ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

JETHA' PARKHA AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RA'MCHANDRA VITHOBA, (ORIGINAL DEFENDANT), RESPONDENT.*

1892. *February* 16; *August* 29.

Paper Currency Act (XX of 1882), Sec. 25—Promissory note payable to "bearer on demand"—Note payable whenever "dhani" (i.e., the owner) may demand—Dhani not equivalent to "bearer"—Not a negotiable instrument—Negotiable Instrument Act (XXVI of 1881), Secs. 4 and 13.

The plaintiffs brought a suit on an alleged promissory note of the defendants for Rs. 2,125. The note was in Gujaráti, in the form of an account, on a loose sheet of paper. After reciting that the defendant had borrowed the said sum of Rs. 2,125 on personal security, and that interest was to run thereon at a specified rate, the document continued as follows:—"The same (*i.e.*, the sum borrowed with interest) are payable whenever *dhani* (the owner or lender) may demand payment thereof." The defendant contended that the note in question was in form one payable to "bearer on demand," and as such illegal and void, as being in contravention of the provisions of section 25 of the Paper Currency Act (XX of 1882).

Held, that *dhani* was not, in the ordinary or the commercial language of this Presidency, equivalent to "bearer" in the sense that word was employed in the Paper Currency and Negotiable Instruments Acts, and that the document in question was not, therefore, a negotiable instrument, nor obnoxious to the provisions of the former Act, and there was no objection to a suit founded upon it.

APPEAL from judgment of Parsons, J., dismissing the suit.

This was a suit on an alleged promissory note said to have been executed by the defendant, and given to the plaintiffs for money advanced by the plaintiffs to the defendant. The promissory note was in Gujaráti, and written on a loose sheet of paper. The official translation of the note was as follows:—

"The account of Sutár Rámchandra Vithobáji, the 1st of *Chaitra Vudya of Samvat* 1945, the day of the week, Tuesday, the date of 16th of April 1889; in cash Rs. 2,125, namely rupees twenty-one hundred and twenty-five, in full in cash have been received, (*i.e.* borrowed) on personal security. The same are

* Civil Suit, No. 542 of 1891. Appeal No. 738.

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payable. The interest thereon accrues due at the rate of 6¼ per cent., namely ix and one quarter cents. (*i. e.* 1 anna) per Re. 1 per mensem. The same are payable whenever the owner (*i.e.* the lender) may demand (payment thereof).

1 attestation of Shá Ganma Okáji to Rs. 2,125 in the presence of the party.
1 attestation of Shá Partáp Leláji to Rs. 2,125.

Signed (on a one-anna receipt stamp) in English—
Rámchandra Vithoba.
Rs. 2,125 (two thousand one hundred and twenty-five) 16th April 1889."

The defendant denied executing the note, and also raised the defence that the alleged note, being in form a note payable to bearer on demand, was in contravention of the provisions of section 25 of the Paper Currency Act (XX of 1882),* and consequently illegal and void, and the plaintiffs could not maintain any action thereon. The first issue raised by the defendant was as follows :—

1. Whether the plaintiffs are entitled to recover from the defendant on the promissory note mentioned in the plaint, having regard to the provisions of section 25 of Act XX of 1882?

By consent this issue was tried first. It was found in the negative by the learned Judge, Parsons, J., who accordingly dismissed the suit with costs.

The learned Judge made the following remarks in delivering his judgment:— "The note in question is on a loose piece of paper; the name of the lender of the money is not disclosed. The note purports to be payable to *dhani, i. e.* the 'owner,' or 'possessor,' which, I take it, must mean the owner or possessor

* Section 25.—No body corporate or 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 of money on the bills, hundis or notes payable to bearer on demand, of any such body corporate or of any such person :

Provided that cheques or drafts payable to bearer on demand, or otherwise, may be drawn on bankers, shroffs, or agents by their customers or constituents, in respect of deposits of money in the hands of those bankers, shroffs or agents, and held by them at the credit and disposal of the persons drawing such cheques or drafts.

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of the piece of paper; he may or may not be the lender of the money. '*Dhani*,' therefore, in this context, it seems to me, is equivalent to the 'holder' or the 'bearer'—the person who possesses the document and produces it. If so, I think the document comes within the mischief of the Act, and the plaintiffs cannot be allowed to recover on it. I therefore dismiss the suit with costs."

The plaintiffs appealed.

