

(1929) 09 MAD CK 0032
In the Madras High Court

Munnaluri Narayanamoorti and Another	APPELLANT
Vs	
Dwadasi Vumamakeswaram and Others	RESPONDENT

Date of Decision : 27-09-1929

Acts Referred:

Citation : 122 Ind. Cas. 345

Hon'ble Judges : Wallace, J

Bench : Single Bench

Judgement

Wallace, J.—This second appeal is against the decision of the lower Appellate Court in the matter of a promissory note claim. The promissory note dated the 9th June, 1920, was executed by the 1st defendant in favour of the 1st plaintiff on behalf of the joint family of which he was the manager. In a partition suit decree, this promissory note was allotted to the share of one Balakrishnayya, although the promissory note appears to have remained with the 1st plaintiff. On the 14th September, 1922, Balakrishnayya executed a release deed relinquishing his rights in the suit note in favour of both the plaintiffs. Both the plaintiffs filed this suit to recover the full amount due upon the note. The defence was a discharge to Balakrishayya partly by cash and partly by execution of another promissory note. The trial Court held that the payment pleaded by the defendants was true but that it was not binding on the plaintiffs. The lower Appellate Court agreed in holding that the payment was true but held further that the plaintiffs had no title to sue, not being holders in due course. It, therefore, dismissed the suit and the plaintiffs' appeal.

2. The first contention urged by them is that as the promissory note is the name of the 1st plaintiff and has not been endorsed by him to anyone else, he is the holder and entitled to recover from the defendants. This to my mind is entirely a new case set up here for the first time. It may be a good case or a bad case, but the defendants have never been given an opportunity of meeting it. It is argued that this is a pure question of law but clearly that is not so. I cannot speculate as to what would have been the defendants' defence if the 1st plaintiff alone had

sued upon the note. Attempts to raise in second appeal points which are not even in the pleadings and which the other side has never been called upon to meet are not to be lightly permitted in second appeal. The Privy Council has lately condemned such a practice: "It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court." James Richard Rennel Skinner v. Naunihal Singh 117 Ind. Cas. 22 : (1929) M.W.N. 676 : AIR 1929 P.C. 158 : 33 C.W.N. 761 : 31 Bom. L.R. 854 : (1929) A.L.J. 566 : 30 L.W. 76 : 50 C.L.J. 74 : 51 A. 367 (P.C.).

3. That this present contention is a new case is clear from a perusal of the pleadings and the judgment of the Courts. There is no hint in the plaint that the 1st plaintiff has any cause of action apart from that of the 2nd plaintiff. The manner in which the plaintiffs became absolute hukdars of the promissory note is stated in para. 6 to be the release deed. The only prayer in the plaint is to pay the suit amount to both the plaintiffs. There is no issue whatever on this present point and the frame of the only issue shows that it was never raised. The only issue is, "whether the discharge set up by the defendants is true and binding on the plaintiffs?" If there had been any case that the 1st plaintiff alone was entitled to sue as holder, the plea of discharge to some one else who never was holder was irrelevant and could not have arisen. A perusal of the judgments of both Courts shows also that the present contention was never raised there, and neither Court has given any finding which can remotely be related to such a contention. I, therefore, refuse to allow this contention to be raised at this state.

4. We are then concerned with the joint rights of both plaintiffs to sue on the footing of the release deed. The 1st plaintiff's rights in this matter are no more than the 2nd plaintiff's. So it will be convenient to ask what rights the plaintiff now has to sue upon the promissory note. His rights is derivable, if anywhere, from the release deed which conveyed to him the right which Balakrishnayya had in the promissory note. What right had Balakrishnayya? The note was not endorsed to him, so that he is not a holder in due course by endorsement. Is he otherwise a holder in due course? It must be held that he clearly was not. A holder in due course must have come into possession of the note if payable to bearer or be an endorsee or payee if payable to the payee. Balakrishnayya never came into possession of the note and in any case the note is payable to the 1st plaintiff and not to bearer, and the note was never endorsed to him. He cannot, therefore, be a holder in due course. That being so, he cannot make his assignees by a release deed holders in due course. The lower Appellate Court is, therefore, quite correct in deciding that the plaintiffs are not holders in due course.

