1934 *Present:* **Garvin S.P.J. and Akbar J.**

ADAPPA CHETTIAR *v.* ISADEEN *et al.*

284—D. C. Colombo, 44,669.

Promissory note—Note delivered to the payee—Third party signs at back to accept liability as endorser—Payee's authority to fill note to secure endorser's liability—Bills of Exchange Ordinance, No. 25 of 1927, ss. 20 (1) and 56.

A promissory note was drawn in favour of a payee and delivered to him. Thereafter a third party put his signature at the back, intending to make himself liable as an endorser, and the payee placed his name above the endorsement.

Held, that the payee had authority to fill in his name to secure the endorser's liability and to make the note complete and enforceable.

THIS was an action brought to recover a sum of Rs. 2,000 due on a promissory note payable on demand, of which the payee was S. K. R. A. A. R. Suppiahpillai, the first defendant was the maker of the note and the second defendant was sued as endorser. The second defendant who is the father of the first defendant in his answer admitted his bare signature on the back of the note and set up the defence that by doing so he has not become liable thereon as endorser. The learned District Judge held that the plaintiff was not a holder in due course and dismissed the plaintiff's action.

H. V. Perera (with him *Chelvanayagam*), for plaintiff, appellant.—On the date of the making of this note, first and second defendants were both liable to plaintiff in the sum of Rs. 2,000. In payment of that liability first defendant made the note sued on in favour of plaintiff's manager or agent, S. K. R. A. A. R. Suppiahpillai. Suppiahpillai took the note under the impression that first defendant had made the note in favour of second defendant and that the second defendant had endorsed the same. On discovering his mistake, Suppiahpillai took the note to second defendant who put his signature at the back of the note and returned same to Suppiahpillai. It is true that second defendant was not the payee of the note. Nor had the note been endorsed to second defendant at or before the time of his endorsement. But the circumstances in which he put his name at the back of the note show clearly that the second defendant intended to become liable as an endorser. When it was thus endorsed and handed to Suppiahpillai, the note may be considered not complete and wanting in a material particular, namely, the signature of the payee Suppiahpillai himself above that of second defendant. Under section 20 of the Bills of Exchange Ordinance it was open to Suppiahpillai to supply this deficiency and he had done so by putting his signature above that of second defendant before plaintiff sued on the note. When the deficiency was so supplied the note was a complete instrument wherein the second defendant was in the position of an endorser liable to the holder Suppiahpillai. In other words the document looked as if it had been made by first defendant and delivered to Suppiahpillai who endorsed the same and delivered to second defendant who in turn endorsed and delivered to Suppiahpillai. Second defendant was therefore liable to plaintiff on

the note. This was the basis on which the House of Lords decided *MacDonald & Co. v. Nash & Co.*[1], the facts of which case are identical with the facts here with the exception that in the House of Lords case the instrument was a bill and not a note. That makes no difference to the pirnciple applicable.

There is yet another section of the Ordinance which makes the second defendant liable on the note. Under section 56 "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course". Plaintiff is a holder in due course because the note has been finally endorsed to him for value by his agent, the said Suppiahpillai.

Counsel also cited *McCall Bros. v. Hargreaves*[2] and *Nagoor Pitche v. Appuhamy*[3].

N. Nadarajah, for second defendant, respondent. The case in the plaint is different from the case presented by Counsel for appellant. Plaint states that Suppiahpillai's name was entered as payee by a mistake and that it was intended to make second defendant payee and the endorser. Plaint does not state that Suppiahpillai signed at the back to cure any omission.

Suppiahpillai, the payee on the note, cannot be a holder in due course, see *R. E. Jones, Ltd. v. Waring & Gillow Ltd.*[4] Hence his principal, the plaintiff, cannot be a holder in due course. The case has not proceeded on the footing that plaintiff gave value to Suppiahpillai. Under section 56, second defendant is liable only to a holder in due course. As plaintiff is not a holder in due course, second defendant in this case is not liable. The finding is that second defendant signed to make himself liable as a guarantor only. If that be so, the statute of frauds would prevent plaintiff from recovering from the second defendant in the absence of a writing. See *Steele v. Mckinly*[5].

Further, there is no evidence in this case that there was authority to fill in the name of Suppiahpillai. See the judgment of Wright J. in *National Sales Corporation Ltd. v. Bernardi*[6]

December 21, 1934. GARVIN S.P.J.—

This action was brought on a promissory note payable on demand, of which the payee is S. K. R. A. A. R. Suppiahpillai, for a sum of Rs. 2,000. The first defendant is the maker of the note and the second defendant is sued as endorser. The note in its present form is complete in all respects, for it bears on the back of it the endorsement of S. K. R. A. A. R. Suppiahpillai and below it the endorsement of the second defendant. The plaintiff is Adappa Chettiar of the firm of S. K. R. A. A. R. Suppiahpillai, the payee on the note was the then attorney of the firm of S. K. R. A. A. R. The second defendant is the father of the first defendant, who has since been declared insolvent. The principal contest in the case is between the plaintiff and the second defendant. In his answer the second defendant

[1] (1924) *A. C. 625.*
[2] (1932) *2 K. B. 423.*
[3] *32 N. L. R. 232.*
[4] (1926) *A. C. 670.*
[5] *5 A. C. 754.*
[6] (1931) *2 K. B. 188.*

admitted his bare signature on the back of the note and the defence set up on his behalf is that he has not by putting his signature on this note become liable thereon as endorser.

