Present : Lascelles C.J. and Wood Renton J.

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PALANIAPPA CHETTY *v.* SAMINATHAN CHETTY *et al.*

38—D. C. Colombo, 30,719.

Payment of debt by a promissory note—Conditional payment—Action on notes dismissed for material alteration—Subsequent action for the recovery of the original consideration—Res judicata—*Civil Procedure Code, ss. 34,207.*

The defendants gave the plaintiff two promissory notes as a conditional discharge of their indebtedness. The plaintiff sued the defendants on the notes, but the action was dismissed on the ground that the notes were materially altered by the insertion of a rate of interest. The plaintiff thereupon brought the present action for the recovery of part of the original consideration in respect of which the notes were granted.

Held, that plaintiff's action was not barred by the dismissal of the previous action upon the notes.

WOOD RENTON J.—"Section 34 of the Civil Procedure Code does not require a plaintiff to exhaust in one suit all the causes of action that he may have at the date of the suit in respect of the property or the relief claimed by him, and of which he was then aware."

LASCELLES C.J.—"The crucial question in a case like this is not whether the subject-matter of the present action, that is to say, the moneys sought to be recovered, is the same as part of the subject-matter in the former action. The question is whether the 'cause of action,' that is, the question of right involved in the two actions, is identical. They appear to me to be essentially different. In the one case it is the failure of the defendants to meet their notes; in the other it is their failure to pay a balance claimed by the plaintiff on certain complicated loan transactions."

Where a bill or note is given by way payment there is a strong presumption that the payment is conditional, so that the original debt revives if the note or bill is not realized.

THE facts are set out as follows by Wood Renton J.:—

The plaintiff-appellant sues the defendants-respondents for the recovery (1) of Rs. 11,526.23, with interest thereon at 9 per cent. from August 30, 1909, till payment in full; (2) of a sum of Rs. 771, being the balance of principal and interest thereon at date of suit, together with further interest on the principal sum at 9 per cent. from August 30, 1909, till payment in full. The appellant, who is a money lender and trader carrying on business under the *vilasam* of S. S. P., alleged that the respondents were partners, and that the first defendant-respondent was also, between December 14, 1905,

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and June 15, 1909, his agent and the manager of his business in Ceylon during his absence in India. During that period the second defendant-respondent was a member of the firm of M. S. P. The appellant, on his return from India in 1909, examined the accounts of the first defendant-respondent, and found, as he alleged in his plaint, in the first place, that the first defendant-respondent had discounted a large number of promissory notes at the banks for the firms of M. S. P. and S. S. P., which had not been entered in his books, and the profits of which had not been credited to him; and in the next place, that the first defendant-respondent had had transactions with the firms of M. S. P., S. S. P., and M. K. P. R., with whom the appellant had forbidden him to have any business dealings as his agent. The appellant threatened to prosecute the respondents criminally. The respondents thereupon approached two leading members of the Chetty community, Ramanathan Chetty and Muttu Ramen Chetty, and induced them to arbitrate, and if possible to settle the disputes, between the parties. The appellant consented to their doing so. The arbitrators examined the parties and their accounts, and on August 30, 1909, a settlement was drawn up and signed by both respondents, whose signatures were attested by those of the arbitrators. The arbitrators found that the total amount of the indebtedness of the respondents to the appellant was Rs. 28,224.15⅝. This sum was made up of the following amounts.....

It is necessary to quote the exact language of the paragraphs in the settlement following this enumeration of the various heads of the respondents' indebtedness.

"This total amount we have this day settled with you in the following manner:—

"Rs. 224.15⅝ in cash is paid to you by us this day.

"On demand promissory note given you by us, on which Rs. 14,000 is payable by us with interest on September 15 proximo.

"On demand promissory note given to you by us on this day, on which Rs. 14,000 is payable by us with interest on November 30 proximo.

"As the said Rs. 28,224.15⅝ has been settled in the manner aforesaid, this receipt shall be witness to the fact that there shall be no further claim whatever against us by you or anything due by us to you."