5. Nor are they joint holders, The 2nd plaintiff's name does not appear upon the promissory note. No one can sue on a negotiable instrument as holder unless he

is named therein as the payee or unless he becomes entitled to it as endorsee or bearer. See *Subba Narayana Vathiyar v. Ramaswmi Iyer* 30 M. 88 : 1 M.L.T. 377 : 16 M.L.J. 508 (F.B.) which is a binding authority one me.

6. The only right that 2nd plaintiff and, therefore, 1st plaintiff can have is any right which he may have acquired from Balakrishnayya by the assignment itself. That a party can acquire such rights in a negotiable instrument has been held by this Court in several reported cases, the ratio decidendi being that such an assignment is an assignment of a chose in action. No doubt there has been some difference of opinion in this Court as to whether a suit lies on a promissory note by a party as an assignee of a chose-in-action, early cases, *Pattat Ambadi Marar v. Krishnan* 11 M. 290 *Abboy Chetti v. Ramachandra* 17 M. 461. *Arunachala Reddi v. Subba Reddi* 17 M.L.J. 393 : 3 M.L.T. 7 and *Ulagappa Chetty v. Ramanathan Chetty* 32 Ind. Cas. 821 : 3 L.W. 171 saying that he cannot sue, later cases *Muhammad Khumarali v. Ranga Rao* 24 M. 654, *Muthar Sahib Maraikayar v. Kadir Sahib Maraikayar* 28 M. 544 : 15 M.L.J. 384 *Chandana Vencatadri v. Majati Lakshminarasimha Row* 8 Ind. Cas. 33 : 21 M.L.J. 80 : 8 M.L.T. 449 : (1910) M.W.N. 824 and *Kuthalalingam Pillay v. Packiyam Fernandez* 8 Ind. Cas. 17 : 21 M.L.J. 422 : 8 M.L.T. 448 : (1910) M.W.N. 733 saying that he can sue, subject to the condition that he takes over the equities to which his assignor was subject. *Subrahmanian Chetty v. Alagappa Chetty* 30 M. 441 : 17 M.L.J. 414 *Sowcar Lodd Govinda Doss v. Lepali Muneppa Naidu* 31 M. 534 : 4 M.L.T. 341 and *Ramanadhan Chetty v. Katha Velan* 42 Ind. Cas. 934 : 41 M. 353 : 33 M.L.J. 627 : 6 L.W. 753 : (1917) M.W.N. 843 : 22 M.L.T. 458 lay down that a negotiable instrument may pass by operation of law without endorsement. The plaintiffs ask me in consequence of this difference of opinion to refer the present appeal to a Full Bench, but clearly that is not necessary for a decision of this case since on neither view can the plaintiffs succeed in their claim. If they cannot sue on the assignment as assignees, they cannot sue at all, since they are not suing as holders, nor was their assignor, Balakrishnayya from whom they derived their rights a holder. The plaintiffs, therefore, must sue as assignees of a chose-in-action or be non-suited, and it is only if I follow the cases which ruled that they can that the plaintiffs have any case.

7. Such an assignment only transfers to the assignee such rights as the assignor had at the time and not the full rights of a holder or a holder in due course. If the plaintiffs are to be given any relief as assignees of a chose-in-action they can only take what Balakrishnayya had to give, namely the right to recover the unpaid balance of the promissory note amount. But again the question arises if they can be given that relief in this suit, and I do not see how that can be done. Both the lower Courts have found on the facts that the suit promissory note has been fully discharged by part payment and by the execution of a fresh promissory note, and in the lower Appellate Court the present appellants did not seriously dispute that. Therefore the promissory note on which they now take their stand has been discharged and is no longer in force, It is not a case where a mere part-payment has been made and the balance is still owing on the note

itself. It is a case where the note sued upon is dead in law and, therefore, cannot be a source of any legal rights. Any relief on the footing of the balance still due on the original note can only be granted either by having the fresh note in favour of Balakrishnayya cancelled or by having it endorsed to the plaintiffs. But Balakrishnayya is not a party to this suit, so that neither course is open to me here. I may observe also that this present claim was never raised before the lower Appellate Court and has not been raised in the grounds of appeal here.

8. The appeal must, therefore, fail in toto and is dismissed with costs.