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Present : Dalton J. and Jayewardene A.J.

DAVITH APPU *v.* DE SILVA.

68—D. C. Hatton, 1,643.

Promissory note—Alteration of sum by payee—Judgment against maker —Defence raised—Action for damages by maker against payee.

Plaintiff, who was the maker of a promissory note, sued the defendant, the payee, to recover damages on the ground that the defendant had altered the sum due on the note, before endorsing the note to K. K had sued the plaintiff on the note, when the latter raised in defence the question of his liability on the note based upon the wrongful act of the payee. Judgment in that case went against the plaintiff, he having failed to provide security as a condition of being given leave to defend.

Held, that the plaintiff could not maintain the present action against the defendant.

APPEAL from a judgment of the District Judge of Hatton. Plaintiff sued the defendant to recover a sum of Rs. 1,500 damages sustained by reason of a wrongful act of the defendant in falsely altering the sum payable on a promissory note granted to him by the plaintiff.

It was alleged that the defendant altered the sum of Rs. 834·95 to Rs. 1,834·95 and endorsed the note to one Kumarasinghe, who sued the plaintiff in D. C. Galle, 24,149. In that case plaintiff set up the identical allegations which he was now making, viz., that he had signed the note for Rs. 834·95 and that it had been fraudulently and materially altered by the payee. When the plaintiff asked for leave to defend, the District Judge granted leave on condition of his giving security in the sum of Rs. 2,600.

Plaintiff failed to do so and decree was entered in favour of Kumarasinghe for the amount claimed.

The learned District Judge dismissed the plaintiff's action.

N. E. Weerasooria, for appellant.

Garvin, for respondent.

July 18, 1928. DALTON J.—

Plaintiff, Davith Appu, who is the present appellant, sued the defendant (respondent) to recover the sum of Rs. 1,500 damages alleged to have been sustained by him at the hands of the defendant in the following circumstances. In March, 1925, he signed in favour of the defendant a promissory note for the sum of Rs. 834·95, with interest at the rate of 18 per cent. This sum, he says, represented the balance due by him to the defendant in respect of

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a transaction that had taken place between the parties. He alleges that defendant falsely altered the note by altering the sum of Rs. 834·95 to Rs. 1,834·59, and then endorsed it to one B. Kumarasinghe. B. Kumarasinghe then sued plaintiff in D. C. Galle, No. 24,149, on the note, and judgment was entered against him for Rs. 2,391·24. He now seeks to recover Rs. 1,500 from defendant for his alleged false and wrongful act.

Before going into the facts, apart from the production of a certified copy of the record in D. C. Galle, No. 24,149, the trial Judge dismissed the action on certain legal objections taken.

It was first of all urged for the defendant-respondent that the question of liability on the note referred to in the plaint was finally decided in D. C. Galle, No. 24,149, and that the defendant is entitled to plead *res judicata* under section 207 of the Civil Procedure Code.

On the question of *res judicata* the trial Judge came to the conclusion that the defendant's plea must be upheld. On the appeal, however, Mr. Garvin for the defendant stated he was not able to sustain this conclusion as it was obvious that whatever be urged about the cause of action, the parties to D. C. Galle, No. 24,149, were not the same parties as those in this case. There was nothing before the trial Judge to lead him to conclude that the defendant was privy to that suit or that the indorsee was his representative.

The determining factor in this case it seems to me is the answer to the question whether plaintiff set up or was entitled to set up as a defence in D. C. Galle, No. 24,149, the circumstances he now pleads as the basis for his present action for damages. To answer this question it is necessary to look at the pleadings and proceedings in that earlier case which were produced in the lower Court. There it seems the plaintiff Kumarasinghe sought to recover Rs. 1,834·59 as principal and Rs. 556·65 as interest on the note made by the defendant Davith Appu in favour of Barnes de Silva and indorsed by the latter to Kumarasinghe. Davith Appu then set up as a defence the identical allegations he is making in this case, namely, that he had signed a note for Rs. 834·95 only and that it had been fraudulently and materially altered by the payee. When he asked for leave to defend, the District Judge pointed out that there was nothing on the note to show either that the figure " 1 " or the words " one thousand " had been added. As he came to the conclusion there was no good reason to believe that the note was given for Rs. 834·95 only, he gave leave to defend only on condition that security be given in the sum of Rs. 2,600. Defendant (present plaintiff) neither gave security nor did he appeal from this order, and decree was thereupon entered for Kumarasinghe for the amount claimed.

It is now stated in appellant's petition of appeal that he "was not in a position for various reasons to contest the said action against the said indorsee." What those various reasons were he does not state, but it has been urged before us that he would in that action be unable to contest his liability to Kumarasinghe on the note as sued upon in view of the provisions of section 64 of the Bills of Exchange Act. That argument, it seems to me, is based upon an incorrect interpretation of the provisions of that section. Appellant as defendant in that action pleaded a material alteration in the note to which he had not agreed and for which he was in no way responsible. The section enacts that it is avoided in such a case except as against a party who has himself made, authorized, or assented to, the alteration and subsequent indorses. Clearly on his own showing neither he nor Kumarasinghe, who was not an indorser at all, come within these exceptions. Even under the proviso to the section, had Kumarasinghe come within the exception, on the assumption that the alteration on the note was not apparent (as would appear to be the case from the District Judge's reasons for refusing unconditional leave to defend) and that it was in the hands of a holder in due course, he could only enforce payment according to its original tenour.

It will be seen then that the appellant raised in that former action the question of his liability on the note based upon the wrongful act of the payee which he was entitled to raise. If he had been successful in that action, he would have obtained all the remedy to which, on his own showing, he was then entitled, and no damages such as he now pleads would have resulted. He did not pursue it for reasons best known to himself and judgment went against him. He now seeks to raise exactly the same question in another action disguised in another form. I am not satisfied he is entitled to do so. This action was therefore rightly dismissed. This appeal must therefore be dismissed with costs.

JAYEWARDENE A.J.—

Section 64 of the Bills of Exchange Act enacts that a bill which is materially altered is avoided, except as *against* (1) a party who has made, authorized, or assented to, the alteration, and (2) subsequent indorsers.

The present plaintiff, who was defendant in D. C. Galle, No. 24,149, does not come under either category. He was the maker of the note, and had not made, authorized, or assented to, the alteration.

After the alteration the note was a nullity as far as the present plaintiff, the maker, was concerned. (*Valliappa Chetty v. Silva.*[1])

[1] *(1918) 20 N. L. R. 340.*

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Even in the view placed before us at the argument (which I think is incorrect), that the note was good in the hands of a subsequent indorser, the plaintiff in the Galle case was not an indorser at all. He was merely the indorsee.

An altered note binds subsequent indorsers because they negotiate the bill on the footing of the alteration.

It was open to the present plaintiff to prove in the Galle case that the note had been altered and that it was void as against him. He failed to do that and if he has suffered any damage, it was due to his own default.

A defendant is always entitled to prove that whatever damages the plaintiff may have suffered were due, not to the defendant's conduct but to the plaintiff's own laches (*Fonseka v. Perera.*[1])

I agree that the appeal should be dismissed with costs.

Appeal dismissed.