

9, 1957

No. 46 of 1954.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

BADURDIN MOHAMEDALLY (First Defendant) . . . *Appellant*

AND

G E MISSO (Plaintiff) **VERNON PIERIS** (Second Defendant) . . . *Respondents.*

RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

BADURDIN MOHAMEDALLY (First Defendant) *Appellant*

AND

G E MISSO (Plaintiff) VERNON PIERIS
 (Second Defendant) *Respondents.*

RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN
BADURDIN MOHAMEDALLY (First Defendant) *Appellant*

AND

G E MISSO (Plaintiff) VERNON PIERIS
(Second Defendant) *Respondents.*

10 **RECORD OF PROCEEDINGS**

*In the
District
Court,
Colombo.*

No. 1.
PLAINT.

No. 1.
Plaint,
24th May
1950.

IN THE DISTRICT COURT OF COLOMBO.

G. E. MISSO of Dickman's Road Havelock Town . Plaintiff

vs.

1. BADURDIN MOHAMEDALLY of 50 Dam Street,
Colombo and
2. VERNON PIERIS of 6, Ferry Street, Hultsdorf,
Colombo Defendants.

20 On this 24th day of May, 1950.

The Plaintiff of the Plaintiff above-named appearing by Herman J. C. Perera his Proctor states as follows :—

1. The Plaintiff and the Defendants reside and the cause of action hereinafter set forth arose at Colombo within the jurisdiction of this Court.

2. The 1st Defendant above-named at Colombo within the jurisdiction of this Court by his Promissory Note dated 16th October, 1947, herewith filed marked " A " and pleaded as part and parcel of this plaint

*In the
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Court,
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promised to pay the 2nd Defendant or order on demand a sum of Rs.35,450/- with interest thereon at the rate of ten (10) per centum per annum from 16th October, 1947.

No. 1.
Plaint,
24th May
1950,
continued.

3. The said 2nd Defendant also at Colombo aforesaid endorsed and delivered the said note to the Plaintiff for valuable consideration.

4. There is now justly and truly due and owing to the Plaintiff from the said Defendants jointly and severally on the said note the sum of Rs.49,393/64 to wit :—Rs.35,450/- being principal and Rs.13,943/64 being interest due from 16th October, 1947, up to 1st May, 1950, which sum or any part thereof the Defendants have failed and neglected to pay 10 though thereto often demanded.

WHEREFORE the Plaintiff prays :—

(A) for judgment against the Defendants jointly and severally for the said sum of Rs.49,393/64 together with further interest on Rs.35,450/- at the rate of 10 per centum per annum from 2nd May, 1950, till date of decree and thereafter legal interest at the rate of 5 per centum per annum on the aggregate amount till payment in full,

(B) for costs of suit, and

(C) for such other and further relief not otherwise specially 20 prayed for as to this court shall seem meet.

(Sgd.) HERMAN J. C. PERERA,
Proctor for Plaintiff.

Documents filed with the plaint

1. Promissory Note dated 16th October, 1947, marked letter "A."

2. Affidavit.

(Sgd.) HERMAN J. C. PERERA,
Proctor for Plaintiff.

Settled by Mr. Missor & Mr. Cyril E. S. Perera, Advocates.

No. 2.
PLAINTIFF'S AFFIDAVIT.

(*Title as No. 1.*)

*In the
District
Court,
Colombo.*

No. 2.
Plaintiff's
Affidavit,
24th May
1950.

I, G. E. MISSO of Dickman's Road, Havelock Town being a Christian do hereby make oath and say as follows :—

1. I am the deponent above named.
2. I am the Plaintiff above named.
3. The 1st Defendant above named at Colombo within the jurisdiction of this Court by his Promissory Note dated 16th October, 1947, herewith produced marked " A " promised to pay the 2nd Defendant or order on demand a sum of Rs.35,450/- with interest thereon at the rate of ten (10) per centum per annum from 16th October, 1947.
4. The said 2nd Defendant also at Colombo aforesaid endorsed and delivered the said note to me for valuable consideration.
5. There is now justly and truly due and owing to me from the said Defendants jointly and severally on the said note the sum of Rs.49,393/64 to wit :—Rs.35,450/- being principal and Rs.13,943/64 being interest due from 16th October, 1947, up to 1st May, 1950, which sum or any part thereof the Defendants have failed and neglected to pay me though thereto often demanded.

Read over signed and sworn to at
Colombo on this 24th day of May, 1950 } (Sgd.) G. E. MISSO.

Before me,

(Sgd.) illegibly,

Commissioner for Oaths.

*In the
District
Court,
Colombo.*

No. 3.

SECOND DEFENDANT'S AFFIDAVIT.

(Title as No. 1.)

No. 3.
Second
Defendant's
Affidavit,
7th June
1950.

I, CHARLES VERNON PEIRIS of 6 Ferry Street, Hultsdorf, Colombo, being a christian do hereby make oath and say as follows :—

1. I am the 2nd Defendant above-named. The Plaintiff is my father-in-law. I have been served with summons in the above case on the 3rd day of July, 1950.

2. In the year 1947 I had given loans to 1st Defendant aggregating to Rs.119,425/- on the security of four promissory notes, namely :— 10

(A) Rs.37,500/- on the promissory note dated 5th September, 1947.

(B) Rs.15,525/- on the promissory note dated 26th September, 1947.

(C) Rs.30,650/- on the promissory note dated 11th October, 1947, and

(D) Rs.35,450/- on the promissory note dated 16th October, 1947.

And the note which is sued in this action is for Rs.35,450/- dated 16th October, 1947. 20

3. On the 15th of January, 1948, the 1st Defendant by Bond No. 44 attested by S. Coomaraswamy, Notary Public, a certified copy of which is herewith annexed marked " X," bound himself, his heirs, executors and administrators to pay me the sum of Rs.94,125/- being the aggregate balance amount due on the said four promissory notes together with interest thereon at ten (10) per centum per annum and further hypothecated his share of certain properties as security for the repayment of this sum of Rs.94,125/-

4. Mr. S. Coomaraswamy, the Notary Public, who attested the said bond made endorsement on each one of the said four notes in regard 30 to the execution of the said Bond No. 44.

5. The said four notes had then become paid and discharged by the granting of the said mortgage bond No. 44 but the 1st Defendant allowed the said four notes to be retained by me to evidence the consideration for the said mortgage bond No. 44.

6. Some time in December, 1948, I was indebted to the Commissioner of Income Tax in the sum of Rs.22,428/-. The Plaintiff provided me with the sum of Rs.22,428/- to be utilised by me for paying the said debt. I agreed to repay the said amount without any interest no sooner I recovered the money due to me on the said mortgage bond No. 44. The 40 Plaintiff asked me to endorse the note sued upon and deliver to him as security. I pointed out to him that the said note was paid and discharged

by the bond referred to above. However as he insisted on the said note being endorsed and delivered to him I endorsed the note and delivered to him but told him that the said note was a worthless document.

In the District Court, Colombo.

7. I filed action on the said bond on the 29th day of September, 1948, in Mortgage Bond case No. 2101 of the District Court of Colombo. The case was settled, the terms being "action dismissed without costs." Thus in July, 1949, the Bond was duly discharged and a certified copy of the plaint and journal entry relating to the terms of settlement in the said case No. 2101 is herewith filed marked "X2." The Plaintiff was fully aware of the settlement of Mortgage Bond case No. 2101 of this Court and was particularly aware that the Bond was duly discharged.

No. 3. Second Defendant's Affidavit, 7th June 1950, continued.

8. I tendered to the Plaintiff the sum of Rs.22,428/- on or about the 16th of June, 1949, but the Plaintiff wrongly refused to accept it and wrongly required me to pay him the sum of Rs.35,450/- together with interest thereon up to date of payment. I declined to pay the amount claimed by the Plaintiff for the reason that—

(A) no claim could be made against me on the said note in view of the circumstances in which the said note was endorsed and delivered to Plaintiff, and

(B) the Plaintiff had agreed to accept from me only Rs.22,428/- without any interest whatsoever.

9. The Plaintiff's refusal of the amount tendered by me was due to the fact that prior to the date of settlement of the mortgage bond case No. 2101, he quarrelled with me because I had refused to take in my brother-in-law, his son, as a partner in my business.

10. I state that the Plaintiff is not entitled to recover from me the sum of Rs.22,428/- for the reason that I had tendered to him this amount and he had refused to accept it.

11. In any event I state that Plaintiff cannot maintain any action against me or the First Defendant on the said note for—

(A) The said note was duly paid and discharged prior to the date it was endorsed and delivered to Plaintiff.

(B) In view of the endorsement on the note by Mr. S. Coomaraswamy in regard to the execution of the said Bond No. 44 the Plaintiff did not acquire any right against me or 1st Defendant by reason of my endorsement of the said note and delivery to him.

12. I have a good and valid defence for this action and pray that I be given unconditional leave to appear and defend this action.

Read over signed and sworn to at Colombo on this 7th day of June, 1950 } (Sgd.) VERNON PEIRIS.

Before me, (Sgd.) illegibly, Commissioner of Oaths.

*In the
District
Court,
Colombo.*

No. 4.

FIRST DEFENDANT'S AFFIDAVIT.

(Title as No. 1.)

No. 4.
First
Defendant's
Affidavit,
5th July
1950.

I, BADRUDIN MOHAMEDALLY of 50 Dam Street Colombo, being a Muslim do hereby solemnly sincerely and truly declare and affirm as follows :—

1. I am the 1st Defendant above named.

2. I deny paragraphs 3 and 4 of the plaint and state that no money whatsoever is due by me to the Plaintiff on the note sued upon in this case.

3. The 2nd Defendant and I were intimately known to each other 10 from the time of our school days, and the 2nd Defendant was in a position of active confidence towards me prior to and during the periods material to this action and was able to dominate my will, by wrongfully availing himself of the position aforesaid and by the exercise of undue influence the 2nd Defendant wrongfully and deceitfully induced me into signing promissory notes, including the note sued upon in this case, mortgage bond and warrants of attorney to confess judgment and also into parting with various sums of money.

4. The 2nd Defendant in or about November, 1947, wrongfully and deceitfully induced me to sign four ante-dated promissory notes referred 20 to in mortgage bond No. 44 hereinafter mentioned in the 2nd Defendant's favour without any consideration. The said notes were for the sums of Rs.37,500/—, Rs.15,525/—, Rs.30,650/— and Rs.35,450/—, the last mentioned note being the note sued upon in this case.

5. The said four promissory notes are fictitious within the meaning of the Money Lending Ordinance and unenforceable in law. No consideration passed on the said notes.

6. Subsequently the 2nd Defendant wrongfully and deceitfully induced me to sign a mortgage bond bearing No. 44 dated 15th January, 1948, and attested by S. Coomaraswamy, Notary Public of Colombo in 30 favour of the 2nd Defendant to secure payment of all moneys alleged to be due and outstanding on the four notes aforesaid. The said mortgage bond was executed without any consideration whatsoever and nothing was due thereunder.

7. At the time of the execution of the said bond all the four notes referred to above were produced by the 2nd Defendant before the notary attesting the bond. The Notary made the endorsement appearing on the back of the note sued upon at the time of the execution of the said bond. I was informed by the Notary that the note thereupon stood cancelled.

8. The 2nd Defendant also wrongfully and deceitfully induced me 40 to sign a collateral document which I later understood was a warrant of Attorney to confess Judgment bearing No. 45 dated 15th January, 1948, and attested by S. Coomaraswamy, Notary Public of Colombo.

9. On 17th July, 1948, I filed plaint No. 257/Z of this Court against the 2nd Defendant. I swear to the correctness of the facts in that plaint. In that plaint I asked *inter alia* (A) for a declaration that no money is due from me on the said bond No. 44 and for the cancellation of the same and (B) for the return of the said four promissory notes.

In the District Court, Colombo.

No. 4.
First Defendant's Affidavit, 5th July 1950, *continued.*

10. The Plaintiff is the father-in-law of the 2nd Defendant and resided in the same house at the dates material to this action.

11. Pending my action No. 257/Z aforesaid the 2nd Defendant on 30th September, 1948, at the instigation of the Plaintiff filed case 10 No. 2101/M.B. of this Court and applied for judgment with the help of the warrant of Attorney to confess judgment.

12. On 4th July, 1949, both my action No. 257/Z and the 2nd Defendant's action No. 2101/M.B. were dismissed of consent. It was agreed that all promissory notes and other documents to which I and the 2nd Defendant were parties stood cancelled.

13. I am advised that the settlement of the two cases aforesaid and the decree entered therein is a bar to any action on the note sued upon in this case.

14. I deny that the said note sued upon was negotiated by the 20 2nd Defendant to the Plaintiff for valuable consideration. I deny also that the Plaintiff is a bona fide holder. He was at all times well aware of the facts referred to herein.

15. The Plaintiff and his son-in-law the 2nd Defendant are acting in collusion with each other in this matter.

16. I am advised that I have good and valid defence in this case.

17. I pray that the Court be pleased to grant me leave to appear and defend this action unconditionally.

30 Read over signed and affirmed to at }
Colombo on this 5th day of July, } (Sgd.) B. MOHAMEDALLY.
1950

Before me,
(Sgd.) illegibly,
Commissioner for Oaths.



In the
District
Court,
Colombo.

No. 5.

FURTHER AFFIDAVIT of First Defendant.

(Title as No. 1.)

No. 5.
Further
Affidavit
of First
Defendant,
29th July
1950.

I, BADRUDIN MOHAMEDALLY of No. 50 Dam Street in Colombo being a Muslim do solemnly sincerely and truly declare and affirm as follows :—

1. I am the 1st Defendant above named.

2. Further to what I have affirmed in my affidavit dated 5th July, 1950, and filed of record, I affirm the following :—

3. On the 17th July, 1948, I instituted action No. 257/Z referred to in paragraph 9 of my aforesaid affidavit. On or about 20th July, 1948, my Proctor had the *lis pendens* in the said case No. 257/Z registered and I file a copy of the application for registration and the receipt issued by the Registrar of Lands marked "1.D1" and "1.D2" respectively. The complaint dated 17th July, 1948, along with the answer dated 8th October, 1948, the Fiscal's report of service dated 12th August, 1948, and journal entries up to 6th October, 1948, in the said case No. 257/Z is marked "1.D3." After summons had been served in case No. 257/Z on Vernon Pieris, the 2nd Defendant, in this case, he instituted action No. 2101/M.B. against me on 30th September, 1948, on Bond No. 44 dated 15th January, 1948, and moved for judgment on a warrant of Attorney to confess Judgment. I intervened in the said mortgage action No. 2101/M.B. and moved for stay of proceedings and proceedings were stayed.

4. On 4th July, 1949, cases No. 257/Z and No. 2101/M.B. were both settled. I produced the consent motion in case No. 257/Z marked "1.D4" and the consent motion in case No. 2101/M.B. marked "1.D5." Decrees were entered in terms of the said consent motions.

5. When the said cases were settled, the 2nd Defendant discharged the mortgage bond No. 44 marked "1.D6" herewith filed and the discharge was duly registered.

6. The Plaintiff alleged that the 2nd Defendant endorsed the promissory note marked "A" in this case in favour of the Plaintiff on 18th December, 1948. On that day both the aforesaid cases No. 257/Z and No. 2101/M.B. were pending. I produce letter of demand sent by Plaintiff's proctor to me dated 17th October, 1949, marked "1.D7." To this my proctor replied on 24th October, 1949; a copy of which letter is herewith produced marked "1.D8."

Read over signed and affirmed to at
Colombo on this 29th day of July, 1950. } (Sgd.) B. MOHAMEDALLY.

Before me,
(Sgd.) illegibly,
Commissioner for Oaths.

30

40

No. 6.
ADDRESSES OF COUNSEL.

*In the
District
Court,
Colombo.*

12th September, 1950.

—
No. 6.
Addresses
of Counsel,
12th
September
1950.

Mr. Adv. Misso with Mr. Adv. Wijetunga for the Plaintiff instructed by Mr. Perera.

Mr. Adv. Kumarasingham with Mr. Adv. Shanmuganayagam for the 1st Defendant instructed by Mr. Sivasubramaniam.

Mr. Adv. Navaratnarajah for the 2nd Defendant instructed by Mr. Coomaraswamy.

