APPELLATE CIVIL, FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Varadachariar and Mr. Justice King.

1934, September 19.

VENKATARAMA REDDIAR AND ANOTHER (PLAINTIFFS 1 AND 2), APPELLANTS,

v.

VALLI AKKAL AND FOUR OTHERS (DEFENDANTS AND THIRD PLAINTIFF), RESPONDENTS.*

Negotiable Instrument—Third party to same—Suit by, against promisor for a declaration that the payee named in the instrument is a benamidar—Maintainability of.

Though a promisor cannot, in a suit on a negotiable instrument, plead that somebody other than the payee named in the instrument is the person entitled to sue, nor plead discharge by payment to the alleged real owner, yet, as between the payee named in the instrument and persons other than the promisor, there is no rule which precludes the admissibility of evidence showing that the payee was only a benamidar for another.

Held, accordingly, that a suit could be maintained by A for a declaration that a promissory note executed by C in favour of D and endorsed over by the latter to E was attachable in execution of a money decree obtained by A against B, on the ground that the promissory note was taken, in pursuance of a fraudulent scheme, benami in the name of D in respect of moneys really due by C to B.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 192 of 1928 (Appeal Suit No. 125 of 1928, District Court, Coimbatore) preferred against the decree of the Court of the District Munsif of Dharapuram in Original Suit No. 1663 of 1926.

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* Second Appeal No. 953 of 1929.

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N. Sivaramakrishna Ayyar for *T. M. Krishnaswami Ayyar* for appellants.

T. P. Gopalakrishna Ayyar for *Watrap S. Subramania Ayyar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

VARADACHARIAR J.

VARADACHARIAR J.—The plaintiffs appeal against the decree dismissing their suit *in limine*. They had obtained a money decree against the first defendant and in execution thereof they attempted to attach a promissory note, dated 23rd December 1924, executed by the second defendant in favour of the third defendant and endorsed by the third defendant to the fourth defendant. The allegations in the plaint were that, with a view to defraud the plaintiffs of the amount due to them under their decree, the first, third and fourth defendants joined together and got this promissory note executed by the second defendant in favour of the third defendant in respect of a sum of money really due by the second defendant to the first and that in pursuance of the same fraudulent scheme the note was transferred to the fourth defendant without any consideration. An application to attach this promissory note was dismissed, on objection raised by the fourth defendant, on the ground that the promissory note standing in his name or in the name of the third defendant could not be attached. This suit was then laid for a declaration that the promissory note is liable to be attached in execution of the decree obtained by the plaintiffs against the first defendant.

Issues 1, 4 and 5 were argued as preliminary issues in the Court of First Instance and the Court

held that the present suit was one to obtain relief "on the basis of the promissory note and on the promissory note alone", that neither the first defendant nor the second defendant could be allowed to prove that the third defendant did not advance the amount for the promissory note or that his endorsee, the fourth defendant, is not entitled to recover the amount due thereunder and that, as the plaintiffs could have no higher rights than the first defendant, the suit must fail. On appeal, the Subordinate Judge, in a very brief judgment, also held that it was not open to the plaintiffs to plead that the payee under the promissory note is not the fourth defendant but somebody else. Hence this second appeal.

The judgments of the Courts below rest upon a misapprehension of the observations in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*(1) and similar cases. It is not right to say generally that that class of cases lays down that parol evidence is not admissible to show that a note has been taken *benami* in the name of a person for money advanced by another. It is one thing to say that the promisor, cannot, *in a suit on the note*, plead that somebody other than the payee is the person entitled to sue, nor plead discharge by payment to the alleged real owner, and a wholly different thing to say that as between the payee named in the document and persons other than the promisor there is any rule which precludes the admissibility of evidence showing that the payee was only a benamidar for another. The Negotiable Instruments Act lays down certain special rules of evidence and certain special presumptions and

(1) (1906) I.L.R. 30 Mad. 88.

