Privy Council Appeal No. 46 *of* 1954

Badurdin Mohamedally - - - - - - - - *Appellant*

v.

G. E. Misso and another - - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1957.

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD TUCKER
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

The appellant was sued in the District Court of Colombo as maker of a promissory note dated 16th October, 1947, for Rs.49,393/64 with interest thereon by the first respondent as holder in due course. The second respondent was also sued as indorser of the note. The trial Judge gave judgment against the second respondent and dismissed the claim against the appellant. The first respondent appealed against the decision dismissing his claim against the appellant and on 11th February, 1954, the Supreme Court of Ceylon allowed the appeal holding that the first respondent, the holder, was entitled to judgment against the appellant, the maker, as well as against the second respondent, the indorser.

From this decision the appellant now appeals to Her Majesty in Council. The second respondent has taken no part in the appeal and the only question is as to the rights, if any, of the first respondent against the appellant.

The case for the appellant is that the promissory note had been discharged on 15th January, 1948, by a mortgage bond executed by him in favour of the second respondent, the payee of the note, before it was indorsed and delivered to the first respondent.

It will be convenient to refer to the parties hereafter by their names, as follows, the appellant the maker as "Mohamedally", the first respondent the holder as "Misso", and the second respondent the payee and indorser as "Pieris".

There are now only two issues, viz., (1) whether the bond given by Mohamedally to Pieris was an effective discharge of the note as between themselves and (2) if so, whether such discharge precludes Misso the holder for value by subsequent indorsement and delivery from recovering against Mohamedally the maker.

Both questions must be answered in the affirmative for Mohamedally to succeed in this appeal.

Although the issues are now narrowed as indicated above and Mohamedally rests his claim on the validity of the mortgage bond it is to be observed that in his pleadings in the present action, as well as in other proceedings between himself and Pieris, he has alleged that he was " wrongfully and deceitfully induced by Pieris to sign the mortgage bond ", and in fact two actions between these parties were eventually settled on 5th July, 1949, on terms which included the cancellation of this mortgage bond.

It may be convenient at this stage to refer to the relevant sections of the Ceylon Bills of Exchange Ordinance (Ch. 68)—

> Section 36 (1) " Where a bill is negotiable in its origin it continues to be negotiable until it has been—
>
> (*a*) restrictively indorsed or
>
> (*b*) discharged by payment or otherwise ".
>
> Section 59 (1) " A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.
>
> ' Payment in due course ' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective ".
>
> Section 62 (1) " When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.
>
> The renunciation must be in writing unless the bill is delivered up to the acceptor ".
>
> Section 63 (1) " Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged ".
>
> Section 90 (1) " Subject to the provisions in this Part, and except as by this section provided, the provisions of this Ordinance relating to bills of exchange, apply, with the necessary modifications, to promissory notes ".
>
> (2) " In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order ".

Prior to the execution of the bond on 15th January, 1948, Mohamedally was indebted to Pieris in the sum of Rs.119,125 on four promissory notes including the note now sued on.

The bond recited that Rs.25,000 together with interest had been paid to Pieris in part payment of the sum of Rs.37,500 due on one of these notes dated 5th September, 1947, and that the sum of Rs.94,125 with interest thereon at ten per cent. per annum from the date of the bond remained due. It then recited that Mohamedally had agreed to secure unto Pieris the said sum of Rs.94,125 with interest in the manner hereinafter expressed. Mohamedally then bound himself to Pieris in the said sum " being the money borrowed by me on the promissory notes (the dates and amounts of which are then set out) (the receipt whereof I do hereby acknowledge ") to be paid to the obligee (Pieris) his heirs executors administrators or assigns with interest at ten per cent. per annum from the date thereof on demand. For securing the payment of all sums due and payable under the bond he specially mortgaged and hypothecated to the obligee as a first and primary mortgage free from any mortgage charge or other encumbrance the lands and premises described in the first schedule, and as a second mortgage the lands described in the second schedule.

It was then provided as the condition of the bond that on payment of the said sum advanced and in the meantime of interest thereon at ten per cent. per annum payable monthly on or before the 15th day of each and every month and on the obligor carefully keeping and maintaining the mortgaged lands and premises and the buildings thereon the bond should be null and void, with a proviso that in the event of any default in payment of interest or breach of any other covenant or condition all monies due under the bond should be recoverable.

