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C.A.P.C.S. CHETTIAR FIRM v. V.V.R. CHETTIAR FIRM.

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The above finding, which does not purport to embody any definite statement in fact made by the appellant, is something different from what the finding would have been if it had been held that the allegation in clause 8 of the verifying affidavit had been made out. But, with all respect, I am of opinion that the facts of the case as disclosed in the evidence would not justify a finding such as that at which the learned Judge in insolvency arrived, and that this insolvency petition also fails on the merits.

For these reasons the appeal will be allowed, the order from which the appeal is brought set aside, and the petition dismissed. The appellant is entitled to his costs in both the Courts, advocate's fee in each Court, ten gold mohurs.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Apl. 2.

A. R. M. JAMAL

v.

ALBERT JOSEPH & SONS.*

Negotiable Instruments—Accommodation note—Holder after maturity—Deposit of note by payee with creditor as security—Subsequent endorsement of note to creditor—Creditor's right to recover full amount from drawer—Common-law rights of a holder by way of lien—Bills of Exchange Act (45 & 46 Vict. c. 61), s. 27 (3)—Negotiable Instruments Act (XXVI of 1881), s. 59, proviso.

The defendants drew three promissory notes for Rs. 600 each in favour of *A* for his accommodation. The notes were payable some four months after the respective dates of execution. After the maturity of these notes *A* who was indebted to the plaintiff to the extent of about Rs. 1,650 deposited the notes with the plaintiff and subsequently endorsed them to him. The latter sued the defendants for the full amount due thereon.

Held, that the plaintiff did not hold the notes merely as security but that he was the indorsee thereof in good faith and for consideration, and therefore

* Civil First Appeal No. 163 of 1934 from the judgment of this Court on the Original Side in Civil Regular No. 191 of 1934.

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under the proviso to s. 59 of the Negotiable Instruments Act he was entitled to recover the full amount due under the notes from the defendants, and not merely the amount of *A*'s indebtedness to the plaintiff.

There is no provision in the Negotiable Instruments Act similar to s. 27 (3) of the English Bills of Exchange Act limiting the right of a holder of a bill who has a lien on it to the extent of the sum due to him. Also at common law the plaintiff would be entitled to recover the full amount of the notes from the defendants, the person entitled to the balance outstanding, after the amount due to the plaintiff from *A* had been liquidated, being at liberty to recover the same in an action for money had and received.

Attenborough v. *Clarke*, 27 L.J. (N.S.) Ex. 138 ; *Atwood* v. *Crowdie*, 1 Stark 483 ; *Bloxam, Ex parte*, 5 Ves. J. 447*a* ; 6 Ves. J. 448 ; *Cook* v. *Lister*, 32 L.J. (N.S.) C.P. 121 ; *Currie* v. *Misa*, L.R. 10 Ex. 153 ; *Daulatram* v. *Nagindas*, 15 B.L.R. 33 ; *Easton* v. *Pratchett*, 1 C.M. & R. 798 ; *Giles* v. *Perkins*, 9 East. 12 ; *Glassock* v. *Balls*, 24 Q.B.D. 13 ; *Jenkins* v. *Tongue*, 29 L.J. (N.S.) 1 Ex. 147 ; *Jones* v. *Hibbert*, 2 Stark 304 ; *Newton, Ex parte*, 16 C.D. 330 ; *Peacock* v. *Purssell*, 32 L.J. (N.S.) C.P. 266 ; *Pease* v. *Hirst*, 10 B. & C. 122 ; *Royal Bank of Scotland* v. *Rahim Cassum & Son*, I.L.R. 49 Bom. 207—*referred to*.

Foucar for the appellant. The proviso to s. 59 of the Negotiable Instruments Act engrafts an exception on it, and states that the holder of an accommodation instrument after maturity is in the same position as a holder before maturity, and therefore he can recover the full amount from the parties liable on the instrument.