- 10 *Mr. Kumarasingham heard* :—He states :—1st Defendant was a good friend of the 2nd Defendant. 2nd Defendant was a man of substance. 2nd Defendant managed to secure promissory notes from 1st Defendant. On 5.9.47 1st Defendant gave a note for Rs.37,500/- to the 2nd Defendant, a note for Rs.15,225/- on 15.9.47, a note for Rs.30,650/- on 11.10.47 and a note for Rs.35,450/- on 16.10.47. On 15.1.48 mortgage bond No. 44 was got by the 2nd Defendant from the 1st Defendant. The note before court is the note for Rs.35,450/-. The proctor who attested the bond made an endorsement on the reverse of the note. On 17.7.48 1st Defendant filed action 257/Z (He refers to "1.D1" and "1.D2"). On 12.8.48 summons
20 was served. Answer was eventually filed on 8.10.48. On 30.9.48 2nd Defendant filed action 2101 on his mortgage bond, with a warrant to confess judgment and wanted judgment to be entered. Thereafter 1st Defendant appeared and judgment was not entered. (He refers to letter of demand of the Plaintiff "1.D7" dated 17.10.49.) Plaintiff alleged that the 2nd Defendant had endorsed the note to him. 2nd Defendant is the son-in-law of the Plaintiff. On 4.7.49 257/Z and 2101/M.B. were settled. "1.D4" and "1.D5" are the terms of settlement. All the details are set out in the supplementary affidavit of 29.7.50. In the affidavit of 5.7.50 1st Defendant sets out his position.
30 (Affidavit read.)

- Mr. Navaratnarajah heard.* He states: 2nd Defendant endorsed the note in December, 1948. It was a worthless document. Plaintiff is 2nd Defendant's father-in-law. He knew that these documents were in favour of the 2nd Defendant. 2nd Defendant had to pay income tax Rs.22,428/-. Plaintiff gave the money to the 2nd Defendant. On 16.6.49 2nd Defendant tendered the money Rs.22,428/- to the Plaintiff and wanted the note back. He refused to accept it. He wanted the full amount of the note. Plaintiff is not entitled to recover the Rs.22,428/- from 2nd Defendant. 2nd Defendant admits Rs.22,428/- is due. The
40 note was paid and discharged on the day the endorsement was made by the proctor. It was incorporated in the Bond. (He refers to the affidavit of 2nd Defendant.)

Mr. Kumarasingham refers to the affidavit of the 2nd Defendant. He states :—At all times material Plaintiff and 2nd Defendant were living together.

*In the
District
Court,
Colombo.*

*Mr. Navaratnarajah states :—*The 2nd Defendant parted company soon after the endorsement was made. 2nd Defendant lived in the adjoining house.

No. 6.
Addresses
of Counsel,
12th
September
1950,
continued.

*Mr. Misso states :—*2nd Defendant and Plaintiff did not live together. 2nd Defendant lived in the adjoining house. Eventually 2nd Defendant was ejected.

*Mr. Kumarasingham states :—*At the time the mortgage bond was attested the notes were discharged. (He cites 44 N.L.R. 231.) (Mortgage bond read.) Once the bond was given by the 1st Defendant there was full discharge of the notes. (He cites 35 N.L.R. 239, 44 N.L.R. 409.) 10

*Mr. Navaratnarajah states :—*The note was endorsed in December, 1948. Plaintiff must have been aware of the existence of bond No. 44 and the contents of bond No. 44. (He cites Byles on Bills at page 238 ; 3 Barnewall & Crosswell, page 208 ; page 210 bottom.) The question to consider is whether it was intended between the parties that by this mortgage bond the promissory note was to be extinguished. Interest was calculated on these notes up to 15.1.48. (He refers to the bond.) If the interest was so paid the bond was not to be sued upon. If the interest is not paid the mortgagee can sue on the bond to recover the money on the bond. (He refers to the attestation clause.) Consideration 20 of the bond was set off against moneys due on the notes. Therefore those notes were paid and discharged on the day the mortgage bond was executed. On 15th January the parties entered into a separate contract. This mortgage bond does not recognise the continued existence of the promissory notes. The circumstances are set out in the 2nd Defendant's affidavit. The bond does not say the notes were paid and discharged. The bond is to that effect. Mortgage bond was given by 1st Defendant to 2nd Defendant. Balance was struck on the day the bond was executed.

*Mr. Misso states :—*At the date of the endorsement of the promissory note on 18.12.48 this note was a note regular on the face of it. In regard 30 to its negotiability it was still a valid note. It would depend on the endorsement. Having regard to the endorsement and terms of the bond the negotiability of the document as a promissory note was not in any way affected. (Endorsement read.) There is nothing on the note to suggest that this note had ceased to have its effect as a promissory note. The endorsement is a notice to the Plaintiff of the existence of a bond. These are transactions between two other persons over whom Plaintiff has no control. The transaction was a purely business transaction. On the face of the note it requires investigation. There is nothing in the bond that takes away the liability of the party on the note. The bond 40 has been given as further security to the party lending the money on the notes. (He refers to the operative clause.) Liability was intended to continue. There is an express recital by which liability on this note is acknowledged. (He refers to the bond.) The purport of the bond is to give additional security. If a note has been discharged by payment but continues to be outstanding, it continues to be negotiable until it comes back to the maker. (He cites 6 Law Reporter, page 43.) There is some duty cast on the maker to get the note back.

Mr. Navaratnarajah states : There is an endorsement on the note. Plaintiff does not say he got the note without knowledge of the endorsement. He got the note with full knowledge of the endorsement. He knew that there was a bond which had been taken in connection with the note. Should he not find out what the bond says? Court will go on the basis that he was aware of the terms and conditions in the bond when he took the note. He had notice of bond No. 44. (He cites 35 N.L.R. 241, 242, Chalmers (14th Edition) at page 195. He refers to page 93.)

*In the
District
Court,
Colombo.*

No. 6.
Addresses
of Counsel,
12th
September
1950,
continued.

Mr. Misso states : There is an endorsement which does not take
10 away the negotiability of the instrument.

(Mr. Misso marks writing dated 16.10.47 (“ P1 ”).)

“ P1 ” is signed by the 1st Defendant and handed to Plaintiff by the endorser on 18.12.48.

(Mr. Misso marks letter dated 26.5.49 written by 2nd Defendant to Plaintiff (“ P2 ”); Letter dated 27.5.49 written by 2nd Defendant to Plaintiff (“ P3 ”); letter dated 15.6.49 (“ P4 ”); letter dated 17.9.49 (“ P5 ”) written by Plaintiff to Proctor Weeratunga of Julius & Creasy.)

The court should hold that this note is not discharged by the bond. (He refers to affidavit of 2nd Defendant.) There is evidence on which
20 court will hold that there was no discharge of the promissory notes by the bond in January, 1948. All the circumstances considered, it was not the intention of the parties. It was taken as further security. Whatever they may have done, so long as this note is outstanding the maker of the note is liable and the endorser is liable. Both affidavits raise matters not affecting the Plaintiff. So far as the 2nd Defendant is concerned, he admits liability to the extent of Rs.22,000/- odd. Letters “ P2 ” to “ P5 ” clearly show that 2nd Defendant was liable to pay on the note.

Mr. Navaratnarajah states : Plaintiff got the note with full knowledge of the contents of the bond. (He cites Chalmers page 92.)

In the
District
Court,
Colombo.

No. 7.

ORDER giving leave to Defend.

ORDER.

No. 7.
Order
giving
leave to
defend,
12th
September
1950.

The Plaintiff sues the two Defendants upon a promissory note dated 16.10.47 made by the 1st Defendant in favour of the 2nd Defendant and endorsed by him to the Plaintiff. The Defendants apply for leave to appear and defend and they allege that the Plaintiff cannot succeed upon this note. The 2nd Defendant is the son-in-law of the Plaintiff, and it is admitted that he and the Plaintiff did live in adjoining houses. The 1st Defendant is a man of a different nationality and became indebted to the 2nd Defendant upon several promissory notes which are set out in his affidavit. At a certain stage when these debts had accumulated to a large sum, he executed mortgage bond No. 44 (X1) on 15.1.48 in favour of the 2nd Defendant. That bond sets out the fact that there were debts due upon the promissory notes and the fact that there has been payment and that the balance then due was Rs.94,125/-. The bond goes on to state that whereas the 1st Defendant had agreed to secure the repayment of this sum he hypothecates the property therein referred to for the repayment of the Rs.94,125/- borrowed upon the promissory note in question and other promissory notes. In the attestation clause with regard to the consideration it is stated that no consideration passed in the presence of the Notary but the same was set off against the amounts due on the promissory notes referred to earlier in the document and including the note upon which this action is based. It would appear that at a certain stage the 1st Defendant brought an action against the 2nd Defendant to have the mortgage bond No. 44 set aside. This action No. 257/Z was subsequently settled. Before, however, the settlement was reached, the 2nd Defendant instituted action No. 2101/M.B. upon the mortgage bond in question on 30.9.48. Both matters were settled. "1.D4" and "1.D5" are the terms of settlement reached. The terms of settlement as recorded, merely states that the Plaintiff's action is to be dismissed without costs. What transpired behind the scene is not known, but it would appear that before even the institution of the action 2101 upon mortgage bond No. 44 but after the institution of the action to set aside the mortgage bond, the note in question was endorsed to the Plaintiff by the 2nd Defendant on 18.12.48. There is on the note an endorsement by the Notary who executed the mortgage bond to the following effect :—

" The amount due on this promissory note together with interest thereon from date hereof has been secured by mortgage bond No. 44 dated 15.1.48 attested by me."

It is after this that the 2nd Defendant's endorsement appears. It is thus clear that the note was not received by the Plaintiff as a bona fide holder in due course.

The endorsement affects him with notice of its contents and I should think also of the contents of the mortgage bond No. 44. It is not *ex facie* complete and regular. In this connection *vide* Commentary by Chalmers in his latest edition on the Bills of Exchange Act at page 93 where he says :—

" The rights of a holder in due course can only be acquired by a person who takes a bill before it is overdue, and which is ' complete

and regular on the face of it.' If the bill itself conveys a warning, 'caveat emptor.' The holder however cannot acquire a better title than that of the transferor."

In the
District
Court,
Colombo.

No. 7.
Order
giving
leave to
defend,
12th
September
1950,
continued.

From this the inference is inescapable that the Plaintiff was in no better position than the 2nd Defendant with regard to the 1st Defendant's liability upon the note. For the 1st Defendant it is argued that the note has been paid and discharged and this payment is, it is argued, effected by the execution of the mortgage bond, which is higher security and into which is merged the liability on the promissory notes. In support of this
10 proposition learned Counsel referred to a passage in Byles on Bills (20th Edition) at page 238 where it is stated " that the taking of co-extensive security of a higher nature for a bill or note merges the remedy on the inferior instrument. But if the new security recognises the bill or note as still existing it is not extinguished." *Ex facie* upon the attestation contained in the mortgage bond, it would appear as if the higher security was obtained in full discharge of the liability on the notes, but this is a matter which is open to argument. For the Plaintiff it was contended that the mortgage bond was merely an additional security. If this were really so, then of course the note would not be discharged. The discharge of the note,
20 if the bond operated the discharge, took place when the bond was executed in January, 1948. The endorsement to the Plaintiff by the 2nd Defendant was in December, 1948, long after the execution of the bond. If, therefore, the bond operated in discharge of the note, the Plaintiff would not be able to sue upon it. Payment in this case being made by the payee to the maker, it is a discharge within the meaning of the Bills of Exchange Act and will have the effect of making a promissory note a mere scrap of paper. On this point although at some stage doubt was thrown upon the decision in *Jayawardne v. Rahaiman Lebbe*, the subsequent case of *Vellasamy Pulle v. Mohideen* reported in 35 N.L.R. at page 239 makes it quite clear that the
30 Full Bench decision is good law in Ceylon in that once the note has been discharged it ceases to be a negotiable instrument and subsequent endorsement does not give the endorsee any rights even though he may be a bona fide holder in due course.

At this stage the only question for this Court to consider is whether the defence which it is sought to interpose is *bona fide*, or is a frivolous one. As I stated earlier, *ex facie* there appears to be a defence though this is a matter which I would hesitate to decide until I have heard full argument after a full trial.

In the circumstances, I think the Defendants are entitled to appear
40 and defend unconditionally. Although the 2nd Defendant in his affidavit states that he is liable in a sum of Rs.22,000/- odd to the Plaintiff, his liability is upon a separate cause of action and not upon the note itself.

Answer on 25.9.50.

(Sgd.) N. SINNATAMBY,

A.D.J.

*In the
District
Court,
Colombo.*

No. 8.

ANSWER of First Defendant.

(Title as No. 1.)

No. 8.
Answer
of First
Defendant,
25th
September
1950.

On this 25th day of September, 1950.

The answer of the 1st Defendant above named appearing by Subramanian Sivasubramaniam his Proctor states as follows :—

1. Answering to paragraph 1 of the plaint, this Defendant admits the jurisdiction of this Court to hear and determine this action but denies that any cause of action has accrued to the Plaintiff against this Defendant.

2. This Defendant denies all and singular the other averments in the 10
plaint subject to the bare admission of the genuineness of his signature on
the note sued upon.

3. Further answering this Defendant states :—

(A) The 2nd Defendant in or about November, 1947, wrongfully and deceitfully induced this Defendant to sign four ante-dated promissory notes referred to in Mortgage Bond No. 44 hereinafter mentioned in the 2nd Defendant's favour without any consideration. The said notes were for the sums of Rs.37,500/—, Rs.15,525/—, Rs.30,650/— and Rs.35,450/—, the last-mentioned note being the note 20
sued upon in this case.

(B) The said four promissory notes are fictitious within the meaning of the Money Lending Ordinance and unenforceable in law. No consideration passed on the said notes.

(C) Subsequently the 2nd Defendant wrongfully and deceitfully induced this Defendant to sign a mortgage Bond bearing No. 44 dated 15th January, 1948, and attested by S. Coomaraswamy, Notary Public of Colombo in favour of the 2nd Defendant in settlement and discharge of all moneys alleged to be due and outstanding on the four notes aforesaid. The note sued upon thus 30
became discharged while in the hands of the 2nd Defendant. In the
result no rights can accrue or have accrued to the Plaintiff on the
note sued upon in this case.

(D) At the time of the execution of the said bond all the four notes referred to above were produced by the 2nd Defendant before the Notary attesting the bond. The Notary made the endorsement appearing on the back of the note sued upon at the time of the execution of the said bond. This Defendant was informed by the Notary that the note thereupon stood cancelled.

(E) The 2nd Defendant also wrongfully and deceitfully induced this Defendant to sign a collateral document which this Defendant 40
later understood was a warrant of Attorney to Confess Judgment
bearing No. 45 dated 15th January, 1948, and attested by
S. Coomaraswamy, Notary Public of Colombo.

(F) On 17th July, 1948, this Defendant filed plaint No. 257/Z of this Court against the 2nd Defendant. This Defendant affirms to the correctness of the facts in that plaint. In that plaint this Defendant asked *inter alia* (i) for a declaration that no money is due from this Defendant on the said Bond No. 44 and for the cancellation of the said Bond and (ii) for the return of the said four promissory Notes.

*In the
District
Court,
Colombo.*

No. 8.
Answer
of First
Defendant,
25th
September
1950,
continued.

10

(G) Pending this Defendant's action No. 257/Z aforesaid, the 2nd Defendant on 30th September, 1948, at the instigation of the Plaintiff filed case No. 2101/M.B. of this Court and applied for judgment with the help of the Warrant of Attorney to Confess judgment.

(H) On 4th July, 1949, both this Defendant's action No. 257/Z and the 2nd Defendant's action No. 2101/M.B. were dismissed of consent. It was agreed that all promissory notes and other documents to which this Defendant and the 2nd Defendant were parties stood cancelled.

4. The Plaintiff is the father-in-law of the 2nd Defendant and both resided in the same house at all dates material to this action. The Plaintiff was aware at every stage, the various transactions pleaded above and is not a holder in due course. This action has been filed by the Plaintiff *mala fide* and in collusion with the 2nd Defendant. In the result the Plaintiff cannot have and maintain this action.

5. The settlement of the two cases aforesaid and the decrees entered therein are a bar to any action on the note sued upon in this case.

Wherefore this Defendant prays for the dismissal of the Plaintiff's action against this Defendant with costs and for such other and further relief as to this Court shall seem meet.

(Sgd.) S. SIVASUBRAMANIAM,

Proctor for the 1st Defendant.

30

*In the
District
Court,
Colombo.*

No. 9.

ANSWER of Second Defendant.

(Title as No. 1.)

No. 9.
Answer of
Second
Defendant,
25th
September
1950.

On this 25th day of September, 1950.

The answer of the second Defendant above-named appearing by Sanmugam Coomaraswamy his Proctor states as follows :—

1. Answering to paragraph 1 of the plaint the second Defendant admits the jurisdiction of this Court but denies the other averments contained therein.

2. The second Defendant admits the averments in paragraph 2 of 10 the plaint.

3. Save as hereinafter admitted the second Defendant denies the averments in paragraphs 3 and 4 of the plaint.

4. (A) Further answering the second Defendant states that the said note sued upon was duly paid and discharged on or about 15th January, 1948.

