APPELLATE CIVIL.

Before Mr. Justice Wassoodew and Mr. Justice Indarnarayen.

ZUJYA PASCOL DAMEL (ORIGINAL DEFENDANT), APPELLANT *v.* MANMOHANDAS LALUBHAI PRATAP AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1939 *September* 13

Negotiable Instruments Act (XXVI of 1881), s. 8—Holder—Joint family firm—Promissory note in firm's name—Partition—Suit in individual names of coparceners—Maintainability.

Where a promissory note was executed in the name of a Hindu family firm and subsequently at a partition the debt mentioned in the note was allotted to the share of one of the coparceners, a suit filed in the individual names of the coparceners to recover the debt due on the promissory note is maintainable.

Madubai Damel v. *Vadilal*,[1] approved.

Per Wassoodew J. The trend of the authorities is that no person can sue on a negotiable instrument unless he is named therein as a payee or endorsee, the ratio being that the right to sue on a promissory note for the debt is personal to the holder named in the note. Our Courts have recognised a distinction between a right to the note and a right to the debt. The latter might be claimed independently of the note. For instance, if the debt was part of the coparcenary estate, every coparcener could claim a right to it although only the coparcener named in the note could sue on it.

SECOND APPEAL from the decision of S. M. Kalkini, Assistant Judge, Thana, confirming the decree made by P. B. Patel, Joint Subordinate Judge, Andheri.

Suit to recover money.

Manmohandas, Wadilal, and Chandulal formed a joint Hindu family. They carried on a business in the name of Kashidas Ambaidas.

On August 29, 1931, Zujya (appellant) executed in favour of Kashidas Ambaidas a promissory note for Rs. 2,351.

In the same year, there was a partition in the family when the promissory note was allotted to the share of Manmohandas (respondent No. 1) who was managing the business.

* Second Appeal No. 487 of 1937.

[1] (1938) 41 Bom. L. R. 219.

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On August 29, 1934, respondent No. 1 filed the present suit to recover the amount due under the promissory note, impleading Wadilal and Chandulal, as defendants Nos. 2 and 3. On the date of the hearing of the suit defendants Nos. 2 and 3 were transposed as co-plaintiffs under O. 1, r. 10, of the Civil Procedure Code.

The appellant denied the execution of the promissory note and contended, *inter alia*, that the action of the respondents in their individual names was not maintainable as they were not holders, nor endorsees, nor assignees of the note.

The trial Judge gave respondent No. 1 a decree as prayed.

On appeal, the learned Assistant Judge confirmed the decree.

Defendant appealed.

Purshottam Tricumdas, with *N. M. Hungund*, for the appellant.

K. N. Dharap, for respondent No. 1.

S. A. Merchant, for respondents Nos. 2 and 3.

WASSOODEW J. This is a second appeal from a decision of the Assistant Judge of Thana in a suit to recover a debt due on a promissory note. The only question argued is whether Hindu coparceners governed by the Mitakshara law, carrying on a joint family business, can institute in their individual names a suit to recover a debt on a promissory note obtained in the name of the family firm. The material facts can be shortly stated.

The plaintiffs were members of an undivided Hindu family governed by the Mitakshara law, and they carried on a family business in the name of Kashidas Ambaidas. In the ordinary course of that business the defendant, who

was a debtor of their firm, executed the promissory note in suit on August 29, 1931, in favour of the firm. The relevant portions of that promissory note are these :—

"The balance due on 29th of August 1931 is in figures Rs. 2,351. In consideration thereof I the signatory Pascal Damel pass this promissory note to the shop of Sha Kashidas Ambaidas and promise to pay with interest the said amount of Rs. 2,351 when demanded."

In 1931 there was a division of the family and the promissory note was allotted to the share of plaintiff No. 1, Manmohandas, who was also managing the business. The latter in his own individual name instituted this action to recover the amount of the promissory note on August 29, 1934. He impleaded his adult coparceners as defendants Nos. 2 and 3 in the suit. On the day of the hearing of the suit they were transposed as co-plaintiffs under the provisions of O. I, r. 10, of the Civil Procedure Code.