Lang (Acting Advocate General) and *Inverarity* for the appellants:—The sections of the Paper Currency Act are highly penal in their nature, and must be construed strictly. The prohibition is against the issue of notes made payable to "bearer on demand." These very words, or possibly, if the document is in a native vernacular, their exact equivalent, must be used. No authority will be found for saying "*dhani*" is equivalent to "bearer." In this context it means really the lender,' the owner of the debt. Possibly it might denote the 'holder,' but not the 'bearer.' 'Holder' implies a title to hold—section 8, Act XXVI of 1881. This document, moreover, is not a promissory note.

[BAYLEY, C. J.:—The Act says "promissory note, or engagement for the payment of money."]

No doubt it is an "engagement for the payment of money," but not the sort of engagement contemplated by the section. The section contemplates documents which are in form negotiable instruments, passing by mere delivery. This is not a negotiable instrument: it does not come within the terms of section 13 of the Negotiable Instruments Act (XXVI of 1881). That definition is exhaustive.

Jardine and *Anderson* for the respondent:—The plaintiffs themselves put forward this document in their plaint as a promissory note. It is in the ordinary form of a Márvádi promissory note. It is on a separate piece of paper,—not written, as sometimes is the case, in an account book. It discloses no name but the name of the debtor. It is payable "whenever *dhani* may demand." The object of making it so payable is that it may pass from hand to hand. What is

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there in this note to prevent it so passing? Any one producing it may claim to be the *dhani*, *i. e.* the 'holder,' or 'possessor,' or 'owner' of the document, and, therefore, of the debt. It comes within the mischief of the section. It is not necessary that the exact words "bearer on demand," or, if in a native language, their exact equivalent, should be employed. A bill, drawn payable to A and endorsed by A in blank, comes within the mischief of the section: see Chalmers' Indian Negotiable Instruments Act: note to section 5, p. 10. "Bearer" is not defined in the Indian Act. "Holder," as Mr. Chalmers says in his notes to the Act (pp. 18-19), is not very happily defined therein; the *de facto* holder is really contemplated by the Act. A note, therefore, made payable to the "holder" on demand would come within the mischief of the Act. That is exactly what this note is.

[FARRAN, J.:—Suppose *dhani* there means "creditor": do you say a note made payable to the 'creditor' whenever he shall demand would come within the purview of the Act?]

We maintain it would, though we submit that is not this case.

C. A. V.

BAYLEY, C. J. (ACTING):—This suit is brought by Jethá Parkha and three others trading at Breach Candy Road, outside the Fort, under the style and firm of Jethá Parkha and Company, and by Bhotá Cámmá and three others, trading at Girgaum under the style and firm of Bhotá Cammá and Company, and by their plaint they state that defendant by his promissory note, dated 16th April, 1889, executed at Bombay, promised to pay to the plaintiffs, Jethá Parkha and Company, on demand the sum of Rs. 2,125 for value received, with interest at 6¼ per cent. per mensem, and that the said sum of Rs. 2,125 was advanced to defendant on joint account by Jethá Parkha and Company and the plaintiff Bhotá Cammá.

The defendant in paragraph 6 of his written statement submitted that the document sued on, being in form payable to bearer on demand, was illegal, void, and of no effect.

At the hearing the first issue framed was whether the plaintiffs were entitled to recover from the defendant on the promissory

note sued on, having regard to the provisions of Act XX of 1882.

There were other issues, but the questions raised by them were not gone into, and no findings thereon were recorded.

The Judge of the Divisional Court held that the person lending the money was not disclosed on the face of the document, the word "*dhani*" only being used, so that any one possessed of the document could sue on it, such word being, he considered, equivalent to "bearer," or "holder." He held that section 25 of the Indian Paper Currency Act (XX of 1882) applied, found the first issue in the negative, and dismissed the suit with costs, without prejudice to the plaintiffs' rights, if any, to bring a fresh suit to recover the amount as money had and received, or money lent.

The plaintiffs appealed, and the only question for the consideration of this Court is whether the learned Judge was right in holding that the Márvádi document sued on came within section 25 of Act XX of 1882.

