1961 *Present :* **Sinnetamby, J., and L. B. de Silva, J.**

R. S. THAMBIRAJAH, Appellant, *and* T. MAHESWARI, Respondent

S. C. 394—D. C. Colombo, 21633/S

Promissory note—Action instituted by indorsee against maker—Issue raised as to fact of indorsement—Burden of proof—No presumption in favour of valid or genuine indorsement—Bills of Exchange Ordinance, ss. 2, 21 (2), 30 (2), 31 (2)—Evidence Ordinance, s. 101.

In an action in which the maker and the payee of a promissory note payable to order are sued by the person to whom the payee indorsed the note, if the maker raises an issue questioning whether the note was indorsed, the burden is upon the plaintiff to prove affirmatively the fact of indorsement completed by delivery. In such a case the plaintiff must first prove that he is a " holder " within the meaning of that term in section 2 of the Bills of Exchange Ordinance before he can claim the benefit of the presumption created under section 30 (2) that every holder of a bill is prima facie deemed to be a holder in due course.

APPEAL from a judgment of the District Court, Colombo.

A. C. M. Uvais, for the Plaintiff-Appellant.

N. K. Choksy, Q.C., with *E. B. Wikramanayake, Q.C.*, and *S. Sharvananda*, for the 1st Defendant-Respondent.

Cur. adv. vult.

January 24, 1961. L. B. DE SILVA, J.—

The Plaintiff sued the 1st and 2nd Defendants to recover two sums of Rs. 1,000 and Rs. 500 on the Promissory Notes marked " A " and " B " filed of Record and dated 10/3/1956. Admittedly the 1st Respondent granted the promissory notes in favour of the 2nd defendant. The Plaintiff alleged in his plaint that the 2nd defendant had endorsed the said notes to the Plaintiff for valuable consideration and that he became the holder of the said notes in due course.

This action was filed under Summary Procedure and the 1st defendant brought the amount claimed to Court and obtained leave to defend the action. The 2nd defendant did not obtain leave to defend the action.

The case went to trial between the Plaintiff and the 1st defendant on several issues. Amongst them, were the following issues :—

(1) Were the Notes in question endorsed to the Plaintiff by the 2nd defendant ?

(2) If so, has the 2nd Defendant the legal capacity to endorse the said notes ?

(3) Did the Plaintiff pay the 2nd defendant valuable consideration for the said notes ?

(4) Is the Plaintiff a holder in due course ?

(5) Were the Notes in question given as security for loans of Rs. 850 and Rs. 425 respectively ?

(6) Were sums of Rs. 150 and Rs. 75 respectively deducted as interest for 3 months at the time of the said loans ?

(7) If so, are the said Notes unenforceable in terms of section 10 of the Money Lending Ordinance.

(8) Are the Defendants or either of them married ?

(9) If so, are they and their husbands subject to the Law of Thesavalamai ?

(10) If so, did the 1st defendant have the capacity to incur liability by signing the notes sued upon or borrow money without the concurrence or consent of her husband ?

After trial the learned District Judge answered the Issues as follows:—

(1) Yes.

(2) Does not arise in view of section 89 (*b*) of the Bills of Exchange Ordinance.

(3) and (4) Plaintiff did not pay to the 2nd Defendant valuable consideration for the Notes and the Plaintiff is not a holder in due course.

(5)-(10) Does not arise.

The action against the 1st defendant was dismissed with costs.

The Plaintiff appealed against the Judgment and Decree in favour of the 1st defendant. It was urged in appeal that there was no evidence except hearsay that only sums of Rs. 850 and Rs. 425 were lent on these notes—and that the balance was deducted by way of interest.

The husband of the 1st defendant gave evidence in this case. Commenting on his evidence, the learned District Judge stated in his judgment "Thereupon, he questioned his wife who appears to have told him that she actually borrowed sums of Rs. 850 and Rs. 425 on the two notes and the balance was deducted by way of interest for 3 months. He thereupon spoke to the 2nd defendant and reprimanded her and asked her whether it was proper for her to be a usurious money lender and deduct these sums by way of interest. The 2nd defendant did not either contradict or deny what Mr. Thiagalingam told her ".

The 1st defendant did not give evidence in this case and clearly the statement of the 1st defendant to her husband is hearsay and inadmissible in evidence. The fact that the 2nd defendant neither admitted nor denied the accusation by the husband of the 1st defendant that 2nd defendant was a usurious money lender who deducted interest in advance, when he reprimanded the 2nd defendant (a woman) over the telephone, can scarcely be said to be evidence to justify a finding that only the sums of Rs. 850 and Rs. 425 were lent on these Notes and the balance sums of Rs. 150 and Rs. 75 were deducted as interest in advance, which would taint these notes with illegality under the provisions of section 10 of the Money Lending Ordinance (Chapter 67, Legislative Enactments of Ceylon).

