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PRIVY COUNCIL.

MASCARENHAS AND OTHERS (PLAINTIFFS) *v.* MERCANTILE BANK OF INDIA, LIMITED (DEFENDANT No. 3) AND CONNECTED APPEAL.

[On appeal from the High Court at Bombay]

* J. C. 1931 *July* 28.

Negotiable Instrument—Promissory Note—Bombay Improvement Trust Debentures—Transfer by forged indorsements—New debentures issued in exchange—Holder in due course of new debentures—Claim by owner of old debentures—New contract—The Negotiable Instruments Act (XXVI of 1881), sections 4, 9, 13, 87.

Forty-one debentures issued by the Bombay Improvement Trustees, and being promissory notes and therefore negotiable instruments within Act XXVI of 1881, were owned by the appellants. They were transferred to the A. Bank by forged indorsements as security for the forger's loan account. Subsequently the Trustees issued 22 new debentures in exchange for the 41 debentures, which they cancelled. The new debentures, which were of the same aggregate face value as the old, were issued direct to the A. Bank, and were in form promises to pay that Bank or order; they contained no apparent reference to the old debentures. Subsequently the forger transferred his loan account to the respondent Bank, and by his directions the A. Bank indorsed to them the new debentures, which they received without notice of any defect in the title of the A. Bank. The appellants sued the respondent Bank claimnig the new debentures.

Held, that the new debentures constituted new contracts between the Trustees and the A. Bank and that the respondent Bank being holders of them in due course, the appellants had no cause of action against them.

Hunsraj v. *Ruttonji*,[1] disapproved.

Lee v. *Zagury*,[2] distinguished.

Decree of the High Court, 52 Bom. 792, affirmed.

CONSOLIDATED APPEALS (Nos. 87 and 88 of 1929) from two decrees of the High Court in its appellate jurisdiction, dated March 26 and 27, 1928, which respectively reversed, so far as material to the present appeal, a decree of the Court in its original jurisdiction, dated April 12, 1927, and varied a similar decree dated April 14, 1927.

**Present:* Lord Tomlin, Lord Russell of Killowen and Sir George Lowndes.

(1) (1899) 24 Bom. 65.

(2) (1817) 8 Taunt. 114.

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The two suits were instituted against the respondent bank as third defendants by separate plaintiffs, the present appellants. The question arising in both was substantially the same, namely, whether the respondents were entitled to hold as against the respective appellants certain debenture bonds of the City of Bombay Improvement Trust, and, (in the second suit) a Municipal debenture as security for money advanced to the first defendant.

The decision of the appellate Court (Marten C. J. and Blackwell J.) was in favour of the respondents, except as regards three debenture bonds with which the second suit was also concerned and as to which the present appeals did not relate. The judgments of March 26, 1928, are reported at 52 Bom. 792.

The material facts appear from the judgment of the Judicial Committee.

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June 29.

Conway, K. C., and *Parikh*, for the appellants.

Rayner Goddard, K. C., and *C. W. Turner*, for the respondents, were not called upon.

July 28.

The judgment of their Lordships was delivered by SIR GEORGE LOWNDES :—The questions for decision in these appeals arise out of a fraud committed by one Fernandes. In the year 1914 he was entrusted by the appellants, who were residents of Goa, with certain securities for the purpose of collecting on their behalf the interest as it fell due. Among these securities were 41 "debentures" issued by the Trustees for the Improvement of the City of Bombay under powers contained in their Act (Bombay Act IV of 1898) and also one "municipal debenture," being presumably a debenture issued by the Municipal Corporation of Bombay under Bombay Act III of 1888. All of these securities were transferable by endorsement.

Fernandes seems to have remitted the interest to the appellants regularly till the middle of 1923, when he defaulted, and it was then discovered that he had, in 1918,

by means of forged endorsements in his own favour, pledged all the debentures in question (together with others not the subject of these appeals) with the Alliance Bank of Simla, endorsing them over to that bank to secure his own indebtedness.

Had no further complications occurred there would probably have been little difficulty in deciding on the rights of the parties; but in 1921 the Alliance Bank surrendered the 41 Improvement Trust debentures to the Trustees, who exchanged them for 22 new debentures, the face value of which differed in many cases from those of the originals, though the totals were the same. This transaction is described in the record as a "renewal" of the debentures, and seems to have been in accordance with the usual practice, but it has an important bearing on the rights of the parties. (All these new instruments were issued directly to, and in the name of, the Alliance Bank, clear of all previous endorsements.) The original securities were cancelled by the Trustees and retained by them. The same process, *mutatis mutandis*, was gone through in the case of the Municipal debenture.

Thereafter, in 1921, Fernandes transferred his loan account to the Mercantile Bank of India, the respondents in these appeals, and on his instructions the Alliance Bank endorsed the new instruments over to the respondents.

The appellants now claim the delivery and transfer to them of these instruments by the respondents. They succeeded in the first Court in India, but failed to hold their decree on appeal and the questions involved come before this Board for final determination. There is no dispute as to the facts set out above.

The securities entrusted to Fernandes were the property of the two sets of appellants, and suits were instituted by them separately on the original side of the Bombay High Court. The defendants in each case were Fernandes, the

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Alliance Bank, and the respondents, but the suits were defended only by the respondents. They were tried and heard in appeal separately, but are consolidated before the Board, and in their Lordships' opinion the same considerations apply in each.

