

9, 1957

No. 46 of 1954.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

BADURDIN MOHAMEDALLY (First Defendant) *Appellant*

AND

G. E. MISSO (Plaintiff)

VERNON PIERIS (Second Defendant) *Respondents*

UNIVERSITY OF LONDON
25 FEB 1958
INSTITUTE OF LEGAL STUDIES

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Case

FOR THE FIRST RESPONDENT.

RECORD.

1. This appeal is from a judgment of the Supreme Court of the Island of Ceylon, dated the 11th February, 1954, allowing an appeal by the First Respondent from a judgment of Sansoni, A.D.J., in the District Court of Colombo, dated the 6th March, 1951, dismissing a claim by the First Respondent for Rs.49,393/64 with interest on a Promissory Note against the Appellant. pp. 35-38.
pp. 26-30.

20 2. The principal issue to be determined on this appeal is whether the Promissory Note sued upon had been discharged by the promisee (the Second Respondent) having taken from the promisor (the First Respondent) a security of a higher nature, viz., a mortgage Bond for the amount of the note, or whether the said Bond was merely an additional security.

3. The suit was instituted in the District Court by the First Respondent as Plaintiff against the Appellant and the Second Respondent as Defendants, by a Plaint dated 24th May, 1950. The said Plaint contained, *inter alia*, the following allegations :— pp. 1-2.

30 (1) That the Appellant by a Promissory Note dated 16th October, 1947, promised to pay the Second Respondent or order on demand a sum of Rs.35,450/- with interest thereon at the rate of 10 per cent. per annum from 16th October, 1947.

(2) That the Second Respondent endorsed and delivered the said note to the First Respondent for valuable consideration.

(3) That there is due and owing to the First Respondent from the Appellant and the Second Respondent jointly and severally on the said note the sum of Rs.49,393/64 principal and interest.

p. 12, l. 6.

pp. 3-8.

pp. 9-11.

pp. 12-13.

4. An application was made by the Appellant and the Second Respondent for leave to defend the suit and on the 12th September, 1950, Sinnatamby, A.D.J., after reading affidavits and hearing Counsel on behalf of all parties, made an order giving leave to both Defendants to defend unconditionally.

pp. 14-15.

5. By his Answer dated 25th September, 1950, the Appellant stated *inter alia* as follows :—

(1) That he denies that any cause of action has accrued to the First Respondent against the Appellant.

(2) That he denies the averments in the plaint subject to the bare admission of the genuineness of his signature on the note sued upon. 10

(3) That he signed the mortgage Bond dated 15th January, 1948, and attested by a Notary Public in favour of the Second Respondent in settlement and discharge of all moneys alleged to be due and outstanding on the note sued upon and three other promissory notes and that the note sued upon thus became discharged while in the hands of the Second Respondent and no rights have accrued to the First Respondent on the note.

(4) That at the time of the execution of the bond the four notes were produced before the Notary attesting the bond, the Notary made the endorsement appearing on the back of the note sued upon at the time of the execution of the said bond and the Appellant was informed by the Notary that the note thereupon stood cancelled. 20

(5) That on the 4th July, 1949, an action by the Appellant against the Second Respondent and an action by the Second Respondent against the Appellant were dismissed by consent and it was agreed that all promissory notes and other documents to which the Appellant and the Second Respondent were parties stood cancelled. 30

(6) That the First Respondent was aware at every stage of the various transactions pleaded in the said Answer and is not a holder in due course and that the action has been filed by the First Respondent *mala fide* and in collusion with the Second Respondent.

(7) That the settlement of the two cases aforesaid and the decrees entered therein are a bar to any action on the note sued upon.

p. 16.

6. The Second Respondent by his Answer, dated 25th September, 1950, alleged *inter alia* that the note sued upon was duly paid and discharged on or about the 15th January, 1948, and that when he signed the said note and delivered it to the First Respondent he informed the First Respondent that the said note had been paid and discharged as aforesaid on or about the 15th January, 1948. 40

7. Issues were settled on the 7th February, 1951, as follows :— pp. 17-18.

(1) Did the First Defendant by his promissory note dated 16.10.47 promise to pay the Second Defendant or order on demand a sum of Rs.35,450/- with interest thereon at 10 per cent. per annum ?