As required by the law of Ceylon a Notary Public added the following attestation:—" I, Sanmugam Coomaraswamy of Colombo in the Island of Ceylon, Notary Public, do hereby certify and attest that no consideration passed in my presence but the same was set off against the amounts due on promissory notes dated 5th September 1947, 26th September 1947, 11th October 1947, and 16th October 1947 in favour of the said obligee and which said promissory notes have been duly identified by me and annexed to the original of this instrument and that the duplicate of this instrument bears twelve stamps to the aggregate value of Rs.837/- and the original a stamp of Rs.1/-. Which I attest ".

(Signed) S. Coomaraswamy,
Notary Public.

The following endorsement was also placed on the reverse side of the note now in suit :—

> " 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 ".
>
> (Signed) S. Coomaraswamy,
> Notary Public.

Three weeks later the bond with the notes attached was handed by the Notary to Pieris and retained by him.

Subsequently the note now sued on was indorsed by Pieris and delivered for valuable consideration to Misso.

The learned District Judge held that the note in suit was discharged upon the execution of the bond with the result that Misso could not recover thereon from Mohamedally, but that by virtue of section 55 (2) (c) of the Bills of Exchange Ordinance he could recover against Pieris as his immediate indorsee who was precluded from denying that the note was at the time of indorsement a valid and subsisting note and that he had a good title thereto. He based his decision as to the discharge of the note upon the uncontradicted evidence of the Notary (which will be referred to later) together with the terms of the attestation clause and the indorsement of the note.

In the Supreme Court Mr. Justice Gratiaen, with whose judgment Mr. Justice Gunasekara agreed, held that Misso was entitled to recover against Mohamedally as well as against Pieris. He said " 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. 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 ".

After referring to *Glasscock* v. *Balls* (1889) 24 Q.B.D. 13 and certain Ceylon authorities he continued :—" Be that as it may, it is certainly permissible to regard the fact that a promissory note remained in the payee's hands (without any indication of 'discharge' or 'cancellation' on the face of it) as a relevant circumstance to be taken into account in

deciding the question of fact whether the liability had been extinguished by novation. 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 indorsement which he signed. The language of his indorsement 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 ".

Their Lordships are in full agreement with these observations in so far as they relate to the issue of discharge. They do not find it necessary in the present case to express any view with regard to the suggested estoppel which had not in fact been pleaded and would only arise if discharge of the note had in fact been established.

The Supreme Court judgment does not, however, contain any reference to the evidence of the Notary Public on which the District Judge had largely based his decision. It is therefore necessary to refer to it. The effect of it can be summarised as follows. After attesting the bond he explained to Mohamedally and Pieris why he had done so. He said it was because no money had passed in his presence and he informed them that the promissory note was cancelled and discharged by the bond. He said he had received instructions from Pieris to prepare the bond and Mohamedally and Pieris attended at his office on several occasions and the bond as finally settled was in accordance with the instructions of both parties.

In re-examination the following questions and answers appear :—

" Q. What did he (i.e. Pieris) tell you about these four notes?

A. They were to be cancelled immediately the bond was signed.

Q. Did you make that position of Vernon Pieris clear to Mohamedally?

A. Yes."

In so far as this evidence relates to the meaning of the bond it was clearly inadmissible (vide section 91 of the Evidence Ordinance). The language of the bond together with that of the notes attached thereto speaks for itself and even if admitted without objection the Court could not properly act on such evidence.

In so far as the questions and answers in re-examination are relied upon as supporting a separate and independent agreement upon a matter on which the bond was silent (see proviso (2) to section 92 of the Evidence Ordinance) they are not evidence against Misso of an oral agreement between Mohamedally and Pieris neither of whom went into the witness box. Furthermore if such an agreement was in fact made it is clear that it was not carried out as the notes were not " cancelled " in the manner provided in section 63 (1) of the Bills of Exchange Ordinance with regard to intentional cancellation.

Their Lordships consider that the bond by itself is equivocal but the indorsement on the note and the fact that the notes were attached to the bond and retained by the mortgagee and payee are conclusive to negative the discharge by merger or novation relied upon and show that the bond was taken by way of additional security. This conclusion is in no way vitiated by the evidence of the Notary.

For these reasons their Lordships are of opinion that the appellant fails on the first limb of his case and they will accordingly humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

(39028) Wt. 8075—17 100 5/57 D.L.

In the Privy Council

BADURDIN MOHAMEDALLY

v.

G. E. MISSO AND ANOTHER

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1957