CADER SAIBO *v.* FERNANDO.

1901.
March 27.

D. C. Colombo, 12,547.

Promissory note—Action by endorsee against maker—Endorsement in blank—Effect of such endorsement—Right of holder in due course to sue—Bills of Exchange Act, 1882, s. 34, sub-section 4—Conversion of endorsement in blank into special endorsement—Onus probandi—*Amendment of pleading.*

Where a promissory note was endorsed in blank, and below such endorsement there appeared the words "Pay the National Bank of India, Limited, or order," followed by the signature "Ye A. Sidambaram Chetty,"—

Held, that these words did not convert the note, which had been endorsed, in blank, into a note payable to a special endorsee, because there was no direction written above the endorsee's signature (as required by the Bills of Exchange Act, 1882, section 34, sub-section 4) to pay the bill to, or the order of, himself or of some other person; that, in failure of a reconversion of the note into one payable to a special endorsee, the note was a note payable to bearer; and that a holder in due course may sue on it, without proving how he came by it.

The duty of proving that he is not the lawful holder lies on the defendant.

Pleadings are not to be amended by the parties, but by the judge after hearing the parties.

ACTION by endorsee against the maker of two promissory notes, each for Rs. 500. The first note ran as follows:—

"Colombo, 7th March, 1898.

"On the 1st day of November, 1898, I, the undersigned, promise "to pay to M. T. Ossen Saibo, Esq., or order, at the Bank of Madras, "Colombo, the sum of Rs. 500 currency, for value received.

"Julian Fernando."

This note bore endorsements as follows:—

"M. T. Ossen Saibo."

"*Per pro.* M. Cader Saibo & Co., N. Ibrahim."

"K. P. N. Arunasalem Chetty."

"Pay the National Bank of India, Limited, or order, Ye A. Sidambaram Chetty."

"Received payment for the National Bank of India, Limited. John Laidlaw."

The plaint alleged "that the said M. T. Ossen Saibo endorsed "and delivered the said note to the plaintiff, who endorsed the same "to K. P. N. Arunasalem Chetty, and that the said note was duly "presented for payment at the said Bank of Madras and was "dishonoured," &c.

The other note made in favour of M. L. L. C. Marikar bore the following endorsements:—

"M. L. L. C. Marikar."
"M. T. Ossen Saibo."
"*Per pro.* M. Cader Saibo, N. Ibrahim."
"Ku Ye Arunasalem Chetty."
"Pay the Equitable Loan Company of Ceylon, Limited, or order, Mu Ru Na Periya Karuppan Chetty."

As regards this note, the plaintiff's allegation was "that the said "M. L. L. C. Marikar endorsed the said note to M. T. Ossen Saibo, "who endorsed the same to Ku Ye Arunasalem Chetty, and that "the said note was duly presented for payment at the said bank "and was dishonoured," &c.

Wherefore the plaintiff prayed for judgment for the aggregate sum of Rs. 1000, &c.

The defendant in his answer admitted the making of the promissory notes, but pleaded that he signed them, without receiving any consideration, for the accommodation of the payee, M. T. Ossen Saibo; that it was agreed that in case the notes were dishonoured the defendant was not to be held liable; and that the plaintiff, having taken the note with notice of dishonour, took it subject to such agreement.

The learned District Judge, before framing the issues, desired the plaintiff to amend his plaint so as to show how he became the lawful holder of the notes, because "after his endorsement to Arunasalem Chetty he ceased to be the lawful holder."

The counsel for the plaintiff refusing to amend the plaint, defendant's counsel moved that plaintiff's action be dismissed, and the District Court dismissed it.

Plaintiff appealed.

Wendt (with him *Van Langenberg*), for appellant.—It is admitted that plaintiff is the endorsee of the notes. They are now payable to bearer, and plaintiff need not prove how he came by them. He holds them, and is entitled to sue on them without amending his plaint in order to show how he came by them. [BONSER, C.J.—It is for the District Judge to amend pleadings, not for the parties to the suit. How was he led into this wrong decision?]

