1930

Present : **Akbar J.**

NAGOOR PITCHE *v.* ANDRIS APPUHAMY

174—*C. R. Colombo*, 55,190.

Promissory note—Drawn by A in favour of B—Signature of C on back—Liability of C—Bills of Exchange Ordinance, No. 25 of 1927, s. 58.

Where a promissory note was drawn by A in favour of B, and C signed the note on the back,—

Held, that C was not liable on the note.

THIS was an action to recover a sum of Rs. 250 with interest due on a promissory note given by one Singho Appu in favour of the plaintiff. The plaint stated that the defendant had endorsed the note for valuable consideration. The defendant denied liability on the ground that he had received no consideration and that he signed the note only as a witness. The following issue among others was raised : " In the circumstances in which the note was made is the defendant liable as a joint and several maker? The Commissioner of Requests gave judgment for the plaintiff.

N. E. Weerasooria (with him *Amarasinghe*), for defendant, appellant.—The Commissioner has held that the appellant was not a joint-maker and is not liable as a guarantor. If so, he is not liable at all. The bill has not been endorsed by the payee. The endorsement by the appellant created no rights in the payee. At the time of the endorsement the bill had not been delivered to the payee and the payee never endorsed the bill. The respondent was not a holder in due course—see *Chalmer's Bills of Exchange, ss.* 56, 84, *and* 88. The principles of liability are discussed in the commentaries on the sections and the cases cited clearly show that the appellant is not liable.

[AKBAR J.—Can you distinguish the case of *Macdonald & Co. v. Nash & Co.*[1]]

[1] (1924) *L. J. R., K. B. D.* 93, *p.* 610.

The facts are different. The Court proceeded on section 20. On the construction of section 56 the majority of the Judges took the view that no rights passed. Section 20 has no application to the present case. Counsel also cited *English and Empire Digest, vol. 6, s. 2101 ; Lecaan v. Kirkman.* [1]

Nadarajah, for plaintiff, respondent.—Section 56 of the Bills of Exchange Ordinance provides that a stranger who signs a bill incurs all the liabilities of an endorser. It has been held by the learned Commissioner that the appellant has signed the promissory note sued on with the intention of becoming liable to the respondent. It is not open to the appellant to challenge this finding of fact, as no appeal has been preferred against the findings of fact. The reasoning of Lord Waston in *Steele v. Mickinly* [2] sets out the law applicable in this case. The case of *Macdonald & Co. v. Nash & Co. (supra)* is in support of appellant's liability. It is submitted that the respondent is a holder in due course. The term " negotiation " would include the original issue also. Section 30 (2) sets out who is to be deemed a holder in due course.

This is precisely a case contemplated by section 56 of Ordinance No. 25 of 1927.

The following authorities were also cited : *Wilkinson v. Unwin,* [3] *Glennier v. Bruce Smith* [4].

December 2, 1930. AKBAR J.—

In this action one Singho Appu by his promissory note marked P2 promised to pay to the plaintiff or to his order a sum of Rs. 250 with interest and the plaintiff stated in his plaint that the defendant endorsed the promissory note for valuable consideration. The plaintiff further alleged that the defendant had paid a sum of Rs. 70 and he claimed the balance. The defendant on the other hand denied his liability on the ground that he received no consideration and that he signed only as a witness. Several issues were framed, namely, whether the defendant signed the note as a witness or as an endorser, and even if the defendant signed as an endorser whether he was liable and what amount was due to the plaintiff. Further issues were framed but they are immaterial for the purposes of this appeal except that issue No. 7 was as follows: — " In the circumstance under which this note was made, is the defendant liable as a joint and several maker ? " Prior to a discussion of the law, it would be convenient to set forth the facts as they appear on the record. Singho Appu, it appears, purchased goods from the plaintiff on October 1, 1925. He went with the defendant and the plaintiff gave the goods on credit. Singho Appu signed an " on demand " promissory note (P2) and the plaintiff also got the defendant to endorse the note on the back as a " guarantor ". Plaintiff stated in evidence that he drew up a bill for the full amount (see P1) in which both Singho Appu and the defendant are stated to be the debtors and the signatures of Singho Appu and the defendant appear on the bill. The promissory note is signed by Singho Appu and also at the back of the note by the defendant. It is not endorsed by the plaintiff. As regards the bill (P 1), it is signed by Singho Appu and after a considerable space by the defendant at the botton of the bill. It is not quite clear in the original document (P1) whether the defendant's name was written at the time that it was drawn up or whether it was added afterwards. This point is not of much importance, in my opinion, as the case has to be decided more or less on questions of law. The defendant, on the other hand, stated that he signed the note (P 2) and the bill (P 1) only as a witness. On this point the Commissioner of Requests holds (and I agree with him) that the defendant was speaking an untruth. The finding of the learned Commissioner is as follows :—" I am quite satisfied that the defendant accepted the liabilities of an indorser and that he knew that the plaintiff wanted him to guarantee

[1] (1859) *Jur. N. S.* 17.
[2] 5 *App. Cases, p.* 754.
[3] (1881) 7 *Q. B. D.* 636.
[4] (1908) 1 *K. B.* 263.

