FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Dunkley.

1937

Jan. 7.

U PO GYI AND OTHERS
v.
LUTCHMANAN CHETTYAR AND OTHERS.*

Promissory note—Joint payees—Payment by maker to one joint payee—Discharge as against other joint payees—English rules of common law and equity—Joint promisees in India tenants-in-common of debt—Contract Act (IX of 1872), ss. 38, 42 to 44, 45—Negotiable Instruments Act (XXVI of 1881), ss. 13 (2), 78, 82.

In the absence of fraud, intimidation or undue influence a joint payee of a promissory note cannot effectively discharge the maker from liability thereunder so as to bar a claim against the maker by the other joint payees.

Ankalamma v. *Chenchayya*, I.L.R. 41 Mad. 637; *Harihar Pershad* v. *Bholi Pershad*, 6 C.L.J. 383; *Hossainara Begum* v. *Rahimannessa Begum*, I.L.R. 38 Cal. 342; *Mathra Das* v. *Nizam Din*, 52 P.R. 252; *Manzur Ali* v. *Mahmudunnissa*, I.L.R. 25 All. 155; *Ramsami* v. *Muniyandi*, 20 M.L.J. 709; *Ray* v. *Jatindra Nath*, 31 C.W.N. 374; *Syed Abbas Ali* v. *Misri Lall*, 5 P.L.J. 376, referred to.

M. Annapurnamma v. *U Akkayya*, I.L.R. 36 Mad. 544, dissented from.

At common law a joint promisee of a promissory note can effectively discharge the maker from liability so as to bar a claim against him by the other joint promisees. Equity on the other hand regards joint creditors as tenants-in-common of the debt. In England, as the result of the fusion of law and equity, joint creditors are treated as tenants-in-common, unless it is clear that they should be treated as joint tenants.

Powell v. *Brodhurst*, (1901) Ch. 161; *Steeds* v. *Steeds*, 22 Q.B.D. 537; *Wallace* v. *Kelsall*, 151 E.R. 765, referred to.

In India s. 45 of the Contract Act and ss. 13 (2), 78 and 82 of the Negotiable Instruments Act indicate that joint promisees are tenants-in-common and not joint tenants of the debt. Ss. 42 to 44 of the Contract Act embody exceptions to the common law. The concluding portion of s. 38 of the Contract Act at first sight appears to embody a rule of common law, but the section has reference merely to the consequences of refusal of an offer of performance, not the consequences of acceptance.

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* Civil Reference No. 13 of 1936 arising out of Civil First Appeal No. 182 of 1935 from the judgment of the Assistant District Court of Mandalay in Civil Regular No. 24 of 1934.

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A reference for the decision of a Full Bench was made in the following terms by

ROBERTS, C.J. and BAGULEY, J.—This appeal is brought by U Po Gyi and two infants, his great-nephews Maung Kyauk Khe and Maung Kyauk Lone, against a judgment of the Assistant District Judge of Mandalay dismissing a suit which they brought as plaintiffs for recovery from defendants of Rs. 7,500 balance due on a promissory note.

The respondents after giving the promissory note were in financial difficulties, and it is alleged that U Po Gyi was party to a composition deed which he signed on behalf of himself and these two minors, and under which he received various payments from or on behalf of the respondents. The Assistant District Judge found as a fact that he accepted the composition deed for himself and these minors and cannot now claim under the note.

The case of *Punushwami* v. *Veeramuth* (1) and *Maung Thin Maung* v. *Ma Saw Shin* (2) were cited before us as authority to show that in order to dispose of or encumber a minor's estate a *de facto* or natural guardian must have been appointed by the Court.

A translation into English of the promissory note is attached, and we desire to refer for the decision of a Full Bench the following questions the answers to which appear to be in a state of doubt which has been by no means wholly resolved by the decision of the Madras Bench in *M. Annapurnamma* v. *U Akkayya* (3) from which Arnold White C.J. dissented. (See Pollock & Mulla's Contract Act, 1931 edition, at page 279):

1. In the absence of fraud, intimidation or undue influence can a joint payee of a promissory note effectively discharge the maker from liability thereunder so as to bar a claim against the maker by the other joint payees?
2. If the answer is in the affirmative, does the fact that the persons so barred are minors, and the person who gives the discharge is an adult and not their legal guardian, make any and if so what difference?