The official translation of the instrument, which is written in the form of an account, not in a book, but on a separate piece of paper, is as follows:—[The learned Judge read it and continued.] Section 25 of Act XX of 1882 enacts that "no body corporate or 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 of money on the bills, hundis, or notes, payable to bearer on demand, of any such body corporate, or of any such person;" and section 26 states that any body corporate or person committing any offence under section 25 shall, on conviction before a Presidency Magistrate, or a Magistrate of the 1st class, be punished with a fine equal to the amount of the bill, hundi, note, or engagement in respect whereof the offence is committed. There is a proviso exempting from the operation of section 25 cheques, or drafts drawn on bankers, shroffs, or agents, by their customers or constituents.

The enactment is a penal one. An Act or Statute imposing penalties must, according to the well-known rule, be construed

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strictly—*Empress* v. *Kola Lalang*(1). In *Reg.* v. *Bhista bin Madanna*(2) a Bench of four Judges of this Court held that a penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subjects.

Now, is the word "*dhani*" in this instrument equivalent to "holder" or "bearer"?

From Wilson's Glossary, p. 135, it appears that the word is derived from the Sanskrit word "*dhan*," which means "wealth, property, a loan; the cattle of a village". "*Dhani*" is stated by that learned oriental scholar to mean "one having property —a master—an owner—also, a lender, a creditor".

In Molesworth's Maráthi Dictionary "*dhani*" is translated a "proprietor—owner". It was stated by the Advocate General, who appeared for the defendant, and not denied on the other side, that none of the dictionaries translate "*dhani*" as "bearer." We were not referred to any usage, or custom of trade, or to any authority whence it could be inferred that the word had ever been considered as equivalent to "bearer."

In the document sued on it is stated that Rs. 2,125 in full in cash had been received, *i. e.* borrowed on personal security, and that the same are payable, with interest, whenever the owner, "*dhani*" (*i. e.* the lender) may demand payment thereof.

In Story on Bills of Exchange, placitum 60, it is stated that it was formerly a matter of doubt whether by English law it was not essential to the character of a bill of exchange that it should be negotiable, *i. e.* that it should be payable either to A, or his order, or to the bearer. It was, says Mr. Justice Story, formerly held that a bill payable to A, or bearer, was not negotiable (*Hodges* v. *Steward*(3)); but that had been overruled, and the contrary doctrine established (*Grant* v. *Vaughan*(4)). That eminent writer says that it is essential to the negotiability of an instrument that it should be payable to order, or to bearer, or that some other equivalent word should be used authorizing the payee to assign or transfer the same to third persons, such, for example, as payable "to A or his assigns." Where a bill payable to order was endorsed in blank by the

(1) I. L. R., 8 Calc., 214.
(2) I. L. R., 1 Bom., 308.
(3) 1 Salk., 125.
(4) 3 Burr., 1516.

payee it was held by Lord Mansfield, C. J., and the other Judges of the Court of the King's Bench in *Peacock* v. *Rhodes*(1) that it was transferable by mere delivery, in the same manner as if it were payable to the bearer. In the Negotiable Instruments Act (XXVI of 1881) a "negotiable instrument" is by section 13 stated to mean "a promissory note, bill of exchange, or cheque expressed to be payable to a specified person, or his order, or to the order of a specified person, or to the bearer thereof". By section 8 the "holder" of a promissory note means "any person entitled in his own name to the possession thereof, and to receive or recover the amount due thereon from the parties thereto."

I may here notice that by the Bill of Exchange Act, 1882 (45 and 46 Vict., c. 61), section 8,

(1) when a bill, (which applies also to a promissory note, section 89), contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill (or note) may be payable either to order, or to bearer.

(3) A bill (or note) is payable to bearer which is expressed to be so payable, or on which the only, or last, endorsement is an endorsement in blank.

As the word "*dhani*" in the instrument sued on is not, in my opinion, equivalent to "bearer," and there being no words in the document indicating an intention that it can be transferred to any one else, it appears to me to follow that it is not a negotiable instrument.

The present owners of it, the "holders," are creditors of the defendant, who allege that they lent their money to him and obtained his signature to the document as security for the money so advanced. Such document never was, and is not, negotiable, and, therefore, is not a promissory note, or engagement for the payment of money, *payable to bearer on demand*, within the meaning of section 25 of the Indian Paper Currency Act of

(1) 2 Doug., 633.

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1882. It was, in my opinion, clearly admissible in evidence, and the decree of the Court below must, therefore, be reversed.

As to costs, I think, the plaintiffs (appellants) ought to have the costs of this appeal, and that the costs already incurred in the Court below should be left to be disposed of by the Judge who finally decides the suit.