(B) The said note was at the request of the Plaintiff signed by the second Defendant and delivered to him in or about December, 1948. The second Defendant informed the Plaintiff and the Plaintiff was aware at the time of the said "endorsement" that the said note has been paid 20 and discharged as aforesaid on or about 15th January, 1948.

Wherefore the second Defendant prays :—

(A) That the Plaintiff's action be dismissed

(B) for costs and

(C) for such other and further relief as to this Court shall seem meet.

(Sgd.) S. COOMARASWAMY,
Proctor for second Defendant.

Settled by

(Sgd.) illegibly.

No. 10.
SETTLEMENT OF ISSUES.

*In the
District
Court,
Colombo.*

7th February, 1951.

No. 10.
Settlement
of Issues,
7th
February
1951.

Mr. Adv. Kadirgamar for the Plaintiff instructed.

Mr. Adv. Thiagalingam, K.C., with Mr. Adv. Thambiah and Mr. Adv. Shamuganayagam for the 1st Defendant instructed.

Mr. Adv. Navaratnarajah for the 2nd Defendant instructed.

Mr. Kadirgamar suggests the following issues :—

10 (1) Did the 1st Defendant by his promissory note dated 16.10.47 promise to pay the 2nd Defendant or order on demand a sum of Rs.35,450/- with interest thereon at 10 per cent. per annum ?

(2) Did the 2nd Defendant endorse and deliver the said promissory note to the Plaintiff for valuable consideration ?

(3) If issues (1) and (2) are answered in the Plaintiff's favour, is the Plaintiff entitled to judgment against the Defendants jointly and severally, and if so, in what sum ?

Mr. Thiagalingam suggests the following further issues :—

(4) Is the note sued upon fictitious within the meaning of the Money Lending Ordinance ?

20 (5) Was the note discharged and settled while in the hands of the 2nd Defendant by the execution of mortgage bond No. 44 dated 15.1.48 and by the execution of a warrant of attorney to confess judgment on such bond ?

(6) Did the 1st Defendant on 17.7.48 file case No. 257/Z of this court against the 2nd Defendant asking for a declaration that no money was due from the 1st Defendant to the 2nd Defendant on the said bond No. 44 and for the return of the four notes referred to in such bond inclusive of the note sued upon in this case ?

30 (7) Did the 2nd Defendant thereupon put the said bond No. 44 in suit in case No. 2101/M.B. of this Court ?

(8) Was the Plaintiff aware of all or any of the facts set out in Issues (4) or (5) or (6) or (7) ?

(9) Is the Plaintiff a holder in due course for value ?

(10) If any of the Issues (4) or (5) or (6) or (7) or (8) or (9) be answered in the 1st Defendant's favour, can Plaintiff have and maintain this action ?

(11) Were actions Nos. 257/Z of this Court and 2101/M.B. of this Court dismissed and the bond No. 44 cancelled and discharged ?

*In the
District
Court,
Colombo.*

No. 10.
Settlement
of Issues,
7th
February
1951,
continued.

(12) If Issue (11) be answered in the affirmative, is the Plaintiff barred from suing on the note in this case ?

Mr. Navaratnarajah states that his position is set out in Issues (5) and (8).

Mr. Navaratnarajah suggests the following further issues :—

(13) Did the 2nd Defendant inform the Plaintiff that the note sued upon had been paid and discharged on or about 15.1.48 ?

(14) Was the Plaintiff aware of all the facts put in Issue (5) ?

(15) If Issues (5), (13) and (14) are answered in the affirmative, can the Plaintiff have and maintain this action ?

10

Issues accepted.

Mr. Kadirgamar submits that the burden is on the Defendants.

Mr. Thiagalingam submits that the burden on Issues (1) and (2) is on the Plaintiff and that the Plaintiff should begin.

Mr. Navaratnarajah does not address.

ORDER.

The answers of the Defendants admit as far as the 1st Defendant is concerned the execution of the note and as far as the 2nd Defendant is concerned that he endorsed it to the Plaintiff. I think the Defendants should begin.

20

Mr. Thiagalingam says he is not calling any evidence on Issues (1) and (2). He moves to call evidence on the other Issues.

*First
Defendant's
Evidence.*

No. 11.
S. Coom-
araswamy,
7th
February
1951.

FIRST DEFENDANT'S EVIDENCE.

No. 11.

S. COOMARASWAMY.

Mr. Thiagalingam calls :—

S. COOMARASWAMY—Affirmed—Proctor, S.C. & N.P., Colombo.

Examina-
tion.

I am a Proctor of the Supreme Court. I attested bond No. 44 of 15.1.48. I attested the bond which is already filed of record marked "X1." I have got the protocol with me in Court. In the attestation to that bond I certify that no consideration passed in my presence but that the same was set off against the amounts due on promissory notes dated 5.9.47, 26.9.47, 11.10.47 and 16.10.47. The note of 16.10.47 is the note sued upon in this case.

30

I saw that note on the day I attested this bond. I made an endorsement on the reverse of the note sued upon at that time. That endorsement was signed by me. When I signed that endorsement there was no other writing on the reverse of the note. At the time I signed it I got Vernon Peiris and the mortgagor to sign it. I cannot identify Vernon Peiris' other signatures. On the reverse of the note the two signatures underlined by Counsel in blue pencil were put in my presence.

*In the
District
Court,
Colombo.*

*First
Defendant's
Evidence.*

10 There is another signature which reads Vernon Peiris. That was not put in my presence. I do not want to say that the other signature is Vernon Peiris'.

No. 11.
S. Coom-
araswamy,
7th
February
1951.

Q. Did you tell both the 1st and 2nd Defendants anything at the time you made the endorsement on the back of the note ?

A. I said that the four promissory notes were cancelled and discharged by this bond.

Examina-
tion,
continued.

The notes were to be kept by the mortgagee, namely, the 2nd Defendant as proof of consideration for the bond. I made that perfectly clear in the attestation.

Xxn. by Mr. Navaratnarajah :

Nil.

20 *Xxn. by Mr. Kadirgamar :*

Only the 1st and 2nd Defendants were present at the time I endorsed the reverse of the note. Nobody else was present except my clerk and somebody else. There might have been somebody else present. The mortgage bond No. 44 was executed first. That was signed by the parties concerned. It was only after the bond No. 44 was signed by the parties and the warrant of Attorney to confess Judgment was executed that I wrote the endorsement on the reverse of the note sued upon. I was acting as proctor for Mr. Vernon Peiris, the 2nd Defendant. I told the 1st and 2nd Defendants that this promissory note was cancelled and discharged by the bond. I told them that on my own. It was a voluntary statement of mine.

Cross-
examina-
tion.

Q. In point of fact you need not have made that statement ?

A. When I made the endorsement I had to explain to them why I made that endorsement.

Q. You made that statement because you thought it necessary to explain to the 1st Defendant what the effect of the mortgage bond was on the promissory note ?

A. Because no money passed in my presence. I said I will retain the notes. I said the notes are hereby cancelled.

40 There were 3 other notes. All 4 notes were produced by Mr. Vernon Peiris. They were with me. When Vernon Peiris left that day all four notes were with me. Subsequently I handed the four notes after about 3 weeks with the bond to the 2nd Defendant. Bond No. 44 was witnessed by two witnesses, F. Abdeen and K. Kandiah. Abdeen is a moneylender and a client of mine. Kandiah is a person who acts as peon for me and some other proctors.

*In the
District
Court,
Colombo.*

*First
Defendant's
Evidence.*

No. 11.

*S. Coom-
araswamy,
7th
February
1951.*

*Cross-
examina-
tion,
continued.*

The 1st Defendant I had known earlier for about 5 or 6 years. He can read English and write English. He signed bond No. 44 in the presence of these two witnesses. I made the endorsement on the promissory note after the bond was signed. After I made the endorsement I made the statement to the 1st Defendant. That statement was not made in the presence of the two witnesses. The signature underlined in blue was the signature written by Vernon Peiris on the day I made the endorsement. The other name Vernon Peiris was not there at the time.

Q. You took instructions for preparation of bond No. 44 from the 2nd Defendant ?

10

A. Yes, and the 1st Defendant.

Vernon Peiris told me he wants a bond like this and he said he got the notes. I asked him to ask the person who signed the notes to come. Vernon Peiris and the 1st Defendant came. They came somewhere in November, 1947. That was about 2 months before the execution of the bond. After the 1st and 2nd Defendants saw me in November, 1947, they used to come practically every day to my office to see if the bond was ready. There was a delay in the preparation of the bond.

Q. 1st Defendant gave you instructions that he was indebted to the 2nd Defendant in Rs.94,125/- ?

20

A. He never told me specifically.

He told me he was prepared to sign the bond as the money was due from him. I specifically questioned the 1st and 2nd Defendants as to what they wanted done. There had been transactions. I took instructions with regard to those transactions. Having taken instructions I prepared bond No. 44. 1st Defendant told me he was indebted to 2nd Defendant in the sum of Rs.94,125/-.

Q. It was not the 1st Defendant's position at the time he gave you instructions to have the bond prepared that he had not borrowed any sum of money from the 2nd Defendant ?

30

A. No.

Q. Nor was it his position that he had lent money to the 2nd Defendant ?

A. No.

At the time he gave me instructions I saw the promissory notes. 1st Defendant's position was that there was consideration for the promissory notes. It was his position that the four notes were valid notes including the note sued upon. I have been in practice for 12 years. In accordance with the Notaries Ordinance the attestation to a bond must be done in a reasonable period of time after the document is executed. Ordinarily the attestation is done sometime later after the bond is executed.

40

Q. If the attestation is done later the attestation would bear a later date ?

A. I do not know. I have never done it in my lifetime.

In this case the attestation was done immediately after the document was signed. 1st and 2nd Defendants left office about 2.30 or 3. I drafted the attestation and gave it to my typist at about 3.30 or 4 on 15.1.48.

He gave me it at about 6.30. I signed the attestation at about 6.30 on 15.1.48. I drafted the attestation within an hour after bond No. 44 was signed.

*In the
District
Court,
Colombo.*

(Adjournment).

*First
Defendant's
Evidence.*

*No. 11.
S. Coom-
araswamy,
7th
February
1951.
Cross-
examina-
tion,
continued.*

On the reverse of the note the first Defendant has signed the endorsement. That was signed in my presence. Of the two witnesses Abdeen is a money lender. My office is at 282/6 Dam Street, Hultsdorf. The first witness, Abdeen, has his office somewhere in the same building. He only comes in the morning and goes off. I do not know where he carries on his business of money lending. I have given his address as 282 Dam Street. He is a man who does his business from the same building which I occupy.

10 *Q.* When the first and the second Defendants came to your office on the 15th January, 1948, Bond No. 44 was ready for signature ?

A. Yes, it had been ready from the 14th evening. Between November, 1947, and 14th January, 1948, I had met the first and second Defendants on several occasions. They gave me instructions at the beginning, somewhere in November, 1947. I spoke about it to them. I took down the Instructions.

20 *Q.* You endeavoured at that time to be as accurate as you can in the instructions ?

A. Yes.

I incorporated those instructions in the bond. Both the first and the second Defendants read the bond before they signed it.

Q. Before you wrote the endorsement on the bond you did not ask either Defendant ?

A. About what ?

Q. Anything ?

A. Nothing.

30 After bond 44 had been signed I wrote out the endorsement on the back of the note. I have a copy of the bond before me.

Q. In the second recital of the bond it is stated that Mohamed Ali had already paid Rs.25,000/- together with interest to the second Defendant ?

A. In fact that note bears an endorsement to that effect.

The first Defendant was willing to secure the repayment of the sum of Rs.25,000/-. I knew that the money due on the four notes amounted to Rs.94,125/-.

40 Both Defendants told me that of the money originally borrowed on the promissory notes the balance due was Rs.25,000/-. Of the other two sums the first Defendant had not paid any portion of the money originally borrowed. The last sum Rs.35,450/- is represented in the note in this case.

Q. It is stated that the first Defendant acknowledges the receipt of that sum ?

A. The receipt covers the whole amount Rs.94,125/-.

*In the
District
Court,
Colombo.*

*First
Defendant's
Evidence.*

No. 11.
S. Coom-
araswamy,
7th
February
1951.
Cross-
examina-
tion,
continued.

Q. The first Defendant told you that he had borrowed and received from the 2nd Defendant all those sums ?

A. Yes.

Q. The first Defendant in this mortgage bond acknowledged the receipt of the money on the 4 promissory notes from the second Defendant ?

A. Yes.

Q. And he also acknowledges that the sum due was Rs.94,125/- ?

A. Yes.

I wrote the endorsement on the reverse of the promissory notes in the interests of both parties. I thought I should make that endorsement. 10
I do not know if the first and the second Defendants were friendly at that time.

Q. Were they hostile to each other ?

A. I had no occasion to test whether they were hostile or not to each other.

Q. As far as you knew were they hostile to each other ?

A. As far as I knew they were not hostile to each other.

Q. You suggested to the second Defendant that he should keep the four notes ?

A. Since I had made that endorsement I suggested that he should 20
keep the four notes.

The first Defendant did not ask me for the return of the notes. He did not ask the second Defendant in my presence for the return of the notes.

Q. Have you filed a proxy on behalf of the second Defendant since this mortgage bond was executed ?

A. This is the first case. In one case he had gone to some other proctor.

Q. You endeavoured to set out in this bond No. 44 the agreement that had been arrived at between the first and the second Defendant in 30
regard to the money transactions ?

A. Yes.

(Endorsement read to witness and he is asked to interpret what he has written. Mr. Thiagalingam objects to the witness being asked to interpret what he has written as he has already answered this question several times. Objection is upheld.)

*Re-exami-
nation.*

Re-Exd. :

Q. What did Vernon Peiris tell you about those four notes ?

Mr. Kadirgamar objects to this question. Mr. Thiagalingam submits that the witness was cross-examined as to whether Vernon Peiris gave 40
him instructions and further why he did not appear for Mr. Vernon Peiris in another case.

ORDER.

I think the witness can be asked what second Defendant said. This would be evidence against the second Defendant but not against the Plaintiff.

Q. What did he tell you about these four notes ?

A. They were to be cancelled immediately the bond was signed.

Q. Did you make that position of Vernon Peiris clear to Mohamed Ali ?

A. Yes.

Q. Was it thereafter that the first Defendant agreed to sign the bond ?

A. At the time they gave instructions I wanted to be clear before I started the work as to what the amount to be included was and what the properties were and Vernon Peiris told me that the notes were to be cancelled. I told both that it was quite right as the amounts were included
10 in the bond.

Q. Have you been drafting a good number of bonds ?

A. Yes.

Q. In this particular case did the money pass in your presence ?

A. No.

By this bond the mortgagor undertook the primary liability on the notes.

Q. Did you think it wise as a notary to return the notes to the mortgagor ?

A. No.

20 Q. Is that done ?

A. I do not know how others do it.

Q. Would you do it ?

A. Yes.

Q. Would you return the notes to the mortgagor ?

A. No.

Q. Does the attestation correctly set out the agreement between party and party in regard to the notes ?

A. Yes.

30 Q. Did you ever intend that the mortgagee should have a right to sue on the note and the bond separately ?

A. No.

Mr. Kadirgamar objects to the question. He says that the intention of the witness is not required to interpret the bond.

Q. Why did you draft the bond with reference to the notes and the amount due on those notes ?

A. Because it was not actually money lent on the Bond, so I wanted to make it clear to anyone how the money passed from the mortgagee to the mortgagor.

40 Q. As far as you were concerned did the notes have any value in themselves after you signed the bond ?

A. No.

Mr. Kadirgamar objects to this question as it is a matter of law.

Q. Why did you make that endorsement on that note ?

*In the
District
Court,
Colombo.*

*First
Defendant's
Evidence.*

*No. 11.
S. Coom-
araswamy,
7th
February
1951.
Re-exami-
nation,
continued.*

*In the
District
Court,
Colombo.*

*First
Defendant's
Evidence.*

No. 11.
S. Coom-
araswamy,
7th
February
1951.
Re-exami-
nation,
continued.

A. Because it was agreed between the parties must remain cancelled once the bond was signed.

The case in which Vernon Peiris went to another proctor is one between him and Mohamed Ali. I made the endorsement on the back of the note after the mortgagor signed the bond. I made the endorsement in the presence of the two Defendants.

Q. Were the endorsements made at different times from the execution of the bond ?

A. No, at the same time. First the bond, then the warrant of Attorney, then the endorsement. All were done at the same time. 10

Q. And you got the witnesses for the occasion ?

A. They used to be there. Whenever I wanted them I had them.

Mr. Canagaratnam appeared for Vernon Peiris in the other case. It was a case against Mohamed Ali. I know the dispute was about this bond. I was not a witness in that case.

(Sgd.) M. C. SANSONI.

