APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902.
December
3, 4, 5.

JAMBU CHETTY AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

PALANIAPPA CHETTIAR (PLAINTIFF), RESPONDENT.*

Negotiable Instruments Act—XXVI of 1881, ss. 1, 94—Local usage—Applicability of Act to Natives of India—Notice of dishonour to drawer where drawee has failed to accept—Acceptance of hundi as conditional or absolute payment.

In a suit for the amount due on account of goods sold and delivered and money lent, the defence was that plaintiff had accepted hundis in discharge of the debt and was, in consequence, debarred from suing on the original consideration and that his remedy, if he had one, was on the hundis. It was also contended that the hundis had been accepted as cash payment, in consideration of a discount of 2½ per cent. and that, in consequence, plaintiff had no cause of action either on the original debt or upon the hundis, as he had taken the risk of the latter being dishonoured by the drawee :

Held, that it is a question of fact, with regard to promissory notes or bills or hundis, whether the parties intended them to operate as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid.

Held also, on the evidence, that plaintiff had accepted the hundis unconditionally, and was, in consequence, precluded from suing on the original debt.

Section 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonour is given should be informed, not only that the instrument has been dishonoured and in what way, but also that he will be held liable thereon. So, where a drawee of a bill of exchange does not accept it, though the drawer is primarily liable, the payee should give notice of dishonour to the drawer.

The provisions of the Negotiable Instruments Act are strictly applicable to natives. Where any local usage is relied on under section 1 of the Act, it should be alleged and established by the party who relies upon it.

SUIT to recover Rs. 5,421-14-10, being the balance alleged to be due on account of goods sold and delivered and money lent by plaintiff to first defendant. Liability was admitted by first defendant to the extent of Rs. 521-3-9, and objection was taken by him to debits of Rs. 1,547-4-9, Rs. 1,500-0-0, Rs. 1,765-8-3, and Rs. 1,100-0-0, in respect of certain hundis. These hundis had been drawn by first defendant in plaintiff's favour, but had been

* Appeal Suit No. 86 of 1901 presented against the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Original Suit No. 14 of 1900.

dishonoured by the drawee at Rangoon. The Subordinate Judge overruled these objections and decreed in plaintiff's favour. The facts are more fully set out in the judgment of the High Court.

Defendants preferred this appeal.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for appellants.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—This is an action for the recovery of the sum of Rs. 5,421-14-10, being the balance alleged to be due on accounts for goods sold and sums lent from time to time by the plaintiff to the first defendant. The first defendant admitted his liability only to the extent of Rs. 521-3-9 and objected, among other items, to his having been debited by the plaintiff with the several sums of Rs. 1,547-4-9, Rs. 1,500-0-0, Rs. 1,765-8-3, and Rs. 1,100-0-0, being the amounts of four hundis drawn by the first defendant in favour of the plaintiff, which were dishonoured by the drawee at Rangoon. The Subordinate Judge overruled the defendant's objection and gave a decree in favour of the plaintiff as sued for. The defendants appeal against that decree and urge in support of their appeal that the plaintiff having accepted the hundis in discharge of the debt due to him, he cannot sue upon the consideration for the hundis, and that his remedy, if any, is upon the hundis. Apparently the first defendant contended in the Court below that the hundis had not only been accepted in discharge of the debt, but that the same were accepted as cash payment in consideration of a discount of $2\frac{1}{2}$ per cent. on the amount of the hundis, and that therefore the plaintiff had no cause of action against him either on the original debt or upon the hundis, he, the plaintiff, having taken the risk of their being dishonoured by the drawee.

Upon the evidence in the case, we are clearly of opinion that the first defendant has entirely failed to establish that the hundis were treated and accepted as cash payment. As we understand the learned pleader for the appellants, his contention in this court is only that the hundis were taken as absolute payment and that the plaintiff cannot therefore sue upon the original consideration. He argues that, unlike a promissory note, the giving of a bill or hundi *primâ facie* operates as absolute payment of the debt, and that the onus is upon the party affirming the contrary to show that the parties intended it to operate only as a conditional

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payment. We think that there is no distinction in this respect between a note and a bill, and no authority has been cited to us in support of such a distinction.

Whether it be a note or a bill, it is a question of fact in either case, whether the parties intended the same as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid. As stated by the Master of the Rolls in *In re Romer and Haslam*(1), "it is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it."

It is next urged that the evidence in the case shows that the parties intended the hundis to operate as absolute payment of the debt, and in support of this contention reliance is chiefly placed upon the plaintiff having been allowed a discount of 2½ per cent. upon the amount of the hundis in addition to interest from the date of the hundis, at the current rate prevailing in Rangoon, which, it is shown, was higher than the local current rate. The first defendant in his written statement expressly relied upon this circumstance in support of this contention, and on this point also cross-examined the plaintiff's sixth witness, who was the plaintiff's agent at that time. The witness stated that discount was allowed to cover risks in connection with the realization of the hundis and that it is allowed in every case. The evidence given by the first defendant on this point was that for cashing Rangoon hundis the highest discount is ¾ per cent., but that he consented to pay 2½ per cent., in regard to the hundis in question, because the plaintiff was to have the risk in case Kadai Rowoothen (the drawee) proved insolvent. There was no cross-examination of the first defendant on this point, nor was any explanation elicited in the re-examination of the plaintiff's sixth witness. The allowing of ¾ per cent. discount may be regarded as a reasonable compensation, for the trouble to be taken in realizing at Rangoon the amount of a hundi drawn and given in Madura; but 2½ per cent. cannot reasonably be regarded merely as such compensation, and it clearly shows that the plaintiff

(1) [1893] L.R., 2 Q.B., 296.

calculated upon making a clear profit of about 2 per cent. by taking the bill in discharge of the debt, without at the same time running any real risk, inasmuch as he would have his remedy against the first defendant, upon the bills, if the same were dishonoured at Rangoon. And it is fairly certain that the plaintiff's action would have been based upon the hundis, but for his having been probably advised that such action would be sure to fail for want of due notice of dishonour.