The original Improvement Trust "debentures," specimens of which are printed in the record, were in the form of a promise to pay a particular sum to the Bank of Bombay or order on August 20, 1963, with half-yearly interest in the meantime, at 4 per cent. per annum. On the back was a series of spaces for the entry of interest payments and a column of endorsements commencing with an endorsement by the original payee, the Bank of Bombay, and ending with that of Fernandes to the Alliance Bank. The renewals, with which the appeals are principally concerned, were in the form of a promise to pay the Alliance Bank or order, and contained no reference to the originals except that under the serial numbers of each new instrument was entered another number, which is said to be that of an old debenture, and where two or more of the originals were consolidated in a new instrument the word "consolidation" appeared.

It was agreed on the argument in appeal in India that the so-called "debentures" were promissory notes as defined in section 4 of Act XXVI of 1881, and, therefore, under section 13 of that Act negotiable instruments. In their Lordships' opinion this is the correct view of their legal attributes. There was no irregularity in their transfer to the respondents; the references to the old numbers and to consolidation were not, their Lordships think, sufficient to lead the respondents to believe that there was any defect in the title of the Alliance Bank, and it is not suggested that there was anything else in the transaction to put them on enquiry. The respondents were apparently, therefore,

in the position of holders in due course under section 9 of the Act.

The trial Judge, as already stated, decided both the suits in favour of the plaintiffs, the present appellants. The main ground of his judgment was that no title could be acquired by the respondents through the forged endorsements and that the "renewals" must be regarded in law as merely the "fruit" of the original securities. He relied upon the cases of *Lee* v. *Zagury*[1] and *Hunsraj* v. *Ruttonji*.[2] He made decrees in the appellants' favour, declaring in each case their title to the instruments claimed, and ordering the respondents to transfer and hand over the same to them together with all interest or dividends realized by the respondents within three years prior to the filing of the suits. He also granted the appellants certain relief against Fernandes, which is not now material.

The appeals were heard by Marten C. J. and Blackwell J., who delivered in each suit separate, but concurring, judgments in favour of the present respondents. In the one case they dismissed the suit as against the respondents, declaring that the appellants were not entitled to the "new debentures" held by the respondents; in the other they limited the decree of the lower Court to certain securities not in question in these appeals.

The learned Judges were of opinion that the issue by the Improvement Trustees of the instruments the subject of the suit constituted in effect a 'new contract' in each case between them and the Alliance Bank; that the respondents were holders in due course of these instruments, and that the appellants had no right of action against them. Referring to the authorities on which the trial Judge had relied, they held that the case of *Hunsraj* v. *Ruttonji*[2] was wrongly decided, and that *Lee* v. *Zagury*[1] was a decision on very special facts, and could not govern the cases before them.

(1) (1817) 8 Taunt. 114.

(2) (1899) 24 Bom. 65.

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In their Lordships' opinion the conclusion come to by the appellate Court was right. They think that the suits, so far as the respondents were concerned, were misconceived. On the original debentures the Improvement Trustees were, no doubt, bound to the appellants, and the forged endorsements in favour of Fernandes would not, *prima facie*, affect their title. If these debentures had come into the possession of the respondents, the appellants might well have been entitled to recover them. But what the appellants claimed to have transferred and made over to them were instruments to which they never had a title and with which their Lordships think they had no concern. They were not in any sense mere appendages to or continuations of the original securities. They may be called "renewals," but they were in form and in substance new and independent obligations in substitution for those under the surrendered instruments, and entered into by them with the Alliance Bank and their transferees. This is shown by the consolidation of the amounts for which the original promissory notes were issued, and by the elimination of the previous endorsements. In the case of dishonour by the makers it is hardly conceivable that the holders could be entitled to sue the endorsers of the old notes: they would not ordinarily even know who they were, and consolidation would be inexplicable except on the basis of a new contract, as any material alteration of the originals would render them void against intermediate parties; see section 87 of the Act above referred to.

In truth, the only connection between the old and the new instruments was that, as between the Trustees and the Alliance Bank, the consideration for the issue of the new was the surrender of the old instruments. This cannot, their Lordships think, give the appellants any title to the new instruments, though it may not affect their title to the old ones.

It may be that if the suits had been instituted against the Improvement Trust it would have been difficult for that body to resist them. They were in possession of the securities to which the appellants were entitled, and though they affected to cancel them, this would not necessarily defeat the appellants' title. Their Lordships are not called upon to express, and do not express, any opinion upon this question.

Their Lordships agree with the learned Chief Justice of Bombay in thinking that *Hunsraj* v. *Ruttonji*,[1] so far as that decision dealt with "renewals" of Government promissory notes, was wrongly decided. They notice that the Indian Securities Act, XIII of 1886, which provided for such renewals, gave special statutory protection to the Government in respect of the original securities, and this protection is continued, though subject to more stringent conditions, by Act X of 1920.

With regard to *Lee* v. *Zagury*,[2] their Lordships agree that it is no authority upon the present case; it was a decision upon a complicated set of facts, and did not affect to lay down any principle of law.

Their Lordships have dealt in this judgment mainly with the Improvement Trust debentures, but they think that the same considerations apply to the Municipal debenture, and that the appeals fail with regard to all of them.

For the reasons given their Lordships will humbly advise His Majesty that the consolidated appeals should be dismissed. The appellants must pay the costs.

Solicitors for appellants: Messrs. *Birkbeck Julius, Edwards & Co.*

Solicitors for respondents: Messrs. *E. F. Turner & Sons.*

Appeals dismissed.

A. M. T.

[1] (1899) 24 Bom. 65.

[2] (1817) 8 Taunt. 114.