No. 12.
Court Notes
as to Docu-
mentary
Evidence,
7th
February
1951.

No. 12.

COURT NOTES as to Documentary Evidence.

Mr. Thiagalingam marks mortgage referred to as "X1" as "1.D1"; 20
plaint in case No. 257/Z as "1.D2," "1.D3" application to register the
lis pendens in that case; "1.D4" the receipt for payment in respect of
that application. "1.D5" journal entries in that case; "1.D6" consent
motion; "1.D7" the decree in that case; "1.D8" the plaint in case
No. 2101/M.B.; "1.D9" the journal entries; "1.D10" consent motion;
"1.D11" the decree in that case; "1.D12" a certified copy of the bond
No. 44 filed in case No. 2101/M.B. with the discharge endorsed; "1.D13"
the letter of Vernon Peiris filed of record in this Court by the Plaintiff
dated 26th May, 1949, and already marked "P2"; "1.D14" letter filed
by the Plaintiff in this case signed by Vernon Peiris bearing date 15th June, 30
1949, already marked "P4"; "1.D15" letter of demand sent by the
Plaintiff's proctor dated 17th October, 1949, which gives the endorsement
as 18th December, 1948, already marked "P7"; "1.D16" our reply to that
letter dated 24th October, 1949 (Original handed to counsel).

Mr. Thiagalingam closes his case reading in evidence "1.D1"
to "1.D16."

Mr. Navaratnarajah says that he is not calling any evidence.

Mr. Kadiragamar moves to mark "P1" the Promissory note dated
16.10.47.

Mr. Thiagalingam objects to this being marked in evidence, except
for purpose of identification. 40

Mr. Kadirgamar says that this document has already been spoken to by the last witness who was shown it by Mr. Thiagalingam and questioned about it.

*In the
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ORDER.

I think this should really have been marked at that time. There is no harm in marking it now. I therefore mark it "P1."

No. 12.
Court Notes
as to Docu-
mentary
Evidence,
7th
February
1951,
continued.

Mr. Kadirgamar marks "P2" the answer filed by Vernon Peiris the second Defendant, in case No. 257/Z. Mr. Thiagalingam submits that this will not be evidence against his client.

10 Mr. Kadirgamar marks "P3," a certified copy of petition of first Defendant filed in case No. 2101/M.B.; "P4" the affidavit of the first Defendant filed in case No. 2101/M.B.

Mr. Kadirgamar moves to mark "P5" the document which has already been filed to record marked "P1" dated 16th October, 1947.

Mr. Thiagalingam objects to this document being marked. He says this document must be proved before it can be marked.

Mr. Kadirgamar says this is a document which was marked in the earlier proceedings and no objection was raised then.

ORDER.

20 This is a document which Plaintiff himself marked in the earlier proceedings but which does not seem to be admitted anywhere by the first Defendant. I think when it is marked in these proceedings it should be proved. For the purpose of the earlier proceedings the first Defendant may have been contented to allow it to be marked without raising the question of its genuineness. Different issues have to be decided now in this trial. I do not think it can be marked unless it is proved.

Mr. Kadirgamar closes case reading in evidence "P1" to "P4." Further trial on 13th February.

30

(Sgd.) M. C. SANSONI,
A.D.J.

*In the
District
Court,
Colombo.*

**No. 13.
JUDGMENT.**

No. 11594/S.

6.3.51.

No. 13.
Judgment,
6th March
1951.

JUDGMENT.

The Plaintiff, claiming to be the endorsee for valuable consideration of the promissory note "P1," has sued the maker (the first Defendant), and the payee (the second Defendant) to recover the principal sum of Rs.35,450/- and as interest Rs.13,943/64 cts. The first Defendant filed answer admitting that he signed the note in question, but he pleaded that second Defendant wrongfully and deceitfully induced him to sign this note 10 and three others, and that all four promissory notes are fictitious within the meaning of the Money Lending Ordinance and therefore unenforceable; that no consideration passed on the said notes; that second Defendant subsequently wrongfully and deceitfully induced him to sign the mortgage bond No. 44 of 15th January, 1948, in favour of the second Defendant in settlement and discharge of all moneys alleged to be due on the four notes, and that therefore the note in suit became discharged while in the hands of the second Defendant. First Defendant pleads that, therefore, no rights have accrued to Plaintiff upon the note sued upon. First Defendant also refers to two actions filed in this Court. The first was No. 257/Z 20 filed on 17th July, 1948, brought by him against the second Defendant asking for a declaration that no money was due from first Defendant to second Defendant on the said bond and for the cancellation of the bond and for the return of the four notes. The next action was by the second Defendant against the first Defendant No. 2101/M.B. filed on 30th September, 1948, on the mortgage bond. First Defendant refers to the settlement of both these actions on 4th July, 1949, by which it was agreed that all promissory notes and other documents to which these two Defendants were parties stood cancelled. First Defendant pleads that Plaintiff who is the father-in-law of the second Defendant was aware 30 at every stage of these transactions and that Plaintiff was not a holder in due course. He also pleaded that the settlement of the two cases and the decrees entered in those cases are a bar to an action on the note.

Second Defendant filed answer pleading that the note sued upon was paid and discharged on or about 15th January, 1948. He further pleads that this note was at the Plaintiff's request signed by him and delivered to Plaintiff in December, 1948. He pleads that he informed the Plaintiff at the time of the said endorsement that the note had been paid and discharged on or about 15th January, 1948. The note in question bears an endorsement which reads as follows: "The amount 40 due on this promissory note together with the interest thereon from the date hereof has been secured by mortgage bond No. 44 dated 15th January, 1948, attested by me." This endorsement was signed by Mr. S. Coomarasamy, Proctor and Notary Public, and is dated 15th January, 1948. It was also signed at the time it was made by both the Defendants. Under this endorsement and the signatures of the two Defendants appears another signature Vernon Peiries which the second Defendant in his answer admits having made. The second endorsement admitted to have been made by the second Defendant was on the 18th December, 1948.

This is proved by the letter of demand 1.D15 sent by the Plaintiff's proctor to the first Defendant. The date 15th January, 1948, is important because on that day was executed the mortgage bond No. 44 by first Defendant in favour of second Defendant and attested by Mr. S. Cumarasamy. By this bond the first Defendant recites that he was indebted to the second Defendant in the principal sum of Rs.119,125/- made up of the principal sums due on the four promissory notes. The note in suit is one of those four notes recited and it is dated 16th October, 1947. The bond goes on to recite that a part payment on account of principal had been made and the sum Rs.94,125/- with interest thereon at 10 per cent. per annum from the date of the bond is due from the first Defendant to second Defendant. It further recites that first Defendant has agreed to secure to second Defendant the repayment of this amount and for this purpose he mortgaged a number of lands. The attestation of the notary contains the statement that no consideration passed in his presence, but the same was set off against the amounts due on the four promissory notes in favour of the second Defendant, and which promissory notes have been duly identified by him and annexed to the original bond.

*In the
District
Court,
Colombo.*

No. 13.
Judgment,
6th March
1951,
continued.

10

The position of the Defendant is that upon the execution of the bond the note in suit apart from the other three notes, was discharged. That, it seems to me, is the crucial point in this case though there are other matters also which I shall have to deal with. The Notary in his evidence has stated that at the time he made the endorsement on the back of the note he told both Defendants that the four notes were cancelled and discharged by the bond. The notes, however, came to be kept by the second Defendant, the mortgagee, as proof of consideration for the bond. He has also stated that a warrant of attorney to confess judgment was at the time executed by the first Defendant. The notary's evidence stands uncontradicted, and I accept his evidence as to what he told the Defendants at the time of the execution of the bond. He further says that his attestation clause was typed immediately after the execution of the bond and signed by him the same evening. He says he was acting on behalf of the second Defendant, and his statement to them that the four notes were cancelled and discharged by the bond would, therefore, carry more weight when one has to consider the question whether such discharge actually took place. In fact he has made it clear that the second Defendant told him that the four notes were to be cancelled immediately the bond was signed, and he says he told the first Defendant that. On the Notary's evidence and I can see nothing in that bond to contradict it, I think it is clear that the note in suit was discharged upon the execution of the bond.

30

40

The meaning of the words "set off" appearing in the attestation, is, I think that the consideration for the bond was the money which had previously been due on the four notes. Although there is no recital to the effect that the four notes were to stand cancelled and discharged by reason of the execution of the bond, I think that was the result intended by the second Defendant who was primarily concerned, and accepted by the first Defendant, and also conveyed to the parties by the notary.

Apart from these considerations one has also to see what would be the effect in law of the execution of the bond upon the four notes. There are

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No. 13.
Judgment,
6th March
1951,
continued.

certain relevant passages in Byles on Bills which are worth quoting in this connection. On page 230 of the 18th edition appears the following passage: "the taking of co-extensive security of a higher nature for a bill or note merges the remedy on the inferior instrument (but) if the new security recognised the bill or note as still existent it is not extinguished." At page 232 he says "taking security of a higher nature as a deed though it extinguishes the simple contract debt on the bill, as between the parties to the substitution, has no effect on the liability of the other distinct parties to the bill."

At the date of the mortgage bond there were no other parties to the note in existence. One more quotation on this point will be helpful. At page 278 he refers to a case where *B* being indebted to *A* procured *C* to join with him in giving a joint and several note for the amount, and afterwards having become further indebted and, being pressed by *A* for further security, by deed reciting the debt and that for a part a note had been given by him to *C*, and *A* having demanded payment for the debt, *B* had requested him to accept a further security, assigned to *A* all his household goods, etc., as a further security."

It was there held that this did not effect the remedy on the note against *C*. The difference between that case and this is that it was distinctly stated that the deed was executed as a further security. Now can it be said that the mortgage bond recognises this note as still existing? The Privy Council judgment in 17 N.L.R. page 56 has, I think, some bearing on this question because the substance of the first Defendant's defence is that there was a substitution of the mortgage bond for the note. In that case there was a settlement of existing disputes by an award of Arbitrators and the Privy Council referred to it as an accord and satisfaction by a substituted agreement whereby the respective parties *inter se* abandoned their respective rights in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all parties are fully represented by it.

In view of the evidence of Mr. Coomarasamy, the terms of the attestation clause in the bond, the endorsement on the note made by the notary at the time of the execution of the bond, and the effect of the decisions which I have referred to, I hold that there was a discharge of the note in suit on 15.1.48.

The result of this finding is that the endorsement of the note by the second Defendant to the Plaintiff eleven months later gave the Plaintiff no rights as against the first Defendant. The authority of the Full Bench Case 21, N.L.R. 178, is quite clear on this point. That was an action by an endorsee against the maker of a note. The note had been discharged by payment by the maker to the endorser before the endorsement took place. It was held that the endorsee had no right to maintain the action against the maker. Similarly in 11, N.L.R. 27, which was also an action by an endorsee against the maker where the endorsement had taken place after the maker had paid the endorser (who was the payee) it was held that the action was not maintainable. Section 36 (1) (b) of the Bills

of Exchange Act makes it clear that discharge can take place by payment or otherwise. Wendt, J., quotes the following passage from Chalmers:—
 “Payment and other *discharges* are sometimes spoken of as equities attaching to a bill but this seems incorrect—they are rather grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper.”

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—
No. 13.
Judgment,
6th March
1951.

continued.

While I am on this point, I do not think the position of the second Defendant is the same as that of the first Defendant in regard to the effect of the discharge which took place on 15.1.48. De
 10 Sampayo, J., in the Full Bench case said: “it is only necessary to add that there is nothing to prevent the Plaintiff from enforcing his remedy against his immediate endorser, who was the payee on the note.” This would seem to follow from the terms of Section 55 (2) (c) of the Ordinance which enacts that the endorser of a bill by endorsing it is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement *a valid and subsisting bill* and that he had then a good title thereto. The Plaintiff is, therefore, entitled in my opinion to maintain his action on the note against the second Defendant.

20 The other defences raised can be dealt with briefly. The defence that the note is fictitious within the meaning of the Money Lending Ordinance has not been established. There is no evidence whatever on this point. It is true that the first Defendant filed case No. 257/Z against second Defendant on this basis, but the second Defendant in turn put the bond No. 44 in suit. And as those two cases were settled nothing useful can be extracted from them on this question of the note being fictitious. Relying, I think, on the effect of the decisions in 21 N.L.R. 339 and 50 N.L.R. 433, Mr. Thiagalingam also argued that his client cannot be made to pay the Plaintiff because of the decisions in the two earlier cases. As I
 30 have already said those two cases were settled and I do not, therefore, think that anything in first Defendant’s favour can be said to arise from the decisions on those cases.

The second Defendant has raised the issue that he informed the Plaintiff that the Note had been paid and discharged on or about 15.1.48. There is no proof of this, and I cannot, therefore, say that section 55 (2) (c) does not apply.

Finally, I should like to deal with the argument of Mr. Thiagalingam as to the necessity for Plaintiff to prove the endorsement as against first Defendant. He submitted that second Defendant’s admission does not
 40 help Plaintiff. Apart from the fact that Plaintiff was the holder of this note which bears on it what purports to be an endorsement by the second Defendant which he has admitted. And apart also from the presumption created by section 32 (2) that every holder of a bill is *prima facie* deemed to be a holder in due course, I would also refer to the judgment in 4 Leader Law Reports 129. That was an action by a person who claimed to be the endorsee of a note against the maker. The endorsement was not admitted by the maker. The two judges were not agreed as to the burden of proof in regard to the endorsement. Hutchinson, C.J., held that Plaintiff had to prove the endorsement, and would then be presumed to be a holder

*In the
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No. 13.
Judgment,
6th March
1951,
continued.

in due course. But Woodrenton, J., held that the District Judge rightly ruled that the onus was on the defendant maker. The question is merely academic in view of my finding on the question of Discharge. Again, in view of my findings on the plea of discharge, I do not think it is necessary to refer to the other authorities cited, as to what is the real effect of the decision in the case reported at 24 Q.B.D. 13. My finding that the note was discharged by the execution of the bond renders it unnecessary.

I answer the issues :—

- (1) Yes.
- (2) Yes. 10
- (3) No.
- (4) Not proved.
- (5) Yes.
- (6) Yes.
- (7) Yes.
- (8) Not proved.
- (9) Yes.
- (10) Not against first Defendant.
- (11) They were settled, and the bond thereupon cancelled and discharged. 20
- (12) No.
- (13) Not proved.
- (14) Not proved.
- (15) He can against second Defendant.

I dismiss Plaintiff's action against first Defendant with costs, and give judgment for Plaintiff as prayed for with costs against second Defendant.

(Sgd.) M. C. SANSONI,
A.D.J.

Delivered in open Court in the presence of

A.D.J. 30

No. 14.
DECREE.

*In the
District
Court,
Colombo.*

DECREE.

IN THE DISTRICT COURT OF COLOMBO.

No. 14.
Decree,
6th March
1951.

G. E. MISSO, of Dickman's Road,
Havelock Town Plaintiff

against

1. BADURDIN MOHAMED ALLY of
50 Dam Street

10 2. VERNON PIERIS, of 6 Ferry Street,
Hultsdorf, Colombo

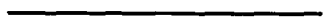
THIS action coming on for final disposal before M. C. Sansoni, Esqr., Addl. District Judge, Colombo, on the 6th day of March, 1951, in the presence of Mr. H. J. C. Perera, Proctor, on the part of the Plaintiff and Mr. S. Sivasubramaniam, Proctor, on the part of the 1st Defendant, and Mr. S. Coomarasamy, Proctor, on the part of the 2nd Defendant, IT IS ORDERED AND DECREED that, the Plaintiff's action against first Defendant be dismissed with costs.

IT IS FURTHER ORDERED AND DECREED that the second
20 Defendant do pay to the Plaintiff the said sum of Rs.49,393/64, together with further interest on Rs.35,450/- at the rate of 10 per centum per annum from 2nd May, 1950, till date hereof and hereafter legal interest at the rate of 5 per centum per annum on the aggregate amount till payment in full and costs of suit.

(Sgd.) M. C. SANSONI,

Addtl. District Judge.

The 6th day of March, 1951.



*In the
Supreme
Court.*

No. 15.

PETITION OF APPEAL.

No. 15.
Petition
of Appeal,
12th March
1951.

S.C. No.

D.C. Colombo, Case No. 11594/S.

G. E. MISSO, of Dickman's Road,
Havelock Town, Colombo . . . Plaintiff

Vs.

1. BADURDIN MOHAMEDALLY, of
50 Dam Street, Pettah

2. VERNON PEIRIS, of 6 Ferry Street,
Hultsdorf, Colombo . . . Defendants

10

and

1. G. E. MISSO, of Dickman's Road,
Havelock Town, Colombo . . . Plaintiff-Appellant

Vs.

