*Present :* Bertram C.J. and Jayewardene A.J. 1924.

MUTTU CARPEN CHETTY *v.* SAMARATUNGE.

*42—D. C. Kandy, 31,068.*

*Promissory note—Holder for value of a discharged note—Right to sue.*

*Per* JAYEWARDENE A.J.—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.

The correctness of the decision in *Jayawardena v. Rahaiman Lebbe* [1] doubted.

APPEAL from a judgment of the District Judge of Kandy. The facts are stated in the judgment of the Chief Justice.

*H. V. Perera*, for plaintiff, appellant.

*Drieberg, K.C.* (with him *R. C. Fonseka*),for defendant, respondent.

September 15, 1924. BERTRAM C.J.—

This is a case which has given us some trouble. The action is brought on a promissory note for Rs. 2,900 given by the defendant on July 31, 1917, to Sinnan Chetty, a member of a Chetty firm which consisted of himself and two brothers. The course of business in pursuance of which this note was given appears to have been that, when accounts were taken, a note would be given in respect of the balance due on the amount against the customer, and that would be discharged by periodical supplies of produce, in this case tea. The object of embodying the balance in a promissory note was, no doubt, partly convenience of suit, and partly the further convenience of getting an acknowledgment of the debt due. The business appears to have gone on for some two years, and presumably the defendant by supplies of tea leaf gradually reduced the balance against him as shown by the note. But some time, in the course of the year 1919, this Chetty firm dissolved partnership. The defendant says that he knew the plaintiff who was one of the members of the firm to be such, and that he knew nothing of its dissolution, and the learned Judge has accepted this account. After this dissolution, as far as one can gather, the business went on in the same way. The story is that the note on dissolution was assigned to the plaintiff as one of the assets to be appropriated to his share of the partnership. He took no action on the note. He does not seem to have given the defendant any notice that the note had been assigned to him. There is no evidence that any change took place in the course of dealings between the defendant

[1] *(1919) 21 N. L. R. 178.*

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and Sinnan Chetty, and the defendant alleges that the business went on in precisely the same way. He further says that two years later, in February, 1921, accounts were again taken, and it was found that Rs. 1,332.50 was due from the defendant to the firm. To cover that indebtedness the firm took a promissory note. Just before the period of prescription expired he brought an action upon it.

Now the learned Judge has accepted the story of the defendant that his account was continuous from the time the promissory note was given in July, 1917, and the time when on a further settlement the note for Rs. 1,500 was given. We have not these facts at all fully proved. The accounts of the Chetty firm have not been produced during the interval, and though the defendant produces pass books they do not cover the whole period. He explains that the earlier pass books were returned. The defendant pleads that he has settled the note account, the liability in respect of which the note for Rs. 2,900 was given, and that the debt should be considered as discharged.

What is the legal position under these circumstances? It seems to me there are two answers to the plaintiff's claim. When he received the endorsement of this note in 1919, he had a certain duty in connection with the endorsement. He as partner knew the course of business between his firm and the defendant. He knew that supplies of tea leaf must have from time to time been brought in. He knew that further supplies of tea leaf would continue to be brought in. He knew that these things were given in business of this sort, not for purposes of negotiation, but for purpose of record.

The question is. Under these circumstances, had he a duty to inform him that the partnership had been dissolved, and that this note had been assigned to him, the plaintiff, as his share of the assets. Had that information being conveyed to the defendant, he would have undoubtedly asked for an account to be taken, and to have his supplies of tea leaf brought to account, and he would not have continued to make these further supplies in liquidation of the note which he supposed to be still in the hands of the firm. Not having discharged this duty, I think that the plaintiff is estopped from setting up the plea as against the defendant that the note is still payable.

Further, I think that the plaintiff is precluded from suing in this way. Supposing that the partnership had still been subsisting, and supposing that Sinnan Chetty had endorsed this note over to his brother, the plaintiff; for value; and supposing that the defendant had continued to pay in tea leaf in discharging of the indebtedness; could this partner have sued the defendant upon the note given in respect of a firm debt already discharged? Clearly he could not

Not having given notice of the dissolution of the firm, and being known to be a partner by the defendant, he is in exactly the same position as a partner.

