1933 *Present:* **Dalton A.C.J. and Koch A.J.**

VELLASAMY PULLE *v.* MOHIDEEN

255—D. C. Chilaw, 9,353.

Promissory note—Action by holder for value—Note discharged at time of endorsement—Right of holder to maintain action.

Where a promissory note given as security for a debt was endorsed to a *bona fide* holder for value after the debt had been paid and discharged by the maker,—

Held, that the note had ceased to be a negotiable instrument at the time of its endorsement and that no action was maintainable on it.

APPEAL from a judgment of the District Judge of Chilaw.

H. V. Perera (with him *D. W. Fernando*), for plaintiff, appellant.

N. E. Weerasooria (with him *H. E. Amerasinghe*), for defendant, respondent.

November 3, 1933. DALTON A.C.J.—

The plaintiff sought to recover the sum of Rs. 624.02, being part of the principal due and interest on a promissory note of September 19, 1924, for the sum of Rs. 600, made by the defendant in favour of W. K. Perera and endorsed on or about September 19, 1927, by the latter for valuable consideration to the plaintiff who claims now to be the holder in due course.

The defendant pleaded in answer to the claim that the note was given by him to plaintiff to secure an advance made to him by plaintiff under an agreement whereby the defendant was to purchase and supply to plaintiff coconuts; that he did so; that on August 16, 1926, accounts were looked into between them and the sum of Rs. 156.75 was found to be due by him to plaintiff; and that thereafter during the same year 1926, he paid the balance by the supply of 3,000 coconuts, the note being thereby fully discharged.

Two issues were framed, as follows:—

(1) Was the note sued on paid and settled in full?

(2) In any event is plaintiff entitled to judgment, and if so, to what amount?

The facts as found by the trial Judge are not contested on the appeal. He finds that defendant's version of the agreement on which the note was made and given, and of the subsequent transactions, is the correct one but that plaintiff's is a holder in due course for valuable consideration without notice of the settlement between Perera and defendant, Perera having cheated him when he endorsed the note over to him. Plaintiff paid Perera the sum of Rs. 434.15, which sum Perera represented to him was due to him from the maker of the note at the time. At the time of the endorsement, however, nothing was due under the agreement to payee, but he appears nevertheless to have been allowed by defendant to retain the note. On the first issue it was held that the note was paid and settled in full in October, 1926. On the second issue, following the decision in *Jayawardena v. Rahaiman Lebbe*[1] by which he was bound, the trial Judge held the note ceased to be a note on payment by the maker, and therefore at the time of the endorsement of it to plaintiff, it had ceased to be a negotiable instrument. The plaintiff's action was therefore dismissed with costs.

The facts in *Jayawardena v. Rahaiman Lebbe* (*supra*) are not set out fully in the reports and I have therefore obtained the record from the Court of Requests, Gampola, to ascertain how the note in that case was paid or satisfied. Loos A.J., before whom that appeal first came, submitted it for the opinion of a fuller Bench on the following facts. The note was made by defendant in favour of one Phillips. Phillips was the superintendent of a Mr. R. S. Agar, who gave Phillips money to purchase certain land. Phillips employed defendant to buy the land, giving him the money but taking the note in question and three others from him as security for the due application of the money. The land was purchased, the money being duly applied for that purpose by the defendant, and Agar received conveyances for the land. Phillips nevertheless subsequently endorsed the note sued on over to the plaintiff who took the note for

[1] *21 N. L. R. 178.*

value in good faith and was held to be a holder in due course. Defendant pleaded the money had been applied by him for the purpose for which he received it, the note being security that it should be so applied, and that he was no longer liable on it, the note being thereby discharged. On the facts it seems to me the case of *Jayawardena v. Rahaiman Lebbe* (*supra*) cannot be differentiated from the case before us, and the decision is binding upon us.

Counsel for appellant has urged however the matter should now be reconsidered as some doubt has been thrown upon the correctness of the decision in *Jayawardena v. Rahaiman Lebbe* (*supra*). A St. V. Jayewardene J. in *Muttu Carpen Chetty v. Samaratunge* [1] doubted the correctness of that decision, but it was not necessary to consider it for the purpose of that case. In giving expression to his doubts he refers to the case of *Glasscock v. Balls* [2] and to certain remarks there of Lord Esher M.R.

