## WHITHAM *v.* PICHCHE MUTTU KANKANI.

1900.
*July 4, and*
1902.
*November 18 and 20, and December 9.*

*D. C., Kandy, 13,172.*

*Promissory note—Action under chapter 53 of the Civil Procedure Code—Defence to such action—Claim in reconvention for unliquidated damages—Transactions between superintendent of an estate and his head kankani—Position of head kankani—His relations between superintendent and sub-kankanies and coolies—Promissory note by head kankani—Purpose for which the note was given—Subsequent difference between superintendent and head kankani—Interference of superintendent with head kankani's coolies—Severence of head kankani's responsibility—Right of superintendent to sue him on promissory note—Validity of plea that note was given, in pursuance of a well-known custom, by way of security for repayment of advances made to coolies.*

A claim in reconvention for unliquidated damages is a "defence" to an action on a promissory note instituted under chapter 53 of the Civil Procedure Code.

The employment of coolies on estates up-country is effected according to a well-known custom, whereby the head kankani of an estate desiring employment on another estate comes to it with a *tundu* or memorandum received from his present employer showing the amount due to the estate from the coolies on advances. The would-be employer gives the kankani a cheque for the amount appearing in the *tundu* in favour of the present employer, who thereupon permits the kankani and his coolies to serve on the new estate. On arrival, the kankani gives the superintendent a promissory note for the amount of the advances received on account of the coolies, and in turn takes promissory notes from his sub-kanganies. By this arrangement the superintendent avoids the inconvenience of having to treat with each cooly, and so long as the coolies continue under the head kankani, the superintendent obtains on pay days and other occasions a reduction of the debt due to the estate.

In view of such a custom, a promissory note signed by the head kankani in favour of the superintendent, though containing an unconditional promise to pay on demand or on a certain date, must be looked upon as a note given for a special purpose and subject to special conditions.

So long as there is no severance of connection between the kankanies, coolies, and the estate, the note cannot be put in suit. But if it becomes impossible by no fault of the superintendent to induce the coolies to pay off their debt, the liability of the head kankani to the estate becomes actual.

If the superintendent interferes with the coolies and severs their connection with the head kankani, such conduct woulud discharge the latter from his liability.

The promissory note of the head kankani is only a security for the advances made to the coolies and sub-kankanies, and it is the duty of the superintendent who comes into Court with such a note, to prove failure on the part of the principal debtors to pay the amounts due by them.

ACTION on a promissory note for Rs. 4,641.19 made by the defendant as follows:—

"Kadawella, Watawala, 2nd October, 1897.

On demand, I, Pichche Muttu, head kankani, do promise to pay to John Whitham, or the Superintendent of Kadawella estate

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for the time being, or order, the sum of Rs. 4,641.19 for value received."

The plaintiff prayed in his plaint for leave to proceed under chapter 53 of the Civil Procedure Code, and for judgment for the amount due at the time of the plaint, viz., Rs. 3,480, with interest thereon.

Summons being allowed, the defendant submitted by his petition that he had a good and valid defence in the case; that he made the note sued on, but was not indebted to the plaintiff in any sum whatsoever; and that the said note was made in the following circumstances:—

At the time of the making of the note the petitioner was employed as the head kankani of Kadawella estate, and had under him a gang of 148 coolies, including 13 sub-kankanies. In October, 1897, his sub-kankanies were indebted to the estate on account of advances in the sum of Rs. 4,641.19. He made the note sued on by way of security for their debt in favour of the plaintiff, the superintendent of the said estate, who was acting for and on behalf of the proprietors of the said estate. Since March, 1899, the plaintiff began to intimidate the petitioner's gang of coolies, and press them into the service of another head kankani; and the plaintiff did actually remove from the petitioner's gang 123 coolies and 8 sub-kankanies, whose debts to the petitioner amounted to Rs. 7,103.87 in various proportions.

The petitioner prayed that he be allowed to defend the suit and claim in reconvention the said sum of Rs. 7,103.87 and Rs. 2,500 as damages for the wrongful acts committed by the plaintiff.

The District Judge (Mr. J. H. de Saram) held as follows:—

"The defendant has no defence to the claim on the promissory note. He has his remedy against his sub-kankanies on the promissory notes he holds from them.

