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We consider therefore that for both these reasons in the present case there has been sufficient compliance with the particulars of the law in regard to attestation. Accordingly we allow this Letters Patent appeal and dismiss the appeal of the defendant in this Court and restore the judgment of the lower appellate court with costs to plaintiff in both appearances in this Court.

Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.

SEWA RAM (DEFENDANT) *v.* HOTI LAL (PLAINTIFF) AND PANNA LAL (DEFENDANT).*

1930 *June*, 5.

Negotiable Instruments Act (*XXVI of* 1881), *section* 78—*Promissory note*—Benami *transaction*—*Holder a* benamidar—*Suit by real owner on the promissory note*—*Whether maintainable*—*Whether real owner can sue on the basis of the original consideration.*

Section 78 of the Negotiable Instruments Act does not prohibit any person other than the holder of a promissory note to bring a suit thereupon, if that person be the true owner and the holder a *benamidar* for him. It does not in terms refer to a right to sue, and all that it provides is that payment made to any person other than the holder shall not operate as a discharge of the maker in respect of his liability to the holder. In a suit brought by the real or beneficial owner, to which the maker and the holder of the promissory note are parties, a decree can be passed against the maker with due provisions for safeguarding the interests of all parties and making payment to the plaintiff contingent on his securing a valid discharge of the maker by the holder of the note.

A claim for recovery of the debt due under a promissory note cannot be enforced independently of it, and a plaintiff is not allowed to fall back upon the original obligation or loan if the promissory note is admissible in evidence and provable by the holder thereof who can recover the debt due thereunder. The real or beneficial owner of a promissory note executed in favour of a *benamidar*, can not, therefore, maintain a suit.

* Second Appeal No. 2308 of 1927, from a decree of Ali Ausat, Additional Judge of Aligarh, dated the 19th of October, 1927, reversing a decree of Kedar Nath Mehra, Munsif of Kasganj, dated the 22nd of July, 1927.

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apart from the promissory note itself, for recovery of the money from the maker of the note.

Brojo Lal Saha v. *Budh Nath Pyarilal and Co.* (1), followed. *Gur Narayan* v. *Sheolal Singh* (2), *Gurumurti* v. *Sivayya* (3), *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (4), and *Dori Lal* v. *Sewak Ram* (5), referred to. *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (6), and *Reoti Lal* v. *Manna Kunwar* (7), not approved.

Mr. *P. L. Banerji*, for the appellant.

Messrs. *Panna Lal* and *Binod Behari Lal*, for the respondents.

SEN and NIAMAT-ULLAH, JJ. :—This is the defendant No. 1's appeal from the decree passed by the learned Additional District Judge, reversing the decree passed by the Munsif of Kasganj in a suit brought by the plaintiff respondent for recovery of Rs. 1,000 on foot of a promissory note, dated the 14th of April, 1924.

The promissory note in suit was executed by Sewa Ram, the first defendant (the appellant), in favour of Panna Lal, the second defendant, on the 14th of April, 1924, for a sum of Rs. 700 advanced thereunder at the rate of Rs. 1-4-0 per cent. per mensem. Seth Hoti Lal, the plaintiff respondent, sued on the promissory note on the allegation that the first defendant is his brother-in-law (wife's brother) to whom he advanced the loan in question. He took the promissory note in the name of the second defendant and retained it in his own possession. In other words, the plaintiff claims to be the real creditor under the promissory note in suit, the second defendant being his *benamidar*.

The suit was contested by the first defendant, who denied having borrowed any money from the plaintiff but admitted the execution of the promissory note in

(1) (1927) I. L. R., 55 Cal., 551.
(2) (1918) I. L. R., 46 Cal., 566.
(3) (1897) I. L. R., 21 Mad., 391.
(4) (1904) I. L. R., 28 Mad., 205.
(5) (1915) 13 A. L. J., 695.
(6) (1906) I. L. R., 30 Mad., 88.
(7) (1922) I. L. R., 44 All., 290.

suit under circumstances stated in his written statement, viz. that one Ganeshi Lal, said to be the plaintiff's *karinda*, agreed to secure for the first defendant a loan of Rs. 700 from the second defendant Panna Lal; that in anticipation of the loan he (the first defendant) executed the promissory note and made it over to Ganeshi Lal, but that no money was subsequently lent and the transaction fell through. The suggestion is that the plaintiff got the promissory note from Ganeshi Lal and preferred a groundless claim. It was also pleaded that the plaintiff is not competent to maintain a suit on foot of a promissory note in favour of the second defendant, in view of section 78 of the Negotiable Instruments Act.