If one examine the facts in *Glasscock v. Balls* (*supra*), it is clear they differ from the facts in the case before us and from the facts in *Jayawardena v. Rahaiman Lebbe* (*supra*) in one important respect. In the English case the note had not been paid or discharged, within the meaning of section 59 of the Bills of Exchange Act, 1882, by or on behalf of the drawee or acceptor. The facts were that the defendant gave a note (the note sued on) for £289 to one W. to secure a debt. Subsequently he became indebted to W. in a larger sum. W. required further security and defendant executed a mortgage in his favour to secure the total debt, a memorandum being made at the time that the mortgage was to be an extra security for the amount secured by the promissory note. W. afterwards transferred the mortgage to one Hall, receiving from him the sum of £700 on the transfer. The note remained in W.'s hands after the transfer of the mortgage and he endorsed it to plaintiff as security for a debt of £200 due from him to plaintiff. The plaintiff took the note without knowledge of any of these circumstances. At the trial it was proved W. had paid the plaintiff £60 on account of his debt, and plaintiff obtained judgment for £140, the balance of the debt. On appeal this decision was affirmed.

Lord Esher in the course of his judgment states that the case is not within the rule applicable in such cases as *Bartrum v. Caddy* [3] for two reasons. The first reason is that the note had not been paid. The mortgagee had received payment of the amount of his mortgage from the transferee, but that was not a payment or discharge of the note under section 59 of the Act. (See Chalmer's *Bills of Exchange, 9th ed., pp. 233, 234*). It is not a question of there being no payment by legal tender as was urged before us, but whether there was any satisfaction of the note by or on behalf of the maker which would operate as a discharge. Both Lord Esher and Lord Lindley point out that the payment of the amount secured by the mortgage to the payee on the note would entitle the maker of the note to certain rights as against the payee, but that was not payment of the note and did not affect a *bona fide* indorsee for value.

It is quite sufficient for this first reason to state that *Glasscock v. Balls* (*supra*) cannot govern the case before us for decision. It was on this first ground that the learned Judges in *Thamboo v. Philippu Pillai* [4] following the

[1] *26 N. L. R. 381.*
[2] *24 Q. B. D. 13.*
[3] *9 Ad. & El. 275.*
[4] *32 N. L. R. 35.*

decision in *Glasscock v. Balls* (*supra*) distinguished the case before them from *Jayawardena v. Rahaiman Lebbe* (*supra*). The full facts not appear in the report of *Thamboo v. Philippu Pillai* (*supra*), but it would appear the trial Judge had found that the note which was taken as additional security for a loan already secured by a mortgage bond had been paid, and in appeal it was accepted that the mortgage bond had been discharged before the note was negotiated so that there is sufficient material to indicate that in respect of the mortgage (bond) the facts in the two cases are not entirely similar, since the mortgage in *Glasscock v. Balls* (*supra*) was not paid and discharged but only assigned.

The second reason given by Lord Esher refers to the question of re-issue of the note. He states that even if the note could be treated as paid, never having come back into the power or control of the maker, it cannot be said to have been re-issued. On that ground also it does not come within the decision in *Bartrum v. Caddy* (*supra*). In this latter case Lord Denman C.J. and Patterson J. decided the question before them on the basis that the note having been paid, and returning to the hands of the maker, it could not be re-issued since that is prohibited by the provisions of the Statute.[1] There is, so far as I am aware, no such statutory provision in Ceylon nor can counsel refer us to a similar provision in any local Ordinance. Williams and Coleridge JJ. appear, however, to have come to a conclusion in the case on the question of payment only, holding that the note having been satisfied by the makers, an end is put to it and it is no longer a negotiable instrument.

It is in the earlier part of his judgment, before he states the reasons upon which the rule applicable in such cases as *Bartrum v. Caddy* (*supra*) does not apply, that Lord Esher states that there may be a defence to an action by a *bona fide* indorsee for value where the note has been paid and has come back into the maker's hands before it was indorsed to the plaintiff. That defence he states does not arise in respect of any merits of the defendant but because a provision of the Stamp Act[2] has not been complied with. If there is no such statutory provision in Ceylon, that defence is not available here. Further, if this means that there is no defence to such an action, where the note has been paid but has not come back into the maker's hands before it was indorsed to plaintiff, that would, it is urged, be an additional reason to show that *Jayawardena v. Rahaiman Lebbe* (*supra*) was wrongly decided.

After consideration of the argument of counsel in support of this request for a reconsideration of the question, I do not think this Court under the circumstances would be justified in allowing it on the facts here. The case of *Glasscock v. Balls* (*supra*) upon the facts on which it was decided, as I have pointed out, differs from the present case on the facts, and in the absence of any other equivalent authority the decision in *Jayawardena v. Rahaiman Lebbe* (*supra*) is binding upon us.

The appeal must therefore be dismissed with costs.

KOCH A.J.—I entirely agree.

Appeal dismissed.

[1] *55 Geo. III. c. 184. s. 19.*

[2] *55 Geo. III. c. 184.*