The promissory notes made by the respondents in favour of the appellant were payable on demand. But according to the settlement they were not payable till September 15 and November 30 respectively. The respondents failed to pay the note falling due on September 15, and the appellant then sued them on both notes in case No. 29,886, D. C. Colombo. The respondents met the appellant's claim on the notes in that action by a plea that there had been a

material alteration of the notes without their consent. This alteration consisted in the insertion in the notes of the rate of interest. It was effected by the arbitrators themselves. But the District Judge, in case No. 29886, D. C. Colombo, upheld the respondents' plea, and dismissed the appellant's action with costs. In the present action the appellant sues, not on the notes themselves, but for the recovery of part of the original consideration in respect of which they were granted. His claim has been met by two pleas: first, that in the settlement of August 30, 1909, he accepted the notes as a discharge of any claim that he might have had for the original debt; and in the next place, that even if he accepted the notes merely as conditional payment, sections 34 and 207 of the Civil Procedure Code rendered his claim for the original debt not maintainable, since he could have, and ought to have, included it in his plaint in case No. 29,886, D. C. Colombo. The learned District Judge has upheld both pleas, and the appellant's action has again been dismissed with costs.

The plaintiff appealed.

De Sampayo, K.C., for appellant.

Walter Pereira, K.C. (with him *R. L. Pereira*), for the respondents.

Cur. adv. vult.

April 4, 1912. LASCELLES C.J.—

His Lordship stated the facts, and continued:—

To this claim the defendants in effect plead (1) that the notes were given to the plaintiff in full payment and satisfaction of the defendants' liabilities, and (2) that the present action is barred by sections 34 and 207 of the Civil Procedure Code. The District Judge has considered that he was obliged to uphold the defendants' contention on both grounds, and from his decision the present appeal is now brought.

With regard to the first point, there is no question as to the general principle that, where a bill or note is given by way of payment, as is admittedly the case here, there is a strong presumption that the payment is conditional, so that the original debt revives if the note or bill is not realized. But the respondents claim that they have rebutted this presumption, and proved that the notes were given and taken in complete satisfaction and discharge of the debt. The question is thus one of the intention of the parties.

Neither of the defendants went into the witness box, but the respondents rely principally on the evidence of one of the arbitrators, the terms of the document P 1, and the conduct of the parties.

A good deal of caution is necessary, in my opinion, in considering the effect of oral evidence on a point like that now in question, especially when the questions are addressed to a native witness through the medium of an interpreter. The question whether a

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note is given as absolute or conditional payment is one of some nicety. It cannot be disposed of by the respondents' counsel eliciting an affirmative answer to a skilfully framed question. It must be shown that the witness appreciated the distinction between conditional and absolute payment, and that he gave his answer in the one direction or the other with full knowledge of the distinction.

The respondents rely strongly on certain passages in the cross-examination of the arbitrator, Muttu Ramen Chetty. At page 32 of the record he said, " the plaintiff accepted the two promissory notes in satisfaction of the old account," and when asked whether a certain passage in the memorandum P 1 meant that the plaintiff or defendants should have no claim against each other except on the promissory notes, he replied: " That is how it is written here—the plaintiff took the two promissory notes on that footing." But reading his evidence as a whole, I do not think that it goes far to support the respondents' contention, for in re-examination the same witness stated: " The promissory notes were given as a security for the debt, and not in lieu of the debt "—a statement which is wholly inconsistent with his former answer, and suggests that the distinction between conditional and absolute payment was not present in the witness's mind. I can find nothing in the evidence of Ramanathan Chetty, the other arbitrator, which supports the contention that the plaintiff received the two promissory notes in absolute payment of the debt, nor is there anything in the plaintiff's evidence which lends countenance to this view of the transaction. The notes, he says, were given to him, not on his own suggestion, but on that of the arbitrators'. In the oral evidence I can find no clear indication that the notes were given and taken in satisfaction and discharge of the debt, the creditor accepting the risk of the notes proving worthless. The truth, perhaps, is that the defendants were induced to give promissory notes, because it was considered they were slippery people, and that it was necessary to bind them to their bargain in this way.

