

174 of the Bengal Tenancy Act and by Order XXI, rule 89, to the judgment-debtor for making the deposit in Court can be extended at all, it is only when the judgment-debtor has established that he has made a mistake and that that mistake is directly due to an act of *the Court* itself.

Rule made absolute.

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LACHMI
OJA
v.
MAHARAJ
KUMAR RAM
RAN BIJAY
PRASAD
SINGH.

MACPHER-
SON, J.

REVISIONAL CIVIL.

Before Courtney Terrell, C. J. and Varma, J.

PEARAY PASI

v.

GAURI LALL.*

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March,
22, 23,
April, 4.

Negotiable Instruments Act, 1881 (Act XXVI of 1881), sections 8, 9, 46 and 78—suit based on promissory note, whether necessarily governed by the provisions of the Act—person other than holder of the note, whether competent to maintain a suit based on the note on the allegation that he is the beneficial owner and the holder is his benamidar—assignment of note, how effected.

Negotiable Instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Negotiable Instruments Act, 1881, and transfer of the rights of a party under a note to order to someone else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise.

Benode Kishore v. Asutosh Mukhopadhyaya(1), referred to.

A suit based on a promissory note is necessarily governed by the provisions of the Negotiable Instruments Act, under which only the holder of such note is competent to sue thereon.

A person who is not the holder of the note cannot, therefore, maintain a suit based on the note, on the allegation

* Civil Revision no. 493 of 1933, from an order of Maulavi Khalilur Rahman, Small Cause Court Judge of Patna, dated the 13th June, 1933, (1) (1912) 16 Cal. W. N. 666.

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Subha Narayani Vathiyar v. Ramaswami Aiyar(1) and *Harkishore Barua v. Gura Mia Chowdhari*(2), followed.

Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.(3), *Sarjug Singh v. Deosaran Singh*(4) and *Gurumurti v. Sivayya*(5), not followed.

Surajman Prasad Missar v. Sadanand Misra(6) and *Ramnagina Prasad v. Bishwanath Prasad*(7), distinguished.

Pattat Ambadi Marar v. Krishnan(8), *Abboy Chatti v. Ramachandra Rau*(9), *Reoti Lal v. Manna Kunwar*(10) and *Madan Lal v. Lal Chand*(11), referred to.

Petition by the defendant no. 1 under section 25 of the Provincial Small Cause Courts Act.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

K. N. Lal, for the petitioner.

Rajeswari Prasad, for the opposite party.

COURTNEY TERRELL, C. J.—This is a petition for Revision of a decree by a Small Cause Court in favour of the plaintiff upon a handnote.

The defendant no. 1 borrowed money from his aunt since deceased. He executed a handnote for the sum borrowed with interest dated May 28th, 1930, in favour of defendant no. 2 who was the aunt's "man of affairs." The aunt in consideration of a sum of money assigned the handnote (with others of a like

(1) (1906) I. L. R. 30 Mad. 88, F. B.

(2) (1930) I. L. R. 58 Cal. 752.

(3) (1927) I. L. R. 55 Cal. 551.

(4) (1930) 11 Pat. L. T. 255.

(5) (1897) I. L. R. 21 Mad. 391.

(6) (1932) I. L. R. 11 Pat. 616.

(7) (1933) 15 Pat. L. T. 102.

(8) (1887) I. L. R. 11 Mad. 290.

(9) (1894) I. L. R. 17 Mad. 461.

(10) (1922) I. L. R. 44 All. 290.

(11) (1927) I. L. R. 49 All. 457.

nature) to the plaintiff. Defendant no. 2 executed a document acknowledging that the lady was the real beneficiary of this and the other notes and that he had no interest in them and assented to the assignment. The defendant nos. 1 and 2 gave evidence (which was disbelieved) to the effect that defendant no. 1 had paid the amount of the note to defendant no. 2 and produced a receipt which was held to be collusive. The name of the plaintiff does not appear upon the hand-note. The Munsif decreed the suit. The defendant no. 1 takes the point that the plaintiff had no title to sue on the note. It is contended that he is neither the payee nor a holder in due course, which is certainly true. The note is made payable to defendant no. 2; it is not payable to bearer and, therefore, any transfer to constitute the transferee a holder in due course must be by indorsement and delivery according to section 9 and section 46 of the Negotiable Instruments Act.