1. BADURDIN MOHAMEDALLY, of
50 Dam Street, Hultsdorf, Colombo .

2. VERNON PIERIS, of 6 Ferry Street,
Hultsdorf, Colombo . . . Defendants-Respondents.

To the Honourable the Chief Justice and the other Honourable Judges of
the Supreme Court of the Island of Ceylon.

20

On this 12th day of March, 1951.

The Petition of appeal of the Plaintiff-Appellant above-named appearing
by Hermon J. C. Perera, his Proctor, states as follows :—

1. On or about the 24th day of May, 1950, the Plaintiff-Appellant
instituted this action against the Defendants-Respondents and pleading
that the 1st Defendant-Respondent by his promissory note dated
16th October, 1947 (which was filed with the plaint and pleaded as part
and parcel thereof) promised to pay the 2nd Defendant-Respondent or
order on demand a sum of Rs.35,450/- with interest thereon at the rate
of 10% per annum from 16th October, 1947, and that the 2nd Defendant-
Respondent endorsed and delivered the said note to the Plaintiff-Appellant
for valuable consideration, prayed for judgment against the Defendant-
Respondents jointly and severally in a sum of Rs.49,393/64 being principal
Rs.35,450/- and interest Rs.13,943/64 from 16th October, 1947, to 1st May,
1950, and with further interest on Rs.35,450/- as prayed for in the plaint.

30

2. The Defendants-Respondents filed their respective answers on
the 25th day of September, 1950, and the said case went to trial before
the learned additional District Judge of Colombo on the 7th and 13th
day of February, 1951.

3. The action went to trial on the following issues which were framed by the Court :—

*In the
Supreme
Court.*

(1) Did the 1st Defendant by his promissory note dated 16.10.47 promise to pay the 2nd Defendant or order on demand a sum of Rs.35,450/- with interest thereon at 10 per centum per annum ?

—
No. 15.
Petition
of Appeal,
12th March
1951,
continued.

(2) Did the 2nd Defendant endorse and deliver the said promissory note to the Plaintiff for valuable consideration ?

10 (3) If Issues (1) and (2) are answered in the Plaintiff's favour, is the Plaintiff entitled to judgment against the Defendants jointly and severally, and, if so, in what sum ?

(4) Is the note sued upon fictitious within the meaning of the Money Lending Ordinance ?

(5) Was the note discharged and settled while in the hands of the 2nd Defendant by the execution of mortgage bond No. 44 dated 15.1.48 and by the execution of a warrant of attorney to confess judgment on such bond ?

20 (6) Did the 1st Defendant on 17.7.48 file case No. 257/Z of this Court against the 2nd Defendant asking for a declaration that no money was due from the 1st Defendant to the 2nd Defendant on the said bond No. 44 and for the return of the four notes referred to in such bond inclusive of the note sued upon in this case ?

(7) Did the 2nd Defendant thereupon put the said bond No. 44 in suit in case No. 2101/M.B. of this Court ?

(8) Was the Plaintiff aware of all or any of the facts set out in Issues (4) or (5) or (6) or (7) ?

(9) Is the Plaintiff a holder in due course for value ?

30 (10) If any of the Issues (4) or (5) or (6) or (7) or (8) or (9) be answered in the 1st Defendant's favour, can the Plaintiff have and maintain this action ?

(11) Were actions Nos. 257/Z of this Court and 2101/MB of this court dismissed and the bond No. 44 cancelled and discharged ?

(12) If issue (11) be answered in the affirmative, is the Plaintiff barred from suing on the note in this case ?

(13) Did the 2nd Defendant inform the Plaintiff that the note sued upon had been paid and discharged on or about 15.1.48 ?

(14) Was the Plaintiff aware of all the facts put in Issue (5) ?

40 (15) If Issues (5), (13) and (14) are answered in the affirmative, can Plaintiff have and maintain this action ?

4. The learned Additional District Judge made order that the burden was on the Defendants-Respondents and that the Defendants-Respondents were to begin, and Counsel for the 1st Defendant-Respondent

*In the
Supreme
Court.*

No. 15.
Petition
of Appeal,
12th March
1951,
continued.

having stated that he was not calling any evidence on issues (1) and (2) called Mr. S. Coomaraswamy Notary Public as witness for the 1st Defendant-Respondent and marking certain documents the case for the 1st Defendant-Respondent was closed.

5. The 2nd Defendant-Respondent called no evidence.

6. On the 6th day of March, 1951, the learned Additional District Judge of Colombo delivered judgment and made order dismissing the Plaintiffs-Appellant's action against the 1st Defendant-Respondent with costs and entered judgment for the Plaintiff-Appellant as prayed for in the plaint against the 2nd Defendant-Respondent. 10

7. Being dissatisfied with the said judgment and order of the learned Additional District Judge in so far as the Plaintiff-Appellant's action against the 1st Defendant-Respondent was dismissed the Plaintiff-Appellant begs to appeal against the judgment and order dismissing the Plaintiff-Appellant's action against the 1st Defendant-Respondent to Your Lordships' Court on the following among other grounds that Counsel may urge at the hearing of this appeal:—

(i) The said judgment and order dismissing the Plaintiff-Appellant's action against the 1st Defendant-Respondent is contrary to law and against the weight of evidence. 20

(ii) The learned judge erred in holding that the promissory note was discharged by the mortgage bond executed on 15th January, 1948. The said finding is contrary to law the circumstances of the case and the evidence led in the action.

(iii) The learned judge erred in accepting and in acting upon the evidence of the Notary. The evidence of the said Notary was in law hearsay and was not admissible in law and in any event should not have been acted upon even though admitted.

(iv) The Plaintiff-Appellant submits that the 1st Defendant-Respondent is liable to the Plaintiff-Appellant upon the said promissory note being the maker of the said note and having issued the same and having allowed it to be in circulation as a negotiable instrument. 30

(v) There was no payment or discharge of the said note within the meaning of the provisions of the Bills of Exchange Ordinance and it is clear from the provisions of the mortgage bond and the endorsement on the said promissory note that the said promissory note was not discharged but continued to be and remained valid and effectual and of such a nature that in law the 1st Defendant-Respondent was liable to the Plaintiff-Appellant. 40

(vi) It was clearly proved that the said promissory note was valid and effectual and that there was consideration for the same at the time of execution. It was in evidence that the 1st Defendant-Respondent's position was that there was no consideration for the said mortgage bond and that the same was therefore executed by the 1st Defendant-Respondent without consideration and in these premises the Plaintiff-Appellant submits that the promissory note was not discharged by the said mortgage bond.

(vii) The learned additional District Judge has rightly held that the Plaintiff-Appellant was a holder in due course for value and accordingly the Plaintiff-Appellant is in law entitled to judgment as prayed for against the 1st Defendant jointly and severally with the 2nd Defendant.

*In the
Supreme
Court.*

No. 15.
Petition
of Appeal,
12th March
1951,
continued.

Wherefore the Plaintiff-Appellant prays :—

(A) That the judgment and order of the learned Additional District Judge dismissing the action as against the 1st Defendant-Respondent be set aside and reversed.

10 (B) That judgment be entered in Plaintiff-Appellant's favour against the 1st Defendant-Respondent as prayed for in the plaint jointly and severally with the 2nd Defendant-Respondent.

(C) For costs and for such other and further relief as to Your Lordships' Court shall seem meet.

Settled by
Mr. S. J. KADIRGAMAR,
Advocate.

(Sgd.) HERMAN J. C. PERERA,
Proctor for Plaintiff-Appellant.

No. 16.

JUDGMENT.

No. 16.
Judgment,
11th
February
1954.

20

S.C. No. 282 M of 1951.

D.C. (F) Colombo 11594/S

G. E. MISSO of Havelock Town, Colombo 5 . Plaintiff-Appellant

vs.

BADURDIN MOHAMEDALLY of Hultsdorf,
Colombo 12, and another . Defendants-Respondents.

Present : GRATIAEN J. and GUNASEKERA J.

Counsel : Colvin R. de Silva with S. J. Kadirgamar and L. Muttutantri for the Appellant. H. V. Perera, Q.C., with H. W. Thambiah and C. Shanmuganayagam for the Respondents.

30 Argued on : 27th January, 1954.

Decided on : 11th February, 1954.

GRATIAEN, J.

This was an action for the recovery of a sum of Rs.34,450/- and interest alleged to be due on a promissory note dated 16th October, 1947, from the 1st Defendant (as maker of the note) and the 2nd Defendant (as payee who had subsequently indorsed it to the Plaintiff).

The Defendants filed separate answers denying liability on the note. For the purpose of our decision, the following facts as held by the learned trial Judge will form the basis of my judgment :

40 The " on demand " promissory note sued on had been granted by the 1st Defendant to the 2nd Defendant for valuable consideration. On

*In the
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Court.*

No. 16.
Judgment,
11th
February
1954,
continued.

15th January, 1948, a total sum of Rs.94,150/- was found to be due by the 1st Defendant to the 2nd Defendant on this and certain other transactions, and the 1st Defendant executed a notarially attested mortgage bond whereby he hypothecated certain immovable property as security for the repayment of the aggregate amount (which was specifically stated to include the sum of Rs.35,450/- and interest borrowed on the promissory note sued on). The 2nd Defendant continued, however, to retain the promissory note in its original condition except that it now bore an endorsement signed by both defendants and by the attesting notary to the following effect :—

10

“The amount due on this promissory note together with interest from the date hereof has been secured by mortgage bond No. 44 dated 15th January, 1948 . . .”

The endorsement was undated, but it was in fact made at the attesting notary's office immediately after the execution of the bond. Several months later, the 2nd Defendant endorsed and delivered the note to the Plaintiff for valuable consideration. It had never come back into the maker's hands during the intervening period.

Upon these facts, and upon the evidence of the attesting notary who explained his version of the circumstances which led to the execution of the bond and to the endorsement made on the note, the learned Judge held (1) that the note had been discharged on 15th January, 1948, by the 2nd Defendant's acceptance of the “higher security” of the mortgage bond, and that therefore (2) only the 2nd Defendant (but not the 1st Defendant) was liable on the note to the Plaintiff who subsequently became its holder for value. Judgment was accordingly entered as prayed for against the 2nd Defendant, but the Plaintiff's action against the 1st Defendant was dismissed with costs. This appeal is against the latter part of the decree.

20

The learned Judge has rejected as unproved the allegation that the Plaintiff was aware, at the time of the endorsement in his favour, that the note had been previously (as alleged) been “discharged.” Nevertheless, he held, on the authority of *Jayawardene v. Rahaiman Lebbe* (1919) 21 N.L.R. 178 and *Tenna v. Balaya* (1908) 11 N.L.R. 27 that, when the bond had been granted to secure the liability on the promissory note, the note itself was automatically discharged and became “a mere waste-paper”—with the result that its subsequent indorsement by the original payee could not vest the indorsee with any rights on the document against the original maker.

30

Section 36 (1) of the Bills of Exchange Ordinance provides, *inter alia*, that a promissory note loses its character of negotiability when it has been “discharged by payment or otherwise,” and it is clear law that the rights of a holder of a note can be satisfied, extinguished or released in a number of ways besides payment—Byles on Bills (20th Ed.) p. 237. As an illustration of a discharge “otherwise than by payment,” the textbook mentions, at p. 238, a case where “the taking of a security of a higher nature for a bill or note merges the remedy on the inferior instrument.” It is by the application of this rule that the learned Judge decided the present case.

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There is no absolute proposition of law which declares that the taking of a “higher security” necessarily operates in every case as a discharge of the earlier “inferior instrument.” As I understand the true principle, the

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issue invariably calls for a decision on a question of fact, and the onus of proving the discharge in an action between an endorsee for value and a maker is on the maker. In *Twopenny v. Young* (1824), 3 B. and C. 208, for instance, the plea of "discharge" was rejected because the latter security recognised the earlier note as still existing. In other words, the maker had failed to prove that the transaction was intended to operate as an extinguishment of the payee's claims on the original security.

*In the
Supreme
Court.*
—
No. 16.
Judgment,
11th
February
1954,
continued.

If the maker of a promissory note subsequently creates a mortgage to secure the repayment of his debt, the Court would not be justified in holding that the note was thereby discharged unless an intention to provide a substituted (as opposed to an additional) security was established. "It is often a nice question whether an obligation arising from a bond novates an earlier obligation founded on . . . a promissory note or other *causa debendi*. If the facts show that the bond was granted as an additional security, there is no novation; but if it is manifest that the parties intended the bond to supersede the original obligation and take its place, then there is a novation"—Wessels' Law of Contract, Vol. I, p. 723, para. 2409.

In the present case, the language of the indorsement made on the note (and signed by both Defendants) by no means makes it "manifest" that the liability on the note had been extinguished. On the contrary, it is calculated to give the impression that the repayment of the "amount due" on the note was *also* secured by the mortgage bond dated 15th January, 1948. Besides, at the time when the note was subsequently indorsed to the Plaintiff for value, it still remained in the payee's hands and bore all the appearances of an undischarged note. In *Glasscock v. Balls* (1889), 24 Q.B.D. 13 at 15, Lord Esher said:—

"If a negotiable instrument remains current, even though it has been paid there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing."

It is not easy to reconcile this *dictum* with the proposition laid down in far more general terms by a Bench of three Judges of this Court (wrongly described in the Report as a "Full Bench") in *Jayawardena v. Rahaiman Lebbe* (*supra*), and I respectfully agree with the view of Jayawardena, J., that the question calls for an authoritative decision, after reconsideration of the problem, when a suitable occasion arises. (*Muttu Carpen Chetty v. Samaratunga* (1924), 26 N.L.R. 381 at 384.) Be that as it may, it is certainly permissible to regard the fact that a promissory note remained in the payee's hands (without any indication of "discharge" or "cancellation" on the face of it) as a relevant circumstance to be taken into account in deciding the question of fact whether the liability had been extinguished by novation. Moreover, the 1st Defendant (as maker of the note), is, in my opinion, precluded *as against an indorsee for value without notice* from alleging that the execution of the mortgage bond was intended by him to have more serious implications than those which were actually indicated in the endorsement which he signed. The language of his endorsement is quite insufficient to support the plea of discharge by novation, and is especially binding on the maker of a note who allows it thereafter to remain in circulation with all the appearances of a valid promissory note. Besides, to my mind the language of the bond itself is equivocal.

*In the
Supreme
Court.*

No. 16.
Judgment,
11th
February
1954,
continued.

It would seriously impair the principle of negotiability attaching to instruments governed by the Bills of Exchange Ordinance if an indorsee for value without notice could be confronted with defences which are inconsistent with the terms of a memorandum or endorsement made on the face of the instrument by both the maker and the payee. Even, therefore, if as between the Defendants *inter se*, the true position (unknown to the Plaintiff) was that the note sued on ought to be regarded as having been discharged on 15th January, 1948, that defence is not in my opinion available as against the Plaintiff. The present case is, in the special circumstances described by me, distinguishable from those with which the 10 earlier decisions were concerned.

It was suggested to us during the argument that the learned Judge had wrongly applied in favour of the Plaintiff the statutory presumption that he was a holder for value, because the Plaintiff had not discharged the initial onus of proving (as against the 1st Defendant) that the note had in fact been indorsed and delivered to him by the 2nd Defendant. I agree that generally an indorsee must establish that he is the *holder* of a note before he can rely on the presumption that he is a holder *for value*. But this, in any particular case, depends on whether the fact of indorsement and delivery has been challenged by the maker. I do not 20 doubt that, at the preliminary discussion which took place under section 146 of the Civil Procedure Code when the trial commenced, the learned Judge was made to understand that the 1st Defendant, while not disputing that the note had in fact been indorsed and delivered to the Plaintiff, denied only that he was a *holder for value without notice*. Indeed the 1st Defendant's position (as indicated in his pleadings) seems to have been that the note had been indorsed to the Plaintiff *but collusively and without consideration*. When the stage for determining the issues arrives no issue was suggested by the 1st Defendant's counsel with specific reference to the bare fact of endorsement and delivery (as distinct from the connected 30 issues of "consideration" and "notice"). On the contrary, the issues, as finally determined at the trial, emphasised that the dispute on this aspect of the litigation was confined to the alleged absence of consideration for the indorsement, and to the further allegation that the Plaintiff was well aware that the note had been discharged before indorsement. It could only have been for this reason that the learned Judge ruled that the onus was on the Defendants to rebut the statutory presumptions in favour of the Plaintiff. I cannot imagine that the experienced judge who tried the case could have entertained the view that a person purporting to sue on a promissory note as its indorsee must be presumed to be its indorsee 40 even though the bare fact of indorsement has been put in issue.

I would allow the appeal and enter judgment in favour of the Plaintiff as prayed for with costs in both Courts.

GUNASEKARA, J.

I agree.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice.

(Sgd.) E. H. T. GUNASEKARA,
Puisne Justice.

DECREE.

