Present : Pereira J. and Ennis J. 1913.

MARIKAR *v.* CAROLIS *et al.*

216—D. C. Galle, 11,419

Promissory note—Action by an endorsee—Defence that note was given as security—" Overdue."

In an action on a promissory note granted by the first defendant to the second, and endorsed and delivered by the second defendant to the plaintiff, it is open to the first defendant to prove that the note was granted by him as security for the supply of goods by him to a firm, of which the second defendant was broker, and to which the second defendant was thus liable for the default of the first defendant as a customer introduced to it by him, and that the note was discharged by the due supply of goods as undertaken.

A promissory note payable on demand is not necessarily to be deemed to be an overdue note. Unlike a bill of exchange, a promissory note payable on demand is not to be deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

THE facts appear from the judgment.

A. St. V. Jayewardene, for plaintiff, appellant.

H. A. Jayewardene and *De Zoysa*, for first defendant, respondent.

Guneratne, for second defendant, respondent.

Cur. adv. vult.

July 29, 1913. PEREIRA J.—

In this case the first question to be decided is whether the promissory note sued upon has been duly paid and discharged. The second defendant was the broker of the firm of Clark, Spence & Co., and it is clear from the evidence of Mr. Leefe, the manager of that firm, that the promissory note was given by the first defendant as security for the supply by the first defendant to the firm of coir yarn in liquidation of advances made to him by the firm. It appears that the second defendant, as the broker of the firm of Clark, Spence & Co., was liable to the firm for advances made to customers introduced by him. If they made default, the second defendant was liable to make good to the firm the loss, and hence promissory notes were, as stated by Mr. Leefe, usually taken in favour of the second defendant, so that he might recover on them

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if he was obliged to make good loss as stated above. The promissory note in question was in effect security for the supply of a certain quantity of coir yarn by the first defendant to Clark, Spence & Co. The moment he supplied the required quantity of coir yarn the note was discharged. The appellant's counsel argued that it was not open to the first defendant to prove such an understanding, it being, as he contended, obnoxious to the provision of section 92 of the Evidence Ordinance. I do not think so. There can be no greater objection to proof of such an understanding than there could have been to proof of suspension of liability on a note which this Court held would take place in certain circumstances in the case of *Coles v. Caruppen*, reported in the *New Law Reports, vol. XVI., p. 198.* In the present case, of course, as sworn to by Mr. Leefe, the first defendant did supply the coir yarn in liquidation of the amount advanced to him.

The next question is, how far the defence available to the first defendant as against the second is available to him as against the plaintiff ? On the authority of the case of *Tenna v. Balaya* [1] the District Judge has treated the present promissory note as an overdue note, and possibly the first defendant's counsel in the Court below placed reliance on the decision in that case in conducting the defence. If that decision is to be deemed as implying that a promissory note payable on demand is always to be regarded as an overdue note so far as the matter of negotiation is concerned, I am not, as at present advised, inclined to endorse it. But I am not sure that the learned Judge who decided that case intended to go so far. Anyway, in the solution of the question whether a given instrument is overdue, the considerations that apply to bills of exchange payable on demand are different from those that apply to promissory notes payable on demand. Section 36, sub-section (3), of the Bills of Exchange Act, 1882 (45 & 46 Vict., ch. 61), enacts : " A bill payable on demand is deemed to be overdue ..... when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for the purpose is a question of fact. " But in section 86, sub-section (2), it is provided as follows : " Where a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. " So that the promissory note in question in this case cannot be deemed to be, and treated as, an overdue note. That being so, it is necessary that the tenth issue framed should be definitely determined. In view of the decision in the case of *Tenna v. Balaya* cited above, neither Judge nor counsel would appear to have treated that issue as of primary importance in this case. That issue is tantamount to the

[1] *(1908) 11 N. L. R. 27.*

question whether the plaintiff is a " holder in due course " of the promissory note in question ; and a " holder in due course, " I need hardly observe, is defined in section 29 of the Act. I would set aside the judgment appealed from, and remit the case to the District Court for the decision of the tenth issue as explained above and judgment accordingly. All costs should, I think, abide the event.

ENNIS J.—Agreed.

Sent back.