Then, reliance has been placed on the passage in P 1, which is translated as follows: " As the said Rs. 28,224.15⅛ has been settled in the manner aforesaid, this receipt shall be witness to the fact that there shall be no further claim whatever against us by you or anything due by us to you." This passage is no doubt consistent with the view that the notes were given in absolute payment; but, on the other hand, it is equally consistent with the view that all that the parties intended was that the award, as regards the amounts mutually payable by the parties, was accepted as final and conclusive. Then, it is said, that the conduct of the plaintiff in suing on the notes after the defendants had failed to meet them proves that he regarded the notes as absolute payment of the debt.

But the circumstances that he put the notes in suit is surely not inconsistent with the view that the notes were accepted only as

conditional payment. In several English cases, where the negotiable instrument was held to be merely conditional payment, a similar course was taken. Thus, in *Wegg Prosser v. Evans*,[1] one of two joint guarantors gave his cheque for the amount; the plaintiff recovered judgment on the cheque, but the judgment was not satisfied. The plaintiff then sued the other guarantor on his guarantee. In that case it was held that the judgment was no defence to the claim on the guarantee, and it appears from the judgment of Lord Esher that the result would have been the same if the plaintiff, in the second action, had sued both guarantors. In *Drake v. Mitchell* [2] an unsatisfied judgment recovered against one of three covenantors was held to be no bar to an action against all three. The fact that a part of the consideration was paid in cash does not amount to much, as it is apparent that the object of the payment was to enable the notes to be given in round sums of Rs. 14,000.

For the above reasons, I would hold that the defendants have failed to rebut the strong presumption of law that the notes were given merely as conditional payment.

It has been strongly insisted that the present action is barred by section 34 of the Civil Procedure Code. The question whether section 34 has this effect depends upon whether the " cause of action " is the same in both actions. The leading Indian decisions on the meaning of the terms " cause of action " in the corresponding Indian rule are clearly summarized in Woodroffe and Amir Ali's work on Civil Procedure. On these authorities, and on the authority of the decision of the Privy Council in *Pittapur Raja v. Suriya Ran*,[3] it is clear that the crucial question in a case like this is not whether the subject-matter of the present action, that is to say, the moneys sought to be recovered, is the same as part of the subject-matter in the former action. The question is whether the " cause of action," that is, the question of right involved in the two actions, is identical. They appear to me to be essentially different. In the one case it is the failure of the defendants to meet their notes; in the other it is their failure to pay a balance claimed by the plaintiff on certain complicated loan transactions. The period of prescription in an action on the notes would, under section 7 of Ordinance No. 22 of 1871, be six years; whilst in the present action it would, under section 8, be three years. In the former case the rights and liabilities of the parties would, under section 2 of Ordinance No. 5 of 1852, be regulated by the law of England; in the present action it is possible that the relations of the parties may be in some respects governed by the Roman-Dutch law. Further, if we apply the test laid down in *Brunsden v. Humphreys*,[4] the difference between the two causes of action is clear, for the evidence required to support the former claim would be different from that on which the present claim depends.

[1] *(1895) 1 Q. B. 108.*
[2] *(1803) 3 East 253.*
[3] *(1885) I. L. R. 8 Mad. 520.*
[4] *(1884) 14 Q. B. D. 141.*

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With regard to section 207 of the Civil Procedure Code, it is clear that the section is applicable only if the causes of action are the same in the two actions. If, as I hold, the causes of action are not identical, it is clear that no question of *res judicata* can arise. In my opinion the result of the evidence is that the two promissory notes were accepted by the plaintiff as merely conditional payment, so that it is open to him, now that he has failed to realize the notes, to enforce the original cause of action, and I do not think that he is precluded by sections 34 or 207 from taking this course. The result is that the appeal succeeds, and judgment must be entered for the plaintiff in accordance with his plaint, with costs here and in the Court below. I should have much regretted the result if we had been obliged on merely technical grounds to come to a different conclusion in a case where every consideration of justice and honesty is on the side of the plaintiff.

WOOD RENTON J.—

His Lordship stated the facts, and continued:—

It is obvious that if this decision is correct on the law, it entails great hardship on the appellant. The respondents' liability to him has been ascertained by arbitrators selected by themselves, and they have no defence to the appellant's action on the merits.

