FULL BENCH.

Before Mr. Justice Boys, Mr. Justice Kendall and Mr. Justice Sen.

1928
April, 24.

MIAN BAKHSH *v.* BODHIYA.*

Act No. X of 1923 (Indian Paper Currency Act), section 25—Promissory note payable on demand to lender or bearer or to order—Note invalid—Question whether a suit on an independent obligation will lie and to what extent the note may be used as evidence.

Held that a promissory note payable on demand to the lender or the bearer or to order offends against the provision of section 25 of the Paper Currency Act, 1923, and therefore cannot form the basis of a suit.

Held, by BOYS and KENDALL JJ., that the payee can, however, sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of such a promissory note, independently of the execution of the promissory note, *Hedayat Ali Beg* v. *Nga Kyaing* (1), *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (2), *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (3), *Nachimuthu Chetty* v. *Andiappa* (4), and *Natarajulu Naiker* v. *Subramanian Chettiar* (5), referred to. *Held, also*, that where there is other evidence outside the promissory note of the obligation sued upon, such a promissory note would be admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admisible in evidence, there can be no decree on the basis of it alone.

THIS was a reference made by the Munsif of Fatehpur under the provisions of order XLVI, rule 1, of the Code of Civil Procedure. The case came originally before a Bench consisting of BOYS and ASHWORTH, JJ., at whose instance it was referred to a Full Bench and then laid before a Bench consisting of BOYS, KENDALL and SEN, JJ.

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*Miscellaneous Case No. 1254 of 1927.

(1) (1914) 24 Indian Cases, 721. (2) (1916) 35 Indian Cases, 219.
(3) (1916) I.L.R., 40 Mad., 585. (4) (1917) 42 Indian Cases, 706.
(5) (1922) I.L.R., 45 Mad., 778.

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The parties were not represented.

THE facts of the case are fully stated in the judgement of BOYS, J.

BOYS, J. (KENDALL, J., concurring.—This is a reference by the Munsif of Fatehpur under order XLIV, rule 1. He has referred two suits, one No. 350 and one No. 310. The Munsif himself states that in suit No. 350 an appeal will lie, and there is, therefore, no power in him to make the reference. But in suit No. 310 no appeal lies, and it was open to him to make the reference, and we have to entertain it. Notices have been served on the parties and nobody appears.

The learned Munsif states the question referred as follows :—

"Whether a promissory note made payable to bearer on demand offends against the provisions of section 25 of the Indian Paper Currency Act, No. X of 1923 "?

"Is such a promissory note void and inadmissible in evidence and cannot be the basis of a claim in any court of law "?

He states that promissory notes payable to bearer on demand are a common form of promissory note occurring in the district of Fatehpur, and that "at least about 100" of such promissory notes are the basis of suits pending in his court.

The promissory note in question, after reciting that the executant has taken a certain sum in cash from one Muhammad Bakhsh, continues :—"*Indul-talab dain ko ya hamil ko ya unke hukm par mai sud bashart do rupiya saikra mahwari ta roz wasul ada karunga.*" This, though not grammatically worded, is in plain terms a promissory note payable on demand to the lender or the bearer or to order.

The questions propounded by the Munsif can best be answered by separating them into four questions :—

(1) Is the promissory note in question forbidden by law?

(2) If the promissory note is forbidden by law, can it form the basis of a suit?

(3) If the promissory note cannot form the basis of a suit, can the obligation, as existing independently of the promissory note, be sued upon (if any such obligation exists,— a question to be determined on the facts of the case)?

(4) Is the promissory note admissible in evidence, and if so, for what purpose and to what extent?

The Indian Paper Currency Act, X of 1923, section 25, says :—"No person. . . . shall draw etc., ... any. . . . . . promissory note . . . . for the payment of money payable to bearer on demand."

First question.—Is the promissory note in question forbidden by law? There can be no doubt but that this document is a promissory note, see Act XXVI of 1881 (Negotiable Instruments Act), section 4. It is an instruction in writing (not being a bank note or currency note) containing an unconditional undertaking to pay a certain sum to a certain person or to the order of that person or to bearer. It also clearly contains a term rendering the executant liable to pay the amount specified in it to the bearer on demand. As such, it is forbidden by section 25 of Act X of 1923. The only exception to the prohibition contained in section 25 is to be found in the proviso where such a document is drawn on a banker, shroff or agent by the customer or a constituent of the drawee in respect of deposits of money in the hands of

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such person, etc. This document was not so drawn, and therefore the benefit of that exception does not enure to it. The only other type of promissory note payable to bearer on demand permitted by law is a promissory note drawn by Government. Such a promissory note is provided for in section 3 of Act X of 1923, and they are described therein as currency notes. Such promissory notes section 25 of Act X of 1923 does not forbid, for they are not drawn by any "person". The promissory note in question is, therefore, clearly forbidden by law. The learned Munsif was himself quite clear upon this point, and in his order of reference to this Court has stated the case very clearly. I answer his reference on this point in the affirmative. The promissory note is contrary to law.