There is a sharp conflict of fact between the plaintiff and the defendants as to the circumstances under which this note was made, granted and endorsed. It is not denied that at the date of the note, to wit January 7, 1931, the first defendant was liable in respect of his dealings with the firm of S. K. R. A. A. R. to pay them a sum of Rs. 2,000. It was the case for the plaintiff however that both defendants were liable and not the first defendant alone. The learned District Judge has, despite the evidence called by the plaintiff and the production of his books, chosen to accept the story told by the defendants. It was, however, strongly urged that the learned District Judge's finding was incorrect. There are many circumstances which seem to indicate that the second defendant was jointly liable with the first defendant, but in view of this finding of fact we must, I think, proceed upon the footing that at the material date the liability was that of the first defendant.

Early in January, presumably on the 7th, Suppiahpillai went to the house of the second defendant where the first defendant also lived. He met the first defendant and asked for a cheque in lieu of a cheque which had been given previously to secure a loan and which was then overdue A hot discussion appears to have taken place which was overheard by the second defendant. He came out of the house and joined the others on the verandah. He says he told his son not to give a cheque but to give a promissory note and that he said to Suppiahpillai "take the note and go and not to be afraid and that *we* will pay the money". He went in, wrote the note himself and got the first defendant to sign as maker. The note was handed so Suppiahpillai, but at that time it did not bear the endorsement of the second defendant. Suppiahpillai took the note and went away. Now the second defendant does not say that Suppiahpillai looked at the note or that he was able to read what was written. He admits that that very evening he got a telephone message and that the next day Suppiahpillai came back and asked for the cheque which had been returned to the first defendant. The second defendant told him that the cheque had been torn and that his son had no money at the bank and could not give him a cheque. Suppiahpillai then wanted the second defendant to endorse the note. The second defendant says that he did so "as security", adding, "he wanted my signature by way of security and I gave it". It is quite evident from the second defendant's evidence that Suppiahpillai had not fully realized the nature of the instrument which had been given to him in exchange for the overdue cheque and there seems to be no reason therefore to doubt the version of the plaintiff that his impression was that the promissory note had been drawn up by the first defendant in favour of the second defendant. Doubtless, it was when Suppiahpillai realized that the instrument had not been endorsed by the second defendant that he returned and insisted on having the endorsement of the second defendant. The District Judge's finding on this point is expressed by him as follows:—"I accept also second defendant's story that when he put his name on the following day he did so as security and not to incur the liabilities of an endorser".

Whatever the second defendant may have intended, he did not say in so many words that when he endorsed this promissory note he did not intend to incur the liabilities of an endorser. What he did say is, "I endorsed the note on the back . . . . he wanted my signature by way of security and I gave it".

Now at the very outset when the second defendant interposed in the conversation that was going on between Suppiahpillai and the first defendant he suggested that in lieu of the cheque which Suppiahpillai was seeking to recover he should take a promissory note, remarking that "we will pay the money". He wrote out the note himself and there can be little doubt that he intended Suppiahpillai to understand that in consideration of his taking a note in lieu of the cheque he would make himself liable with his son. The liability which he promised to undertake was clearly a liability to pay the promissory note. What happened thereafter when Suppiahpillai realized that the second defendant had not made himself liable on the note is described by the second defendant as follows:—"The Chettiar sent a telephone message and he came the next day and he insisted that I should sign on the back as security. He said that if I could not sign to give another cheque and as my son had no money I signed as security". The second defendant is quite familiar with cheques and promissory notes and with the purpose and function of endorsements. On his own evidence it is, I think, clear that he intended to make himself liable for the debt due on the note and that he endorsed the promissory note for the purpose and with the intention of making himself liable thereon. He is now endeavouring by the repetition of the words "as security" to lay the foundation for the contention that he only intended to be a guarantor and not to assume the liabilities of an endorser. For my own part, I think the proper inference from the facts spoken to by the second defendant himself is that he represented from the very outset that he would hold himself liable for the debt and, when he found that Suppiahpillai was not content to accept the promissory note in the form in which it was drawn, agreed and did intend to become a party to the note as endorsee to Suppiahpillai.

It was urged by Counsel for the appellant that in these circumstances this case was covered by the decision in *Macdonald v. Nash*[1], in that the promissory note when it was ultimately accepted by Suppiahpillai was wanting in a material particular within the meaning of section 20 of our Bills of Exchange Ordinance by reason of the absence of Suppiahpillai's endorsement above the signature of the second defendant and that he had an implied authority to supply the want, as he did, by placing his signature above that of the second defendant and that the promissory note was therefore enforceable against the second defendant. It was further argued that the plaintiff was a holder in due course and that by reason of section 56 of the Bills of Exchange Ordinance the second defendant as the endorser of the bill was liable on the promissory note.