FARRAN, J. :—I am also of opinion that this appeal must be allowed. As we differ from the view of the Division Court, I think that I ought to state my reasons for doing so.

The only question which we have to determine is whether the instrument sued upon is in contravention of the provisions of the Indian Paper Currency Act, 1882, section 25. That section enacts that "no body corporate or 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 of money on the bills, *hundis* or notes payable to bearer on demand, of any such body corporate or of any such person." I omit the proviso as to cheques, which has no bearing on the present case. Section 26 imposes a severe penalty upon any one contravening the provisions of section 25.

Now section 25 of the Indian Paper Currency Act follows the wording of the English Bank Charter Act (7 and 8 Vict., c. 32, section 11.) The ambiguity (if any existed) in this latter Act is removed by Stat. 17 and 18 Vict., c. 83, sec. 11, which provides *(inter alia)* that "promissory notes, which shall entitle, or be intended to entitle, the bearer or holder thereof without endorsement * * * to the payment of any sum of money on demand whether the same shall be so expressed or not, in whatever form such notes shall be made, shall be deemed to be notes within the meaning of the former Act." The Indian Paper Currency Act (section 25) has not been so explained, but I think upon its actual wording the result is the same. It, in my opinion, embraces a promissory note which is expressed to be, as also one which in legal effect is, payable to bearer on demand. The Act is contravened when the promissory note is made payable to bearer on demand in words, and also when, if made in

other words, it is, in law, a promissory note or other instrument payable to bearer on demand.

Now in this case the instrument sued on is as follows:—[His Lordship then read the note as above set out, and continued.] That is signed by Rámchandra Vithoba, and his signature is attested by two witnesses. The document is in the Márvádi character and in the Gujaráti language such as Márvádis in Bombay speak and write. The form of the instrument and the reservation of interest by it show, I think, that it does not fall within the spirit of the Act, the object of which is to protect the monopoly which is secured to the Government of India to issue the paper currency of the country. That, however, is unimportant if the wording of the instrument brings it within the purview of the section. The word which the translator renders "owner" is "*dhani*" in the original instrument. The translations issued, by Government, of the Act in Gujaráti and Maráthi render a bill of exchange and promissory note payable to bearer by the well-known expressions "*saha jog hundi*" and "*Saha jog chithi*," which would convey to a native mind the same meaning as the expressions bill and note payable to bearer convey to the mind of an English merchant, though perhaps their legal effect may be slightly different according to the law merchant as it prevails amongst Hindus: see *Davlatrám* v. *Bulákidás*[1].

It will be convenient first to consider whether, if the instrument had been in the English language and the word "owner" had been used where "*dhani*" occurs in the native document, it would have been negotiable by delivery—whether it would have been, in legal effect, payable to bearer on demand. To determine this, recourse must be had to the Negotiable Instruments Act (XXVI of 1881). Section 4 defines a promissory note as "an instrument in writing * * * containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument." That definition is, it appears to me, exhaustive and excludes from the category of promissory

(1) 6 Bom. H. C. Rep., 24.

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notes instruments which do not fall within its terms. Section 13 defines a negotiable instrument to be "a promissory note, bill of exchange or cheque expressed to be payable to a specified person or his order, or to the order of a specified person, or to the bearer thereof." This again is exhaustive. If an instrument does not fall within the definition, it is not termed a "negotiable instrument."

If this reasoning is correct, it follows that a document making a sum of money payable to "owner" on demand is not negotiable by mere delivery under section 47 of Act XXVI of 1881, and is not within the words or intent of section 25 of the Currency Act. On the other hand, a demand bill of exchange drawn payable to drawee's order, and then endorsed by him in blank, is an instrument payable to bearer on demand, and, as pointed out by Mr. Chalmers at p. 2 of his edition of the Negotiable Instruments Act, would seem to come within the purview of the sections.

The first question for our decision, therefore, narrows itself to this. Is "*dhani*" used, in the ordinary or in the commercial native language of this Presidency, as the equivalent of "bearer" in the sense in which that word is employed in the Currency and Negotiable Instruments Acts?

In the translations issued by Government of the latter Act in Gujaráti and Maráthi, "bearer" is rendered by a paraphrase हे ते दस्तावेज आणे तेने—अथवा तो दस्तऐवज हाजर करील त्यास. From this it might be presumed that, except the expression "*sáhá jog*" already alluded to, there is no exact native equivalent of the English word "bearer" as used in those Acts. These translations do not, however, possess any legislative sanction, and we ought not to rely too much upon them.