"If the defendant applies for leave to appear and defend an action and pays into Court the sum mentioned in the summons, he is of right entitled to the leave he asks for (section 706). A bare claim in reconvention may sometimes afford a satisfactory defence within the meaning of chapter 53, as for instance a liquid claim due to the defendant by the plaintiff upon a promissory note, cheque, or guarantee. Such a claim, being of a liquid and definite character, falls within the purview and meaning of the term "defence" as used in chapter 53.

"It was held by the Supreme Court in a case of this Court (D. C., Kandy, 97,222, *8 S. C. C. 148*) in an action of regular procedure that partial failure of convention does not constitute

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a defence to a claim on a promissory note, if the *quantum* to be deducted on the account is matter not of definite computation but of unliquidated damages. Byles says (*p. 150, 15th edition*), 'formerly the money as to which the consideration fails must have been a specific ascertained amount, for the jury could not in an action on a bill or note assess by way of set-off the damages arising from a breach of contract, and the defendant was left to his cross action. But now unliquidated damages may be set up in a counter claim.'

"As such a claim can be made, is a defendant entitled to make it under chapter 53? It seems to me that he is under section 706. Are then the facts sufficient to support the application? I confess I fail to see any facts entitling the defendant to damages.

"I refuse the application for leave to defend the action, and enter a decree for the plaintiff for Rs. 3,480, with interest as prayed."

The defendant appealed.

*Browne* (with him *Van Langenberg*), for appellant.

*Morgan*, for respondent.

The Supreme Court (BONSER, C.J., and MONCREIFF, J.) set aside the decree and permitted the defendant to defend the action, for the following reasons stated in the Chief Justice's judgment:—

4th July, 1900. BONSER, C.J.—

In my opinion the District Judge was quite right in holding that the claim for unliquidated damages was a defence to an action under chapter 53 of the Code.

The case in *8 S. C. C. 148* was decided before the new Code came into operation, and is therefore no authority as to the present procedure.

At the same time I think that the Judge ought to have allowed the defendant to defend the action.

MONCREIFF, J., concurred.

Upon the case going back, the following issues were in due course agreed to:—

(1) Whether the promissory note was given by way of security for advances due by the defendant's coolies to Kadawella estate?

(2) Did the plaintiff unlawfully intimidate the defendant's gang of coolies, and forcibly remove 123 coolies, including 8 sub-kankanies, from defendant's gang and place them under Murukan Kankani?

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(3) If he did, has the defendant been unable to recover the sum of Rs. 7,103.87 alleged to be due to him by the said coolies and sub-kankanies?

(4) If so, is the plaintiff liable to the defendant in the sum or any part thereof? And—

(5) Is the plaintiff liable to the defendant in Rs. 2,500 as damages or any part thereof?

At the conclusion of the trial, the District Judge (Mr. J. H. de Saram) delivered judgment as follows:—

"The defendant says he made the note merely by way of security for advances due by his coolies to the estate. The case of *Imray v. Palawasen Kankani* (*1 Browne, 88*) was cited in support of the position taken by defendant as to his non-liability. The present case is not on all fours with Imray's case, for here Mr. Lyall proves that the note was made for moneys advanced to the defendant for various purposes. Mr. Lyall, from whom the plaintiff took charge of the estate on 2nd October, 1897, had no money dealings of any sort with the sub-kankanies, and kept no account whatever with them. As a matter of fact they owed nothing to the estate. The superintendent could not sue them or the coolies, because he did not know to whom defendant had made payments, or how much had been paid to any particular person. The account book produced by the defendant establishes the plaintiff's case. The defendant is the person who was debited with the advances. He made what distribution he pleased of the money he received from Mr. Lyall, and he holds promissory notes from the sub-kankanies for the amounts paid to them. It has, in my opinion, been proved that the advances were made to the defendant, and that he is liable on the promissory note.

"The defendant is blowing hot and cold. He denies his liability to plaintiff on the note, on the ground that he was merely a surety for the real debtors, who, he says, are the sub-kankanies and coolies; and yet he says they owe him the money, and seeks to recover it from the plaintiff, on the ground that the plaintiff removed some of his coolies and sub-kankanies from his gang and placed them under Murukan, who is now head kankani. There is one circumstance on which Mr. Fernando relied. It is this: Mr. Hutchinson, the Visiting Agent, said he believed Murukan Kankani had given the plaintiff a promissory note for the amount of the defendant's debt. Assume that he has. I do not think that affects the question of defendant's liability. Murukan gave the note to secure the estate, in case of any loss through the defendant. If he chose to undertake that debt, it in no way

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lessens the defendant's liability on his promissory notes for payments made directly to him.