Both the lower courts have disbelieved the defendant's story as regards the circumstances under which he alleged to have executed the promissory note in suit and have concurrently found that the plaintiff respondent actually advanced the loan evidenced by the promissory note, taking it in the name of defendant No. 2 as his *benamidar*. The court of first instance dismissed the suit on the ground that the plaintiff cannot sue on the promissory note, not being the holder thereof. The lower appellate court took a contrary view and decreed the suit, holding that the plaintiff can fall back upon the original consideration, though he may be incompetent to sue on foot of the promissory note of which he is not the holder. The principal question which has been the subject of discussion in second appeal is whether under the circumstances already stated the plaintiff respondent is entitled to sue for recovery of principal and interest due under the promissory note in suit.

The learned advocate for the appellant has argued that a claim arising under a promissory note cannot be enforced independently of it and that a plaintiff is allowed to fall back upon the original loan transaction

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only if the promissory note is inadmissible in evidence or is for any other reason unenforceable. We are of opinion that this contention has force. Where a promissory note or other negotiable instrument is inadmissible in evidence or void, the promise contained therein cannot be established by evidence afforded thereby, and the court has to accept the position that there was no undertaking reduced to writing which can be the foundation of an action. But where such promissory note or negotiable instrument is provable by the holder thereof who can recover the debt due thereunder, no case can exist for recovery of the same debt independently of its terms. Apart from conflicting claims arising from a contrary view, there is an inherent flaw in a claim collateral to the deed being permitted. A *benami* transaction of the kind we are concerned with, closely analysed, amounts to a transaction in which the executant of the promissory note promises to pay to the person in whose favour it is executed in consideration of the money advanced by another. The promissory note having been executed and delivered, the consideration for it is exhausted. All the three parties concerned in such a transaction stand committed to certain promises. The person actually advancing the money did so to induce the borrower to execute the promissory note in favour of, and to agree to pay the sum advanced with interest to, the person mentioned in it. The holder of the promissory note agrees to hand over the money when realised to the actual creditor.

The position of a *benamidar* has been described by their Lordships of the Privy Council as one having "no beneficial interest in the property or business that stands in his name," but representing "the real owner and so far as their relative legal position is concerned, being a mere trustee for him." Under ordinary circumstances the beneficiary can maintain a suit for relief arising out of a transaction in which he is beneficially

interested through a *benamidar*. The right of the *benamidar* to maintain an action has also been affirmed by their Lordships of the Privy Council in *Gur-Narayan* v. *Sheolal Singh* (1), from which the above quotation has been made. If there is no rule of law which bars a suit by the beneficiary, there can be no objection to a decree being passed in his favour in a properly constituted suit to which the *benamidar* and the person liable are parties. In case of a *benami* promissory note, however, section 78 of the Negotiable Instruments Act imposes a certain amount of disability on the person claiming to be the real creditor who took it in the name of another person. It runs as follows: "Subject to the provisions of section 82, clause (*c*), payment of the amount due on a promissory note, bill of exchange or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument." The case before us is free from any complication created by section 82, clause (*c*), referred to in section 78. We may, therefore, leave it out of account. The section makes it perfectly clear that the executant of the promissory note is bound to make the payment of the amount due on the promissory note to the holder of the instrument and that payment to anybody else will not discharge him. The word "holder" has been defined in section 8 as a "person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto." It follows that payment by the maker of the promissory note to the real creditor will not effectively discharge him and his liability on foot of the promissory note will continue in spite of it. To allow the real creditor to sue for the money advanced by him independently of the promissory note, by proving the actual loan, would expose the debtor to a double liability; to the real creditor on foot of the original consideration and to the holder of the promissory note in terms of the

(1) (1918) I. L. R., 46 Cal., 566.

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express promise contained therein. We are, therefore, clearly of opinion that the lower appellate court has taken an erroneous view of the right of the plaintiff respondent to succeed apart from promissory note in suit.