On the facts, however, the appellant does not hold the promissory notes in suit merely by way of collateral security. He is an indorsee in good faith and for consideration, and is entitled to recover the full amount of the notes from the respondent. Even assuming that he is merely a pledgee of the promissory notes the Negotiable Instruments Act does not draw a distinction between a pledgee of a promissory note and an ordinary holder for value. See *Osmond Beeby* v. *Khitish Chandra* (1).

Ghosh for the respondents. The notes in suit are accommodation notes, and they cannot therefore be

(1) I.L.R. 41 Cal. 771.

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negotiated after maturity. Moreover, these notes are held by the appellant as security for a separate loan, and he cannot sue to recover more than the amount actually due to him. One of his remedies would have been to sell the promissory notes. See Order 21, r. 76 of the Civil Procedure Code.

The proviso to s. 59 has no application to this case because the transfer of the instruments to the respondents was not outright but only for a specific purpose, namely, to secure a loan. S. 27 (3) of the English Bills of Exchange Act lays down that the holder of a bill with a lien on it is only a holder for value to the extent of the lien, and this equitable rule of law has been adopted in India although the Negotiable Instruments Act is silent on the point. *Royal Bank of Scotland* v. *Kahim Cassum & Son* (1).

PAGE, C.J.—In my opinion this appeal succeeds on the facts. The learned trial Judge, Braund J. has found—in our opinion correctly—that the defendants drew three promissory notes in favour of one A. G. A. Abba without consideration and for his accommodation. The promissory notes were dated and payable respectively (1) on the 22nd August 1933 for Rs. 600 payable on the 15th December 1933 ; (2) on the 22nd August 1933 payable on the 22nd December 1933 ; (3) on the 22nd August 1933 payable on the 29th December 1933.

Now, in January 1934, after the maturity of the three promissory notes in suit, Abba was indebted to the plaintiff in a sum, which according to the plaintiff, amounted to about Rs. 1,650, for which the plaintiff held other promissory notes and hundis as security.

(1) I.L.R. 49 Bom. 270.

On the 10th January 1934 Abba signed a memorandum in which he stated that of the Rs. 1,650 which he owed to the plaintiff

"Rs. 200 shall be paid by me on 20-1-34 and thereafter Rs. 200 every week. If there be delay in making the payments as mentioned above, you may take necessary steps."

On the 20th January 1934 Abba deposited the three promissory notes in suit with the plaintiff upon the terms that if he failed to repay the loan by weekly instalments of Rs. 200, Abba would endorse the promissory notes in favour of the plaintiff so that the plaintiff could forthwith sue upon them as a means of liquidating the debt due to him from Abba. Abba paid Rs. 200 on the 3rd February 1934, but failed to repay the balance of the debt as agreed or at all. Abba having endorsed the promissory notes to the plaintiff upon the terms stated above the plaintiff has brought the present suit to recover the full amount thereof from the defendants.

It is not now disputed that the plaintiff became the holder of the promissory notes in good faith and for consideration; the sole question in issue being whether the plaintiff is entitled in a suit against the defendants to recover the full amount due under the notes or only the amount of Abba's indebtedness to the plaintiff. Under the proviso to section 59 of the Negotiable Instruments Act (XXVI of 1881 as amended) it is

"provided that any person who, in good faith and for consideration, becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party."

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The learned trial Judge, being of opinion that the three promissory notes were merely deposited with the plaintiff as security, held that the plaintiff could recover from the defendants only the amount of Abba's indebtedness to the plaintiff. Even upon that view of the facts, as at present advised, I should be disposed to hold that at common law the plaintiff would be entitled to recover the full amount of the promissory notes from the defendants, the person entitled to the balance outstanding, after the amount due to the plaintiff from Abba had been liquidated, being at liberty to recover the same in an action for money had and received. As Willes J. pointed out in *Cook and others* v. *Lister* (1)