"The second issue is whether the plaintiff unlawfully intimidated the defendant's gang of coolies and forcibly removed 123 coolies, including 8 sub-kankanies, from defendant's gang and placed them under Murukan Kankani. Mr. Hutchinson went to the estate in consequence of reports made to him by plaintiff against defendant. He asked defendant whether he wanted a *tundu*. The defendant said he would not have it; that he would pay the debt due to the estate and go to the Coast; that he did not want any of his coolies; that Mr. Hutchinson might have them. The defendant was at that time employed on Kadawella. He left shortly afterwards, after giving plaintiff notice. Some of the sub-kankanies and coolies went away with him. The others refused to go with him and remained on the estate. I answer the second issue in the negative. The other issues need not therefore be considered. I give the plaintiff judgment as prayed for and costs."

Defendant appealed. The case was argued before Layard, C.J., and Moncreiff, J., on 18th and 20th November, 1902.

*Van Langenberg*, for appellant.

*Bawa*, for respondent.

*Cur. adv. vult.*

9th December, 1902. LAYARD, C.J.—

This is an action on a promissory note brought by the holder against the maker. The promissory note is dated the 2nd October, 1897, and is in the following terms:—

"Kadawella, Watawala, 2nd October, 1897.

"On demand, I, Pichche Muttu, head kankani, do promise to pay to John Whitham, or the superintendent of Kadawella estate for the time being, or order, the sum of Rupees Four thousand Six hundred and Forty-one and Cents Nineteen (Rs. 4,641.19), value received."

It was made under the following circumstances:—

The maker was the head kankani at Kadawella estate, and had a large gang of coolies under him, divided into small gangs, each gang being under a sub-kankani. The gang consisted of about 140 or 150 coolies under 12 sub-kankanies. On the day the note was executed a Mr. Lyall was superintendent of Kadawella estate, and on that day he handed over the charge of the estate to the plaintiff, the new superintendent.

The main question at issue between the parties is, whether the promissory note was given as security for advances due by the defendant's coolies or for moneys lent to the defendant.

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The defendant has deposed that when the plaintiff took charge of the estate he (the defendant) made the promissory note sued on as security for the debts due by the coolies and sub-kankanies to the superintendent for advances.

The defendant kept a book with the superintendent, which showed the amount due at any time, according to the plaintiff from the defendant, and according to the defendant from the coolies and sub-kankanies, belonging to his gang.

That book was produced by the defendant, and I shall hereafter have to allude more particularly to some of the entries made in it.

The entries made in that book after the plaintiff took over charge of the estate as superintendent were, according to the evidence in the case, made by the plaintiff.

The promissory note having been given for transactions which took place before the plaintiff took charge of the estate, the question as to the purpose for which the note was given must be decided on the evidence of the defendant and Mr. Lyall and the entries in the book above mentioned. Mr. Lyall deposes that on the 2nd October, 1897, he got the head kankanies to give the plaintiff promissory notes for the amount due by each of them to the estate, " and that the defendant at that date owed the estate " Rs. 4,641.19, for moneys advanced to him for various purposes, and that he Mr. Lyall had no dealings with the sub-kankanies and kept no account with them, and that they owed nothing to the estate.

So far it looks as though Mr. Lyall meant that the money was lent to the defendant alone, and that the coolies were in no way indebted to the proprietors or superintendent of the Kadawella estate.

In cross-examination, however, he admits that amounts were due from the coolies to the proprietors or superintendent of the estate, for he says, " if instead of there being a change of superintendents there was to be a change of head kankanies, I would give them *tundus* for the amounts due by them and their men."

It is to be noted that in examination-in-chief he has not told us the various purposes for which the moneys were advanced.

The statements made by him, however, in cross-examination point to one purpose very clearly, viz., that it was advanced to secure from time to time additional labour for working the estate, and that he used to give the kankanies cheques under the following circumstances: if a kankani came to the estate with a *tundu* he used to speak to the defendant and give him a cheque for the amount of the *tundu*.