The defendant denied the execution of the promissory note and contended *inter alia* that the action of the plaintiffs in their individual names was not maintainable as they were not the holders nor endorsees nor assignees of the note. It appears that the allegation that Kashidas Ambaidas was the name in which the joint family business was conducted and that the plaintiffs as members of the joint family were interested in that firm was not denied. Both the Courts below on the question of fact have found that the defendant had executed the promissory note and that plaintiff No. 1 Manmohandas was alone entitled to the debt on the promissory note on account of the agreement between the co-sharers at the date of the partition. The Courts have disallowed the contention regarding the maintainability of the suit and in consequence a decree in terms of the prayer in the plaint was passed. The trial Court was liberal in granting instalments, but its order in first appeal was in that respect slightly varied. Against that decree the defendant has appealed.

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It has been contended on behalf of the appellant-defendant that having regard to the definition of 'holder' in s. 8 of the Negotiable Instruments Act (XXVI of 1881) only a person entitled in his own name or a holder in due course, such as an endorsee of a note or an assignee thereof, can institute an action on a promissory note and that inasmuch as the plaintiffs are not entitled in their own names to the possession of the note and as they are neither endorsees nor assignees, the suit is not maintainable. Section 8 of the Negotiable Instruments Act defines 'holder' as follows :—

"The 'holder' of a promissory note, bill of exchange, or cheque, 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."

Interpreting those provisions the Calcutta High Court in *Harkishore Barna* v. *Gura Mia Chaudhuri*[1] held that a true owner, who is not a holder, cannot maintain a suit on a promissory note, even though the holder is admittedly his *benamidar* and is made a party to the suit, for the property in a promissory note including the right to recover the amount due thereon is vested by statute only in the holder of the note. In some respects the view taken by the same High Court in an earlier case of *Broje Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.*[2] was dissented from. The case of *Harkishore Barna* v. *Gura Mia Chaudhuri*[1] has been followed in Bombay in *Krishnaji* v. *Hanmaraddi*[3] and *Virappa* v. *Mahadevappa.*[4] In the latter case a promissory note which had been passed in favour of the plaintiff's son, was allotted to the share of the plaintiff on partition. The promissory note was not endorsed by the son in favour of the plaintiff. In a suit brought by the plaintiff to recover the amount due on the note, making the son also a defendant, the trial Court in decreeing the suit held that though the note was not endorsed in favour

[1] (1930) 58 Cal. 752.
[2] (1927) 55 Cal. 551.
[3] (1934) 58 Bom. 536.
[4] (1934) 36 Bom. L. R. 807.

of the plaintiff it was transferred to him by operation of law. That view was not approved of by the High Court which held that inasmuch as there could be no assignment of the note by operation of law the defendant-son might have been transposed to the plaintiff's side and a decree passed in his favour. The trend of the authorities is that no person can sue on a negotiable instrument unless he is named therein as a payee or endorsee the ratio being that the right to sue on a promissory note for the debt is personal to the holder named in the note. Our Courts have recognised a distinction between a right to the note and a right to the debt. The latter might be claimed independently of the note. For instance, if the debt was part of the coparcenary estate, every coparcener could claim a right to it although only the coparcener named in the note could sue on it.

The decisions to which we were referred were however not concerned with a Hindu family business and the right of the members of the family to recover the amount of the debt on a promissory note executed in the name of the firm. If the incidents of such a firm were common to an ordinary partnership firm, there could not be much difficulty, for the procedure laid down in O. XXX of the Civil Procedure Code could be followed consistently with the requirements of the Negotiable Instruments Act. But those incidents are clearly not common. The fundamental distinction is that the relation of the members of the family to the firm is not regulated by contract, but is the creature of the Hindu law, and it can safely be asserted that *inter se* the members are not partners in the sense in which that term is used in the Indian Partnership Act (IX of 1932); nor can it be said that they have any special interest in the family business or any definite share therein. There is community of interest in and unity of possession of all the assets of the firm between all the members of the family like any other coparcenary property.

