1929

Present: Lyall Grant and Akbar JJ.

CARUPPEN CHETTY *v.* ABEYRATNE.

6—DC (Inty.) Colombo, 10,468.

Decree—Satisfaction of judgment by pro-note—Certification of payment—Right of judgment-debtor.

Where a judgment-creditor has accepted a promissory note in satisfaction of his debt, the judgment-debtor is not entitled to have satisfaction of the decree entered up in the absence of proof that the note has been met at maturity.

APPEAL from an order of the District Judge of Colombo.

Keuneman, for appellant.

March 14, 1929. LYALL GRANT J.—

The plaintiff-appellant in this case, a Chetty, obtained on February 5, 1924, a decree on a promissory note against the defendant-respondent for Rs. 1,623·75, with interest and costs.

After an unsuccessful attempt to recover the sum by execution against the defendant's property, he obtained a warrant for the arrest of the judgment-debtor on June 16, 1924. The returnable date was June 16, 1925. On that date the Deputy Fiscal returned the warrant to Court with the endorsement that the defendant was not to be found. On June 26, 1925, the plaintiff applied for a reissue of the writ. Nothing seems to have happened on this application, and further application was made on June 30, 1928. Owing to lapse of time an affidavit was required and notice issued on the defendant.

The defendant appeared and led evidence to show that the judgment-debt had been satisfied.

Before considering the evidence led on this question I would refer again to the journal entries in the case.

On September 2, 1924, the defendant appeared by Proctor and filed an affidavit and moved for notice on the plaintiff to show cause why satisfaction of decree should not be entered and for the recall of the warrant of arrest.

Notice to the plaintiff was issued on September 11, 1924. The return of the Fiscal shows that he was not to be found as he was said to have gone to India. Notice was reissued three or four times, and the last journal entry in this connection on December 2, 1924, reads " case called, no steps taken. No order."

The affidavit filed on behalf of the defendant, after narrating the fact that judgment was entered, stated that " The plaintiff eventually took out a warrant of arrest and thereafter the plaintiff in full satisfaction of the claims and costs against me in the said case took a promissory note for Rs. 1,800 from one H. W. Boyagoda and discharged me. The plaintiff promised to enter satisfaction of decree and recall the said warrant but has not done so yet."

On December 12, 1928, evidence was led by the defendant in support of the statement made in the affidavit and counter-evidence was led on behalf of the plaintiff.

The learned District Judge has believed the defendant's evidence and has ordered satisfaction to be entered of record with costs of the inquiry to the defendant.

I will deal later with the question whether the mere fact that a decree holder on a promissory note has accepted a bill in satisfaction of his claim could entitle the court to order satisfaction to be entered of record without any proof that the bill had been met at maturity.

Apart from this question of law, I am bound to say that, in my opinion, the evidence led on behalf of the defendant to prove the alleged granting of the note is extremely unsatisfactory and is by no means the best evidence.

1929

LYALL GRANT J.

Caruppen Chetty v. Abeyratne

He has not called the alleged grantor of the note. The Proctor, Mr. E. A. de Silva, whom he called as an eyewitness to the granting of the promissory note, not only denied that he saw the note given, but says that he did not see the plaintiff in the office that day. The only evidence which corroborates the plaintiff is that of one Selvam Joseph, who goes so far in supporting defendant's evidence as to say that Mr. de Silva was present and saw what was going on. In view of Mr. de Silva's evidence, the veracity of the defendant and his other witness is open to grave suspicion.

The plaintiff's kanakapulle, who is alleged by the defendant to have been present at his arrest and to have taken a part in the bill transaction, denies the whole occurrence and produces his account books to show that there was no entry made of any such note.

I do not think that the defendant has discharged the onus of proof which lies upon him when attempting to show that a bill was given to satisfy the decree which existed in favour of the decree holder.

There was a heavy onus on the defendant; he has not called the best evidence, and I am bound to say I entirely disbelieve the evidence which he has called in so far as it helps his case.

I rather suspect that he submitted a false affidavit when he heard that the plaintiff had gone to India for the purpose of having the warrant of arrest withdrawn; that he took good care that notice was not served on the plaintiff; that when matters came to a head and he was forced to support his affidavit he did the best he could with the aid of one complacent witness.

Apart from the question of proof, section 349 of the Civil Procedure Code provides that a judgment-debtor asking the Court to certify satisfaction of judgment must do so by petition. In *Ran Menika Etana v. Appuhamy*[1] Schneider J. pointed out that it was settled law that the procedure must be strictly followed before payment will be recognized.

I cannot find that in the present case this procedure has been followed.

Further, there is a strong presumption that where a bill or note is given by way of payment, the payment is conditional on the note or the bill being realized. (*Palaniappa Chetty v. Saminathan Chetty et al.*[2] and the cases referred to in *Byles on Bills, c. XXIII.*) No attempt has been made in this case to prove such realization.

The appeal is allowed and the original judgment revived.

AKBAR J.—I agree.

Appeal allowed.

[1] *24 N. L. R. 357.*

[2] *15 N. L. R. 161.*