1941 *Present :* **Soertsz and Keuneman JJ.**

DE SILVA *et al.* *v.* GUNAWARDENA.

313—D. C. Nuwara Eliya, 2,168.

Promissory Note—Payable at a particular place—Presentment for payment—Allegation in plaint regarding presentment essential—Statement that the note was noted for non-payment sufficient—Bills of Exchange Ordinance, s. 88 (Cap. 68).

A promissory note was written in the following terms :—On the Seventeenth day of December, 1938, I the undersigned D. H. Gunawardena of Talawakelle promise to pay D. G. Juwanis Appuhamy of Talawakelle or order, at . . . . Talawakelle the sum of Rupees Five Hundred Currency for value received.

The note fell due on the 20th day of December, 1938, and was not paid. It was noted for non-payment and this appeared on the face of the note. It also appeared from the evidence that the maker and the payee had each a place of business at Talawakelle.

Held, that the promissory note was one payable at a particular place within the meaning of section 88 of the Bills of Exchange Ordinance.

Held, further, that where a note has to be presented for payment at a particular place an allegation to the effect that presentment has been made at that place is a necessary ingredient of the plaint, and the plaintiff's cause of action is not complete without such an allegation.

The allegation in the plaint that the note was noted for non-payment carries with it the implied allegation that it was presented for payment.

APPEAL from a judgment of the District Judge of Nuwara Eliya.

H. V. Perera, K.C. (with him *C. V. Ranawake* and *E. D. Cosmé*), for first defendant, appellant.—The law does not give the plaintiff a right to sue on the promissory note in question without a prior presentment for payment. See sections 88 and 45 of the Bills of Exchange Ordinance (Cap. 68). No excuse has been shown under section 46. Presentment for payment is a condition precedent for the liability of the defendant and is part of the plaintiff's cause of action. It should have been expressly averred in the plaint. The fact that no issue was raised would make no difference.

[SOERTSZ J.—Suppose there had been a waiver of presentment ?]

Then it should be pleaded in the plaint. The burden of proving presentment is on the plaintiff. See *Storer v. Sinthamany Chettiar* [1]; *Spindler v. Grellett* [2]; *Britannia Electric Lamp Works, Ltd. v. Mandler & Co. Ltd.* [3]; *Saibo v. Saibo* [4].

N. E. Weerasooria, K.C. (with him *M. J. Molligodde*), for the plaintiff, respondent.—In the plaint we expressly pleaded that the note was marked for non-payment. In view of that averment it cannot be contended that there was no averment of presentment. *Saibo v. Saibo* (*supra*) is entirely in our favour. The question of presentment was not raised either in the

[1] *(1938) 40 N. L. R. 109.*
[2] *(1847) 1 Exch. Rep. 384.*
[3] *(1939) 187 L. T. J. 324.*
[4] *(1908) 4 A.C.R. 45.*

answer or at the trial when the defendant was given an opportunity to raise an issue regarding it. Further, all that P 2, which was a reply to the letter of demand, stated was that there was nothing due.

It cannot be said that this promissory note was payable at a particular place. Section 88 (1) of Cap. 68 is, therefore, not applicable. "At Talawakelle" is too vague, particularly if a third party, as distinct from an immediate party, obtains rights, as in the present case.

S. W. Jayasuriya for second defendant, respondent.

H. V. Perera, K.C., in reply.—Talawakelle is a distinct place. "Particular place" does not mean a particular building.

A memorandum to the effect "Noted for non-payment" does not necessarily imply that there was presentment—*Saibo v. Saibo* (*supra*). Presentment must be averred unless there is some circumstance rendering presentment unnecessary under sections 45 and 46 of Cap. 68.

Cur. adv. vult.

July 4, 1941. KEUNEMAN J.—

This is an action brought by the plaintiff on Promissory Note "A" dated November 23, 1936, for Rs. 500. The note runs as follows:—

> On the Seventeenth day of December, 1938, I the undersigned D. H. Gunawardena of Talawakelle promise to pay to D. G. Juwanis Appuhamy of Talawakelle or order, at . . . . Talawakelle the sum of Rupees Five Hundred Currency for value received.
>
> (Sgd.) D. H. Gunawardena.

The note fell due on December 20, 1938, and was not paid. It was noted for non-payment, and this noting appears on the face of the note.

It is contended for the appellant, who was the maker of the note, that this was a note which had to be presented for payment, and that the action failed, because there was no allegation that the note was presented at the place of payment, and then dishonoured.

