1930

Present: Garvin A.C.J. and Maartensz A.J.

THAMBOO *v.* PHILIPPU PILLAI *et al.*

72—*D. C. Jaffna*, 25,277.

Promissory note—Given as additional security for mortgage debt—Discharge of debt—Note endorsed for valuable consideration—Action by endorsee.

A promissory note was given by way of additional security for a mortgage debt. After the debt was discharged, the promissory note was endorsed for valuable consideration to the plaintiff, who took it without notice of the circumstances.

Held, that the plaintiff was entitled to recover.

THIS was an action brought by the endorsee of a promissory note. It was pleaded in defence that the note had been given as additional security for a debt due upon a mortgage bond which had been discharged. The learned District Judge dismissed the action on the ground that the plaintiff was aware of the circumstance that the note was given as security for the mortgage bond.

Nadarajah, for plaintiff, appellant.—There is no evidence in this case to rebut the presumption that the plaintiff-appellant is a holder in due course, while the evidence of the payee clearly supports that presumption. The learned District Judge is wrong in holding that the promissory note sued on has been discharged by payment, for that is not the plea for the defence. An attempt has been made to prove that the promissory note sued on was given as additional or further security for a debt due upon a mortgage bond; and that the mortgage bond having been paid, the promissory note was automatically discharged. To bring this case within the ruling of the Divisional Bench in *Jayawardena v. Rahiman Lebbe*,[1] it must be shown that the promissory note was discharged by payment. The correctness of the ruling in the said case was doubted by Jayewardene J. in *Muttucarpen Chetty v. Samaratunge*.[2] The case that is on all fours with the present one is *Glasscock v. Balls*,[3] and the remarks of Lord Esher apply with great force to the present one. It is submitted that the decision in *Glasscock v. Balls* (*supra*) is binding on this Court.

July 21, 1930. GARVIN A.C.J.—

This was an action by the endorsee of a promissory note. The defence was that the note had been given as additional security for a loan which had been secured by mortgage bond No. 7,206 of December 5, 1921, the defendants alleging that the plaintiff took the promissory note with full knowledge of the circumstances. He further pleaded that the mortgage bond had been duly paid and discharged. The case went to trial on the following issues :—

1. Was the promissory note given as additional security for the payment of the mortgage bond No. 7,206 of 1921 ?

2. Was the plaintiff aware of the circumstances under which the note was given ?

The learned District Judge found on both issues in favour of the defendants, but after a careful consideration of the

[1] (1919) 21 *N. L. R.* 178.
[2] (1924) 26 *N. L. R.* 381.
[3] (1889) 24 *L. R. Q. B. D.* 13.

evidence I am unable to see any evidence which justifies the conclusion that the plaintiff had knowledge of the circumstances that this promissory note had been given as additional security for the mortgage bond referred to or that he was aware at the time he took the note that the mortgage bond had been paid. The mere fact that he is said to be a cousin of the payee is not of itself sufficient to justify this conclusion where there is no direct evidence on the point and no evidence establishing other circumstances which would justify such an inference, nor am I satisfied that consideration was not given for the promissory note. There is definite evidence upon the point proceeding from the payee and endorser that he did give consideration and I can see no sufficient reason for holding that consideration was not given. The learned District Judge is disposed to discredit the testimony of the payee, but nothing has been shown in his cross-examination or in the evidence adduced by the plaintiff except perhaps the suggestion that he was a spendthrift, nor do I think there is sufficient ground for describing him as a profligate. This is, therefore, a case in which the plaintiff is the holder of a promissory note for which he has given consideration but in regard to which it has been shown that the principal obligation for which it was to be secured had been discharged at the time it was endorsed to the plaintiff. The learned District Judge treated it as a promissory note which had been discharged by payment and held that the plaintiff was not entitled to recover. The case of *Jayewardene v. Rahiman Lebbe*[1] is certainly an authority for the proposition that a promissory note payable on demand when paid by the maker ceases to be a note and that negotiation at the date of payment does not give any right to the endorsee to sue upon it. But a doubt has been cast upon the correctness of that case in the case of *Muttu Carpen Chetty v. Samaratunga*.[2] In the course of his judgment in that case Jayewardene A.J. says : " The holder for value of a promissory note without notice that it has been paid off is entitled to sue upon it, provided the note has not come back to the hands of the maker " but inasmuch as the earlier case referred to by me was a judgment of three Judges it is binding on us and we should have been bound to follow it. But it seems to me that it is possible to differentiate the circumstances of this case from a case where the promissory note is discharged by payment and its negotiation subsequently to discharge. The case is on all fours with that of *Glasscock v. Balls*.[1] There, as here, were two instruments given to secure the same debt ; one a mortgage and the other a promissory note. The mortgage was discharged and the promissory note which was left in the hands of the payee was negotiated after the discharge of the mortgage bond. The case of *Bertram v. Caddy*,[2] which is referred to in *Jayewardene v. Rahiman Lebbe* (*supra*) is distinguished by Lord Esher M.R. as follows : " First, the note here has not been paid. Nothing has happened which would prove a plea of payment. Something has happened which would entitle the maker to certain rights as against the payee, but which is not payment of the note ". The second ground upon which he distinguishes the case of *Bertram v. Caddy* (*supra*) is that even if the note could be treated as paid, it never came back into the power or control of the maker, and therefore cannot be said to have been re-issued. It is impossible to distinguish the case of *Jayewardene v. Rahiman Lebbe* (*supra*) upon the second of these grounds. It is a ground referred to by Jayewardene A.J. in the later case of *Muttu Carpen Chetty v. Samaratunga* (*supra*) and if it is sound then the case of *Jayewardene v. Rahiman Lebbe* (*supra*) has not been correctly decided. But the first ground remains and it is, I think, sufficient for the determination of the matter before us. I would, therefore, hold, following the authority of *Glasscock v. Balls* (*supra*) that although this

[1] (1919) 21 *N. L. R.* 178.
[2] (1924) 26 *N. L. R.* 381.

[1] (1889) 24 *L. R. Q. B. D.* 13.
[2] *Adolphus and Ellis* 275.

promissory note was endorsed subsequent to the discharge of the debt on the mortgage bond for which it was given by way of additional security, the plaintiff has taken it without knowledge of the circumstances and for valuable consideration and is entitled to recover on it. The judgment under appeal will therefore be set aside and judgment entered for the plaintiff as prayed for with costs in both Courts.

MAARTENSZ A.J.—I agree.

Appeal allowed.