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The question is whether a person interested in a family firm, which is carried on in a particular name and which has accepted a promissory note in that name, must conform to the ordinary rules of procedure applicable to individuals or partnership firms in regard to the form of suits on the note. Mr. Purshottam's argument is that it must, for the provisions of the Negotiable Instruments Act, which codify the Law Merchant, are exhaustive and inasmuch as the provisions of ss. 32 and 78 of that Act lay down the liability of the maker of the note and make it obligatory on him to pay the amount thereof to the holder on demand, there can be no other satisfactory way of discharging the liability unless the firm named in the note institutes a suit in its name or causes the promissory note to be endorsed to all or any of the members in order to enable the latter to institute a suit in their names. Upon their plain language and also upon authority, certain definitions in the Act, such as that of 'negotiable instrument', 'holder' and 'holder in due course' are exhaustive [see *Jetha Parkha* v. *Ramchandra Vithoba*[1] and *Dossabhai* v. *Virchand*[2]]. But it does not necessarily follow that the Act is a compendium of the whole law relating to the transfer of interest in negotiable instruments or the procedure governing actions on them. For instance, there is no special provision as regards the form of a suit by a firm or of representative action. If a firm is the holder of a negotiable instrument, one has to fall back upon the general rules of procedure in the Civil Procedure Code for that purpose. In *Shantaram* v. *Shantaram*[3] Mr. Justice Broomfield observed that "the Act regulates the issue and negotiation of bills, notes, and cheques, but does not provide for the transmission of rights in such instruments by operation of law or by transfer." If I may say so with respect that view seems to be correct. The Act does not expressly exclude the doctrine of

[1] (1892) 16 Bom. 689. [2] (1918) 21 Bom. L. R. 1.
[3] (1938) 40 Bom. L. R. 964 at p. 967.

representative action. If a holder named is dead, a person claiming representation to his estate can bring a suit to recover the debt upon a promissory note in the name of the deceased.

But Mr. Purshottam says that the words in s. 8 "any person entitled in his own name to the possession thereof" are significant, and exclude the right of action by members of a family firm in their individual names independently of the firm. He is certainly entitled to argue that the words of ss. 8 and 32 must be given their full and legal effect. The question is whether in doing so it is necessary to treat a joint family firm on the same footing in the matter of form of action for recovery of a debt due on a promissory note as an ordinary partnership firm. According to Mr. Purshottam, just as a partnership firm after dissolution can sue in the firm's name [see *Harjibandas Gordhandas* v. *Bhagwandas Pursram*[1]], a family firm can still sue in its name even after the disruption of the joint family, for it is contended that the debtor is not given any discretion and cannot seek to ascertain the real payee of the note as is permissible under the English Bills of Exchange Act, 1882. That Act provides as regards payee in s. 7 (1) as follows —

"A bill not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."

Under that provision it is said there is scope and freedom for enquiry, if the indication is supplied by the note. In support we were referred to *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*.[2] It is important to note that the provisions of O. XXX of the Civil Procedure Code do not apply to a joint Hindu family firm, because the rights *inter se* of the members of such a firm are not exclusively regulated by contract. Upon ordinary contracts entered into by a family firm, actions have to be brought in the

[1] (1921) 49 Cal. 394.

[2] (1906) 30 Mad. 88.

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name of the members of the family [see *Ramprasad* v. *Shrinivas*[1]]. That is plainly because a joint family firm is not an independent entity apart from the members of the family. It may be that the vicarious liability of the members of a Hindu joint family, who have not executed a promissory note, proceeds upon the claim on the debt or consideration as distinct from that upon the note; so that in an action upon the note against the actual maker a decree can also be obtained against the other coparceners on the debt. That being based upon an obligation external to the promissory note cannot serve as an analogy for an action by a coparcener not named in the note to recover the debt. The plaintiff must, upon the provisions of s. 8 of the Negotiable Instruments Act, show that he is the person entitled in his own name to the possession of the promissory note and therefore is a holder and can grant a satisfactory discharge in terms of s. 32 of the Negotiable Instruments Act. Can the coparceners carrying on a joint family firm suing in their own name satisfy the requirements of those provisions, if a promissory note is in the firm's name? As I have said a suit cannot be instituted in the name of the family firm under O. XXX of the Civil Procedure Code, and it will lead to injustice if coparceners are prevented from suing on the note in their own name. The law does not deprive coparceners of their right to prove that the name in the note is their assumed name and that therefore they are entitled to the note in their own name. That I suppose is a position consistent with the view propounded and the authorities referred to. As I have already remarked, under the peculiar characteristics of a family business all members become interested in the firm as if it were their own. That is the result of unity of title in a coparcenary estate. If the coparceners chose to conduct a family business under a particular trade name, that name could be claimed as the name of the coparcenary. If a coparcener is able to show