Second question.—If the promissory note is forbidden by law, can it form the basis of a suit? Section 10 of the Contract Act enacts as follows:—

"All agreements are contracts, if they are made . . . . for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

In this case there can be no question but that the object of the contract was lawful. The object of the borrower was to secure the loan to him of a sum of money. The object of the lender was to secure to himself the repayment of that money at a certain rate of interest. There was clearly nothing unlawful in the object of either party. Was then the consideration lawful? As the matter presents itself to me, the consideration received by the borrower was a sum of money, and in that consideration there was clearly nothing unlawful. But the consideration received by the lender was a promissory note of a certain description. There is nothing to show that he would have accepted a promissory note in any other form. If he were asked "What consideration did you

receive when you lent your debtor that sum of money?", what reply could he give other than "I received this promissory note"? Now, the promissory note I have already held to be in a form forbidden by law. In other words, the consideration received by the lender was an unlawful consideration. Section 23 of the Contract Act expressly declares that the consideration of an agreement is lawful unless it is forbidden by law. This leads us to the clear result that the agreement between the parties was void. The plaintiff cannot, therefore, sue on the basis of that agreement.

Third question.—If the promissory note cannot form the basis of a suit, can the obligation, as existing independently of the promissory note, be sued upon (if any such obligation exists,—a question to be determined on the facts of the case)?

It has sometimes been suggested that there may be some difference in the answers to be given to this question, dependent upon whether the obligation in regard to which the promissory note purported to be executed was an obligation existing antecedent to the promissory note (e.g., where the amount of the promissory note represented the balance due or part of the balance due on a running account) or whether it came into existence simultaneously with the promissory note (e.g., where the taking of a loan was the occasion of the execution of the promissory note). In *Hedayat Ali Beg* v. *Nga Kyaing* (1), the conclusion was approved that "where a loan exists independently of the bill or note, that is, where a promissory note is executed for a debt which already exists, the plaintiff can succeed on the original consideration". In that case no question arose as to whether plaintiff could sue on an obligation which came into being simultaneously with the execution of the promissory note.

(1) (1914) 24 Indian Cases, 721.

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But the question was specifically considered in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (1). There Mr. Justice ABDUR RAHIM said :—

"Where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. The whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction."

I also find myself unable to find any basis for such a distinction. The answer could not possibly be made to depend upon sworn testimony as to whether the cash consideration passed a month, a week, an hour, or five minutes before the note was executed or exactly simultaneously with the affixing of the signature to the note. The real question to be considered is, not whether the obligation existed prior to the execution of the promissory note or came into existence simultaneously with the creation of the promissory note, but whether, ignoring the existence of the promissory note altogether, there is evidence, admissible evidence, of an obligation. The problem has been stated, and in my view correctly, in *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (2), in which Mr. Justice OLDFIELD used the phrase :—"Whether there was any obligation apart from the note"; and Mr. Justice KRISHNAN—"If there is an obligation apart from one under the note *itself*, it may clearly be enforced."

For instance, where the plaintiff can prove that on a balance of account a sum is due to him he can sue on that obligation, ignoring the fact that in regard to it or part of it an unlawful promissory note was executed.

(1) (1916) 35 Indian Cases, 219. (2) (1916) I.L.R., 40 Mad., 585.

Similarly, if he has evidence, whether oral or otherwise, independent of the promissory note, that he made a loan of a sum of money to the defendant on the condition that the money would be repaid on demand with certain interest, he can sue on that obligation, ignoring the existence of the promissory note. Nor in this latter case can it be said that section 91 of the Evidence Act will stand in his way. The terms of no "contract" have in this case been reduced to the form of a document, for, *ex hypothesi*, the agreement embodied in the promissory note was not enforceable by law and was therefore not a "contract". Nor, without unduly straining language, could the transaction be described as "a disposition of property".