In Wilson's Glossary "*dhaní*" is explained to be "one having property, a master, an owner; also a lender, a creditor"—while "*dhani jog*" is explained thus: "payable to the purchaser; a bill, &c., as distinguished from that which is payable to some other "*sáhá jog*". In Shápurji's Gujaráti Dictionary "*dhani*" is stated to mean "a proprietor, an owner, a master, lord, ruler; the responsible man, the proper man; he to whom it is the

province: a husband." In Narmadáshankar's Gujaráti Dictionary the meaning is given as equivalent to "*málik*," "*upari*," "*mukhi*," "*vád*." Naoroji Fardunji in his dictionary gives the meaning as "owner," "master," "proprietor," "possessor." Molesworth gives the interpretation thus: "Proprietor or owner, a master, lord, ruler, the leading man; the responsible man; the proper man; he of whom it is the province."

Dhani jog is rendered by Molesworth as "payable to the person who purchases it, as distinguished from *sáhá jog*,—an epithet of a *hundi* which bears this word on it importing that the person presenting it is worthy and may be trusted with the cash, answering to *payable to bearer*.

Naoroji Fardunji translates *sáhá jog* in the same way as Molesworth, and adds "a *hundi* made payable to the bearer on presentment." He does not give "*dhani jog*" as a Gujaráti compound.

From these interpretations it is clear that "*dhani*" in its primary etymological sense is equivalent to the English word "owner," and it follows, therefore, that as a mere translation of owner the use of the word in connection with a promissory note payable on demand does not render the document bearing it negotiable by force of the provisions of the Negotiable Instruments Act. These authorities also show that "*dhani*" is used in a secondary sense when applied to instruments like *hundis*, or promissory notes, as importing payable to the purchaser as distinguished from the "bearer," and they all alike indicate that the mere bearer of a note payable to *dhani* is not, as such, entitled to payment. I think that without evidence of a local usage, such as is preserved by section 1 of the Negotiable Instruments Act, to the effect that instruments in the form sued upon by the plaintiff pass from hand to hand like bank notes, and that the bearer for the time being is entitled to cash them (and no evidence of that kind has been given), the Division Court was in error in holding that the document relied upon by the plaintiff was inadmissible in evidence.

It has been assumed by the Division Court, and it was apparently assumed in the arguments addressed to us, that if the

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document sued on was payable to bearer, the plaintiff could not recover upon it. I do not know upon what reasoning that assumption is based. Section 25 of the Currency Act does not seem to warrant it. That section renders it illegal to "draw, accept, make or issue any bill of exchange, &c., for the payment of money payable to bearer on demand, or to borrow, owe or take up money on such bills, &c." It does not, in terms, say that the holder of such a bill cannot recover upon it, nor does the object of the Act render it likely that the Legislature intended that result. The object was to prevent banks and private persons from infringing the Government monopoly, and not apparently to punish the innocent holders of notes issued in breach of the law, and *pro tanto* to protect the banks and the private persons who have illegally issued the instruments. A contrary assumption was certainly made by the Court of Queen's Bench in England when dealing with the case of *Attorney General* v. *Birkbeck*(1), but as the question was not argued before us I do not pursue the subject further.

Attorneys for the plaintiffs:—Messrs. *Chalk, Walker and Smetham.*

Attorney for the defendant:—Mr. *H. S. Dikshit.*

(1) 12 Q. B. D., 605.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891.
December 17.

LACHMICHAND HIRA'CHAND AND ANOTHER, APPLICANTS, *v.* TUKA'RA'M AND ANOTHER, OPPONENTS.*

Execution —Property attached and ordered to be sold—Person holding a claim—Application, form of—"Circular Orders"—High Court's Civil Circular No. 90 (c) *—Court fee—Court Fees' Act (VII of* 1870), *Sch. II, No.* 1—*Notice to the judgment-debtor.*

A person holding a claim on property ordered to be sold in execution of a decree is required to make the application contemplated in the High Court's Civil Circular No. 90 (c), page 50, of the "Circular Orders." The application must be in writing and bear the proper fee prescribed by Schedule II, No. 1.

*Civil Reference No. 20 of 1891.