The nature of transactions of this kind has been concisely and clearly explained by Bonser, C.J., in his judgment in the case of *Imray v. Palawasen Kankani*, reported in *1 Browne, 89*:—

"It is the well understood practice amongst the planters that one tea planter will not take into his service a cooly who has served on another estate, unless he is satisfied that he is leaving his employer with the latter's consent, and that he has paid off all the money he owes to the former employer in respect of advances and shop debts."

It is usual for the gang of coolies (for there is generally a gang under the headship of one kankani) to produce to the person with whom they wish to take service what is called a *tundu*, which is a written memorandum by the former employer to the effect that he is willing to discharge them from his service upon being paid a certain amount stated in the *tundu* as being the amount of their debts.

The cheques given in this case appear to have been drawn in favour of the planter issuing the *tundu*, and Mr. Lyall then debited the defendant with the amount of the cheque, and he goes on to add that the kankani and coolies are taken on by the defendant. I presume Mr. Lyall means that the coolies enter the service of the superintendent and are entered on the check roll of the estate; that is the ordinary practice, and that supports the plaintiff's view, because it is in evidence that, when differences subsequently arose between the plaintiff and the defendant, Mr. Witham said the coolies were his and not defendant's.

On reference to the book produced, which is styled "the defendant's advance account," I find the account debited with items such as "advance for P. Carpen's coolies," "advance for new coolies," "cheque account, Aruniaigan Kangani," "to amount Anlandy's advance," "Perumal's debt," "to Belliapen for new coolies," "to Murugam, check roll debt," "to Superintendent, Eildon Hall, cheque," &c.

I also find the account is credited with pay due to both coolies and sub-kankanies, in some instances it being stated that they had run away.

The entries disclose that the account was debited with advances made to coolies and sub-kankanies, and was credited with payments made by coolies and sub-kankanies.

I have only so far referred to entries made prior to plaintiff taking over charge of the estate.

Entries subsequent to that date show that a sort of running account was continued in the book, the account being debited in a similar way with debts due by others than the defendant, and

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credited by in one case Suppan's debt transferred to Sannaiya's account, and in another case by Murugan Kankani's debt.

The entries support the defendant's contention that the promissory note was given as security for the debts of others, and not merely as an acknowledgment that he was personally indebted in the amount mentioned in the note.

The book further shows that the plaintiff, subsequent to his taking over, from time to time has added fresh sums to the amount of the debt alleged to be due by defendant on the promissory note, less payments made by defendant on account of the same.

Assuming the promissory note was given for a fixed sum due by defendant, the sums debited to the account subsequent to the date of the promissory note cannot be covered by the note unless the promissory note was given as security for any balance that might at any time be ascertained to be due from the defendant on a running account.

Assuming it was, in this case, given as such security, the plaintiff would have to prove what the balance of the account was before he could recover anything on the promissory note.

My opinion is that the evidence discloses that the promissory note was given merely by way of security for advances made to the coolies and sub-kankanies of the defendant's gang, and that the plaintiff, before he can maintain this action, must show a failure on the part of the principal debtors to pay the amounts due by them.

He has failed to do so.

Admittedly a large number of defendant's gang of coolies are still working on the estate under plaintiff, and the plaintiff has probably, in the ordinary course of business, made deductions from their wages for the advances made to them; if he has neglected to do so, there appears to me no reason why defendant, who is merely surety, should suffer.

I would dismiss plaintiff's action with costs.

MONCREIFF, J.—

This note was given by a kankani who had been on Kadawella estate for many years, and the coolies for advances to whom he says it was given were already on the estate. It was given on the plaintiff's arrival to take Mr. Lyall's place as superintendent, and in substitution for a note which had been held by Lyall; but it was a promise to "pay John Whitham, or the superintendent of Kadawella estate for the time being," Rs. 4,641.19. It was given in respect of estate matters, and was put in suit for a balance of Rs. 3,480. According to the book "P.M.," in which the plaintiff

made entries, the debt secured by the note fluctuated from time to time.

Whether the coolies, in the defendant's gang, came to the estate with him, or came under him afterwards, it may be assumed that they received advances either before or after their arrival. The question is, whether the advances were a matter between them and the kankani, or whether they were advances from the estate made through the kankani, for which the kankani gave a note for a special purpose.

The defendant meets the note (1) with a plea that it was given as security for sums due on advances by his sub-kankanies and coolies to Kadawella estate; (2) with a claim for Rs. 9,603.87 in reconvention by way of damages.