Under Section 30 (2) of the Bills of Exchange Ordinance (Cap 68, Legislative Enactments of Ceylon), every holder of a Bill is prima facie deemed to be a holder in due course but if the issue or subsequent negotiation of the Bill is proved to be affected with fraud, duress, or force and fear or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

The learned District Judge has held in this case that the issue of these promissory notes was affected with illegality and the burden of proving that value has in good faith been given for these bills thereafter, was on the plaintiff which he has failed to discharge.

The learned District Judge had erred in this case in holding that the issue of the promissory Notes has been affected with illegality as there is no admissible evidence to warrant such a finding. He has therefore erred in holding that the burden of proving that value has been given in good faith for these promissory notes, has shifted to the plaintiff.

However in this case, the learned District Judge has erred in answering the 1st Issue in the affirmative. Admittedly in this case, no evidence whatever was led to prove that the 2nd defendant had endorsed these two promissory notes to the Plaintiff. Neither the Plaintiff nor the 1st defendant gave evidence in this case, in spite of the fact that a specific Issue was raised on this point.

For the purposes of proceeding under Summary Procedure (Chapter 53 of the Civil Procedure Code), the plaintiff filed an Affidavit in which he stated that the 2nd defendant endorsed these Promissory Notes to him. That Affidavit was not led in evidence at this trial and the 1st defendant had no opportunity to cross-examine the plaintiff on that affidavit. This Court is unable to accept this averment in the Affidavit filed with the plaint, as evidence at this trial, for the purpose of proving that the 2nd defendant had endorsed the promissory notes to the Plaintiff. Nor can the fact that the 2nd defendant took no steps to defend this action, be taken as evidence or proof of this fact as against the 1st defendant.

The husband of the 1st defendant, in the course of his evidence produced the letter of Demand (1D5) sent by the plaintiff's lawyer and the reply (1D6) sent by him to the Plaintiff's lawyer. The Letter of Demand averred that the 2nd defendant (Mrs. Ariyakutti) had endorsed these promissory Notes to the Plaintiff. In the reply (1D6), the husband of the 1st defendant alleged that the claim was unenforceable for a number of reasons. It is not possible to hold that there is any admission by or on behalf of the 1st defendant, either express or implied, that the 2nd defendant had endorsed these promissory Notes to the plaintiff.

The Counsel for the plaintiff-appellant did not urge at the hearing of this Appeal, that there was any evidence to prove that the 2nd defendant had endorsed the promissory Notes to the plaintiff. He, however, submitted that the burden of proof lay on the 1st defendant to prove that the promissory Notes were not endorsed by the 2nd defendant to the plaintiff and that the presumption created under section 30 (2) of the Bills of Exchange Ordinance that every holder of a bill is prima facie deemed to be a holder in due course prevailed in the absence of such evidence on behalf of the 1st defendant.

The learned Counsel for the Plaintiff-Appellant has mis-apprehended the provisions of this section. Plaintiff must first prove that he is a holder of the promissory Notes before he can claim the presumption created under this section in favour of a holder. Section 2 of the Ordinance states, " A holder means the payee or indorsee of a Bill or Note who is in possession of it, or the bearer thereof ". The same section states, " A bearer means the person in possession of a bill or note which is payable to bearer ".

The Promissory Notes in question are made payable to the 2nd defendant or Order. They are not payable to bearer. So the plaintiff must establish that he is an indorsee of these Notes—to become their holder.

The same section states, "Indorsement means an indorsement completed by delivery ". Section 31 (2) of the Ordinance provides, " A bill payable to order is negotiated by the indorsement of the holder completed by delivery ".

Under section 21 (2), of the Ordinance, a valid delivery by all parties is conclusively presumed in favour of a holder in due course.

There is no presumption created by the Bills of Exchange Ordinance, the Evidence Ordinance or any other enactment, brought to our notice, in favour of a valid or genuine endorsement.

Dealing with the protection given to banks under section 19 of the Stamp Act, 1853, Paget on " The Law of Banking ", 5th Edition, states at page 102, " The words can therefore apply only to a state of facts in which, but for this section, it would be incumbent on the banker, as drawee, to justify his conduct by proving an indorsement to be genuine. . . . . To entitle him to debit the customer, it would be incumbent on him to show that he has paid with the customer's authority, in accordance with his mandate. If the customer said " Pay A or Order " and the banker has paid somebody purporting to hold under A's indorsement, *it would be incumbent on the banker to prove to his customer that the person fulfilled the character of A's order, in other words, to prove the genuineness of A's indorsement* ".

Our Law affecting the burden of proof is set out in section 101 and the following sections of the Evidence Ordinance. Section 101 states, " Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that these facts exist ".