Sampayo, for defendant, respondent.—The note is not payable to bearer, but to Ossen Saibo or order. He endorsed it in blank and delivered it to Cader Saibo, who endorsed it specially. [BONSER, C.J.—Is that special endorsement written over the endorser's signature according to sub-section 4 of section 34 of the Bills of Exchange Act?] Supposing it is not, it does not follow that any

1901. *March 27.*

subsequent holder can sue on it. [LAWRIE, J.—The point is that for want of a special endorsement in terms of section 33 of the English Act, 1882, the notes in suit are notes payable to bearer and any holder can sue upon them.] The note ceased to be negotiable when there was a special endorsement on it. The section in the English Act applies to endorsers in general. [BONSER, C.J.—On these notes there is only one endorser in blank, and the section applies to that endorser. Other so-called special endorsements are not really so, according to the Act.] In D. C., Colombo, 11,501, decided on the 18th August, 1898, the payee endorsed the note in blank to the plaintiff, and Your Lordship held that he was entitled to sue as holder, but as he specially endorsed it to a company, or order, the company became the owners of the document and were the only persons entitled to sue on it; and that as the company had not endorsed it over to the plaintiff, he had no right to sue. Mr. Justice Withers agreed with Your Lordship and the order of the District Judge was reversed. [BONSER, C.J.—Nothing in that judgment seems inconsistent with what I now say. It all depends upon the position of the special endorsement, whether it is above or below the signature of the endorser in blank. What is your real defence?] Plaintiff has not shown how he came by the note after he has endorsed it over. [BONSER, C.J.—He need not do that, as he says in effect that he is the holder in due course. It is for you to show that he is not the lawful holder.]

27th March, 1901. BONSER, C.J.—

This is a very simple case. The plaintiff sues the maker of a promissory note upon his note. Plaintiff alleges himself to be the holder in due course of that note and produces it. His plaint was accepted by the District Judge, but when the case came on for settlement of issues the District Judge called attention to certain endorsements on the back of the note and said that the plaintiff did not state how the plaintiff became the holder of the note, and he invited the plaintiff's counsel to amend the plaint.

The plaintiff's counsel properly declined to do that which he had no power to do, and then the defendant's counsel pressed the District Judge to dismiss the action, which he accordingly did.

Now, we have over and over again said that the parties cannot amend their pleadings, but that it is for the District Judge, when he has ascertained what are the issues of fact and law in dispute between the parties, himself to amend the pleadings, if he thinks any amendment is necessary after hearing what the parties or their counsel have to say.

1901.
March 27.
BONSER, C.J.

Now, this note was made by one Julian Fernando, who promised "to pay M. T. Ossen Saibo, or order, the sum of Rs. 500" on a certain date. The payee, Ossen Saibo, endorsed that note in blank, and thereupon it became a note payable to bearer. Below that endorsement in blank there are certain other endorsements, and one of those endorsements is in these terms: "Pay to the National Bank of India, or order," and signed by a person who would appear to be the then holder of the note. There is also endorsed the signature of the present plaintiffs, Cader Saibo & Co. But that is not in form a special endorsement; it is merely their name written across the back of the note. The note having got back into the hands of Cader Saibo & Co., the District Judge held that it was necessary for the plaintiff to show how he became possessed of this note after apparently it had been in other hands, and to trace the devolution of title.

It seems to me that in this he was wrong. When the note was endorsed in blank by Ossen Saibo, the payee, it became a note payable to bearer and became negotiable, so that any holder could sue upon it.

There is no doubt that a note which has been thus endorsed in blank and converted into a note payable to bearer can be reconverted into a note payable only to a special endorsee, if the procedure laid down in section 34 of the Bills of Exchange Act of 1882, sub-section 4, is followed. That section provides that "when a bill has been endorsed in blank any holder may convert "the blank endorsement into a special endorsement by writing "above the endorser's signature a direction to pay the bill to, or "to the order of, himself or of some other person." Now, it is plain on the face of it that this was not done in the case of this promissory note. There is no direction written above the endorser's signature on the note such as is referred to in that sub-section.

But I understood Mr. Sampayo to argue—and he argued it most strenuously—that the endorser's signature referred to in that section meant the signature of anybody who liked to write his name across the bill, and that, if a direction was written over his old signature on the back of the note by the holder for the time being for payment to himself or order or to some other person, that converted the note back again into a note payable to order. It seems quite clear that that is not so. The endorser's signature means the signature which converted the note into a note payable to bearer. There is no suggestion that it can be converted into such a note in any way other than that pointed out in this section, and as that course has not been followed in this case it appears

1901
March 27.

BONSER, C.J.

to me that the note is still a note payable to bearer, and that a holder in due course can sue upon it, subject, of course, to all proper defences that can be raised to such action. It is open to the defendant to allege and prove that the plaintiff is not the holder in due course, or that he has no title, or that he had taken that note with knowledge of some infirmity which would disentitle him to sue. But these are questions which, if they are intended to be raised, must be raised by proper issues and decided at the trial.

LAWRIE, J., agreed.