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precludes certain pleas being raised in particular circumstances : but it will not be right to say that, beyond the scope of such rules or what may follow as necessary implications therefrom, the applicability of the general principles of law or the ordinary rules of evidence is excluded. For instance, it may be noticed that in sections 120, 121 and 122 of the Act particular pleas are barred only in suits on negotiable instruments. In sections 118 and 119 certain presumptions are laid down with reference to negotiable instruments, and in sections 43 and 44 certain pleas, such as, absence of consideration, etc., are permitted to be raised between immediate parties but not as against other holders. By section 117 of the Evidence Act an acceptor of a bill of exchange is precluded from denying that the drawer had authority to draw such bill and to endorse it. But, beyond special rules thus enacted, there is no reason whatever for holding that the ordinary principles of substantive law or the rules of evidence will not govern claims relating to negotiable instruments, especially, where they arise not between the promisor and the promisee or the drawer and the drawee but between the promisee or drawee on the one hand, and a third person on the other.

It has often been recognized that a plea of *benami* is only a plea in the nature of resulting trust and there is nothing in the Negotiable Instruments Act which justifies a payee, who is in the position of a trustee, insisting that the beneficiary should be precluded from proving that he is only a trustee. The observation in *Harkishore*

Barna v. *Gura Mia Chaudhuri*(1) that the "property" in the note is only in the person named as payee does not affect this question at all. It is unnecessary in this case to express an opinion upon the conflict of views as to whether a person claiming to be the real owner, though not named as payee in a promissory note, can under any circumstances maintain a suit on the note against the promisor; Cf. *Surajman Prasad Misra* v. *Sadanand Misra*(2), *Ramnagina* v. *Bishwanath*(3), *Sewa Ram* v. *Hoti Lal*(4) and *Harkishore Barna* v. *Gura Mia Chaudhuri*(1). The present suit is not really a suit of that kind.

The analogy of the provisions of the Trust Act clearly goes to show that a suit for a declaration that a person is only in the position of a trustee towards the plaintiffs will lie even in the case of negotiable instruments. Section 63 of the Trusts Act contains a general provision that, where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. Section 64 enacts certain exceptions to this rule, and in so doing, refers specifically to negotiable instruments; and the exception in respect of negotiable instruments is confined to cases where the instrument is in the hands of a *bona fide* holder to whom it has passed in circulation. This clearly implies that if the transferee, even of a negotiable instrument, from a trustee, is not a *bona fide* holder, the beneficiary is entitled to call upon him to admit that he is only a trustee or sue for a declaration

(1) (1930) I.L.R. 58 Calc. 752.
(2) (1932) I.L.R. 11 Pat. 616.
(3) A.I.R. 1934 Pat. 85.
(4) (1930) I.L.R. 53 All. 5.

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to that effect. It may be that, even upon getting a declaration to this effect, the beneficiary will not directly be able to sue upon the promissory note ; but that does not mean that a declaration of this kind will be futile. Under other provisions of the Trusts Act the beneficiary can sue for the execution of the trust by compelling the trustee to take the necessary steps and have a receiver appointed in the course of such proceedings so that the receiver may sue for the debt, or the beneficiary may also insist upon the trustee conveying the legal title to himself, and after such transfer there will be no difficulty in his suing upon the promissory note in his own name ; Cf. *Fletcher* v. *Fletcher*(1), *Sharpe* v. *San Paulo Railway Co.*(2) and *Ex parte Kearsley. In re Genese*(3). The Trusts Act also recognizes that the right of the beneficiary is capable of being transferred and that the transferee will have all the rights of the beneficiary as against the trustee. Cf. sections 56, 58, 61 and 69 of the Trusts Act.