The three cases to which reference has already been made, and also the cases of *Nachimuthu Chetty* v. *Andiappa* (1) and *Natarajulu Naicker* v. *Subramanian Chettiar* (2), which are discussed in the judgement of my learned brother, are ample authority, if authority be necessary, for the proposition that an obligation which exists, and as to which there is evidence independent of the promissory note, can form the basis of a suit, despite the fact that the promissory note is in an unlawful form and cannot form the basis of a suit.

The question whether any obligation exists apart from the note is a question the answer to which must of course depend on the facts of the case and will be determined by the trial court.

In one of the cases, *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (3), it was said :—

"It may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument executed for it, but no such case was sought to be made here."

(1) (1917) 42 Indian Cases, 706. (2) (1922) I.L.R., 45 Mad., 778.
(3) (1916) 35 Indian Cases, 219 (221).

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In other words, it was suggested that there might in some cases be room for an issue as to whether the independent obligation was merged in the obligation under the promissory note, but it is difficult to see how an obligation independently existing could be merged in an agreement which has been held to be an unlawful agreement and therefore void.

Fourth question.—Is the promissory note admissible in evidence, and, if so, for what purpose and to what extent?

In only two of the cases above referred to was the question of admissibility in evidence adverted to. It appears to me incumbent on us to answer this reference not only by saying whether the document is admissible or not in evidence, but also to indicate to what extent and for what purpose it is admissible, if admissible at all. In *Nachimuthu Chetty* v. *Andiappa* (1) Mr. Justice SPENCER and Mr. Justice KRISHNAN said :—

"We may observe that there is nothing in law to prevent a note offending against section 26 (of Act II of 1910) being admitted in evidence as an acknowledgment."

And again the same Judge, Mr. Justice SPENCER, sitting with Mr. Justice DEVADOSS in *Natarajulu Naicker* v. *Subramanian Chettiar* (2), said :—

"The real consideration for the hypothecation bonds is the first defendant's indebtedness ascertained by the settlement of accounts, of which the promissory notes are evidence, and the liability for the debts will remain even if the notes are unenforceable." . . . .

"There is no provision of law making promissory notes in a prohibited form inadmissible in evidence . . . . They are admissible in evidence as acknowledgments."

(1) (1917) 42 Indian Cases, 706.

(2) (1922) I. L. R., 45 Mad., 778 (784).

It may be open to question whether it is desirable as a matter of public policy that a document which is in a form expressly prohibited by law should be admissible for any purpose whatever, but I also am unable to find any express provision of the law altogether prohibiting admission in evidence of a document such as the promissory note in question. I do not, therefore, feel justified in holding that the document is inadmissible in evidence.

Where there is other evidence, oral or documentary, of the obligation, I find no reason for holding that the promissory note, properly proved, is not admissible, and the fact of its having been written must be weighed with the other evidence to arrive at a determination whether any obligation existing independently of the execution of the promissory note is proved. It may be noted here that this proposition does, where the arising of the debt is simultaneous or practically simultaneous with the execution of the document, seem to go very near allowing proof of the obligation or part at least of the obligation created by the note; but that is only because, being simultaneous, the obligation independent of, and the obligation purporting to be created by, the promissory note must obviously be nearly or wholly identical. But the obligation which is being proved is nevertheless the independent obligation.

Where there is no such other evidence, for instance, where a son finds a promissory note among his deceased father's papers and, though able to prove the handwriting of the executant, has no other evidence as to the circumstances in which it came to be written, then, while the promissory note is still in law admissible in evidence, there can be no decree on the basis of it alone.

There is no legitimate distinction between the recital in the document (if in fact there be such a recital) that the executant had received a certain sum of money and

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any other statement in the document as to the conditions under which the money was taken, e.g., the promise to pay and the rate of interest; all such statements are equally "facts."

To give a decree on the basis of those statements alone would be to give a decree on the basis of the execution of the document and that cannot, as already stated, be done.

I would return the following answers :—

(1) The promissory note in question is in a form forbidden by law.

(2) The promissory note in question cannot form the basis of a suit.

(3) The plaintiff can sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note.

(4) Where there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone.

SEN, J.—This is a matter which comes up on a reference by the learned Munsif of Fatehpur under section 113 of the Code of Civil Procedure. The powers of the subordinate judiciary to make a reference for the opinion of the High Court are hedged in by certain conditions and limitations which are to be found in

order XLVI, rule 1, of the Code of Civil Procedure. A right of reference is fundamentally different from a right of appeal. The former vests in the court, and the latter vests in the suitor. This Court cannot entertain a reference from a subordinate civil tribunal unless certain requisite conditions are fulfilled and it is necessary that the reference should be made in a pending suit or appeal arising out of a suit in which no appeal or further appeal is permissible, and that it should relate to a question of law on which the court making the reference has a reasonable doubt.