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(1) (1925) I.L.R. 3 Ran. 452. (2) (1933) I.L.R. 11 Ran. 193.
(3) (1912) I.L.R. 36 Mad. 544.

A. N. Basu for the 1st appellant.

K. C. Sanyal for the minor appellants. The law is correctly stated in the dissenting judgment of Sir Arnold White Chief Justice in *M. Annapurnamma* v. *U Akkayya* (1) and in *Mathra Das* v. *Nizam Din* (2). The Court deciding the latter case observed that the majority decision in the Madras case constituted an unwarrantable extension of the law. Under s. 45 of the Contract Act all the promisees must join in a suit to claim the debt from the promisor; one promisee cannot sue for his share alone, nor can one of the joint promisees give a discharge to the debtor for the whole debt. *Annapurnamma's* case has not been followed anywhere. See *Ray Satindra Nath* v. *Jatindra Nath* (3); *Manzur Ali* v. *Mahmudunnissa* (4). It makes no difference whether the creditors are joint mortgagees or joint promisees. Payment to one of them only cannot discharge the debtor. If his promise is to pay three persons it would not be in accordance with the tenor of his agreement to pay only one of them. See sections 8, 26, 32, 78 of the Negotiable Instruments Act. To obtain a valid discharge the debtor must pay the holder of the note, and if a minor is one of the promisees, he is as much a holder as an adult person.

P. K. Basu for the 1st respondent. In case of a mortgage the security is one and indivisible, and therefore, a mortgagor does not get his release by paying one of several co-mortgagees. See *Ramsamy* v. *Muniyandi* (5); *Ahinsa Bibi* v. *Abdul Kader Saheb* (6); *Ray Satindra Nath* v. *Jatindra Nath* (3); *Syed Abbas Ali* v. *Misri Lall* (7). On the other

(1) I.L.R. 36 Mad. 544.
(2) 52 P.R. 252.
(3) 31 C.W.N. 374.
(4) I.L.R. 25 All. 155, 157.
(5) 20 M.L.J. 709, 712.
(6) I.L.R. 25 Mad. 26.
(7) 5 Pat. L.J. 376.

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hand in *Barber Maran* v. *Ramana Goundan* (1) payment by a mortgagor to one of the joint mortgagees was held to be a discharge of the mortgagor as against all the mortgagees. The Court considered ss. 38, 42, 43 and 45 of the Contract Act, and followed the common law rule in England as laid down in *Wallace* v. *Kelsall* (2). A mortgage debt is on a different basis to a debt due on a promissory note. In *Maung Nyan Mo* v. *Ma Po* (3) it was held that under s. 34 of the Contract Act payment to one of the joint promisees discharges the debt. It follows *Annapurnamma*'s case. The Contract Act reproduces the common law rule of joint tenancy and not the equity rule of tenancy in common of a debt. Under s. 38 of the Contract Act a valid tender of performance can be made to one of the joint promisees. Therefore a payment to one of the joint creditors discharges the debtor. Where an adult person is a promisee along with a minor of a negotiable instrument the adult person is the "holder" of the instrument who can give a valid discharge to the debtor.

LEACH, J.—Under the common law a joint promisee of a promissory note can effectively discharge the maker from liability so as to bar a claim against him by the other joint promisees. This rule of law was clearly stated in the case of *Wallace* v. *Kelsall* (4), which was an action by three plaintiffs for a joint demand in which the defendant pleaded an accord and satisfaction with one of the plaintiffs by a part payment in cash and a set-off of a debt due from that particular plaintiff to the defendant. It was held that the plea was good, without alleging any authority from the other two defendants to make the settlement. It has been said that the authority of this decision has been shaken by

(1) I.L.R. 20 Mad. 461.
(2) 7 M. & W. 264.
(3) 3 U.B.R. 42.
(4) 7 M. & W. 264=151 E.R. 765.

