RAMA-KRISHNA MUDALI v. THE OFFICIAL ASSIGNEE.

COUTTS TROTTER, J.

accordance with the settled line of decisions of the English Chancery Courts on the subject, and we need only refer to a judgment of Sir GEORGE JESSEL, M.R., in *Dicker* v. *Angerstein*(1), where the sale was held good, even though it was proved that the security had actually been satisfied. A similar doctrine has been acted upon in this Court in *Madras Deposit and Benefit Society* v. *Passanha*(2).

We, therefore, are of opinion that all the points taken by the plaintiff and very clearly put in an interesting argument, when examined, fail to stand the test of criticism and that the learned Judge was right in dismissing the plaintiff's suit.

The Appeal fails and must be dismissed with costs, one set.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

1922, March 3.

NATARAJULU NAICKER (SECOND DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTIAR AND NINE OTHERS (PLAINTIFFS AND DEFENDANTS, NOS. 1, 3 AND 4), RESPONDENTS.*

Paper Currency Act (II of 1910), sect. 26—Promissory note payable to bearer forming consideration for hypothecation—Enforceability of hypothecation—Admissibility in evidence of promissory notes payable to bearer—Loan for illegal or immoral purpose when not recoverable.

Though promissory notes payable to bearer are unenforceable according to section 26 of the Paper Currency Act, a hypothecation bond whose consideration is made up of the prior liability evidenced by such notes is enforceable.

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(1) (1876) 3 Ch. D., 600. (2) (1888) I.L.R., 11 Mad., 201.

* Appeal No 183 of 1919.

Ayyasami Pillai v. *Guruswami Naicken*, (1916) 3 L.W., 463 and *Nataraja Naicken* v. *Ayyasawmi Pillai*, (1916) 32 M L.J., 354, followed.

A promissory note payable to bearer is admissible in evidence.

It is only when a person lends money with the knowledge and object that it may be applied to an illegal or immoral purpose that he cannot recover it and not when he merely hands it over to the absolute control of the borrower and the borrower afterwards employs it illegally or immorally; *Pearce* v. *Brooks*, (1866) 1 Ex., 213, followed.

APPEAL against the decree of V. DANDAPANI PILLAI in Original Suit No. 86 of 1917 on the file of the Subordinate Judge's Court, Madura.

The second defendant preferred this Appeal.

The facts are given in the Judgment.

L. A. Govindaraghava Ayyar for appellant.

T. R. Ramachandra Ayyar, *K. Aravamudu Ayyangar* and *S. R. Muttuswami Ayyar* for respondents.

JUDGMENT.—The decrees from which the second defendant's legal representative appeals, the second defendant having since died, were passed in suits brought by three plaintiffs to enforce by the sale of the mortgaged properties two hypothecation bonds executed by first defendant, the elder brother of second defendant in a joint Hindu family managed by the younger brother, second defendant.

The principal of the hypothecation deed concerned in Appeal No. 331 is Rs. 1,250 and the principal of the hypothecation deed concerned in Appeal No. 183 is Rs. 7,500.

The first defendant after sowing his wild oats and hopelessly encumbering his half share of the ancestral estate in doing so, proceeded to convey his interest in the family properties to his brother for Rs. 35,000 by means of an unregistered sale-deed in consideration of

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second defendant's undertaking to discharge the first defendant's debts; but as he neglected to complete it, second defendant had to compel specific performance of his contract by means of a suit, and got a sale-deed executed by the court on behalf of first defendant in favour of the second defendant in the present suits.

At the trial the defence of both brothers to these suits was that the hypothecation bonds were not fully supported by consideration, only Rs. 500 having passed for the bond of Rs. 1,250 and only Rs. 2,880 for the bond of Rs. 7,500, and that even the smaller amounts of which payment was admitted were paid for being spent for immoral purposes. It was also contended that the rate of interest secured by these bonds was penal and should be relieved against.

The learned Subordinate Judge found that the bonds were fully supported by lawful consideration and gave the plaintiffs decrees accordingly. He found the interest to be penal, and in one case reduced the rate from 30 per cent per annum compound interest on default of payment of the principal sum which bore simple interest at 24 per cent, to 25½ per cent simple interest, and in the other case from 21 per cent compound interest on default of payment of the principal which bore simple interest at 18 per cent, to 19½ per cent simple interest.