There has been some discussion in the Courts as to the right of a person other than the holder in due course to sue on a negotiable instrument. The matter was argued in *Subha Narayana Vathiyar v. Ramaswami Aiyar*⁽¹⁾ before a Full Bench and it was held that sections 8 and 78 of Negotiable Instruments Act are a reproduction of the English law merchant. In that case the defendant sought to defend on the ground that the holder of the note sued on was a mere benamidar. The plea was rejected and the Court said "We cannot find any English case in which an undisclosed principal has attempted to sue on a negotiable instrument, and we think that the decisions clearly establish that an undisclosed principal could not be sued.....in the case of instruments intended to be negotiable and to pass from hand to hand usage and policy alike required that the real contract should appear on the face of the instrument". Towards the close of the judgment, however, the Court said "We

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think it unnecessary to discuss the more recent decisions of this Court holding that the assignee of a negotiable instrument to whom it has been assigned otherwise than by indorsement may, when in possession of the instrument, sue in his own name, as there are considerations in such a case which do not arise here". As to the first two passages of this judgment there is in my opinion no doubt that the law is correctly stated and that statement has been expressly approved by the Calcutta Court in *Harkishore Barua v. Gura Mia Chowdhuri*(1). In the latter case the defendant no. 1 had executed a promissory note payable to defendant no. 2 but the plaintiff claimed to have advanced the money and to be the real or beneficial owner of the note and that defendant no. 2 was merely his benamidar, and the defendant no. 2 actually deposed to this effect. It was held that the plaintiff could not recover on the note and reference was made to section 32 of the Act in which the holder is defined as

"any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto".

On this definition and on the wording of section 78 (which requires that payment to discharge the maker must be made to the holder) and on that of sections 48 and 50, it was held that the property in the note and the right to recover thereon was vested in the holder and no one else. Mr. Justice Patterson said "In my opinion, the plaintiff in the present case is not competent to prosecute the suit, not being the holder of the note, and the fact that the holder of the note has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference. The property in the note, including the right to receive or recover the amount due thereon is vested in the holder, and cannot be transferred to the plaintiff except by the process prescribed by law, viz. by endorsement and delivery. It may be that the suit

(1) (1930) I. L. R. 58 Cal. 752.

would have succeeded if it had been based on the consideration and not on the note but being based on the note, it is, in my opinion, necessarily governed by the provisions of the Negotiable Instruments Act, and under the provisions of that Act as I understand them, only the holder of a promissory note is competent to sue thereon". [See also *Pattat Ambadi Marar v. Krishnan*(1); *Abboy Chatti v. Ramachandra Rau*(2); *Reoti Lal v. Manna Kunwar*(3) and *Madan Lal v. Lal Chand*(4)].

It was argued before us that this case differs from that just cited in the fact that the plaintiff is an assignee of the note sued on though by means other than indorsement. Now it may be that the assignee of a debt evidenced by a note may sue [see e.g. *Muthu Krishniar v. Veeranaghava Iyer*(5)] but section 137 of the Transfer of Property Act expressly excluded negotiable instruments from its purview and the plaintiff cannot be deemed to be the assignee of the note or of the right to sue thereon. Our attention was drawn to some cases in which prior to the decision in *Harkishore Barua v. Gura Mia Chaudhuri*(6) doubts had been expressed of the soundness of the decision in *Subba Narayana Vathiya v. Ramaswami Aiyar*(7) and the opinion had been advanced that the Negotiable Instruments Act had not affected the Indian law of benami so that persons other than the holder or maker might sue or be sued on a note. The first of these was *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.*(8) but the opinions expressed in that case were specifically stated to be obiter dicta and merely out of deference to the arguments which had been presented in the course of the case. They are in my opinion

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(1) (1887) I. L. R. 11 Mad. 290.