the decision of Farwell J. in *Powell* v. *Brodhurst* (1). But an examination of the judgment in that case clearly shows that the rule of common law has not in any way been modified by later decisions. It has only been made clear that according to equity joint creditors must *prima facie* be taken to be interested as tenants in common, and not as joint tenants which the common law regards them as being—*Steeds* v. *Steeds* (2). It was pointed out in *Powell* v. *Brodhurst* (1) that equity followed the law when there is no question that the law applies. In *Steeds* v. *Steeds* (2) there was a conflict between law and equity as to the presumption to be drawn from the existence of a security to two persons without words of severance, which Farwell J. was careful to point out in *Powell* v. *Brodhurst* (1). In England, as the result of the fusion of law and equity, joint creditors are treated as tenants in common, unless it is quite clear that they should be treated as joint tenants.

It will be convenient here to examine the provisions of the Indian Contract Act which relate to joint promisees. In this Act an attempt has been made to codify the law of contract so far as India is concerned, but like most codes it is found on examination not to be exhaustive. The first section to which I will refer is section 38 which reads as follows :

" Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :

(1) It must be unconditional.

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made

(1) (1901) Ch. 161. (2) (1889) 22 Q.B.D. 537.

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may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them."

The last paragraph of this section would at the first glance appear to imply that the Act sought to embody the rule in *Wallace* v. *Kelsall* (1), but, for reasons which I shall state later, I do not consider that that is so.

Section 42 provides that when two or more persons make a joint promise, then (unless a contrary intention appears by the contract) all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise. Under section 43, when two or more persons make a joint promise the promisee may, in the absence of express agreement to the contrary, compel any one of the joint promisors to perform the whole of the promise. Section 44 deals with the effect of the release of one joint promisor. His release does not operate to discharge the other joint promisor or joint promisors; nor does it free the one released from responsibility to the others. Then we get section 45, which is as follows:

"When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them,

(1) 7 M. & W. 264 = 151 E.R. 765.

with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

Sections 42 to 44 embody exceptions to the common law, and section 45 is consistent only with joint promisees being regarded as tenants in common. In other words, the section follows equity, and not the law. Section 165 of the Act has also been referred to in certain of the authorities dealing with the question under discussion, but I do not regard it as having an important bearing on the question. Under this section, if several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary. Goods are not the same as money, and convenience requires a provision of this nature in the case of goods.

Turning to the Negotiable Instruments Act, we find that section 13 (2) states that negotiable instruments may be made payable to two or more payees jointly, or may be made payable in the alternative to one of two or one or some of several payees. Section 78 provides that :

"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."

Section 82 reads as follows :

"The maker, acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon—

(*a*) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;

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(*b*) to a holder thereof who otherwise discharges such maker, acceptor, or indorser, and to all parties deriving title under such holder after notice of such discharge;

(*c*) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon."

The word "holder" is defined in section 8 as any person entitled in his own name to possession of the instrument and to receive or recover the amount due thereon from the parties thereto. Having regard to these sections it seems to me that in the case of a promissory note made payable to two or more persons, the word "holder" must be taken to apply to all the payees and not confined to the one who may happen to be in physical possession of it.

The point of law involved in the first question referred to us was discussed by a Full Bench of the Madras High Court in the case of *M. Annapurnamma* v. *U Akkayya* (1). The Court consisted of White C.J. and Sankaran Nair and Sadasiva Ayyar JJ. By a majority (White C.J. dissenting) it was held that one of several payees of a negotiable instrument could give a valid discharge of the entire debt without the concurrence of the other payees. The majority view was that the case was governed by the concluding portion of section 38 of the Contract Act. If a promisor was entitled to offer payment to one, the person to whom payment was offered was, it was said, entitled to accept it and give a complete discharge. White C.J. adhered to the view expressed by him in the case of *Ramsami* v. *Muniyandi* (2), wherein he dissented from the

(1) (1912) I.L.R. 36 Mad. 544. (2) 20 M.L.J. 709.

decision of the Madras High Court in *Barber Maran* v. *Ramana Goundan* (1). It was held in *Barber Maran* v. *Ramana Goundan* (1) that where a sum due on a mortgage was paid to one of two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee, the mortgage was discharged, in the absence of fraud, and the other mortgagee was not entitled to sue upon it. The correctness of the decision in this case has been the subject of much criticism, and before us it was conceded by Mr. Basu that payment to one of two mortgagees would not defeat the rights of the other mortgagee, but he contended that a mortgage debt was on a different basis to a debt due on a promissory note.