*In the
Supreme
Court.*

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH.

No. 17.
Decree,
15th
February
1954.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

D.C. (F) 282 M
1951.

G. E. MISSO of Dickman's Road, Havelock
Town, Colombo Plaintiff-Appellant

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against

1. BADURDIN MOHAMEDALLY of
50 Dam Street, Hulsdorf, Colombo.

2. VERNON PIERIS of 6 Ferry Street,
Hulsdorf, Colombo Defendants-Respondents

Action No. 11594/Summary.

District Court of Colombo.

This cause coming on for hearing and determination on the
27th January and 11th day of February, 1954, and on this day, upon an
appeal preferred by the Plaintiff-Appellant before the Hon. Mr. E. F. N.
20 Gratiaen, Q.C., Puisne Justice and the Hon. Mr. E. H. T. Gunasekara,
Puisne Justice of this Court, in the presence of Counsel for the Appellant
and Respondents. It is considered and adjudged that this appeal be
and the same is hereby allowed and Judgment is entered in favour of the
Plaintiff as prayed for with costs in both Courts.

Witness the Hon. Mr. E. F. N. Gratiaen, Q.C., Acting Chief Justice
at Colombo, the 15th day of February in the year of our Lord One thousand
Nine hundred and Fifty-Four and of Our Reign the Third.

(Sgd.) W. G. WOUTERSZ,

Dy. Registrar, S.C.



*In the
Supreme
Court.*

GRANT OF FINAL LEAVE to Appeal to Her Majesty in Council.

No. 18.
Grant of
Final Leave
to Appeal
to Her
Majesty
in Council,
2nd June
1954.

**ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH.**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

**BADRUDIN MOHAMEDALLY, of No. 50 Dam
Street, Colombo Petitioner
(1st Defendant-Respondent)**

Vs.

**G. E. MISSO, of Dickman's Road, Havelock
Town, Colombo 1st Respondent
(Plaintiff-Appellant) 10**

**VERNON PIERES, of 6 Ferry Street, Hultsdorf,
Colombo 2nd Respondent
(2nd Defendant-Respondent).**

Action No. 11594/S. District Court of Colombo.

In the matter of an application by the 1st Defendant above-named dated 29th March, 1954, for Final Leave to Appeal to Her Majesty the Queen in Council against the decree of this Court dated 11th February, 1954. 20

This cause coming on for hearing and determination on the 26th day of May, 1954, before the Hon. Mr. E. F. N. Gratiaen, Q.C., Puisne Justice and the Hon. Mr. H. N. G. Fernando, Acting Puisne Justice of this Court, in the presence of Counsel for the Applicant.

The Applicant having complied with the conditions imposed on him by the order of this court dated 5th March, 1954, granting Conditional Leave to Appeal.

It is considered and adjudged that the applicant's application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed. 30

Witness the Hon. Sir Alan Edward Percival Rose, Kt., Q.C., Chief Justice at Colombo, the 2nd day of June in the year of our Lord One thousand Nine hundred and Fifty-four and of Our Reign the Third.

(Sgd.) W. G. WOUTERSZ,
Dy. Registrar, S.C.



EXHIBITS.

" P 1 " PROMISSORY NOTE.

*Exhibits.**Plaintiff-
Respondent's
Exhibits.*

" P1."

- | | | | |
|----|--|---|--|
| 10 | 1. Capital sum borrowed
Rs.35,450/- | 16th October, 1947
Rs.35,450/-. | " P1 "
Promissory
Note, 16th
October
1947. |
| | 2. Interest premium or
charges deducted or paid
in advance.
Rs. Nil | On demand I the undersigned
Badurdin Mohamedally of 50 Dam
Street, Colombo, 12, Promise to
pay Mr. Vernon Pieres Auctioneer
& Broker of 6 Ferry Street,
Hultsdorf or order the sum of
Rupees Thirty five thousand four
hundred and fifty only currency
for value received with interest
thereon at the rate of 10% per
centum per annum, from the date
hereof. | |
| | 3. Rate of interest per
centum per annum 10% | | |
| | Intd. Illegibly 16.10.47 | Sgd. Illegibly on a six cents stamp. | |
| 20 | | Witnesses :
Sgd. Illegibly. | |

Endorsements.

The amount due on this promissory note together with interest thereon from the date hereof has been secured by mortgage Bond No. 44 dated 15th January, 1948, attested by me

(Sgd.) S. COOMARASWAMY,
Notary Public.

(Sgd.) Illegibly

(Sgd.) VERNON PIERES

(Sgd.) VERNON PIERES.

30 my This is the identical promissory note marked " A " and referred to in
affidavit of this date.

(Sgd.) . . . MISSO.

24.5.50.

Before me,

(Sgd.) . . . SOYSA,

Commissioner of Oaths.

*Exhibits.***" 1 D.12 " MORTGAGE BOND. First Defendant to Second Defendant.***Defendant-
Appellant's
Exhibits.*

No. 44.

" 1.D12 "

Mortgage
Bond,
First
Defendant
to Second
Defendant,
15th
January
1948.

To all to whom these presents shall come I Badrudeen Mohamedally of
50 Dam Street in Colombo

Send Greeting :

Whereas I the said Badrudeen Mohamedally am indebted to Charles
Vernon Pieres of Ferry Street in Colombo in the principal sum of Rupees
One Hundred and Nineteen Thousand and One Hundred and Twenty Five
(Rs.119,125/-) to wit : Rupees Thirty Seven Thousand and Five Hundred
(Rs.37,500/-) being the money borrowed by me from the said Charles 10
Vernon Pieres on the promissory note dated 5th September 1947 with
interest at ten per centum per annum ; Rupees Fifteen Thousand and Five
Hundred and Twenty Five (Rs.15,525/-) being the money borrowed by me
from the said Charles Vernon Pieres on the promissory note dated
26th September 1947 with interest at ten per centum per annum ; Rupees
thirty thousand and six hundred and fifty (Rs.30,650/-) being the money
borrowed by me from the said Charles Vernon Pieres on the promissory note
dated 16th October 1947 with interest at ten per centum per annum.

And Whereas I the said Badurdeen Mohamedally have already paid
a sum of Rupees Twenty-Five Thousand (Rs.25,000/-) together with 20
interest to the said Charles Vernon Pieres in part payment of the principal
sum of Rupees Thirty-Seven Thousand and Five Hundred (Rs.37,500/-)
due to the said Charles Vernon Pieres on the promissory note dated
5th September, 1947.

And whereas I the said Badrudeen Mohamedally am at present
indebted to the said Charles Vernon Pieres in the sum of Rupees Ninety-four
thousand and one hundred and twenty-five (Rs.94,125/-) with interest
thereon at the rate of ten per centum per annum from the date of these
presents.

And whereas I the said Badurdeen Mohamedally have agreed to secure 30
unto the said Charles Vernon Pieres the repayment of the said sum of
Rupees Ninety-four thousand and one hundred and twenty-five (Rs.94,125/-)
with interest at the rate of ten per centum per annum for the same from the
date of these presents in the manner hereinafter expressed.

Now know ye and these presents witness that I the said Badurdeen
Mohamedally (hereinafter sometimes called and referred to as "the
Obligor ") am held and firmly bound unto the said Charles Vernon Pieres
(hereinafter sometimes called and referred to as "the Obligee") in the sum
of Rupees Ninety-four thousand and one hundred and twenty-five 40
(Rs.94,125/-) being the money borrowed by me on the promissory notes
dated 5th September, 1947, 26th September, 1947, 11th October, 1947, and
16th October, 1947, for the sums of Rupees Twelve thousand and five hundred
(Rs.12,500/-) (balance principal) Rupees Fifteen thousand and five hundred
and twenty-five (Rs.15,525/-) Rupees Thirty thousand and six hundred
and fifty (Rs.30,650/-) and Rupees Thirty-five thousand and four hundred
and fifty (Rs.35,450/-) respectively (the receipt whereof I do hereby
acknowledge) to be paid to the said obligee his heirs executors administra-
tors or assigns with interest thereon at the rate of ten per centum per annum

to be computed from the date of these presents on demand for which payment to be well and truly made I the said obligor bind myself my heirs executors and administrators firmly by these presents.

Exhibits.
—
Defendant
Appellant's
Exhibits.

And for securing to the said obligee his heirs executors administrators or assigns the payment of all such sums of money due and payable under by virtue or in respect of these presents I the said obligor do hereby specially mortgage and hypothecate to and with the said obligee and his aforewritten as a first or primary mortgage free from any mortgage charge or other encumbrance whatsoever the lands and premises in the First
10 Schedule hereto fully described and as a secondary mortgage that is to say subject to the primary mortgage bonds bearing Nos. 2807 dated 18th November, 1947, attested by R. Muttusamy Notary Public of Colombo and 42 dated 15th January, 1948, attested by the Notary attesting these presents but free from any other encumbrance whatsoever the lands and premises in the Second Schedule hereto fully described together with the buildings and other appurtenances thereon and the buildings hereafter to be erected thereon and the rents income and profits accruing from the same and all and singular the rights ways servitudes privileges advantages and appurtenances whatsoever thereunto belonging or used or enjoyed
20 therewith or reputed or known as part and parcel thereof and all the estate right title interest property claim and demand whatsoever of me the said obligor in to or out of or upon the said lands and premises and every part thereof.

“ 1.D12 ”
Mortgage
Bond,
First
Defendant
to Second
Defendant,
15th
January
1948,
continued.

And I the said obligor do hereby for myself and my aforewritten covenant with the said obligee and his aforewritten that I have just and good right to make the foregoing mortgage in manner aforesaid and that the same or any portion thereof in the lands and premises in the First Schedule hereto are or is not subject to any mortgage charge lease lien fiscal's seizure or other encumbrances whatsoever and that the lands and
30 premises in the Second Schedule hereto are only subject to the mortgage bonds hereinbefore mentioned but free from any other encumbrance whatsoever and that I and my aforewritten shall and will during the continuance of these presents well and carefully keep up and maintain the said lands and premises and the buildings standing thereon or hereafter to be erected and other appurtenances thereon in good order and condition and shall and will at all times hereafter at the request of the said obligor or his aforewritten but at my cost and expense make do and execute or cause to be made done or executed all such further and other acts deeds assurances matters and things whatsoever for the more perfectly assuring
40 to the said obligee and his aforewritten the said lands and premises and every part thereof by way of primary mortgage the lands and premises in the first Schedule hereto fully described and by way of Secondary mortgage the lands and premises in the Second Schedule hereto fully described as by the said obligee or his aforewritten shall or may be reasonably required.

Signed and dated at Colombo on this Fifteenth day of January One thousand nine hundred and forty eight.

Whereas I the said obligor am indebted to the said Obligee in the sum of Rupees Ninety four thousand and one hundred and twenty five
50 (Rs.94,125/-) for money borrowed and received by me from time to time (the receipt of which said sum I do hereby admit and acknowledge) and

Exhibits.

*Defendant-
Appellant's
Exhibits.*

“ 1.D12 ”
Mortgage
Bond,
First
Defendant
to Second
Defendant,
15th
January
1948,
continued.

which sum it has been agreed should be secured by these presents and the mortgage hereby granted and be repaid together with interest thereon at the rate and in the manner hereinafter mentioned.

Now the condition of the aforewritten Bond or Obligation and mortgage is such that if I the said obligor shall and will well and truly repay or cause to be repaid at Colombo on demand unto the said obligee or his aforewritten the said sum of Rupees Ninety four thousand and one hundred and twenty five (Rs.94,125/-) and in the meantime and until such repayment pay interest on the said sum at the rate of ten per centum per annum monthly on or before the Fifteenth day of each and every month and the first of such payments to be made on or before the Fifteenth day of February one thousand Nine hundred and forty eight and shall and will during the continuance of the mortgage effected by these presents well and carefully keep up and maintain the said lands and premises hereby mortgaged and the buildings standing thereon or hereafter to be erected and other appurtenances thereon in good order and condition and shall and will suffer and permit the said obligee or his agent attorney nominee or servant to visit and inspect the state order and condition of the buildings on the said lands and premises at all hours in the day time during the continuance of the mortgage effected by these presents and will duly and punctually pay and discharge all rates taxes assessments and other charges and impositions levied assessed or imposed upon and in respect of the said lands and premises hereby mortgaged and produce unto the said obligee or his aforewritten the receipts for the same whenever demanded and shall and will observe and perform all and singular the covenants and conditions herein on my part contained then the above-written bond or obligation shall be null and void but otherwise the same shall be and remain in full force and virtue.

Provided however that if default shall be made by me the said obligor or my aforewritten in the payment of the said monthly interest or any portion thereof on any of the due dates or if I the said obligor or my aforewritten shall commit a breach of any of the covenants or conditions entered into by me in these presents and on my part to be done observed and performed or in case I the said obligor shall at any time during the continuance of the said mortgage be declared or adjudged an Insolvent or shall enter into a composition with my creditors then and in such case it shall be lawful for the said obligee or his aforewritten at once to sue and recover payment of all moneys payable under and by virtue or in respect of these presents anything herein contained to the contrary notwithstanding but subject however to the claims of the primary mortgages in respect of the lands and premises in the second schedule hereto.

In witness whereof I the said obligor Badrudeen Mohamedally have hereunto and to two others of the same tenor as these presents set my hand at Colombo on this Fifteenth day of January One thousand nine hundred and forty-eight.

THE FIRST SCHEDULE above referred to :

An undivided Seven hundredths (7/100) part or share of the following lands and premises to Wit :—

* * * * *

(Items 1 to 52 are omitted.)

THE SECOND SCHEDULE above referred to :

An undivided Seven hundredths (7/100) part or share of the following lands and premises to Wit :—

(Items 1 to 28 omitted.)

* * * * *

Signed in the presence of the witnesses (Sgd.) B. Mohamedally.

(Sgd.) F. Z. Abdeen.

(Sgd.) K. Kanniah.

(Sgd.) S. Coomara Swamy,
Notary Public.

Exhibits.

*Defendant
Appellant's
Exhibits.*

“ 1.D12 ”

Mortgage
Bond,
First
Defendant
to Second
Defendant,
15th
January
1948,
continued.

- 10 I, SANMUGAM COOMARASWAMY of Colombo in the Island of Ceylon Notary Public do hereby certify and attest that no consideration passed in my presence but the same was set off against the amounts due on promissory notes dated 5th September, 1947, 26th September, 1947, 11th October, 1947 and 16th October, 1947, in favour of the said obligee and which said promissory notes have been duly identified by me and annexed to the original of this instrument and that the duplicate of this instrument bears twelve stamps to the aggregate value of Rs.837/- and the original a stamp of Rs.1/-.

Which I Attest.

20

(Sgd.) S. COOMARASWAMY,
Notary Public.

Date of Attestation
15th January, 1948.

(Seal)

Exhibits.

"1 D.2." PLAINT in Suit No. 257/Z.

*Defendant
Appellant's
Exhibits.*

Mohamedally v. Pieres.

"1.D2."

"1.D2" IN THE DISTRICT COURT OF COLOMBO.

Plaint in
Suit No.
257/Z,
Mohamed-
ally v.
Pieres,
17th July
1948.B. MOHAMEDALLY of No. 4, Charlemont Road
Wellawatta, Colombo Plaintiff*vs.*C. VERNON PIERES of No. 15 Clifford Place,
Bambalapitiya, Colombo Defendant.Plaint accepted 10
summons to issue
for 10.9.Intd. S.S.J.G.
D.J.No. 257/Z
Rs.143,425/-
Class V
Nature: Money
Procedure: RegularOn this 17th day of July, 1948. 20The plaintiff of the Plaintiff above named appearing by Subramaniam
Sivasubramaniam his Proctor states as follows:—

1. The Plaintiff and the Defendant reside in Colombo within the jurisdiction of this Court and the causes of action hereinafter set out also arose within the jurisdiction of this Court.

2. The Defendant and the Plaintiff were intimately known to each other from the time of their school days, and the Defendant was in a position of active confidence towards the Plaintiff prior to and during the periods material to the causes of action herein set out and was able to dominate the will of the Plaintiff. By wrongfully availing himself 30 of the position aforesaid and by the exercise of undue influence the Defendant wrongfully and deceitfully induced the Plaintiff into signing the promissory notes, mortgage bonds and warrant of Attorney to confess judgment referred to herein and also into parting with the various sums of money mentioned herein to the Defendant.

For a first cause of action.

3. The Defendant in or about November, 1947, wrongfully and deceitfully induced the Plaintiff to sign the four antedated promissory

notes referred to in Bond No. 44 hereinafter mentioned in the Defendant's favour without any consideration. The said notes are for the sums of Rs.37,500/-, Rs.15,525/-, Rs.30,650/- and Rs.35,450/-.

Exhibits.
—
Defendant-Appellant's Exhibits.