[1] (1925) 27 Bom. L. R. 1122.

that he is exclusively the person bearing that name being the last surviving coparcener, there is nothing in s. 8 to prevent him from suing on the promissory note being entitled to it in his own name. That seems to be the reasoning adopted in *Madubai Damel* v. *Vadilal*,[1] and I think with respect that view is correct. I am of the opinion that the coparcenary can be described as the holder of a note if it was made as in this case in its collective or business name and therefore in its own name within the meaning of s. 8. That being my view, I think the action brought by all the adult coparceners, who were capable in law of giving a satisfactory discharge, to recover the debt on the promissory note executed in their trade name is maintainable.

It is not suggested that the minor coparceners are necessary parties, or that a discharge by the adult members, particularly plaintiff No. 1, would not bind his minor son. Mr. Purshottam has not suggested that the transposition of certain defendants as co-plaintiffs to mitigate the irregularity, if any, in the form of the suit would affect the merits of the issue, for they were parties to the suit when it was instituted.

Accordingly, I think the decree was rightly passed, and the appeal must be dismissed with costs.

INDARNARAYEN J. I agree that the appeal should be dismissed. The facts of the case have been fully stated by my learned brother, and I need not therefore cover the same ground. I would, however, like to add that applying the principles laid down in ss. 8, 32 and 78 of the Negotiable Instruments Act this suit in which all the adult coparceners were parties from the very beginning was a good suit. The promissory note in question was passed by the defendant to the joint family firm named Kashidas Ambaidas. As pointed out by my learned brother, that name could well

[1] (1938) 41 Bom. L. R. 219.

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be considered, and in fact was, the trade name of the three coparceners who became the plaintiffs in the suit after the transposition of defendants Nos. 2 and 3 as plaintiffs.

Section 8 of the Negotiable Instruments Act requires that in order to be the holder of a promissory note a person should be entitled to the possession thereof in his own name and to receive or recover the amount due thereon. It cannot possibly be contended that the adult coparceners constituting the firm of Kashidas Ambaidas were not entitled (albeit in their own trade name of Kashidas Ambaidas) to the possession of the promissory note. Similarly it is to my mind beyond argument that they were not the persons who could give a valid and proper discharge under the provisions of ss. 32 and 78 of the Negotiable Instruments Act. I therefore fail to see any strength in the argument that the suit as framed cannot be maintained on the negotiable instrument.

If I comprehend the argument of the learned counsel for the appellant correctly, it is briefly this: that the promissory note is passed to the joint family firm of Kashidas Ambaidas, that the firm being a joint family firm, O. XXX of the Civil Procedure Code is not applicable thereto, and hence no suit could be filed in the name of Kashidas Ambaidas, and that because the name of the original plaintiff Manmohandas and those of the transposed plaintiffs Vadilal Kashidas and Chandulal Kashidas do not appear on the promissory note itself as payees or endorsees, none of them could file and maintain this suit against the defendant on the promissory note. Further that if and when there was an endorsement on the promissory note by the original holder, which is "Kashidas Ambaidas", in favour of one or all of them, or if and when there was a deed of assignment in writing assigning the promissory note in their favour, such endorsees or assignees alone could maintain the suit.

If this argument were correct, it would, to my mind, mean that by reason of an endorsement in their favour the plaintiffs would acquire a legal right to sue which did not exist in them prior to the endorsement, and yet that endorsement would have to be effected by the same parties constituting "Kashidas Ambaidas". Obviously no party can transfer a right which he does not possess, and I fail to see how an endorsement of that kind by the coparceners trading in the firm name Kashidas Ambaidas could possibly help the endorsee or endorsees on the facts of this case.