The first question that arises for determination is whether this note is made payable at a "particular place" within the meaning of section 88 of Capter 68. It is to be observed that the note is made payable "at Talawakelle". In *Storer v. Sinthamany Chettiar*[1] Maartensz J., where the note was payable "at Negombo" held "where . . . . there are no circumstances from which the place where payment is to be made in Negombo can be gathered—and it does not even appear whether by 'Negombo' is meant the town or district—the notes in my judgment, are not made payable at a 'particular' place, and presentment for payment is not necessary to render the maker liable". If the words "at Talawakelle" stood alone, these remarks would be apt in this case also, but there is this difference in the present case, viz., that in the body of note "A" it is stated that both the maker and the payee are of Talawakelle, and it is clear from the evidence that each of them has a place of business at Talawakelle. This may at first sight appear to create an ambiguity as to which "place in Talawakelle" is to be the place of

[1] *40 N. L. R. 109.*

presentment, but I think, on consideration, that, as we are dealing with presentment for payment, it may prima facie be taken that presentment should be made at the address of the maker of the note, who is responsible for the payment.

In *Storer's* case, Maartensz J. emphasized the address of the maker, but he also suggested that it may be possible from the course of business carried on between the maker and the payee to find that presentment for payment should be made at another address.

It is, I think, clear from the English cases cited to us that where a note has to be presented for payment at a particular place, an allegation to the effect that presentment has been made at that place is a necessary ingredient of the plaint, and that the plaintiff's cause of action is not complete without such an allegation. It is true that the plaint does not in express words state that the note was presented for payment at the maker's place of business or in fact at any place. But Mr. Weerasooria for the plaintiff-respondent contends that the allegation in paragraph 3 of the plaint, that the said note was "marked for non-payment" on December 20, 1938, is a sufficient compliance with the requirement of the law. The words "marked for non-payment" clearly mean "noted for non-payment", and such noting appears on the face of the document. Now it is true, as Mr. Perera for the appellant points out, that in this particular case, the noting for non-payment does not give any special legal efficacy to the promissory note, but I think we are entitled to take into account the attitude of business men to this question of noting. In this connection Chalmers in his "Bills of Exchange" 9th edition, page 199, says "For business purposes noting is usually taken as showing due presentment". I am inclined to think that the allegation with regard to the noting, carries with it the implied allegation that the note was duly presented for payment.

It is to be observed that while the first defendant expressly traverses the further allegation in paragraph 3 of the plaint of the giving of notice of dishonour, he makes no reference in his answer to the question of due presentment for payment. Also in his reply P 2 to the plaintiff's letter of demand, the defendant stated that he was not bound to pay the amount claimed owing to failure of consideration on the note, and made no mention of a failure to make due presentment for payment.

In *Spindler v. Grellett* (1847) English Reports, Volume 154, page 163, it was held that an allegation in the plaintiff's declaration that the plaintiff was always ready and willing to receive the sum in question, according to the tenor and effect of the note did not amount to an averment of presentment at the proper place. On the other hand in *Huffam v. Ellis* (1811) English Reports, Volume 128, page 165, an allegation, that a bill was presented for payment to the acceptor according to the tenor and effect of the bill (without any express mention of the place where the bill was presented) was held to be a sufficient averment of presentment at the proper place.

I do not think at the present day I am unduly straining the language employed in this plaint when I hold that there is by implication an allegation that the due formalities with regard to presentment for payment have been complied with. I think it was open on the language used in

the plaint for the first defendant to traverse the allegation of due presentment if he wished to do so, and that it was necessary for him to do so at this stage.

The further proceedings in this case have also to be considered. On June 23, 1939, which was a date of trial, Proctor for the first defendant suggested two issues relating to the question of presentment for payment, as follows :—

(1) Can the plaintiff have and maintain this action as presently constituted inasmuch as there is no averment in the plaint as regards presentment ?

(2) Has the note been presented to the first defendant for payment ?

It may be mentioned in this connection that the precise point that the note had not been presented at the particular place has not been specifically raised, although it may come within the ambit of the issues. These issues were disallowed by the District Judge as they had not been raised in the answer. I think this disallowance was justified.

Evidence was then led in the case on the next trial date, viz., July 12, 1939. Proctor for the first defendant once more pressed that the issues in question should be allowed. Plaintiff's counsel refrained from objecting to the issues, but stated that he was not prepared to meet them on that date. The District Judge then allowed the issues, but ordered the first defendant to pay the day's costs to the plaintiff. The first defendant declined to pay these costs, and the District Judge then again disallowed these issues. Here again I think the order of the District Judge was justified.

In substance then the first defendant has been given the opportunity of raising these issues, and has decided not to avail himself of this. I do not think he should be given another opportunity in appeal.

The appeal is dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.