There is also this fact to be borne in mind in connection with this case that the action of the plaintiff is suspicious. The learned Judge is inclined to assume that it was not *bona fide*. He says that it is impossible to doubt that the plaintiff was aware of the fact that dealings were continuing on the original footing. The only question which has given us serious trouble is as whether we should send the case back for further evidence as to what actually was done in the accounts between the Sinnan Chetty and the defendant. The learned Judge has, however, accepted the doubtless imperfect evidence of the defendant. It would be extremely difficult after this long lapse of time due to the inaction, and, as to the learned Judge seems, the *male fide* inaction of the plaintiff, to obtain the proper evidence. Sinnan Chetty himself appears to have been in very infirm health, and may be now even worse. There is this also to be said that it is extremely unlikely that the defendant would have cited Sinnan Chetty to support his story that there was a continuous account if that story had been fictitious. In the circumstances, I think it would be better that we accept the finding of the learned Judge, and leave his judgment undisturbed, and that the appeal should be dismissed, with costs.

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I agree. Notwithstanding Mr. H. V. Perera's able argument for the plaintiff, appellant, I think that the judgment of the learned District Judge is on the facts and circumstances of the case correct. The strongest point against the plaintiff is the long and unexplained delay in bringing the action. That not only led the defendant to believe that the note was paid off, but also rendered it most difficult for the defendant to adduce evidence in proof of the fact that the amount due on the note was set-off in the course of the transactions he had with the payee of the note, who is the plaintiff's brother. There is also another matter to which I should like to refer. It appears to have been contended in the lower Court that, if the promissory note had been endorsed after it had been paid and discharged in the manner indicated in the answer, it could not be sued upon even by an endorsee for valuable consideration—see issue No. 2. This contention is based on the authority of the case of *Jayawardena v. Rahaiman Lebbe* (*supra*), where it was held that when a promissory note payable on demand is paid by the maker, it ceases to be a note, and that the negotiation of it after the date of payment does not give any right to a *bona fide* holder for value to sue on it. This is judgment of a Bench of three Judges. It is, I am afraid, due to a misapprehension of the effect of certain English decisions

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on which it is based. I have come across a case (*Glasscock v. Balls* [1]) which throws considerable doubt on the correctness of that decision. In the English case, which is not referred to in the local case, it is pointed out that it is only where a note comes back into the hands of the maker that its reissue or negotiation confers no right on an indorse, and this because of a prohibition under the English Stamp Act. In that case Lord Esher, M.R. said: " It has been held 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 hand before it was indorsed to the plaintiff. That defence does not arise in respect of any merits of the defendant, but because the Stamp Act has not been complied with. In such a case it had been held that there was a reissue of the note, and therefore the case stood on the same footing as if the note had been issued for the first time without a stamp. The effect of non-compliance with the stamp laws is that the note is not a negotiable instrument, and is not capable of indorsement. Such a defence only arises where there has been a reissue of the note. The note cannot be said to be reissued, unless it gets back again into the power of control of the maker. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value, without knowledge that it has been paid, from suing. This case is not within the rule applicable to such cases as *Bartrum v. Caddy*.[2] " *Bartrum v. Caddy* is one of the cases relied on in the local case. The English case was decided by the Court of Appeal, and a decision of the Court of Appeal in England, on an English Statute identical with a local Statue, is binding on our Courts—see *Trimble v. Hill*,[3] where the Privy Council laid down the rule that where the provisions of a Colonial Statute are identical with those of an English Statute, the Colonial Courts should follow the decisions of the Court of Appeal on the Imperial Statute. In *Mohideen v. Banda*,[4] this rule was followed. The local law relating to bills of exchange and promissory notes is contained in the Bills of Exchange Act. There are, therefore, two decisions on the point in question which are equally binding on this Court, and when a suitable occasion arises, it will have to decide which of them it will follow. I have taken this opportunity of pointing out the state of the law on the subject, as the point is one of great importance and of frequent occurrence in our Courts.

*Appeal dismissed.*

[1] *(1889) 24 L. R. Q. B. D. 13.*
[2] *(1838) 9 Ad. & E. 275.*
[3] *(1879) L. R. 5. A. C. 348.*
[4] *(1898) 1 N. L. R. 51.*