(2) Did the Second Defendant endorse and deliver the said promissory note to the Plaintiff for valuable consideration ?

10 (3) If issues (1) and (2) are answered in the Plaintiff's favour, is the Plaintiff entitled to judgment against the Defendants jointly and severally, and, if so, in what sum ?

(4) Is the note sued upon fictitious within the meaning of the Money Lending Ordinance ?

(5) Was the note discharged and settled while in the hands of the Second Defendant by the execution of mortgage bond No. 44 dated 15.1.48 and by the execution of a warrant of attorney to confess judgment on such bond ?

20 (6) Did the First Defendant on 17.7.48 file Case No. 257/Z of this court against the Second Defendant asking for a declaration that no money was due from the First Defendant to the Second Defendant on the said bond No. 44 and for the return of the four notes referred to in such bond inclusive of the note sued upon in this case ?

(7) Did the Second Defendant thereupon put the said bond No. 44 in suit in case No. 2101/M.B. of this Court ?

(8) Was the Plaintiff aware of all of any of the facts set out in Issues (4) or (5) or (6) or (7) ?

(9) Is the Plaintiff a holder in due course for value ?

30 (10) If any of the Issues (4) or (5) or (6) or (7) or (8) or (9) be answered in the First Defendant's favour, can Plaintiff have and maintain this action ?

(11) Were actions Nos. 257/Z of this Court and 2101/M.B. of this Court dismissed and the bond No. 44 cancelled and discharged ?

(12) If Issue (11) be answered in the affirmative, is the Plaintiff barred from suing on the note in this case ?

(13) Did the Second Defendant inform the Plaintiff that the note sued upon had been paid and discharged on or about 15.1.48 ?

(14) Was the Plaintiff aware of all the facts put in Issue (5) ?

(15) If Issues (5), (13) and (14) are answered in the affirmative, can the Plaintiff have and maintain this action ?

40 The learned trial Judge, Sansoni, A.D.J., decided and ordered that as p. 18, ll. 16-21.
the execution of the note sued upon was admitted by the Appellant and the endorsement to the First Respondent was admitted by the Second Respondent, the Appellant and the Second Respondent (the Defendants) should begin.

8. The only witness called on behalf of the Appellant was one S. Coomaraswamy, the Proctor who attested the mortgage Bond. The attestation certifies that no consideration passed in the presence of the attesting Notary but that the same was set off against the amounts due on specified promissory notes including the note sued upon. The witness stated that he endorsed the note sued upon at the time when he attested the bond. The endorsement reads as follows :—

p. 41. “The amount due on this promissory note together with interest thereon from the date hereof has been secured by mortgage Bond No. 44 dated 15th January, 1948, attested by me 10
(Sgd.) S. COOMARASWAMY,
Notary Public.”

The witness stated that he told the Appellant and the Second Respondent that the four promissory notes were cancelled and discharged by the bond and that the notes were to be kept by the mortgagee, namely, the Second Respondent, as proof of consideration for the bond.

p. 24. Documentary evidence was put in by the Appellant.

p. 24. The Second Respondent called no evidence.

pp. 24-25. The First Respondent put in certain documentary evidence including the promissory note sued upon. 20

pp. 26-30. 9. On the 6th March, 1951, judgment was given. The learned Judge summarised the Appellant's main contention in the following terms :—

p. 27, ll. 18-21. “The position of the Defendant is that upon the execution of the bond the note in suit apart from the other three notes, was discharged. That, it seems to me, is the crucial point in this case though there are other matters also which I shall have to deal with.”

p. 28, ll. 3-5. After quoting the following passage in Byles on Bills, 18th edition, p. 230, “the taking of co-extensive security of a higher nature for a bill or note merges the remedy of the inferior instrument (but) if the new security 30 recognised the bill or note as still existent it is not extinguished,” and referring to *Palaniappa v. Saminathan*, 17 N.L.R. 56, the learned Judge pronounced his finding on this aspect of the case as follows :—

p. 28, ll. 35-42. “In view of the evidence of Mr. Coomaraswamy, the terms of the attestation clause in the bond, the endorsement on the note made by the notary at the time of the execution of the bond, and the effect of the decisions which I have referred to, I hold that there was a discharge of the note in suit on 15.1.48.