There is no difficulty as to the law applicable to the question raised by the first of the two pleas just referred to. A cheque or promissory note given and received in respect of a debt may be so given and received either as conditional or as an absolute satisfaction of the debt. In the former case, when the cheque or note is actually or practically dishonoured, and satisfaction of the claim on the written instrument cannot be obtained, the original claim on the debt revives, and may be enforced. In the latter the original claim on the debt is extinguished by the giving or the acceptance of the cheque or note as an absolute payment of the debt. The law presumes conditional payment. But this presumption may be rebutted by evidence that absolute payment was intended by the parties. On the evidence in the present case the learned District Judge has held that in the settlement of August 30, 1909, the respondents' promissory notes were accepted by the appellant as an absolute discharge of any claim based on the original indebtedness. There are undoubtedly circumstances that tell in favour of that interpretation of the facts. The document in question speaks of itself as a "settlement", and expressly provides that there should be no further claim whatever against the respondents by the appellant or anything due by them to him. Moreover, a portion of the whole amount of the debt as found by the arbitrators was paid to the appellant in cash. In addition to that, there is the *vivâ voce* evidence of Muttu Ramen

Chetty, one of the two arbitrators, that the appellant accepted the two promissory notes in satisfaction of the old account, and that the meaning of the agreement was that the parties should have no claim against each other except on the notes. Lastly, there is the fact spoken to by the other arbitrator, Ramanathan Chetty, that on the execution of the agreement of August 30 four promissory notes, the value of which the respondents had agreed to pay, were handed by him to the second defendant-respondent. There are, however, circumstances that have to be taken account of on the other side. Where the language of an agreement of the character of that of August 30, 1909, is not unambiguous, it is reasonable, I think, to ask ourselves who were the parties to the transaction, and with what intention would they enter into an agreement of this kind. The parties to the transaction were Chetties—a class of business men who are not in the habit of relaxing their legal claims on the one side, or of expecting that such claims should be relaxed on the other. I find it difficult to suppose that the appellant had any other object, in accepting the promissory notes, than to get the amount of the respondents' indebtedness ascertained by a written document signed by, and binding upon, them both. The language of the settlement itself is not inconsistent with this view of its meaning. The clause above quoted, which provides that as the debt has been settled "in the manner aforesaid.....there shall be no further claim whatever against us by you or anything due by us to you," does not determine the question whether the promissory notes were to be an absolute or merely a conditional discharge of the debt, and means only, I think, that there should be no claim outside the amounts dealt with in the settlement. The sum paid to the appellant in cash—namely, Rs. 224.15½—is an amount the deduction of which would enable the remainder of the indebtedness to be dealt with by the two promissory notes in round figures. The appellant, who gave evidence, was not cross-examined on this point. Neither of the respondents ventured into the witness box. The burden of displacing the presumption of conditional payment was on the respondents. In the state of the evidence which I have just described, it may fairly be said that they cannot rely on the cash payment as a very strong circumstance in their favour. It is true that Muttu Ramen Chetty said in one part of his evidence that the promissory notes had been accepted in satisfaction of the old account, but a little later on he stated that they were given as a security for the debt, and not in lieu of the debt. The learned counsel for the respondents relied strongly on the facts that the appellant in his own evidence had not disputed the earlier statement made by Muttu Ramen Chetty as to the intention with which the notes were given and accepted; and further, that when the first of the two notes was not paid, he had immediately brought his action on the notes themselves, showing thereby that it was on them and not on the old account that he relied. The arbitrators' evidence,

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as I have shown, was inconsistent with itself. There was no cross-examination of the appellant on the point, although it touched an issue, the burden of proving which was on the respondents. Moreover, the tenor of the appellant's evidence seems to me to show that he did regard the notes as conditional payment only. In addition to the circumstances just mentioned, there is the fact that the notes on their execution were retained by the arbitrators, and were not received back by the appellant till a few days before the institution of the action No. 29,886, D. C. Colombo. The fact that the appellant having the notes in his possession sued upon them in the first instance, and not upon the original debt, can scarcely be held to justify the conclusion that he regarded himself as having a remedy on the notes alone.