4. The said four promissory notes are fictitious within the meaning of the money lending Ordinance No. . . . consideration passed on the said notes.

“ 1.D2 ”
Plaint in
Suit No.
257/Z,
Mohamed-ally v. Pieres,
17th July
1948,
continued.

5. Subsequently the Defendant wrongfully and deceitfully induced the Plaintiff to sign a mortgage bond bearing No. 44 dated 15th January, 1948, and attested by Mr. S. Coomaraswamy Notary Public of Colombo
10 purporting to hypothecate the properties set out in the schedule hereto in favour of the Defendant for the sum of Rs.94,125/- being part of the alleged amounts of the aforesaid four promissory notes and interest at ten per centum per annum as stated thereon. The said mortgage bond was executed without any consideration whatsoever and nothing is due thereunder.

6. The Defendant also wrongfully and deceitfully induced the Plaintiff to sign a collateral document which the Plaintiff now understands is a Warrant of Attorney to Confess Judgment bearing No. 45 dated 15th January, 1948, and attested by Mr. S. Coomaraswamy, Notary Public
20 of Colombo.

7. The Defendant is now falsely representing that the monies were actually lent by him to the Plaintiff and that the said bond was executed as security therefor and is fraudulently claiming repayment thereof.

8. A cause of action has thus accrued to the Plaintiff to sue the Defendant for a declaration that no money is due from the Plaintiff on the said Bond No. 44 and for the cancellation of the said bond and of the said Warrant of Attorney to Confess Judgment No. 45 and for the return of the said four promissory notes.

For a second cause of action.

30 9. On or about 16th October, 1947, the Defendant wrongfully and deceitfully obtained from the Plaintiff a sum of Rs.20,000/00.

10. The Plaintiff further pleads that the Defendant has been unjustly benefited and enriched at the cost and to the detriment and injury to the Plaintiff in respect of the said sum of Rs.20,000/- and the Plaintiff has had no benefit whatsoever in this connection.

11. The Defendant has not repaid the sum of Rs.20,000/- or any part thereof though thereto often demanded.

12. A cause of action has thus accrued to the Plaintiff to sue the Defendant for the recovery of the said sum of Rs.20,000/- and legal interest
40 thereon from 16th October, 1947, till payment in full.

For a third cause of action.

13. On or about 18th November, 1947, the Defendant wrongfully and deceitfully induced the Plaintiff into signing a Mortgage Bond bearing

Exhibits.
 —
Defendant-Appellant's Exhibits.
 —

“ 1.D2 ”
 Plaintiff in
 Suit No.
 257/Z,
Mohamed-ally v. Pieres,
 17th July
 1948,
continued.

No. 2807 dated 18th November, 1947, and attested by R. Muttusamy, Notary Public of Colombo for Rs.25,000/- with interest at 18 per centum per annum in favour of K. R. S. A. K. R. Karuppan Chettiar and wrongfully and deceitfully obtained from the Plaintiff a sum of Rs.22,300/- which was the net sum obtained for and on account of the Plaintiff from the said K. R. S. A. K. R. Karuppan Chettiar in consideration of the said Mortgage Bond No. 2807.

14. The Plaintiff further pleads that the Defendant has been unjustly benefited and enriched at the cost and to the detriment and injury of the Plaintiff in respect of the said sum of Rs.22,300/- and the Plaintiff 10 has had no benefit whatsoever in this connection.

15. The Defendant has not repaid the said sum of Rs.22,300/- or any part thereof though thereto often demanded.

16. A cause of action has thus accrued to the Plaintiff to sue the Defendant for the recovery of the said sum of Rs.22,300/- and legal interest thereon from 18th November, 1947, till payment in full.

For a Fourth cause of action.

17. On or about the 21st or 22nd January, 1948, the Defendant wrongfully and deceitfully obtained from the Plaintiff a sum of Rs.4,000/-.

18. The Plaintiff further pleads that the Defendant has been unjustly 20 benefited and enriched at the cost and to the detriment and injury to the Plaintiff in respect of the said sum of Rs.4,000/- and the Plaintiff has had no benefit whatsoever in this connection.

19. The Defendant has not repaid the sum of Rs.4,000/- or any part thereof though thereto often demanded.

20. A cause of action has thus accrued to the Plaintiff to sue the Defendant for the recovery of the said sum of Rs.4,000/- and legal interest thereon from 21st January, 1948, till payment in full.

For a fifth cause of action.

21. In or about February and March, 1948, the Defendant wrongfully 30 and deceitfully obtained from the Plaintiff various sums of money aggregating to Rs.3,000/- at the lowest.

22. The Plaintiff further pleads that the Defendant has been unjustly benefited and enriched at the cost and to the detriment and injury of the Plaintiff in respect of the said various sums aggregating to Rs.3,000/- and the Plaintiff has had no benefit whatsoever in this connection.

23. The Defendant has not repaid the said sum of Rs.3,000/- or or any part thereof though thereto often demanded.

24. A cause of action has thus accrued to the Plaintiff to sue the Defendant for the recovery of the said sum of Rs.3,000/- and legal interest 40 thereon from the 1st April, 1948, till payment in full.

25. The subject matter of the various causes of action set out herein are of the value of :—

- (i) Rs.94,125/- on the first cause of action.
- (ii) Rs.20,000/- on the 2nd cause of action.
- (iii) Rs.22,300/- on the 3rd cause of action.
- (iv) Rs.4,000/- on the 4th cause of action.
- (v) Rs.3,000/- on the 5th cause of action

aggregating to Rs.143,425/-.

Wherefore the Plaintiff prays :—

10

(A) For a declaration that no money is due from the Plaintiff on the said bond No. 44 and for the cancellation of the same.

(B) for a declaration that the properties set out in the schedule are free from the hypothecated by the said bond No. 44,

(C) for a declaration that the said Warrant of Attorney to Confess Judgment No. 45 is null and void and for the cancellation of the same,

(D) for the return of the said four promissory notes,

(E) for judgment in the sums of :—

20

(i) Rs.20,000/- and legal interest thereon from 16th October, 1947, till payment in full

(ii) Rs.22,300/- and legal interest thereon from 18th November, 1947, till payment in full

(iii) Rs.4,000/- and legal interest thereon from 21st January, 1948, till payment in full

(iv) Rs.3,000/- and legal interest thereon from 1st April, 1948, till payment in full

(F) for costs and

(G) for such other and further relief as to this court shall seem meet.

30

(Sgd.) S. SIVASUBRAMANIAM,

Proctor for Plaintiff.

Settled by

(Sgd.) S. CHANMUGARAJA.

(Sgd.) H. W. THAMBYAH.

(Sgd.) Illegibly.

(Sgd.) Illegibly.

Exhibits.

Defendant-Appellant's Exhibits.

“ 1.D2 ”
Plaint in
Suit No.
257/Z,
Mohamed-ally v. Pires,
17th July
1948,
continued.

Exhibits.

" 1 D.5 " COURT JOURNAL, Suit No. 257/Z.

*Defendant-
Appellant's
Exhibits.*

IN THE DISTRICT COURT OF COLOMBO.

" 1.D5 "

B. MOHAMEDALLY Plaintiff

Court
Journal,
Suit No.
257/Z,
17th July
to 5th
October
1948.

Vs.

C. VERNON PEIRES Defendant.

" 1.D5."

No. 257/Z.

Class V.

Amount Rs.143,425/-.

Nature : Cancellation of Bond.

Procedure : Regular.

10

JOURNAL.

The 17th day of July, 1948.

Mr. S. Sivasubramaniam, Proctor, files appointment and plaint.

Plaint accepted and summons ordered for 10.9.48.

(Sgd.) S. S. J. GOONESEKERA,
A.D.J.

3.8.48.

Summons issued on Defendant to W.P.

10.9.48.

Mr. S. Sivasubramaniam for Plaintiff.

Summons served on Defendant.

Proxy filed—Ans. 24/9.

Intld. S.S.

24.9.48.

Mr. K. Kanaharatnam for Defendant.

Answer S.O. 8/10.

Intld. S.S.

5.10.48.

Answer filed.

Trial on 26th and 28th July, 1949.

Intld. S.S.

20

30

" 1 D.3 " APPLICATION FOR REGISTRATION of Suit No. 257/Z.*Exhibits.***" 1.D3."**

To the Registrar of Lands, Colombo.

*Defendant-
Appellant's
Exhibits.*

I, SUBRAMANIAM SIVASUBRAMANIAM, Proctor and Notary Public,
of No. 156 Hultsdorf Street, Colombo, do hereby apply for
registration of the action :—

" 1.D3 "
Applica-
tion for
Registra-
tion of
Suit No.
257/Z,
19th July
1948.

Parties : B. MOHAMEDALLY, of No. 4 Charlemont
Road, Wellawatte, Colombo Plaintiff

Vs.

10 C. VERNON PIERES, of No. 15 Clifford Place,
Bambalapitiya, Colombo Defendant.

*Court : District Court of Colombo.**Number of Action : 257/Z.**Prior Registration :**(Details omitted.)*

As a *Lis pendens* affecting the lands situated in your District and
fully described in the schedule hereto annexed.

(Sgd.) S. SIVASUBRAMANIAM,
Proctor for Plaintiff.

20 Colombo, 19th July, 1948.

" 1 D.4 " REGISTRATION RECEIPT.**" 1.D4."****DAY-BOOK RECEIPT.**

28 B.

" 1.D4 "
Registra-
tion
Receipt,
20th July
1948.

Received for Registration 1 Document bearing Day-Book Numbers
and Stamps for Registration as under :—

Value of Stamps

	Rs.	Cts.
24969	57	/-
30 (Three stamps to the value of Rs.7/20 affixed and cancelled) Date : 20.7.48.		

Sgd. Illegibly

Registrar of Lands.

Station : Colombo.

NOTICE.

This Deed is expected to be registered within _____
days from date hereof and its immediate removal after that date is
40 strongly advised to avoid risk of loss or destruction.

*Exhibits.***" 1 D.8 " PLAINT in Suit No. 2101/M.B. Pieres v. Mohamedally.***Defendant-
Appellant's
Exhibits.*

IN THE DISTRICT COURT OF COLOMBO.

C. VERNON PIERES of 32, Dickman's Road,
Bambalapitiya Plaintiff

vs.

BADRUDIN MOHAMEDALLY of 30, Dam Street,
Colombo Defendant.

" 1.D8 "
Plaint in
Suit No.
2101/M.B.,
*Pieres v.
Mohamed-
ally, 29th
September
1948.*

No. 2101/M.B.

Amount Rs.98,440/63

Nature : Money.

10

On this 29th day of September, 1948.

The plaintiff of the Plaintiff above named appearing by Kasipillai
Kanaharatnam his proctor states as follows :—

1. The parties to this action reside and the cause of action herein-
after set out arose at Colombo within the jurisdiction of this court.

2. By a Bond or writing obligatory bearing No. 44 dated 15th January
1948, and attested by S. Coomaraswamy, Notary Public, Colombo (the
original of which is annexed hereto marked letter " A " and pleaded as
part and parcel of this plaintiff) the Defendant above named at Colombo
within the jurisdiction of this Court bound himself his heirs executors
and administrators to pay to the Plaintiff or to his heirs executors and
administrators or assigns on demand the principal sum of Rs.94,125/-
together with interest thereon at the rate of ten per centum per annum
payable monthly from the date of the said bond. 20

3. For securing the payment of the said principal sum of Rs.94,125/-
and interest thereon as aforesaid the Defendant mortgaged and hypothe-
cated to and with the Plaintiffs (A) as a first or primary mortgage free
from all encumbrances whatsoever his undivided share of all those lands
and premises together with the buildings standing thereon mentioned in
the first schedule to the said bond (and which said lands and premises
are fully set out in the First Schedule of this plaintiff) and (B) as a secondary
mortgage subject to the primary mortgage bonds bearing No. 2807 dated
18th November, 1947, and 42 dated 15th January, 1948, attested by the
late R. Muttusamy Notary Public Colombo and S. Coomaraswamy
Notary Public Colombo respectively his undivided share of all those
lands and premises together with the buildings standing thereon and
mentioned in the second schedule to the said Bond No. 44 attested by
S. Coomaraswamy Notary Public Colombo (and which said lands and
premises are also fully set out in the Second Schedule of this plaintiff)
together with all and singular the rights privileges easements servitudes
and appurtenances whatsoever to the said lands and premises described
in the schedule to the said bond and in the schedule hereto together with
all the estate right title interest property claim and demand whatsoever
of the Defendant into out of or upon the said land and premises. 30 40

4. The Defendant has paid to the Plaintiff all the interest up to the 14th day of April, 1948, and thereafter has failed and neglected to pay any sum whatsoever either by way of principal or interest in respect of the said bond No. 44.

Exhibits.
—
Defendant-Appellant's Exhibits.

5. There is now justly and truly due and owing to the Plaintiff from the Defendant in respect of the said Bond the sum of Rs.98,440/63 to wit: Rs.94,125/- being the principal amount and Rs.4,315/63 being the interest thereon from the 15th April, 1948, to date hereof at the rate of ten per centum per annum and which sum or any part thereof the Defendant
10 has failed and neglected to pay to the Plaintiff though thereto often demanded.

“ 1.D8 ”
Plaint in
Suit No.
2101/M.B.,
Pieres v.
Mohamed-
ally, 29th
September
1948,
continued.

Wherefore the Plaintiff prays :—

(A) For judgment against the Defendant for the sum of Rs.98,440/63 together with interest on Rs.94,125/- at the rate of ten per centum per annum from date hereof till date of decree and thereafter at the rate of five per centum per annum on the aggregate amount of the decree till payment in full and costs of this action on some day to be mentioned by Court.

20 (B) That the lands and premises together with the buildings standing thereon and described in the schedule hereto together with all the rights privileges easements servitudes and appurtenances whatsoever to the said lands and premises belonging or usually held occupied used or enjoyed therewith and all the estate, right, title, property claim and demand whatsoever of the Defendant's share into upon or out of the said lands and premises be declared bound and executable for the payment of the said sum of Rs.98,440/63 interest and cost of suit on the footing of the said bonds.

30 (C) That in default of the payment of the sum of Rs.98,440/63 interest and costs of suit within the period aforesaid the said lands and premises be declared specially bound and executable as aforesaid and sold by public auction by Justin Gerhard Vandersmagt Licensed Auctioneer of Colombo, or by some other Licensed Auctioneer named by the Court by public Auction after such advertisement in the *Government Gazette* and in at least one of the local newspapers as the said Auctioneer may consider sufficient upon the annexed Conditions of Sale marked “ B ” or such other conditions of sale as may be prescribed by Court the said Auctioneer being directed and authorised to allow the Plaintiff or anyone else
40 on his behalf to bid for and purchase the said land and premises at such sale and to do so upon such special terms as the Court may impose if the Court imposes any and in the event of the Plaintiff becoming the purchaser thereof to allow the Plaintiff credit to the extent of his claim and costs.

(D) That the Secretary of this Court do execute the necessary conveyance in due form of law in favour of the purchaser or purchasers at such sale on his or their complying with the conditions of sale and being satisfied that if the purchaser be the Plaintiff

Exhibits.

Defendant-Appellant's Exhibits.

“ 1.D8 ”
Plaint in
Suit No.
2101/M.B.,
Pieres v. Mohamedally, 29th
September
1948,
continued.

he has been allowed credit and that in the event of the purchaser or purchasers being a third party or parties that the purchase money has been paid in Court.

(E) That the proceeds of the sale be applied in and towards the payment of the said sum of Rs.98,440/63 interest and costs of suit.

(F) That if the proceeds shall not be sufficient for the payment in full of such amount the Defendant be ordered to pay to the Plaintiff the amount of deficiency with interest thereon at the rate of five per centum per annum until realisation and for those purposes all proper orders and directions may be given and accounts taken by Court. 10

(G) For such other and further relief as to this Court shall seem meet.

(Sgd.) K. KANAHARATNAM,
Proctor for Plaintiff.

“ 1.D9 ”
Court
Journal,
Suit No.
2101/M.B.,
30th
September
1948 to
5th July
1949.

“ 1 D.9 ” COURT JOURNAL, Suit No. 2101/M.B.

IN THE DISTRICT COURT OF COLOMBO.

C. V. PEIRIS Plaintiff

vs.

20

B. MOHAMEDALLY Defendant.

No. 2101/M.B.
Amount Rs.98,440.63.
Nature : Mortgage Bond.
Procedure : Regular.

JOURNAL.

(1) The 30th day of September, 1948.

Mr. K. Kanakaratham, Proctor files appointment (1a) and Plaint (1b) together with Mortgage Bond (1c) and Conditions of sale (1d).

He also files Warrant of Attorney (1e) to confess judgment together with minute of consent (1f) from the Proctor Mr. T. Nadarajah and moves for judgment for Plaintiff as prayed for. 30

He tenders Rs.34/- in stamps for SS.