That the Negotiable Instruments Act should be understood with due regard to its scope and purpose and not interpreted as affecting other branches or rules of law has generally been recognized in this Court, and even in suits upon negotiable instruments, rights and liabilities arising out of the debt to which the negotiable instruments relate have in several instances been permitted to be enforced. The stricter view which DAVIES J. was inclined to take in his dissenting judgment in *Krishna Ayyar* v. *Krishnasami Ayyar*(4) has not been followed. This again is a further indication that, except to the extent

(1) (1844) 4 Hare 67 ; 67 E.R. 564.
(2) (1873) L.R. 8 Ch. App. 597, 610.
(3) (1886) L.R. 17 Q.B.D. 1.
(4) (1900) I.L.R. 23 Mad. 597.

necessarily implied by the special provisions of the Negotiable Instruments Act, the operation of other rules of law is not to be excluded ; Cf. *Shanmuganatha Chettiar* v. *Srinivasa Ayyar*(1), *Gopalu Pillai* v. *Kothandarama Ayyar*(2), *Ramanadhan Chetty* v. *Katha Velan*(3) and *Subramania Iyer* v. *Subban Chettiar*(4). The present case itself affords an illustration of the deplorable consequences that must follow from any other view ; because, if the fourth respondent's contention is right, any judgment-debtor can practically defeat his creditors by lending his moneys to others and taking promissory notes in the names of his friends ; and a decree-holder will have no means of getting at the funds thus lent. In answer to repeated questions from us, the fourth respondent's learned Counsel could only say that even a hardship of that kind ought not to induce us to lay down bad law. We are unable to believe that such was the policy of the Negotiable Instruments Act and there is no specific provision in the Act itself which compels us to accede to such a contention.

As regards attachability, the matter seems to us to be placed beyond all doubt by the language of section 60 of the Civil Procedure Code, clause 1 of which specifically refers to the attachments of bills of exchange and promissory notes, and the concluding words are :

> "whether the same be held in the name of the judgment-debtor or by any other person in trust for him or on his behalf."

There is nothing in the Negotiable Instruments Act which must be understood as practically

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(1) (1916) I.L.R. 40 Mad. 727. (2) A.I.R. 1934 Mad. 529.
(3) (1917) I.L.R. 41 Mad. 353. (4) (1924) 21 L.W. 696.

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making these concluding words meaningless in the case of attachment of negotiable instruments. It was asked (on behalf of the respondent) what course could the attaching decree-holder adopt on the strength of an attachment in such cases and reference was made to a judgment of CURGENVEN J. in *Somu Naidu* v. *Sanyasayya*(1), as showing that, even if the promissory note should be attached and brought to sale in the present case and an endorsement obtained from Court, the Court-purchaser will not be entitled to sue the promisor for the money. The judgment in that case has only proceeded upon a consideration of the endorsement to be made by the executing Court and has not noticed the bearing of the provisions of the Trusts Act under which the purchaser of the beneficiaries' interest could call upon the trustee to convey the legal title to him. A similar situation was well known to the English Law under which, prior to the Judicature Act, an assignee of a "chose in action" could not maintain a suit for money in his own name and the Court of Chancery met the situation by compelling the assignor to allow his name to be used in actions at law on an indemnity against costs. We need not say more about that question in the present case, because, by reason of events which have happened during the pendency of the second appeal, the question of suing on the promissory note is not material to the present case.

We have been informed that, during the pendency of the second appeal, the fourth defendant has sued upon the promissory note and obtained a decree. It is therefore unnecessary to

(1) (1934) 39 L.W. 520.

discuss what the proper procedure will be if the promissory note should still remain outstanding and the auction-purchaser of the beneficiaries' interest is to realise the money from the promisor. On account of this course of events, we have also permitted the appellants to amend paragraph 12 (*a*) of their plaint by adding the words "debt due under" before the words "promissory note dated 23rd December 1924". We see no objection in law to their getting a declaration in terms of paragraph 12 (*a*) of the plaint as now amended, if they are able to prove the necessary allegations of fact. The prayer in paragraph 12 (*b*) has now become unnecessary.

We therefore allow the appeal, set aside the decrees of the Courts below and send the case back to the Court of First Instance for trial on the merits. Costs in this and in the lower appellate Court will abide the result of the suit. The plaintiffs will be entitled to refund of court-fee paid on the memorandum of appeal both here and in the lower appellate Court.

G.R.