The next question is whether the plaintiff respondent is entitled to sue on the promissory note under which he is the real creditor, the holder thereof being his *benamidar* or trustee. It has been argued with reference to section 78 of the Negotiable Instruments Act that the only person who can sue is the holder of the promissory note, in this case the second defendant. If the plaintiff has otherwise a right of suit, we find nothing in section 78 which precludes him from maintaining a suit for enforcement of the liability incurred by the first defendant under the promissory note. All that the section provides is that the payment made to any person other than the holder shall not operate as a discharge. It does not in terms even refer to the right to sue. In a suit brought by the real creditor, to which the debtor and the holder of the promissory note are parties, a decree can be passed against the debtor for what is due from him, with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that it is made by deposit in court, or if money is recovered from him in execution of decree, it shall be to the credit of the holder or may be paid to the plaintiff if he secures a discharge of the debtor by the holder of the promissory note. The plaintiff can also recover by suit against the second defendant if the decretal amount is deposited to the latter's credit. A decree in these terms and payment made in pursuance thereof will satisfy all the requirements of section 78. The holder of the promissory note being a party will be bound by the result of the litigation, and there is no danger of the debtor being sued a second time; nor, if a payment is made by him in the manner directed by the decree, the discharge of his liability will be in any

manner ineffective. Ordinarily there can be no difficulty in the real creditor obtaining proper endorsement of the promissory note from the holder his *benamidar*, which will entitle him to sue. There may be cases in which the plaintiff may have to sue without such endorsement and, if the ends of justice so require, we see no reason why the court should not pass a decree in favour of the plaintiff, making sufficient provision for safeguarding the interest of all the other parties to the suit.

The view stated above finds support from *Brojo Lal Saha* v. *Budh Nath Pyarilal and Co.* (1), in which a promissory note sought to be enforced by a firm had been executed in favour of one of its partners. The suit was brought in the name of the firm as the plaintiff. Exactly similar contention, based on section 78 of the Negotiable Instruments Act, was put forward on behalf of the debtor but was negatived on two grounds: (1) that the holder of the promissory note being one of the partners should be deemed to be the plaintiff and (2) that section 78 of the Negotiable Instruments Act did not preclude a third person suing the maker of the promissory note and recovering money due thereunder if a discharge by the holder could be secured for the debtor.

In cases of *benami* promissory notes the real creditor runs considerable risk in not forthwith obtaining an endorsement in his own favour, as cases are conceivable in which the holder may collude with the debtor and give him a discharge. In the case before us the second defendant has not entered appearance and there is no suggestion that he has given a discharge to the first defendant, or that he opposes the claim of the plaintiff respondent for the enforcement of the liability of defendant No. 1. As a mere lender of name he is apparently not concerned with the result of the suit.

(1) (1927) I. L. R., 55 Cal., 551.

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Unless on the authorities relied on by the appellant, to be presently noticed, the plaintiff respondent is not entitled to maintain the suit at all, we are of opinion that justice should be done by passing a decree against the first defendant and safeguarding the interest of defendant No. 1 in the manner already mentioned.

One of the cases relied on by the learned advocate for the appellant in support of his contention that the plaintiff is not entitled to sue is *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (1), in which the holder of the promissory note sued the debtor for the recovery of what was due thereunder. The latter pleaded in defence that the plaintiff was a mere *benamidar* and not the real creditor and, therefore, not entitled to sue. The learned Judges held with reference to the terms of section 78 of the Negotiable Instruments Act that it was not open to the defendant to plead that the payee or endorsee was a *benamidar*. The case before us is the converse of that case. The actual decision of it is wholly inapplicable to the circumstances before us. The learned Judges, however, proceeded to lay down that "According to the law merchant which governed negotiable instruments in this country before the passing of the Negotiable Instruments Act, no person could sue on a negotiable instrument unless he was named therein as payee or unless he had become entitled as endorsee or bearer, and that sections 8 and 78 of the Negotiable Instruments Act have reproduced the law as it stood before the passing of the Act." This dictum has come in for a good deal of criticism at the hands of the learned Judges of the Calcutta High Court in *Brojo Lal Saha* v. *Budh Nath Pyarilal and Co.* (2), and we share the views of those learned Judges. We have to construe the language of the Negotiable Instruments Act as we find it and are not at liberty to import considerations borrowed from the law merchant in the absence of appropriate words in section 78 of the

(1) (1906) I. L. R., 30 Mad., 88. (2) (1927) I. L. R., 55 Cal., 551.