The plea is founded on a well-known custom, which has often been stated in this Court. On evidence recorded, the custom was recognized and acted upon in *Imray v. Palawasen Kankani* (*1 Browne, 88*). But Mr. Bawa says that there is no such custom, and that each case must depend upon its own circumstances.

As I understand the plea, it means that the note was given for a special purpose and subject to special conditions; that it was given by way of security for the repayment of advances to coolies (of whom the defendant was one); that it was personal as between himself and the estate, and not to be enforced by action so long as the coolies were not severed from him and the estate.

The object of the estate is to get the labour of the coolies, and in order to get it it has to take over, as creditors, the debts due by them to their previous employer (if any) for advances. It cannot treat with each cooly; for convenience, it deals with the kankani under whom the coolies work.

In the usual course the kankani comes to the estate with a *tundu* received from the present employer showing the amount due from the coolies on advances, on payment of which amount the employer is willing to part with the coolies. The estate gives the kankani a cheque for the amount in favour of the present employer; the kankani gives the cheque to the employer, and is then at liberty to take his coolies to the estate which is about to employ them. On arrival the kankani gives the superintendent of the new estate a promissory note for the amount due on advances to coolies, and he in turn takes promissory notes from his sub-kankanies. So long as the coolies are under him, he or the superintendent can, on pay days and other occasions, obtain for the estate payments in reduction of the debt.

The object of all this is to secure the repayment of the debt of the coolies by deductions made with their consent from the pay which

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they earn. The arrangement is understood by all parties. The kankani's note is delivered conditionally, and not for the purpose of transferring property in the note. The note is a sort of escrow, the transfer of property in it is subject to a suspensive condition. So long as there is no severence of the kankanies, the coolies, and the estate, the note cannot be put in suit; but the moment it becomes impossible to reach the coolies and induce them to pay or work off the arrears, the kankani's liability becomes actual. Here, the superintendent took the coolies out of the defendant's hands and cut away the grounds of his responsibility. He exercised the right which he had never lost of dealing directly with the coolies, and put them under another kankani from whom he exacted a note for the amount of the defendant's note. By so doing he not only changed the defendant's position, but discharged him from liability.

The plaintiff's view seems to be that he has nothing to do with advances to the coolies; he knows nothing of them. He has advanced money to the kankani, of which, so far as he knows, the coolies may never have had a cent.

We have not had the assistance we had a right to expect from the plaintiff. He did not give evidence, so we have nothing from him as to the alleged custom; nothing as to special circumstances (if any) attaching to this note; we have no means of knowing whether deductions are now being made from the pay of the coolies. For all we know, the debt may have been extinguished by deduction from wages. He did not call Murugan Kankani, who could have said whether, having given a note for the defendant's debt, he took covering notes from the sub-kankanies; whether, in fact, he simply gave security for the defendant or was substituted for him.

It seems to me that the plaintiff's conduct and the evidence of Mr. Lyall are at variance with the reasons given for this action.

Mr. Lyall, who was superintendent before the plaintiff, says: "If ..... there was to be a change of head kankanies, I would give them *tundus* for the amounts due by them and their men ..... If a head kankani dies, another will take his place on the estate. I would in that case take a promissory note from the next head kankani for the amount of the deceased man's debt. If A and B are head kankanies, and C, a kankani of A, wished to be transferred to B, I would not make the transfer unless with A's consent. If A consents I would make the transfer, credit A with C's advances, and debit B with the amount."

This evidence is destructive of the plaintiff's case. His own action is equally destructive. Although he pretends that the

engagement of and advances to coolies are a matter between them and the head kankani, he took the defendant's coolies from him, depriving him of the benefit of deductions from pay and giving it to another kankani. He took a note from Murugan Kankani for the same debt. I do not believe that that note was taken as security for the defendant's debt. I believe it was taken on substitution of Murugan for the defendant. It is incredible that Murugan should give a note unless he had the advantage of deductions from wages. A further admission is made by transferring to Murugan his own debt of Rs. 312.91 as sub-kankani to the defendant and crediting the defendant with the amount. The plaintiff has directly dealt with the defendant's sub-kankani on a matter with which he says the estate has nothing to do. And lastly, the defendant's book " P. M., " in which the entries were made by the superintendent, repeatedly shows a dealing by the estate with the advances to the kankanies and coolies.

I think that the appeal should be allowed, and that the plaintiff's action should be dismissed.