The view taken by White C.J. in *M. Annapurnamma* v. *U Akkayya* (2) was that section 38 does not deal with the legal consequences of an accepted tender or an accepted offer of performance, but only with the legal consequences of a refusal. He did not regard the provisions of section 45 of the Contract Act as being very helpful in deciding the question, although in *Ramsami* v. *Muniyandi* (3) he had laid stress on the importance of section 45, and pointed out that that section could not be overruled by section 38. In *M. Annapurnamma* v. *U Akkayya* he went on to point out that if it is impossible to answer the question within the four corners of the Contract Act, the Court has to look to the general law and to see whether the rule of law as laid down in *Wallace* v. *Kelsall* (4) applies, or whether the presumption of equity on which *Steeds* v. *Steeds* (5) was decided is to prevail. He

(1) (1897) I.L.R. 20 Mad. 461.
(2) (1912) I.L.R. 36 Mad. 544.
(3) 20 M.L.J. 709.
(4) 7 M. & W. 264 = 151 E.R. 765.
(5) (1889) 22 Q.B.D. 537.

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considered that the equitable presumption applied, and accordingly did not agree in the answer given by the other members of the Board. The correctness of the majority view was questioned by a Bench of the same Court in *Ankalamma* v. *Chenchayya* (1).

Other High Courts of India have signified their disagreement with the decision in *M. Annapurnamma* v. *U Akkayya* (2). In *Hossainara Begum* v. *Rahimannessa Begum* (3), a Bench of the Calcutta High Court (Mookerjee and Sharfuddin JJ.) following the decision in *Harihar Pershad* v. *Bholi Pershad* (4), expressed themselves in favour of the application of the equitable presumption that on a money bond to two or more obligees the obligees are to be regarded as tenants in common, and not joint tenants, with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt. In *Ray Satindra Nath Choudhury* v. *Ray Jatindra Nath Choudhury* (5), another Bench of the Calcutta High Court, (Chatterjee C.J. and Duval J.) agreed with the view taken by White C.J. in the Madras case to which I have referred. A Bench of the Allahabad High Court in *Manzur Ali* v. *Mahmudunnissa* (6) held that in a case of co-obligees of a money bond, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares as tenants in common. The Patna High Court at one time took the view that one joint creditor can give a receipt to a debtor in full discharge of the claims of himself and of the other joint creditors—*Parbhu Ram Pandey* v.

(1) (1917) I.L.R. 41 Mad. 637.
(2) (1912) I.L.R. 36 Mad. 544.
(3) (1910) I.L.R. 38 Cal. 342.
(4) 6 C.L.J. 383.
(5) 31 C.W.N. 374.
(6) (1902) I.L.R. 25 All. 155.

Mussammat Jhalo Kuer (1). But in a later case another Bench took the contrary view. See *Syed Abbas Ali* v. *Misri Lall* (2).

It will be seen that the view of the majority of the Court that decided *M. Annapurnamma* v. *U Akkayya* (3) has not found acceptance in the other High Courts of India, and the correctness of the decision has been doubted by the Madras High Court itself. In my opinion the view expressed by White C.J. is the correct view, and that payment to one of several joint promisees cannot in this country discharge the promisor so as to deprive the other promisees of their share of the debt. The concluding portion of section 38 of the Contract Act does present some difficulty, but, as pointed out by White C.J. the section has reference merely to the consequences of refusal, not the consequences of acceptance. I cannot in these circumstances read section 38 as embodying the rule in *Wallace* v. *Kelsall* (4). On the other hand, section 45 in my opinion tends to show that the Legislature did not wish to embody that rule of law in the Act. If section 38 does not embody the rule then this Court is entitled to apply the presumption in equity that joint promisees are tenants in common. In India the Courts are not required to apply law in preference to equity. They are free to apply principles of equity, and I have no hesitation in holding that they should be applied in a case of this nature. Moreover, this view seems to me to coincide with the provisions of the Negotiable Instruments Act.