Negotiable Instruments Act justifying such considerations. That the holder of a promissory note can sue on it was the only question which the learned Judges of the Madras High Court had to decide and which has been correctly decided. Indeed the right of a *benamidar* generally to sue was always recognized and has been affirmed by their Lordships of the Privy Council in *Gur Narayan* v. *Sheolal Singh* (1), already referred to. In an earlier case decided by the Madras High Court, *Gurumurti* v. *Sivayya* (2), the right of the real creditor to sue on a promissory note taken by him *benami* in the name of another person was affirmed, but we find no discussion of the point raised before us with reference to section 78 of the Negotiable Instruments Act.

In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (3), the promissory note in suit had been executed in favour of the mother of the minor plaintiff suing with his mother as next friend. The claim was barred by limitation if brought by the mother who was adult, but was within limitation if the promissory note be considered to be *benami* for the minor who sued and attempted to escape the bar of limitation in consequence of his minority. It was held that the suit was not maintainable and that it was only the payee of the note who could sue but that her claim was barred by limitation.

In *Dori Lal* v. *Sewak Ram* (4), a learned single Judge of this Court referred to the Madras case last noted, apparently with approval. The case before him was one in revision from the decree passed by a subordinate court dismissing the suit brought by a person alleged to be the real creditor under a promissory note executed *benami* in the name of a person since deceased whose heirs were parties. The learned Judge dismissed the revision, not being prepared "to hold

(1) (1918) I. L. R., 46 Cal., 566. (2) (1897) I. L. R., 21 Mad., 391.
(3) (1904) I. L. R., 28 Mad., 205. (4) (1915) 13 A. L. J., 695.

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that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction, in applying to the decision of the question of law raised by the pleadings before him a principle which has been specifically laid down by one at any rate of the High Courts in India, and not dissented from by the court to which he is subordinate." We do not think that this is at all or was meant to be an authority for the proposition of law which had been acted upon by the court whose decree was under revision.

In a later case, *Reoti Lal* v. *Manna Kunwar* (1), the facts were similar to those before us. The learned Judges constituting the Division Bench followed the Madras cases referred to by us in upholding the decree of the first court by which the plaintiff's suit for money under a promissory note alleged to have been executed *benami* for him was dismissed. The learned Judges have not discussed the terms of section 78 to ascertain how far it precludes a suit by the real creditor which was for recovery of money by the plaintiff. It was not argued before the learned Judges, at any rate they have not considered the question, whether a decree can be passed with due reservations in favour of the debtor and consistently with the terms of section 78 of the Negotiable Instruments Act. We take it as deciding no more than that a plaintiff suing to recover directly from the debtor is not entitled to a decree and consider that we are at liberty to hold that a decree in terms already indicated by us can be passed in a proper case.

We have not been referred to any other case decided by this or any other High Court other than the cases referred to by us. We think that the view taken by the Calcutta High Court in *Brojo Lal Saha* v. *Budh Nath Pyarilal and Co.* (2) is based on a correct view of section 78 of the Negotiable Instruments Act. We have already given our own reasons for arriving

(1) (1922) I. L. R., 44 All., 290. (2) (1927) I. L. R., 55 Cal., 551.

at the same conclusion. To dismiss the plaintiff's suit on the technical ground that he is not entitled to recover from the first defendant what is due under the promissory note in suit will inflict a hardship on the plaintiff for what seems to us to be an erroneous view of law taken by his legal adviser in instituting the suit on his behalf without obtaining the endorsement of defendant No. 2 in respect of the promissory note in suit. The defendant No.1 on the other hand failed to establish the case set up by him as regards the manner in which he executed the promissory note in suit without receipt of any consideration therefor. Both the lower courts have given an emphatic finding that his defence was false. Considering all the circumstances of the case, we allow the appeal so far as to modify the decree passed by the lower court by adding the following proviso to it:

(1) The decretal amount shall be paid to or to the credit of defendant No. 2.

(2) It shall not be recoverable by the plaintiff except on obtaining a discharge from the second defendant in respect of the first defendant's liability under the promissory note in suit.

(3) If the decretal amount is deposited in court by the first defendant or is brought in execution of decree, it shall be to the credit of the second defendant.

In view of the peculiar circumstances of the case we direct the parties to bear their own costs throughout.