(2) (1894) I. L. R. 17 Mad. 461.

(3) (1922) I. L. R. 44 All. 290.

(4) (1927) I. L. R. 49 All. 457.

(5) (1912) I. L. R. 38 Mad. 297.

(6) (1930) I. L. R. 58 Cal. 752.

(7) (1906) I. L. R. 30 Mad. 88, F. B.

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erroneous and were moreover expressly dissented from in the later case before the same Court which has been above quoted. In *Sarjugh Singh v. Deosaran Singh*(1) the facts were exactly similar to those in the case reported in *Harkishore Barua v. Guru Mia Chowdhuri*(2) and Kulwant Sahay, J., sitting singly, expressed his approval of the obiter dicta in *Brojo Lal's*(3) case and decided that the plaintiff could recover and disagreed with the Madras Full Bench decision. He also relied on *Gurumurti v. Sivayya*(4) one of the cases expressly overruled by the Madras Full Bench. For the reasons I have given above I respectfully disagree with the decision of the learned Judge and would treat it as overruled. The two later cases of *Surajman Prasad Miser v. Sadanand Misra*(5) and *Ramnagina Prasad v. Bishwanath Prasad*(6) are clearly distinguishable and only purport to decide that if a suit is brought nominally by a person other than the holder but really on behalf of the holder who is also a party to the suit there is no reason why the suit should not succeed. These were in my opinion rightly decided. In the case before us the real holder (defendant no. 2) alleges that the promissory note has been paid and discharged and is clearly not in the position of a plaintiff.

It was argued on behalf of the plaintiff that he was a transferee of the note as a chattel although not an indorsee. But there is a great difference between the position of the owner of a piece of paper and that of a holder in due course with his statutory rights. In *Benode Kishore v. Asutosh Mukhopadhyaya*(7) the Court held that such a transferee might be the owner of the piece of paper and might have, as under the

(1) (1930) 11 Pat. L. T. 255.

(2) (1930) I. L. R. 58 Cal. 752.

(3) (1927) I. L. R. 55 Cal. 551.

(4) (1897) I. L. R. 21 Mad. 391.

(5) (1932) I. L. R. 11 Pat. 616.

(6) (1933) 15 Pat. L. T. 102.

(7) (1912) 16 Cal. W. N. 666.

English law, the right to compel the transferor to complete the transfer by indorsement but they said that they did not purport to answer the question as to how in default of indorsement the transferee was to enforce payment of the note as against the maker. Moreover even on the matter of the transfer they do not seem to have considered the application of section 137 of the Transfer of Property Act although they decided that the transfer was in accordance with that Act. In short Negotiable Instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Act and transfer of the rights of a party under a note to order to someone else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise. Finally it is clear that the payee of the note, defendant no. 2, has expressly released the maker, defendant no. 1, and as no consideration is required for such a release, the fact that it was collusive is immaterial. It may be that the plaintiff may have some cause of action against defendant no. 2 for his conduct in granting such release but we need not consider that matter. I would allow the prayer of this petitioner and set aside the decree of the Small Cause Court with costs here and below.

Hearing fee two gold mohurs.

VARMA, J.—I agree.

Rule made absolute.

FULL BENCH.

Before Courtney Terrell, C. J., Khaja Mohamad Noor and Verma, JJ.

COMMISSIONER OF INCOME-TAX

v.

CAPTAIN MAHARAJ KUMAR GOPAL SARAN
NARAIN SINGH.*

Income-tax Act, 1922 (Act XI of 1922), sections 4, 6, 12—“income”, meaning and significance of—annuity, when

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* Miscellaneous Judicial Case no. 131 of 1933.