the payment by Singho Appu". The Commissioner is of course right in holding that the bare signature was not enough to make the defendant liable as a guarantor in view of section 21 of Ordinance No. 7 of 1840. In the argument before me the respondent's counsel admitted that the decision on this point was right, but he claimed to support the judgment on section 56 of the Bills of Exchange Ordinance, No. 25 of 1927, which is to this effect: "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course". A similar section in the English Act was construed by the House of Lords in the case of *Mc Donald & Co. v. Nash & Co.*[1]. Unfortunately in that case Viscount Haldane was of one opinion with regard to this section 56 and Lord Dunedin and Lord Sumner were of a contrary opinion. I prefer to follow the opinion of the majority of Judges, not only because the decision of a majority of the Judges should be preferred, but also because if I may say so with all respect, the reasons given by Lord Sumner appeal to me more than those of the Lord Chancellor. As Lord Sumner says in his judgment, "at the time that the note was handed over to the defendant for signature, it was an incomplete bill as the plaintiff had not indorsed the promissory note". For the reasons given by Lord Dunedin, when the defendant wrote his signature on the back of the note, he never had any property in the note and never held it, and merely put his name on it at the instigation of perhaps the plaintiff and Singho Appu. Further, section 56 states that the person who signs a bill otherwise than as drawer or acceptor only incurs the liabilities of an indorser to a holder in due course. As between the defendant and the plaintiff the note has not been indorsed before the defendant signed it; as a matter of fact the note has not been indorsed by the plaintiff at all even now. It was held in a later case also of the House of Lords, namely, the case of *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*,[1] that the original payee of a cheque is not a "holder in due course" within the meaning of the Bills of Exchange Act, 1882. Further, Lord Haldan's opinion would not seem to apply in this case before me because in the case decided in the House of Lords, namely, *MacDonald v. Nash*, MacDonald the plaintiff had indorsed the bill in a space left before the signature of the defendant, before the maturity of the bill. In this case, as I have said, the plaintiff has not indorsed the note at all. Mr. Nadarajah then argued that he was entitled to judgment on the real basis of the decision of the House of Lords in the case last quoted by me, namely, under section 20, sub-section (1), of the English Bills of Exchange Act, which is in similar terms to those of section 20, sub-section (1), of Ordinance No. 21 of 1927. Here too it seems to me that the plaintiff is bound to fail because both on the facts and the law in the House of Lords case it was clearly found that the plaintiff handed over the delivery orders to Nash after Nash had indorsed his name, which had the effect of placing the goods under the absolute control of Nash & Co. And therefore the House of Lords was of opinion that owing to this fact and the fact that a considerable space was left before Nash's signature, MacDonald was authorized *prima facie* to insert his name before Nash's signature under the second part of section 20, sub-section (1). The facts in this case are quite different. It is true that P 1 purports to be made in the name of both the defendant and Singho Appu and that the note is signed at the back by the defendant almost at the bottom of the note. But, if the recorded evidence is scrutinized, the plaintiff himself says definitely that the defendant signed at the back of the note as a guarantor, and he further stated that he demanded payment first of all from Singho Appu and as he did not pay he

[1] (1924) *L. J. R. K. B. D.* 93, *p.* 609.

[1] (1926) *A. C.* 670.

asked for payment from the so-called indorser. The defendant then, it appears, told him to keep on asking from Singho Appu and that if he did not pay he (the defendant) would pay. The whole of the evidence of the plaintiff seems to show that the goods were really taken by Singho Appu and that the defendant only signed as a surety. As a matter of fact the plaintiff said that the Rs. 70 mentioned in his plaint was paid by Singho Appu and not by the defendant. If these goods were sold to both the defendant and Singho Appu, I cannot understand why P 2 was not signed by both of them as joint-makers, and why the defendant's signature in the bill P 1 appears after a considerable space below the signature of Singho Appu. Even according to the finding of the Commissioner, which is somewhat ambiguous, the signature of the defendant was obtained because the plaintiff wanted him to guarantee the payment by Singho Appu. It seems to me that the facts of the case decided by the House of Lords (*Mac-Donald v. Nash*) were quite different to the facts in this case and I will not be entitled to hold that the plaintiff had *prima facie* authority in terms of section 20 (1) to fill up the omission in any way the plaintiff thought fit. But even supposing that the plaintiff had this authority, sub-section (2) of section 20 says that the omission must be supplied within a reasonable time of the making of the bill. In the House of Lords case, as Lord Atkinson points out, the bills were indorsed " very shortly after they became due, that evidently was within reasonable time ". But in this case the note is an " on demand " one and it was made in 1925, and the plaintiff has not indorsed his name even now before the signature of the defendant. So that under section 20, sub-section (2), the plaintiff is bound to fail in this action because he has not supplied the missing particulars within a reasonable time of its making. The plaintiff stated that he allowed Singho Appu up to one month for payment and that he demanded payment after the month expired. When he went to ask for payment from the defendant after the expiry of the one month he did not even then indorse his name before that of the defendant. The case is of course a hard one for the plaintiff, but as pointed out by the English Courts in a case under the Bills of Exchange Ordinance in spite of any apparent inequity the liability of parties has to be determined according to the law merchant. The fault was of course on the part of the plaintiff ; he could have easily got the note made in his favour and obtained the signatures of Singho Appu and the defendant as joint-makers, or he could have got the note drawn up by Singho Appu in favour of the defendant and got the defendant to indorse the note over to him. As he did not comply with either of these rules he must necessarily suffer the loss. I am therefore reluctantly compelled to come to the conclusion that the plaintiff is bound to fail, and his action must be dismissed with costs in both Courts.

Appeal allowed.