On the whole, I am of opinion that the learned District Judge was wrong in holding that the appellant accepted the notes as an absolute discharge of his original claim against the respondents. It was held by the Court of King's Bench in *Drake v. Mitchell*[1] as far back as 1803 that where one of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, a judgment recovered on the bill is no bar to an action of covenant against the three covenantors; such bill of exchange, though stated to have been given for the payment and satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact. In that case the bill was regarded as being a collateral security only. But in the later case of *Tarleton v. Allhusen*,[2] it was held that "judgment without satisfaction is no payment," and in *Wegg Prosser v. Evans*,[3] an unsatisfied judgment against one contractor on a cheque given by him alone for the joint debt was held not to be a bar to an action against the other joint contractor on the original contract. The principle of these decisions seems to me to be applicable here. The appellant's claim on the promissory notes was not satisfied by the action on those notes. He did not even obtain judgment on the notes in that action. His right to sue on the original obligations, therefore, remains unaffected.

Certified copies of the proceedings in D. C. Colombo, No. 29,886, have been put in evidence. It appears to me that the cause of action on which the appellant sued was the breach by the respondents of the undertaking contained in their promissory notes. That was the wrong in respect of which he sought redress. The respondents in their answer alleged that he had agreed to accept interest on the notes at the rate current among Chetties in doing business with each other, and that, in breach of that agreement, he had materially altered the notes by inserting in them a stipulation for the payment of 9 per cent. per annum. The cause set up in the present case is different, viz., failure to pay sums due as the result of mutual

[1] (1803) *3 East 251.*

[2] (1834) *12 Ad. & E. 32.*

[3] (1895) *1 Q. B. 108.*

dealings, and on an account stated, between the parties. Both causes of action no doubt spring to some extent from the same circumstances. But they are not the same. The evidence required in the two cases would be different (*Brunsden v. Humphrey*;[1] *Serrao v. Noel* [2]). As has already been shown, some of the heads of claim in the present suit affect one respondent only. The claim for Rs. 300, for instance, is a matter that concerns the first defendant-respondent alone. Moreover, as the notes were accepted as conditional payment, and not as a collateral security (in which case the explanation to section 34 might have applied), the appellant's remedy on the original obligations was suspended till it had been made apparent that he could not get satisfaction by action upon the notes. Under these circumstances, there is, in my opinion, nothing in section 34 or section 207 of the Civil Procedure Code to compel the appellant to include a claim on the original obligations in his action on the promissory notes, on pain of having his remedy on the original obligations barred if he failed to do so.

Section 34 does not require a plaintiff to exhaust in one suit all the causes of action that he may have at the date of the suit in respect of the property or the relief claimed by him, and of which he was then aware.

Referring to the corresponding provisions in the Indian Code of Civil Procedure [section 7 of Act VIII. of 1859; and *cf.* section 43 of Act XIV. of 1882, and Act V. of 1908, 1st Sched. O. 11 r. 2 (1)], in the case of *Pittapur Raja v. Suriya Ran* [3] the Privy Council observed as follows:—

"That section does not say that every suit shall include every cause of action, or every claim which a party has, but that every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought." (And *cf. Amanat Bibi v. Imdad Husain*;[4] *Mahomed Reasat Ali v. Hasin Banu*;[5] *Ramaswami Ayyar v. Vithinatha Ayyah.*[6])

I would hold that the promissory notes sued on were accepted by the appellant only as a conditional discharge of the respondents' original indebtedness, and that his remedy on the original debt is not barred by the dismissal of his previous action upon the notes. The decree of the District Court should be set aside, and judgment entered for the appellant as prayed for in the plaint, with the costs of the action and of the appeal. The learned District Judge has decided all the material issues, except those as to the meaning of the settlement of August 30, 1909, and *res judicata*, in the appellant's favour, and there is therefore no need for any further inquiry in regard to them.

Set aside.

[1] (*1884*) *14 Q. B. D. 141.*
[2] (*1885*) *15 Q. B. D. 549.*
[3] (*1885*) *I. L. R. 8 Mad. 520.*
[4] (*1888*) *L. R. 15 Ind. App. 111, 112.*
[5] (*1893*) *L. R. 20 Ind. App. 155.*
[6] (*1903*) *I. L. R. 28 Mad. 760.*