At the trial and at the hearing of the Appeals, a special case was attempted to be made out of the fact that on the date when the bond for Rs. 7,500 was executed a promissory note for Rs. 1,000 principal and interest thereon was thereby discharged, a sale-deed of and for a price of Rs. 1,500 was executed by the second plaintiff in favour of Vijayalakshmi, a dancing girl of Palni who was the first defendant's concubine, and that according to the endorsement on the promissory note, Rs. 1,222 of the proceeds of the sale went towards the

discharge of the promissory note drawn in favour of second plaintiff's brother-in-law Rajanan *alias* Subbayya Chetty. The suggestion is that in order that first defendant might fulfil his obligation to the purchaser on account of his co-habitation with her, the money-lending plaintiff sold land belonging to him and by that means increased the indebtedness to himself of the spendthrift whose estate he coveted. It is, therefore, argued on the analogy of *Pannichand* v. *Nanoo Sanker Tawker*(1) and of *Cannan* v. *Bryce*(2) and other English cases that the whole transaction under which the plaintiff lent money to the first defendant was tainted with immorality and so is not enforceable.

But there is no allegation, much less proof, that the land which was the subject of the sale-deed was given to Vijayalakshmi as a reward for concubinage, or that the money borrowed by first defendant went to compensate second plaintiff for the loss of the land, although both brothers, first and second defendants, were examined as defence witnesses and might have stated the fact if it was true. Nor were the first and second plaintiffs cross-examined when they were in the witness box as to the application of the sale-proceeds. Everything has been left to be inferred from the circumstances, that Vijayalakshmi was the name of one of the girls taken by first defendant to Madras for the Christmas festivities, that he admittedly lived with them there for one week, that Vijayalakshmi's house is in Palni where also second and third plaintiffs live, and that she bought a house from the second plaintiff on the same date that the two plaintiffs lent money under a hypothecation bond to the first defendant. The cash paid under that bond to Rajanan Chetty actually fell short of the price paid for the land,

(1) (1908) 18 M.L.J., 456. (2) (1819) 3 B. and Ald., 179.

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if the recitals are true. This is the only item to which the appellant's vakil has been able to point as savouring of immorality. As regards the rest of the money borrowed by first defendant, it has been left to be deduced from mere suspicion that first defendant spent it on immoral objects with the connivance of the plaintiffs. There is no evidence that it was part of the contract between the parties that the money should be so applied. In *Pearce* v. *Brooks*(1) POLLOCK, C. B., referring to *Cannan* v. *Bryce*(2) distinguished between cases where money is lent with the knowledge and object that it should be applied to an illegal purpose and cases where the lender merely hands it over into the absolute control of the borrower and the borrower afterwards employs it illegally. The doctrine *ex turpi causa non oritur actio* is expressed in section 23 of the Indian Contract Act, which declares that the consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy, and under section 10 it is necessary that both the consideration and the object should be lawful for an agreement to become a binding contract. The recitals of the promissory notes and the hypothecation bonds afford no indication that the moneys were borrowed with the immediate object of being spent upon prostitution. The lower Court has found (and we think rightly found) that the first defendant was a man of reckless and extravagant habits, who had no regard for money, and who spent it in an extravagant fashion, and that he was in all probability keeping company with dancing girls. But, as the learned Subordinate Judge observes, there is no proof that the plaintiffs joined the first defendant in his reckless ways, or that they knew that he was spending the money that he borrowed from

(1) (1866) 1 Ex., 213. (2) (1819) 3 B. and Ald., 179.

them for immoral purposes, and that with that knowledge they made the advances. The first defendant was not a minor nor a man who had recently attained majority, and there is no issue or finding that he was under the undue influence of the plaintiffs. The defence thus failed to make out a case that any part of the lending was vitiated by immorality. As to the extent to which the suit mortgages were supported by consideration, the recitals in the documents are borne out by entries in the plaintiffs' ledger and day book. Defendants' second witness deposed that the first defendant admitted having received consideration for one document, Exhibit A, and plaintiffs' second witness spoke to consideration having passed for the other document, Exhibit E, and the Sub-Judge believed him. Plaintiffs' witness No. 5, who wrote both A and E, stated that consideration was paid to the first defendant for both documents. The first defendant prevaricated and repeatedly contradicted himself, first saying that Rs. 1,000 were paid for Exhibit A and then denying it. He says he received only Rs. 2,500 for Exhibit E, though he signed for Rs. 7,500. He states that when he asked for the remaining Rs. 5,000 the plaintiffs took him to an arrack shop and made him drunk. Yet he raised no objection to the document being registered, and in his written statement he did not advance the plea that he was intoxicated and incapable of knowing what he was doing at the time of execution of the suit document.