The reference has been made in two cases, Nos. 350 and 310. In suit No. 350 the reference is clearly untenable, because the decision in the said suit is open to appeal. In suit No. 310 there is no right of appeal and the questions formulated are clearly questions of law. But the order of reference does not clearly indicate that the learned Munsif entertained any reasonable doubts as to the solution of these questions. On two out of the three points raised, he has stated his opinion without any hesitation. On the third point, as to the admissibility of the document in controversy, he does not state that he has any reasonable doubts. The jurisdiction of this Court in the matter of a reference under section 113 being of a very limited character, all the circumstances must be brought out clearly to attract the jurisdiction of this Court. I was inclined to hold that the reference did not fulfil the conditions required by law, but since my learned colleagues are of opinion that from the general *tenor* of the statement submitted by the Munsif it may be inferred that the Munsif did entertain reasonable doubts on the questions raised by him, I would, out of deference to their opinion, proceed to deal with the reference without being too technical and without any further canvassing about its form and outer trappings.

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The suit which has given rise to this reference was brought on a promissory note, the terms of which need not be reproduced in detail. But it was a promissory note payable on demand to the lender or the bearer or to order. It answers the definition of a promissory note given in section 4 of the Negotiable Instruments Act (Act XXVI of 1881). It has been provided in section 1 that "nothing in this Act affects the Indian Paper Currency Act, section 25."

The Paper Currency Act now in force is Act X of 1923, section 25 of which provides :—

"No person in British India shall draw, accept, make or issue any bill of exchange, *hundi*, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums money on the bills, *hundis* or notes payable to bearer on demand, of any such person."

Section 26 of the Act provides that the making of an instrument in contravention of the provisions of section 25 of the Paper Currency Act is an offence and a penalty has been imposed for the transgression.

The objective of the Act is to secure for the Crown a monopoly for the issue and circulation of currency notes which are in form of promissory notes payable to bearer on demand. The only exception engrafted is contained in the proviso, which is for the benefit of persons named therein, and the plaintiff in the present action cannot take shelter under the proviso.

The general provisions of the Negotiable Instruments Act cannot be treated as an indication of an intention on the part of the legislature to legalize an instrument upon which an interdict has been placed by the intervention of a special statute. Again, section 120 of the Negotiable Instruments Act cannot be construed to

include the payee of the negotiable instrument payable to bearer under the head of "a holder in due course."

The promissory note clearly contravenes the provision of section 25 of Act X of 1923.

Under section 23 of the Indian Contract Act "every agreement of which the object or consideration is unlawful is void". The promissory note being the consideration or the object of an agreement to the lender and being clearly forbidden by law, I would hold that it offends against the provision of section 23 of the Indian Contract Act. I would further hold that the promissory note, being forbidden by law, cannot form the basis of a suit.

It is outside the scope of the present reference to determine whether the plaintiff can maintain a claim against the debtor founded upon an obligation independent of the promissory note.

The admissibility of a document and its enforceability are distinct matters and need not stand or fall together. In the absence of a clear statutory bar against its admissibility as has been provided for in special matters by section 49 of the Indian Registration Act or section 35 of the Indian Stamp Act, the document must be held to be admissible in evidence for whatever it may be worth. Section 91 of the Indian Evidence Act does not impose any bar, because an agreement which is not enforceable in law, as the promissory note in the present instance is, cannot be covered by the word "contract". Moreover, the document itself is the primary evidence of its contents.

It is outside the scope of this reference to determine what is the evidentiary value of this document. It would be unwise to attempt to fetter the judgement of the court below by laying down any adventitious or artificial canons regulating or affecting its weight, scope or credibility. I do not therefore consider it necessary to determine

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whether the instrument can, by itself and without any corroboration, justify a decree in plaintiff's favour. Equally it is undesirable to deal with the questions whether the promissory note should be treated as an acknowledgment of liability, as evidence of an implied promise to pay or as supporting an independent obligation.

BY THE COURT :—The order of the Court is that the following answers be returned to the learned Munsif :—

(1) The promissory note in question is in a form forbidden by law.

(2) The promissory note in question cannot form the basis of a suit.

(3) The plaintiff can sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note.

(4) Where there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence there can be no decree on the basis of it alone.