Macdonald v. Nash (*supra*) is the case of a bill of exchange payable to the drawer's order. The bill was duly accepted and by arrangement Nash & Co. endorsed it and passed it on to Macdonald & Co., the drawers. Macdonald & Co. endorsed their names as payees on the bill above the

[1] (1924) *Appeal Cases 625.*

endorser's signature and on the bill being dishonoured sued Nash & Co. The judgment of the Court was " (1) On the fact that the respondents must be taken to have intended to make themselves liable to the appellants on the bill, (2) that the bill when handed to the appellants was wanting in a material particular within the meaning of section 20 of the Bills of exchange Act by reason of the absence of any endorsement by the appellants above the signature of the respondents and that the appellants had implied authority to fill in their names as payees, as they did, over the names of the respondents, and that when so filled up the bill became retrospectively enforceable ". The appellants were Macdonald & Co. In the course of his judgment Viscount Haldane took the view that the bill was complete and regular on the face of it when Nash & Co. took it for endorsement in consideration for value given and for handing it over to the appellants in due course under the agreement, that the appellants, Macdonald & Co., were therefore holders in due course and as such entitled, by the provisions of section 20 of the Act, to make good any lack in a material particular by the insertion of a name of a payee and thereby secure the endorser's liability to themselves or over the payee as endorsers. Some of the other Judges took the view that a bill payable to the drawer's order was incomplete but that in the circumstances of the case, under the provisions of section 20 of the Act, Macdonald & Co. were entitled to fill in the omission and make the bill complete and enforceable. Lord Sumner, in the course of a critical examination of the provisions of section 20, points out that inasmuch as the first part of the section which contemplates the conversion of a simple signature on a blank piece of paper delivered in order that it may be converted into a bill is an authority " to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or an indorser ", and enables the holder when the signature is used as that of an endorser by completing the bill so as to charge him as an endorser, " although when he (the signatory) wrote his name not only had nothing been transferred to him which he could transfer in turn by endorsing and delivering the bill, but no draft, no acceptance, and no order by the drawer, general or special, was in existence at all ", and remarks that this being the effect of the first part of the single sentence of which sub-section (1) consists, he does not see how a more restricted interpretation can be placed on the other part so that the words " in like manner . . . . has a *prima facie* authority to fill up the omission in any way he thinks fit " can be limited so as to exclude endorsees. His Lordship then proceeds to refer to the language of sub-section (2) which in his view points to the same conclusion and remarks, " it expresses a condition of general application to all the cases covered by sub-section (1) " and says, " that in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion it must be filled up within a reasonable time. A bill on which the signature to a blank is utilized as an endorser's signature is such an instrument. A bill complete on the face but purporting to be endorsed by a third party without that party's name being preceded by the endorsement of the drawer is another such instrument. In both cases the bill is incomplete till it is filled up in one

way or the other and when so filled up, though not before, it becomes retrospectively enforceable as if it had been complete throughout". These concluding words, it seems to me, are clearly applicable to the case under consideration. The promissory note was complete on the face of it, and when it was ultimately handed to Suppiahpillai by the defendant it bore his endorsement. That endorsement was made in circumstances which as I have already said leave no doubt that the defendant intended to make himself liable to Suppiahpillai on the bill, and by operation of the latter part of section 20 (1) Suppiahpillai had in law and I think in fact authority to fill in the material particular which was lacking, namely, the endorsement of his own name. This is decisive of the case before us.

As to the second of the two points taken by Counsel for the appellant it is provided by section 56 that "where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liability of an endorser to a holder in due course". The defendant clearly signed the note and for the reasons already given I have come to the conclusion that he did so in this case with the express intention of becoming liable to Suppiahpillai as endorser of the bill. If therefore the plaintiff is a holder in due course the mere circumstance that the defendant has signed this bill renders him liable thereon.

Now the learned District Judge has held that this promissory note was made in favour of S. K. R. A. A. R. Suppiahpillai "in his individual capacity" and that "it does not belong to the firm of S. K. R. A. A. R." It may be taken for granted that the plaintiff when he took the note through his new attorney did not actually pay Suppiahpillai the amount secured by the note. At the time this promissory note was granted Suppiahpillai was the manager of the plaintiff's business. When the period of his managership came to an end and at the accounting between Suppiahpillai and the new attorney of the plaintiff this note was handed over by Suppiahpillai. He has received credit in the accounting in that the plaintiff's attorney took over this promissory note, which the Judge holds was given to Suppiahpillai in his individual capacity, and presumably gave him a discharge to the extent of the value of the note. Had this aspect of the matter been more fully developed during the progress of the case it might have been possible to treat the present plaintiff as a holder in due course.

In the present state of the record I prefer to rest my decision on the answer to the first point taken on behalf of the appellant.

The appeal is accordingly allowed. Judgment will be entered for the plaintiff as prayed for with costs here and below.

AKBAR J.—I agree.

Appeal allowed.