On almost identical facts Mr. Justice Divatia has decided *Madubai Damel* v. *Vadilal*[1] and which refers to the same plaintiffs. There Divatia J. observed (p. 222) :—

"In the present case we have not the case of a coparcener filing a suit on a note passed to another coparcener, but the note is passed to the joint family firm, and the suit is brought by all the members constituting that firm at the time when it was passed. If, therefore, the plaintiffs can be said to be the holders of the note or holders in due course under ss. 8 and 9 of the Negotiable Instruments Act, they would certainly be entitled to bring this suit, and the principal question, therefore, is whether the plaintiffs fall within these two definitions . . . Such a firm, therefore, means the individuals who constitute the firm, and in my opinion, apart from the individuals composing that firm it has no separate legal entity. Even if the firm were an ordinary firm and not a joint Hindu family firm, it would be open to all the partners constituting that firm to bring a suit on a promissory note passed to that firm."

I do not see how the present case could be decided on any lines different from those stated by Mr. Justice Divatia in the case just referred to.

I think it would be also useful to refer to *Pease* v. *Hirst*,[2] where a promissory note was passed to a banking house carried on in the name of Messrs. Pease, Harrison & Co. The partners constituting this banking house thereafter separated and the promissory note was delivered and allotted to a new firm carried on by three of the former partners. A suit was thereafter filed on the promissory note against the debtor by four or five of the surviving

[1] (1938) 41 Bom. L. R. 219. [2] (1829) 10 B. & C. 122.

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partners of the original banking house, and it was held that the suit was good as the plaintiffs on the record could give a proper and valid discharge with respect to the promissory note. The words 'in his own name' in s. 8 do not and cannot mean, in my opinion, the personal name of the person, and there is no reason to suppose that any '*alias*' or assumed trade name would not fall within the meaning of those words. The person or persons who can give a valid dischage, as the plaintiffs in this case, would always have the right to sue.

Reliance was sought to be placed on *Krishnaji* v. *Hammaraddi*.[1] But there the facts were entirely different. There the promissory note had been passed in favour of the plaintiff's father in his own individual name. The father was yet alive and had not renounced the world so as to be considered as civily dead. Nor did the father endorse or assign the promissory note in favour of his son who was the plaintiff in the case. It was rightly held that the plaintiff-son could not sue. The obvious reason was that the son who was suing the defendant was entirely extraneous to the promissory note and could in no sense be said to be the holder thereof having no legal right to the possession thereof and no right to give a valid discharge.

Similarly, the other decided cases show that when a true owner sues on a promissory note taken in the name of another person, the suit cannot be maintained by the true owner even though it may be admitted that the transaction was for his benefit, because he is also extraneous to the note, not being mentioned therein as payee or endorsee.

The facts in the present case are entirely different. It is admitted that the promissory note was passed to the joint family firm of Kashidas Ambaidas wherein Manmohandas was the managing member, as deposed to in the evidence. The suit was filed within three years of the execution of

[1] (1934) 58 Bom. 536.

the promissory note, and the other adult coparceners were joined as co-defendants from the inception thereof. There could hence be no risk whatever to the defendant of having thereafter to contest or meet any further claim or suit on the promissory note at the hands of any one else. Defendants Nos. 2 and 3 were transposed as plaintiffs under O. I., r. 10, correctly. But they admitted the fact that they had no more any interest in the promissory note and that the same had been allotted on partition to plaintiff No. 1. I think, therefore, that the trial Court was not wrong in passing a decree against the defendant in favour of plaintiff No. 1 under the circumstances. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Y. V. D.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, Mr. Justice Broomfield and Mr. Justice Kania.

BAI LALITA, PLAINTIFF *v.* THE TATA IRON AND STEEL COMPANY, LTD., DEFENDANTS.*

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Company—Share-holders—Preference shareholders—Right of Company to deduct income-tax from the dividends—Deductions made when Company paid no income-tax, whether justified—Arrears of dividends, whether a debt—Indian Income-tax Act (XI of 1922), ss. 14, 19, 20, 22 and 48—Indian Limitation Act (IX of 1908), Arts. 116, 120—"Registered," interpretation of.

In the year 1918 the defendant company issued second preference shares conferring on the holders thereof a right to a fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum. The circular letter, addressed to the shareholders offering the shares to them in the first instance, stated that income-tax upon the dividends on the shares would be payable by the holders of such shares. This statement did not form part of the articles of association.

* O. C. J. Suit No. 1742 of 1936.