Such being the state of the evidence the lower Court's finding on the first issue that the bonds are fully supported by consideration must stand undisturbed.

The next attack on the plaintiffs' case is based on the fact that the form of the promissory notes Exhibits B, C, F, F-1, G, G-2, H and H-1 offends against section 26 of the Paper Currency Act II of 1910 in that they are made payable to bearer on demand. This is an illegality

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which the law makes punishable as an offence. This Court has held in *Chidambaram Chettiar* v. *Ayyaswami Theran*(1), and *Nachimuthu Chetty* v. *Audiappa Pillai*(2), that promissory notes in that prohibited form are not enforceable at law, and suits cannot be maintained on them as such. It is argued that as these promissory notes which are forbidden by law form the greater part of the consideration for the suit hypothecation bonds, the consideration for the bonds is unlawful and consequently the bonds are void agreements.

But the real consideration for the hypothecation bonds is the first defendant's indebtedness ascertained upon settlement of accounts, of which the promissory notes are evidence and the liability for the debts will remain even if the notes are unenforceable. See *Ayyasami Pillai* v. *Guruswami Naicken*(3), *Shanmuganatha Chettiar* v. *Srinivasa Ayyar*(4) and *Nataraja Naicken* v. *Ayyasami Pillai*(5). There is no provision of law making promissory notes in a prohibited form inadmissible in evidence, as there is in respect of unregistered documents under section 49 of the Indian Registration Act, or in respect of unstamped documents under section 35 of the Indian Stamp Act. We have therefore held in *Nachimuthu Chetty* v. *Audiappa Pillai*(2), that they are admissible in evidence as acknowledgments. For these reasons, the suits which are on the hypothecation bonds will not fail on account of the prohibited form of the promissory notes which they discharged.

The last objection as to the rate of interest remains to be disposed of. In the absence of a finding that there was undue influence, the original rate of interest

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(1) (1917) I.L.R., 40 Mad., 585. (2) (1917) M.W.N., 778.
(3) (1916) 3 L.W., 463. (4) (1917) I.L.R., 40 Mad., 727.
(5) (1918) 32 M.L.J., 354.

cannot be reopened. Vide *Ponnusami Naicken* v. *Nadimuthu Chetti*(1) and *Aziz Khan* v. *Dani Chand*(2). The rates to which the Subordinate Judge has reduced the interest payable in default appear to be fair and reasonable and we think we should not interfere with them.

In the result both Appeals are dismissed with costs. Time for redemption is extended to a date six months from to-day.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

MINOR SUBBARAYAN, BY GUARDIAN VISALAKSHI ACHI (FOURTH DEFENDANT), (APPELLANT),

1922, March 20.

v.

MINOR NATARAJAN AND TWO OTHERS, BY GUARDIAN GOURI ACHI (ASSIGNEE DECREE-HOLDER'S LEGAL REPRESENTATIVES), (RESPONDENTS).*

Civil Procedure Code (Act V of 1908), sec. 48—Limitation Act (IX of 1908), sec. 15 (1)—Execution of decrees, more than twelve years old—Execution stayed by injunction or order of Court—Application made after 12 years—Computation of time—Deduction of time occupied by stay of execution—Applicability of section 15 (1) of Limitation Act—"Prescribed" in section 15, meaning of—"Period of limitation," meaning of—Limitation Act, sections 4 to 25, whether applicable to section 48 of Civil Procedure Code.

Section 48 of the Civil Procedure Code contains an unqualified prohibition (subject to exceptions contained in clause (2)

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(1) (1917) 33 M.L.J., 302. (2) (1918) 23 C.W.N., 130 (P.C.).

* Appeal against Appellate Order No. 53 of 1921.