In *Davoodbhoy v. Farook and others* [1] His Lordship the Hon. the Chief Justice Basnayake stated " the plaintiffs cannot maintain this action unless they prove that Jaleel is dead, for if he is not dead, on their own showing they have no right to be declared entitled to the land or to be placed in possession of it. The burden of proof in a case such as this would be governed by section 101 and not sections 107 and 108 for, the legal right of the plaintiffs is dependent on the fact of Jaleel's death which the plaintiffs ask the Court to presume without proving by affirmative evidence ".

In this case, the plaintiff comes to Court on the footing that the 2nd defendant has endorsed the Notes to him. His right to sue on the Notes depends on that fact. If that fact is not admitted by any of the defendants, the plaintiff must prove that fact as against him and specially so when that fact is raised as an Issue by the defence at the trial, if he is to succeed in his action.

In support of his contention, the Counsel for the Appellant strongly relied on the decision in *Meera Siabo v. Sangarapillai* [2].

In that case the learned District Judge held that the burden was on the plaintiff to prove that he was a holder in due course and that the note had been duly endorsed to him. He held that the endorsement in the plaintiff's favour was at least doubtful as the defendant had produced a formidable body of evidence in support of his allegation that the Note had been endorsed to Sinna Marikkar and discharged by the delivery of coconuts to him. He dismissed plaintiff's action.

[1] *(1959) 58 C.L.W. 57 at page 59.*

[2] *(1916) 2 C.W.R. 217.*

Wood Renton, C.J. held in that case, " The plaintiff produced the Note on which he sued. He was, prima facie, a holder in due course unless the defendant succeeded, which the District Judge holds that he had not done, in affecting him with notice of the discharge of the Note by the delivery of coconuts, at the time that it passed into his possession or showed affirmatively that it had not been endorsed in his favour ". He cited Chalmers on Bills of Exchange pp. 90 and 94—6th edition, in support of this proposition.

The case was sent back for further hearing as the trial was not satisfactory.

De Sampayo, J. agreed with that decision.

In that case the fact that the defendant's agent had endorsed the Note with his authority was admitted. The defence was that it was not endorsed to the Plaintiff but to a 3rd party Sinna Marikkar and the debt due to him on the Note was discharged by the supply of coconuts.

The defence in that case was that the Note was duly endorsed by Defendant's agent but it was delivered to Sinna Marikkar and not to the plaintiff. So that it was only the question of delivery to the plaintiff, which was necessary to a valid negotiation under section 31 (3) of the Bills of Exchange Ordinance in addition to the endorsement in the case of Bill payable to order, that was in issue.

It is to be noted that under section 21 (2) of the Bills of Exchange Ordinance, a valid delivery of the bill by all parties is conclusively presumed if the bill is in the hands of a holder in due course. The case of *Meera Saibo v. Sangarapillai* [1] does not support the contention of the plaintiff that the burden of proof is on the 1st defendant to prove that the 2nd defendant did not endorse the Notes to the plaintiff.

As the plaintiff has failed to prove the 1st Issue in this case, which goes to the root of plaintiff's case, his appeal must be dismissed.

An interesting and important question of Law as to the capacity of a married woman whose husband is living and who is subject to the Thesavalamai, to incur liability as a party to a bill of exchange has been raised in this case. Section 22 (2) of the Bills of Exchange Ordinance deals with this point. Such capacity is governed by the Roman Dutch Law as applicable in Ceylon, subject to the provisions of any ordinance affecting that Law.

By section 5 of the Married Women's Property Ordinance, (Chapter 46, Legislative Enactments of Ceylon) a married woman is capable of entering into or rendering herself liable in respect of her separate property, on any contract as if she were a feme sole. The disabilities which were applicable to married women under the Roman Dutch Law and under the statutes applicable to them prior to the enactment of the Married Women's Property Ordinance of 1924, were wiped out by this Ordinance.

But under Section 3 (2) of this Ordinance, Kandyans, Muslims or Tamils of the Northern Province who are or may become subject to the Thesavalamai are not affected by this Ordinance.

[1] *(1916) 2 C. W. R. 217.*

It was argued that so far as married women who are governed by the Thesavalamai are concerned (and presumably this would apply to Kandyans and Muslim married women if this contention is correct), their capacity to incur liability as a party to a Bill, will be governed by the Roman Dutch Law applicable to married women subject to any other statutory amendments.

The question raised is of far-reaching importance and wide applicability. The learned District Judge has not given a finding in this case as to whether the 1st Defendant is governed by the Law of Thesavalamai. In view of this circumstance and the fact that our decision on the 1st Issue in this case goes to the root of this appeal and disposes of it, we do not consider it necessary to express any view on this issue.

For the reasons stated above, this appeal is dismissed with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.