> " . . . where an indorsement is made, not as on a sale of the bill, but an advance only of part of the money, with an intention of transferring the rights of the bill to the indorsee. There, where the indorsee gets the right to recover the whole money, he would be necessarily the trustee of the drawer for the amount he secures beyond that which he has advanced. That is the case of *Reid* v. *Furnival* in the *1st Crompton & Meeson*, 538, referring to the case of *Johnson* v. *Kennion* in *2 Wilson*, 262, in which the law is so laid down; . . . The whole right of action passes to the indorsee, who is necessarily a trustee to the extent of the sum exceeding that which he has advanced upon the bill, and it may be, where part of the sum is paid upon the bill, that the same rule ought to apply . . . Why the Court of Chancery is to be invoked for the purpose of settling the rights of parties on bills of exchange, I am quite unable to see. That expression, 'he is a trustee for the rest,' may or may not mean that there is such a trust as may be enforced in the Court of Chancery. I should have thought that an action for money had and received would lie the instant the indorsee himself received more than he was entitled to. I should have thought that the drawer might have brought an action for money had and received, as in *Pownal* v. *Ferrand* (2) he brought it for money paid."

(1) 32 L.J. (N.S.) C.P. 121, 127. (2) 6 B. & C. 439.

Peacock v. *Purssell* (1) is not an authority to the contrary; that case, in my opinion, deciding merely that in certain circumstances a creditor who takes a bill of exchange or promissory note as collateral security for a debt may by his conduct be precluded from recovering either on the bill or promissory note or on the original consideration. In this connection reference may also be made to *Bloxham, Ex parte* (2); *Bloxham, Ex parte* (3); *Attenborough* v. *Clarke* (4); *Jenkins* v. *Tongue and others* (5); *Pease* v. *Hirst* (6); *Easton* v. *Pratchett* (7); *Atwood and another* v. *Crowdie and another* (8); *Jones and others* v. *Hibbert* (9); *Giles and another* v. *Perkins and others* (10); *Ex parte Newton. Ex parte Griffin. In re Bunyard* (11); *Currie and others* v. *Misa* (12); *Glassock* v. *Balls* (13); *Daulatram Kundunmal* v. *Nagindas Ranchhoddas Shroff* (14) *and Royal Bank of Scotland* v. *Rahim Cassum & Son* (15). In India, however, there is no provision in the Negotiable Instruments Act similar to section 27 (3) of the English Bills of Exchange Act (1882) in which the law now obtaining in England is set out in express terms, and the present case must be determined upon a consideration of section 8 and section 59 of the Indian Act.

In the case before us we are not concerned with the rights *inter se* of an indorser and indorsee, but with the rights of an indorsee who holds in good faith and for consideration against the drawer of

(1) 32 L.J. (N.S.) C.P. 266.
(2) 5 Ves. J. 447*a*.
(3) 6 Ves. J. 448, 600.
(4) 27 L.J. (N.S.) Ex. 138.
(5) 29 L.J. (N.S.) 1 Ex. 147.
(6) 10 B. & C. 122.
(7) 1 C.M. & R. 798.
(8) 1 Stark 483.
(9) 2 Stark 304.
(10) 9 East. 12.
(11) 15 C.D. 330.
(12) L.R. 10 Ex. 153.
(13) 24 Q.B.D. 13.
(14) 15 B.L.R. 33.
(15) (1924) I.L.R. 49 Bom. 270.

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the note; and for the purpose of disposing of this appeal it is unnecessary to decide what the rights of the parties would have been if the plaintiff had held these promissory notes as collateral security only, because, with all due respect to Braund J., upon the facts we are of opinion and hold that after the endorsement of the promissory notes to the plaintiff the plaintiff did not hold the notes merely as security, but that "the whole right of action passed to the indorsee", and therefore under the proviso to section 59 of the Negotiable Instruments Act the plaintiff became entitled to "recover the amount of the note" from the defendants.

For these reasons the appeal will be allowed, the decree of the trial Court set aside, and a decree passed in favour of the plaintiff for the amount claimed with costs in both Courts. We assess the advocate's fee in this Court at five gold mohurs.

MYA BU, J.—I agree.