The inference to be drawn from the comparatively high rate of discount is strengthened by the evidence of the plaintiff's sixth and third witnesses. The former says that the first defendant sometimes paid the plaintiff's firm in cash and sometimes by a bill the amount of which was credited to him in the plaintiff's account.

If the bill were dishonoured the first defendant would pay the amount of the bill or he would be debited with the amount thereof, and the plaintiff's account clearly shows that the first defendant was first credited with the amounts of the four hundis in question, and afterwards debited with the same after the plaintiff failed to realize them. The evidence of this witness as to the interview he had with the first defendant at Madura after he received information of the hundis having been dishonoured, and the evidence of the third witness as to what passed between him and the first defendant at Rangoon in reference to these hundis after they had been dishonoured when the first defendant went to Rangoon, clearly go to show that the plaintiff accepted the hundis unconditionally, with the intention of enforcing his remedies thereunder, if the same should be dishonoured, and not with the intention of suing the first defendant upon the original consideration.

We cannot accede to the appellant's contention that the fact of the plaintiff having negotiated two of the hundis shows that the hundis were given and taken as absolute payment; nor can we accede to the respondent's contention that the giving by the first defendant of certain bundles of cloth to the plaintiff as collateral security for the hundis, the bundles of cloth being deliverable to the drawee only after the hundis were honoured by him, is inconsistent with the hundis having been accepted as absolute payment. The negotiation of the hundis is equally consistent with their having been given and taken as absolute payment or as conditional payment; and as, at the commencement of the action, the two

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hundis were not outstanding in the hands of third parties, but were in the plaintiff's possession, who was thus in a position to hand over the bills to the defendant, he could bring an action on the consideration, if the bills in this case, were taken as conditional payment (*Davis* v. *Reilly*(1)).

The giving of additional security for the hundis is a circumstance not inconsistent with their having been accepted as absolute payment but rather tends to confirm the inference that they were given and taken as such. For these reasons, the conclusion we have come to is that the four hundis in question were accepted as absolute payment of the debt and that the plaintiff, therefore, cannot sue upon the original debt. Even in the view that they were given and taken as conditional payment of the debt, the plaintiff cannot maintain this action, as he was guilty of laches in respect of the same, and they must therefore be treated as absolute payments, and as between the first defendant, the debtor, and the plaintiff, the creditor, the debt is discharged.

We cannot accede to the respondent's contention that inasmuch as the drawee did not accept the bills and the first defendant, the drawer, therefore was primarily liable, the plaintiff was under no obligation to give notice of dishonour to the first defendant. Section 94 of the Negotiable Instruments Act, 1881, recognises that the person to whom notice of dishonour is given, should be informed not only that the instrument has been dishonoured, and in what way, but also "that he will be held liable thereon."

Upon the evidence of the plaintiff's sixth and third witnesses, we hold that notice of dishonour was not given either in express terms or by reasonable intendment by informing the first defendant that he would be held liable thereon, and we also hold that such imperfect notice as was given was not given within a reasonable time after dishonour (*vide* sections 105 and 106, Negotiable Instruments Act, also *Jambu Ramaswamy Bhagavathar* v. *Sundararaja Chetti*(2)). The result, therefore, is that the plaintiff cannot sue the first defendant for the debt any more than on the bills. The respondent's pleader relies upon paragraph 12 of the judgment of the Subordinate Judge and on clauses (*a*), (*c*) and (*g*) of section 98 of the Negotiable Instruments Act, and contends that no notice

(1) [1898] L.R., 1 Q.B., 1. (2) I.L.R., 26 Mad., 239.

of dishonour was necessary. If the plaintiff relied upon any of those three exceptions to the general rule as to the necessity of giving notice of dishonour, he ought to have made the necessary averments in the pleadings and established the same. Neither in the pleadings nor in the issues has he relied either generally or specially upon all or any of these three exceptions, and we cannot permit him to raise them now as each of them involves questions of fact which can be satisfactorily tried only by framing additional issues. We may also add that the evidence to which our attention has been drawn is far from making out clearly any of these exceptions. In the view, however, which we have taken of the main question involved in the case, viz., that the bills were given and taken as absolute payment, it becomes unnecessary to remit such additional issues for trial even if we were otherwise disposed to do so.

The Subordinate Judge's view that the provisions of the Negotiable Instruments Act are not, or at any rate ought not to be, strictly applied to natives, is manifestly unsound and untenable. If any local usage relating to bills and notes in an oriental language—the operation of which usage is saved by section 1, though such usage may be at variance with the Act—be relied upon, such usage should be alleged and established by the party relying upon it.

The appeal, therefore, is allowed with costs, and the decree appealed from varied accordingly.

Both parties agree that the plaintiff should have a decree for Rs. 521-3-9, the amount admitted by the defendants in the Court below, with interest at 6 per cent. from date of plaint till payment.

Each party will pay and receive proportionate costs in the Court below.