the first defendant to pay the five thousand rupees. He having thus consented to the arrangement being effected by two such distinct instruments, it cannot possibly be taken that the intention of the parties was otherwise than to keep the two documents as evidence of two separate contracts. In this view the letter operates only as a collateral covenant not to sue for the money due under the promissory note for a limited time. *Thimbleby* v. *Barron*,(1) *Ray* v. *Jones*(2) and the other authorities to which Mr. Krishnaswami Ayyar drew our attention show, that such a covenant does not suspend the right of action on the note and that the covenant cannot be pleaded in bar to the action.

(1) 3 M. & W. 210. (2) 9 C.B.R., (N.S.), 416.

The second defendant herself could have, therefore, maintained the suit and the plaintiff is not the less entitled to do so. In this view it is unnecessary to enter into the question raised by Mr. Desika Chariar that the endorsement on the note was, with reference to section 56 of the Negotiable Instruments Act, such as not to confer on the plaintiff a good title to the note under the law merchant.

The decree of the Subordinate Judge is reversed and the plaintiff's claim allowed with interest on the principal Rs. 5,000 at six per cent. per annum till payment. The plaintiff did not in the lower Court rely on the contention with reference to Exhibit IX on which he succeeds here. We direct that in the lower Court each party will bear his costs. The first defendant will pay the plaintiff's costs of this appeal.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

KRISHNA AYYAR AND OTHERS (DEFENDANTS NOS. 2 TO 5), APPELLANTS,

v.

MUTHUKUMARASAWMIYA PILLAI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1, 6, 7, 8 AND 9), RESPONDENTS.*

1905. November 1, 2, 21.

Transfer of Property Act IV of 1882, *s.* 85—*Does not authorise Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution, right of against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage decree.*

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties.

Timmappa v. *Lakshmamma*, (I.L.R., 5 Mad., 385), referred to.

He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among

* Appeal No. 24 of 1903, presented against the decree of M.R.Ry. S. Duraiswamy Ayyangar, Subordinate Judge of Tinnevelly, in Original Suit No. 10 of 1902.