For the reasons indicated I would answer the first question in the negative. If I am right in this view the second question does not arise.

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(1) 2 P.L.J. 520.
(2) 5 P.L.J. 376.
(3) (1912) I.L.R. 36 Mad. 544.
(4) 7 M. & W. 264 = 151 E.R. 765.

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DUNKLEY, J.—I concur in the judgment of my learned brother Leach and have very little to add. The argument upon which the decision of the majority Judges in *M. Annapurnamma* v. *U Akkayya* (1) was based was, if I may say so with due respect, well answered in the judgment of LeRossignol J. in the Full Bench case of *Mathra Das* v. *Nizam Din* (2), where the learned Judge put the matter as follows :

> "They appear to have been influenced by the following considerations :
>
> 'It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it and therefore the promisor cannot be held liable to pay over again to the other promisees what he has already paid.'
>
> The conclusion is certainly, we suggest with all deference, not justified by section 38 of the Contract Act and it does not follow that because A is entitled to take a certain step, in regard to one person, the rights of other persons not concurring in that step are affected thereby.
>
> Again,
>
> 'the debtor owing money to several joint promisees * * * would feel the greatest difficulty in discharging his obligation if he should not be allowed to make a *bona fide* payment to any one of them.'
>
> What difficulty there would be in such a case is not insuperable ; after all, all complex transactions involve some difficulty and section 38 of the Contract Act has been devised to relieve the debtor, in the case contemplated, of any loss that might accrue to him by the refusal of his creditors to give him a joint discharge.
>
> In any case it is not for us to guess at the intention of the Legislature in a case for which it has not specifically provided, * *."

I would add that, so far as a promissory note is concerned, this difficulty is overcome by the provisions

(1) (1912) I.L.R. 36 Mad. 544, 549. (2) 52 P.R. 252, 258.

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of section 13 (2) of the Negotiable Instruments Act. Section 45 of the Contract Act by its terms indicates that joint promisees are tenants-in-common, and not joint tenants, of the debt.

I agree that the first question propounded should be answered in the negative and that therefore the second question does not arise.

DUNKLEY, J.

ROBERTS, C.J.—In this case I have read the two judgments of my learned brothers and I concur in them and have nothing to add. The costs of the reference will be costs in the appeal, advocate's fee 15 gold mohurs.

LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

1937

Jan. 7.

S.N.V.R. CHETTYAR FIRM
v.
K.Y.A. CHETTYAR FIRM.*

Mortgage—Mortgaged lots—Sale of some lots subject to mortgage—Oral release of some lots from mortgage—Sale of released plots to satisfy mortgagee's other debts—Second mortgage of two lots of mortgaged land—Suit by mortgagee against mortgagor and puisne mortgagee—Claim against puisne mortgagee for proportionate share of mortgage debt—No evidence of valuation of respective lots—Puisne mortgagee's claim to bring sale proceeds of released lots into account—Marshalling—Wrong basis of suit—Necessary parties—Remand of case for addition of parties and fresh evidence—Evidence Act (I of 1872), s. 92—Transfer of Property Act (IV of 1882 and XX of 1929), s. 81—Civil Procedure Code (Act V of 1908), O. 1, r. 10; O. 34, r. 1.

In 1919 H mortgaged her 18 lots of paddy land measuring 381·88 acres to the respondent by a registered instrument. In 1925 H sold 24·91 acres of the mortgaged land to T and his wife subject to the mortgage. In 1926 the respondent orally released from the mortgage 89 acres which H sold to various persons and the purchase price of Rs. 8,500 was applied in the reduction of sundry debts due by H to the respondent. In 1927 H executed in favour of the

* Letters Patent Appeal No. 8 of 1936 from the judgment of this Court in Civil Second Appeal No. 190 of 1936 arising out of Civil Appeal No. 2 of 1936 of the District Court of Pegu.