“The result of this finding is that the endorsement of the note by the Second Defendant to the Plaintiff eleven months later gave 40 the Plaintiff no rights as against the First Defendant.”

The First Respondent submits that the learned Judge erred in holding that the note was discharged.

p. 29, ll. 7-19. The learned Judge held that the position of the Second Respondent was different from that of the First Respondent in that the former had

endorsed the Bill and was thereby precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto.

The issues were answered by the learned Judge as follows :—

p. 30, ll. 8-24.

- (1) Yes.
- (2) Yes.
- (3) No.
- (4) Not proved.
- (5) Yes.
- 10 (6) Yes.
- (7) Yes.
- (8) Not proved.
- (9) Yes.
- (10) Not against First Defendant.
- (11) They were settled, and the bond thereupon cancelled and discharged.
- (12) No.
- (13) Not proved.
- (14) Not proved.
- 20 (15) He can against Second Defendant.

The claim against the Appellant was dismissed with costs and judgment given against the Second Respondent with costs.

10. The First Respondent appealed against the said Judgment in so far as the same dismissed the claim against the Appellant, on the following grounds :— pp. 32-35.
pp. 34-35.

- (i) The said judgment and order dismissing the Plaintiff-Appellant's action against the First Defendant-Respondent is contrary to law and against the weight of evidence.
- 30 (ii) The learned Judge erred in holding that the promissory note was discharged by the mortgage bond executed on 15th January, 1948. The said finding is contrary to law the circumstances of the case and the evidence led in the action.
- (iii) The learned Judge erred in accepting and in acting upon the evidence of the Notary. The evidence of the said Notary was in law hearsay and was not admissible in law and in any event should not have been acted upon even though admitted.
- 40 (iv) The Plaintiff-Appellant submits that the First Defendant-Respondent is liable to the Plaintiff-Appellant upon the said promissory note being the maker of the said note and having issued the same and having allowed it to be in circulation as a negotiable instrument.
- (v) There was no payment or discharge of the said note within the meaning of the provisions of the Bills of Exchange Ordinance and it is clear from the provisions of the mortgage bond and the

endorsement on the said promissory note that the said promissory note was not discharged but continued to be and remained valid and effectual and of such a nature that in law the First Defendant-Respondent was liable to the Plaintiff-Appellant.

(vi) It was clearly proved that the said promissory note was valid and effectual and that there was consideration for the same at the time of execution. It was in evidence that the First Defendant-Respondent's position was that there was no consideration for the said mortgage bond and that the same was therefore executed by the First Defendant-Respondent without consideration and in these premises the Plaintiff-Appellant submits that the promissory note was not discharged by the said mortgage bond. 10

(vii) The learned additional District Judge has rightly held that the Plaintiff-Appellant was a holder in due course for value and accordingly the Plaintiff-Appellant is in law entitled to judgment as prayed for against the First Defendant jointly and severally with the Second Defendant.

11. The Appeal was heard in the Supreme Court coram E. F. N. Gratiaen and E. H. T. Gunasekara, JJ., on the 11th February, 1954. The principal judgment was delivered by Gratiaen, J. Dealing with the law relating to the question of merger of the remedy on a written instrument by the taking of a security of a higher nature (discharge by novation) the learned Judge made the following observations :— 20

pp. 35-38.

p. 36, l. 39-
p. 37, l. 18.

“ Section 36 (1) of the Bills of Exchange Ordinance provides, *inter alia*, that a promissory note loses its character of negotiability when it has been ‘ discharged by payment or otherwise,’ and it is clear law that the rights of a holder of a note can be satisfied, extinguished or released in a number of ways besides payment—Byles on Bills (20th Ed.) p. 237. As an illustration of a discharge ‘ otherwise than by payment,’ the textbook mentions, at p. 238, a case where ‘ the taking of a security of a higher nature for a bill or note merges the remedy on the inferior instrument.’ It is by the application of this rule that the learned Judge decided the present case. 30

“ There is no absolute proposition of law which declares that the taking of a ‘ higher security ’ necessarily operates in every case as a discharge of the earlier ‘ inferior instrument.’ As I understand the true principle, the issue invariably calls for a decision on a question of fact, and the onus of proving the discharge in an action between an endorsee for value and a maker is on the maker. In *Twopenny v. Young* (1824), 3 B. and C. 208, for instance, the plea of ‘ discharge ’ was rejected because the latter security recognised the earlier note as still existing. In other words, the maker had failed to prove that the transaction was intended to operate as an extinguishment of the payee's claims on the original security. 40

“ If the maker of a promissory note subsequently creates a mortgage to secure the repayment of his debt, the Court would not be justified in holding that the note was thereby discharged

unless an intention to provide a substituted (as opposed to an additional) security was established. 'It is often a nice question whether an obligation arising from a bond novates an earlier obligation founded on . . . a promissory note or other *causa debendi*. If the facts show that the bond was granted as an additional security, there is no novation; but if it is manifest that the parties intended the bond to supersede the original obligation and take its place, then there is a novation'—Wessels' Law of Contract, Vol. 1, p. 723, para. 2409."

- 10 The First Respondent submits that the true principle is correctly stated by the learned Judge in the said passage.

Applying the said principle to the facts of this suit the learned Judge stated as follows :—

"In the present case, the language of the indorsement made on the note (and signed by both Defendants) by no means makes it 'manifest' that the liability on the note had been extinguished. p. 36, l. 39-
p. 37, l. 18.

- 20 On the contrary, it is calculated to give the impression that the repayment of the 'amount due' on the note was also secured by the mortgage bond dated 15th January, 1948. Besides, at the time when the note was subsequently indorsed to the Plaintiff for value, it still remained in the payee's hands and bore all the appearances of an undischarged note.

- 30 Moreover, the First Defendant (as maker of the note) is, in my opinion, precluded as against an indorsee for value without notice from alleging that the execution of the mortgage bond was intended by him to have more serious implications than those which were actually indicated in the endorsement which he signed. The language of his endorsement is quite insufficient to support the plea of discharge by novation, and is especially binding on the maker of a note who allows it thereafter to remain in circulation with all the appearances of a valid promissory note. Besides, to my mind the language of the bond itself is equivocal. p. 37, ll. 43-51.

Even, therefore, if as between the Defendants *inter se*, the true position (unknown to the Plaintiff) was that the note sued on ought to be regarded as having been discharged on 15th January, 1948, that defence is not in my opinion available as against the Plaintiff." p. 38, ll. 5-9.

Gunasekara, J., agreed. The appeal was allowed and judgment entered in favour of the First Respondent with costs.

- 40 12. The First Respondent submits that the true principle regarding the merger of the remedy on an inferior written instrument by the taking of a security of a higher nature (discharge by novation) was correctly applied by the Supreme Court to the facts of this suit and that the said judgment of Gratiaen, J., for the reasons therein stated is right.

13. On the 2nd June, 1954, in the Supreme Court, Final Leave to appeal to Her Majesty in Council was granted. p. 40.

14. The First Respondent submits that this appeal should be dismissed with costs for the following among other

REASONS

- (1) BECAUSE the promissory note sued on was not discharged by the execution of the mortgage Bond No. 44 dated 15th January, 1948.
- (2) BECAUSE the said note remained in the payee's hand with the knowledge and consent of the maker bearing all the appearances of an undischarged note after the execution of the said mortgage bond. 10
- (3) BECAUSE the First Respondent is and was at all material times a *bona fide* endorsee for value without notice.
- (4) BECAUSE the Appellant as the maker of the note is precluded as against a *bona fide* endorsee for value without notice from alleging that the said note was discharged by the execution of the said mortgage Bond.
- (5) BECAUSE the judgment of Gratiaen, J., in the Supreme Court, dated the 11th February, 1954, is right for the reasons therein stated and other good and sufficient 20 reasons.

RALPH MILLNER.

In the Privy Council.

ON APPEAL

*from the Supreme Court of the Island
of Ceylon.*

BETWEEN

BADURDIN MOHAMEDALLY

(First Defendant) . . . *Appellant*

AND

G. E. MISSO (Plaintiff)

VERNON PIERIS (Second Defendant)

Respondents.

Case

FOR THE FIRST RESPONDENT

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