Support.
Intd. N.S.
D.J.

(2) 1.10.48.

Mr. Sivasubramaniam Proctor files proxy of the Defendant and states that the Defendant denies liability to pay any money due on the bond and

that he has already filed action in case No. 257/Z of this Court for cancellation of the bond. He moves that the Defendant may be given time to file answers.

Exhibits.
—
Defendant-Appellant's Exhibits.

Support.

Intd. N.S.
A.D.J.

(3) 6.10.48.

Mr. Navaratnarajah Advocate in support of (1) asks that Judgment be entered but execution stopped.

“ 1.D9 ”
Court
Journal,
Suit No.
2101/M.B.,
30th
September
1948 to
5th July
1949,
continued.

10 In the special circumstances described I have doubts as to the right of Plaintiff to demand judgment. Mr. Navaratnarajah asks that the matter be fixed for inquiry. Let Proctor for Defendant Mr. Sivasubramaniam be noticed for 11.10.

Intd. N.S.
A.D.J.

Later.

Mr. Advocate Thiagalingam instructed by Mr. Sivasubramaniam for Defendant takes notice of above application and states that he will be filing papers on 11.10.

Intd. N.S.
A.D.J.

20 (4) 8.10.48.

Notice issued on Proctor for Defendant W.P.

(5) 11.10.48.

Mr. K. Kanaharatnam for Plaintiff pt.

Mr. S. Sivasubramaniam for Defendant pt.

Case called—*vide* 3.

Notice not served on proctor for Defendant for want of time—*vide* order 3.

Mr. Sivasubramaniam files papers.

30 Mr. Kanahartnam takes notice.

I fix all matters for inquiry on 25.11.

Intd. N.S.
A.D.J.

(6) 25.11.48.

Mr. K. Kanaharatnam for Plaintiff.

Mr. S. Sivasubramaniam for Defendant.

Inquiry *vide* (5).

Mr. Advocate Navaratnarajah for Plaintiff.

40 Mr. Advocate Thiagalingam with Mr. Advocate Shanmuganayagam for Defendant of consent judgment to be entered for Plaintiff as prayed for if

Exhibits: the ultimate decision of case No. 257/Z of this Court be in favour of Plaintiff
 Defendant- in this case who is Defendant in that case if in case No. 257/Z Plaintiff
 Appellant's in that case obtains a declaration that the bond sued on in this case is
 Exhibits. cancelled and discharged this action will stand dismissed with costs.

“ 1.D9 ”
 Court
 Journal,
 Suit No.
 2101/M.B.,
 30th
 September
 1948 to
 5th July
 1949,
continued.

(7) 5.7.49.

Intd. N.S.,
 A.D.J.

The parties having settled this case Mr. K. Kanaharatnam Proctor for Plaintiff moves that the Plaintiff's action be dismissed without costs. He also moves to place on record that bond No. 44 has been cancelled and 10 discharged.

It is agreed that all claims including those arising from Promissory notes mortgage Bonds or other instruments to which either the Plaintiff or Defendant is a party be waived and cancelled and that there are no outstanding claims. Mr. S. Sivasubramaniam Proctor for Defendant the Plaintiff and the Defendant consent.

Enter decree accordingly.

Intd. N.S.,
 A.D.J.

Plaintiff-
Respondent's
Exhibits.

“ P2 ”

Respon-
 dent's
 Answer in
 Suit No.
 257/Z, 8th
 October
 1948.

“ P.2 ” RESPONDENT'S ANSWER in Suit No. 257/Z

20

IN THE DISTRICT COURT OF COLOMBO.

B. MOHAMEDALLY of No. 4, Charlemont Road,
 Wellawatte, Colombo Plaintiff

vs.

C. VERNON PIERES of No. 15, Clifford Place,
 Bambalapitiya Colombo, presently of 32 Dick-
 man's Road, Bambalapitiya Defendant.

No. 257/Z

Amount Rs.143,425/-

Class V

30

Nature: Money

Procedure: Regular

On this 8th day of October, 1948.

The answer of the Defendant above-named appearing by Kasipillai Kanakarathnam his proctor states as follows:—

1. Answering to paragraph 1 of the Plaint the Defendant admits the jurisdiction of this Court.

2. Answering to paragraphs 2, 3, 4, 5, 6, 7 and 8 of the plaint the Defendant states :—

Exhibits.

(A) The Defendant who has been a good friend of the Plaintiff since the year 1939 lent and advanced to the Plaintiff at 10% per annum Rs.37,500/- on the 5th September, 1947, Rs.15,525 on the 26th September, 1947, Rs.30,660 on the 11th October, 1947, and Rs.36,450 on the 16th October, 1947 on the security of promissory notes made and signed by the Plaintiff on the respective dates of the loans.

*Plaintiff-
Respondent's
Exhibits.*

“ P2 ”

Respon-
dent's
Answer in
Suit No.
257/Z, 8th
October
1948,
continued.

10 (B) The Plaintiff has made from time to time various payments to Defendant on account of the monies due on the said promissory notes and on or about the 15th January, 1948, there was due to the Defendant from the Plaintiff the sum of Rs.94,125/- on the said promissory notes.

20 (C) For securing the repayment of this sum of Rs.94,125/- together with interest due thereon the Plaintiff by bond No. 44 dated 15th January, 1948 and attested by S. Coomaraswamy Notary Public, Colombo, Mortgaged to and with the Defendant the properties described in the schedule to the said Bond and further duly executed the warrant of Attorney to confess judgment bearing No. 45 and dated the 15th January 1948 and attested by the said S. Coomaraswamy, Notary Public. Save as admitted herein the Defendant denies the other averments in the said paragraphs.

3. The Defendant denies that the Plaintiff paid the Defendant the sum of Rs.20,000/- on the 16th October, 1947, or on any other date. The Defendant denies the averments in paragraphs 9, 10, 11 and 12 of the plaint.

4. Answering to paragraphs 13, 14, 15 and 16 of the plaint the Defendant states :—

30 (A) The Plaintiff borrowed a sum of Rs.25,000/- from K. R. S. K. R. Karuppan Chettiar on Bond No. 2807 dated the 18th November, 1947 and attested by R. Muttusamy Notary Public.

(B) The Defendant denies that Plaintiff paid to him Rs.22,300/- or any money borrowed by him on the said bond. Save as herein admitted the Defendant denies the averments in paragraphs 13, 14, 15 and 16 of the plaint.

40 5. Answering to paragraphs 17, 18, 19, 20, 21, 22, 23, and 24 of the plaint the Defendant states that the Plaintiff has made payments to Defendant on account of the interest due and payable under bond No. 44 referred to above, such payments aggregating to Rs.2,353.98. The Defendant denies the averments in the said paragraphs which are contrary to or inconsistent with the allegations contained herein.

6. The Defendant denies the averments in paragraphs 24 and 25 of the plaint.

Exhibits.
 ———
*Plaintiff-
 Respondent's
 Exhibits.*
 ———
 " P2 "
 Respon-
 dent's
 Answer in
 Suit No.
 257/Z, 8th
 October
 1948,
continued.

7. Further answering the Defendant states that he has filed action in the District Court of Colombo in Case No. 2101/M.B. against the Plaintiff for the recovery of the sum of Rs.98,440/63 being the amount due to him on the said Mortgage Bond No. 44 dated and attested by S. Coomaraswamy of Colombo Notary Public.

Wherefore the Defendant prays that the Plaintiff's action be dismissed with costs and for such other and further relief as to this Court shall seem meet.

(Sgd.) K. KANAHARATNAM,
 Proctor for Defendant. 10

Settled by
 (Sgd.) Illegibly.
 (Sgd.) Illegibly.

" P3 "
 Petition for
 stay in
 Suit No.
 2101/M.B.,
 11th
 October
 1948.

" P 3 " PETITION for Stay in Suit No. 2101/M.B.

No. 2101/M.B.

IN THE DISTRICT COURT OF COLOMBO.

C. VERNON PIERES of 32, Dickman's Road,
 Bambalapitiya Plaintiff

vs.

BADRUDIN MOHAMEDALLY of 50 Dam Street,
 Colombo Defendant. 20

On this 11th day of October, 1948.

The Petition of the Defendant above-named appearing by his proctor Subramaniam Sivasubramaniam states as follows :—

1. The Defendant denies liability to pay the Plaintiff the amount claimed in the plaint or any other sum of money.

2. The Defendant on the other hand states that various sums of money amounting to Rs.49,300/- are due to the Defendant from the Plaintiff.

3. The Defendant states that the document purporting to be a Warrant of Attorney to Confess Judgment filed of record in this case bearing No. 45 on the strength of which the Plaintiff is seeking to obtain judgment is bad in law and is null and void for non-compliance with section 31 of the Civil Procedure Code. Further the said document was not duly executed according to law and is otherwise not enforceable. In the circumstances the Plaintiff cannot obtain judgment on an alleged consent based on the said document. 30

4. The Defendant states that the Mortgage Bond No. 44 filed of record was executed without any consideration and that the Plaintiff wrongfully and deceitfully induced the Defendant to sign the said document and the collateral document bearing No. 45 aforesaid. 40

5. The Defendant specially denies that he paid to the Plaintiff any interest on the bond as alleged in paragraph 4 of the plaint.

6. The Defendant further states that he has already instituted action No. 257 (Z) of this Court against the Plaintiff as early as the 17th of July, 1948, wherein he has prayed *inter alia* that the bond No. 44 sued upon in the present action and the Warrant of Attorney to Confess Judgment No. 45 be declared null and void and for the return of the various sums of money obtained from the Defendant amounting to Rs.49,300/-.

7. Summons in case No. 257/Z was served on the Defendant (therein) who is the Plaintiff in this case on 12th August, 1948. The summons was returnable on 10th September, 1948, and the Defendant (therein) appeared in Court through his Proctor and undertook to file answer and took time till 24th September, 1948. On the 24th September, the proctor for the Defendant (therein) appeared in Court and did not file answer but undertook to file it on 8th October, 1948, and took time till that date. The Defendant (therein) has filed answer and the case has been fixed for trial.

8. It is respectfully submitted that the Plaintiff is in the circumstances debarred in law from instituting and or maintaining and or proceeding with the present action.

9. This Court is already seised of the subject-matter of the present action and the Plaintiff in instituting the present action is in the circumstances guilty of bad faith and is attempting to abuse the powers of Court.

10. The subject-matter of the present action is already before Court for adjudication and the Plaintiff by instituting the present action is attempting to nullify the proceedings of the action already pending and the orders of Court therein and is trying to bypass and circumvent the same by making use of a document purporting to be a Warrant of Attorney to Confess Judgment which the Defendant has already impugned.

11. The Defendant in the plaint filed by him in the aforementioned action No. 257/Z avers *inter alia* as follows :—

(A) That the Defendant (therein) and the Plaintiff (therein) were intimately known to each other from the time of their school-days and the Defendant (therein) was in a position of active confidence towards the Plaintiff (therein) prior to and during the periods material to the causes of action therein set out and was able to dominate the will of the Plaintiff (therein). That by wrongfully availing himself of the position aforesaid and by the exercise of undue influence the Defendant (therein) wrongfully and deceitfully induced the Plaintiff (therein) to sign the promissory notes, mortgage bonds and Warrant of Attorney to Confess Judgment referred to therein and also to part with the various sums of money mentioned therein to the Defendant (therein).

(B) That the Defendant (therein) in or about November, 1947, wrongfully and deceitfully induced the Plaintiff (therein) to sign the four ante-dated promissory notes referred to in Bond No. 44 hereinafter mentioned in favour of the Defendant (therein) without any consideration. That the said notes are for the sums of Rs.37,500/-, Rs.15,525/-, Rs.30,650/- and Rs.35,450/-.

Exhibits.

*Plaintiff-
Respondent's
Exhibits.*

“ P3 ”

Petition for
stay in
Suit No.
2101/M.B.,
11th
October
1948,
continued.

Exhibits.

—
*Plaintiff-
Respondent's
Exhibits.*

—
" P3 "

Petition for
stay in
Suit No.
2101/M.B.,
11th
October
1948,
continued.

(C) That the said four promissory notes are fictitious within the meaning of the Money Lending Ordinance. That no consideration passed on the said notes.

(D) That subsequently the Defendant (therein) wrongfully and deceitfully induced the Plaintiff (therein) to sign a Mortgage Bond bearing No. 44 dated 15th January, 1948, and attested by Mr. S. Coomaraswamy, Notary Public of Colombo, purporting to hypothecate the properties set out in the Schedule thereto in favour of the Defendant (therein) for the sum of Rs.94,125/- being part of the alleged amounts of the aforesaid four promissory notes and 10 interest at ten per centum per annum as stated thereon. That the said mortgage bond was executed without any consideration whatsoever and nothing is due thereunder.

(E) That the Defendant (therein) also wrongfully and deceitfully induced the Plaintiff (therein) to sign a collateral document which the Plaintiff (therein) now understands is a warrant of Attorney to Confess Judgment bearing No. 45 dated 15th January, 1948, and attested by Mr. S. Coomaraswamy, Notary Public of Colombo.

(F) That the Defendant (therein) is now falsely representing that monies were actually lent by him to the Plaintiff (therein) 20 and that the said bond was executed as security therefor and is fraudulently claiming repayment thereof.

(G) That a cause of action has thus accrued to the Plaintiff (therein) to sue the Defendant (therein) for a declaration that no money is due from the Plaintiff (therein) on the said bond No. 44 and for the cancellation of the said bond and of the said Warrant of Attorney to Confess Judgment No. 45 and for the return of the said four promissory notes.

12. The Defendant will be gravely and irreparably prejudiced in the event of Judgment being entered against him and proceedings not being 30 stayed or his not being given an opportunity to file an answer in the present action. The Plaintiff on the other hand will not be prejudiced in any manner by the Court staying proceedings or giving the Defendant time to file answer.

Wherefore the Defendant prays that the Court will be pleased :—

(A) to stay proceedings in this case until the final determination and conclusion of the aforesaid action No. 257/Z of this Court, or in the alternative,

(B) to grant time to the Defendant to file answer in this case.

(Sgd.) S. SIVASUBRAMANIAM, 40
Proctor for Petitioner.

“ P.4 ” AFFIDAVIT of First Defendant in Suit No. 2101/M.B.

Exhibits.

P4.

No. 2101/M.B.

*Plaintiff-
Respondent's
Exhibits.*

IN THE DISTRICT COURT OF COLOMBO.

“ P4 ”

*Affidavit of
First
Defendant
in Suit
No. 2101/
M.B, 11th
October
1948.*

C. VERNON PIERES of 32, Dickman's Road,
Bambalapitiya Plaintiff

vs.

BADRUDIN MOHAMEDALLY of No. 50, Dam
Street, Colombo Defendant.

10 I, BADRUDIN MOHAMEDALLY being a Muslim do hereby truly
sincerely and solemnly declare and affirm as follows :—

1. I am the Defendant in this case.

*(Paragraphs 2 to 13 of this affidavit specifically repeat and verify the
allegations contained in paragraphs 1 to 12 of Exhibit P.3.)*

Read over signed and affirmed to at }
Colombo on this 11th day of October, } (Sgd.) B. M. ALLY.
1948

Before me,
(Sgd.) D. H. JAYASINGHE,
Commissioner for Oaths.

20

11.10.48.

*Defendant-
Appellant's
Exhibits.*

“ 1 D.13 ” LETTER. Second Defendant to Plaintiff.

5/49.

G. E. Misso Esqr.

“ 1.D13 ”
Letter,
Second
Defendant
to Plaintiff,
26th May
1949.

Dear Sir,

By your action my witness has caused this case to be settled for
Rs.27,428/25 being Rs.22,428/25 tax and Rs.500/- the penalty.

30 By your action I have lost a lac of rupees in other words the existence
of your daughter and grand children. Now you can keep your daughter,
your grand-children, your money and your pride.

Please be good enough to call over with my pronote and receipt which
is in your custody at 12.30 p.m. on the 27th May 1949 at Mr. G. M. Abdul
Cader's office at Hultsdorf Street, when you can obtain the Rs.22,428/25

Exhibits. paid to me to honour my income tax. You will then see me receiving this sum and signing the motion which means the driving of the last nail to your daughter's coffin.

Defendant-Appellant's Exhibits.

I am sending the two motions to be returned immediately after your perusal.

" 1.D13 "
Letter,
Second
Defendant
to Plaintiff,
26th May
1949,
continued.

Please be good enough to keep this appointment.

Yours faithfully,
(Sgd.) VERNON PIERES.

Tomorrow morning the 27th May, 1949.

Typed by V.S.

10

Compared by : Intd. Illegibly.

True copy of the document marked P.2 filed of record in D.C. Colombo Case No. 11594/S.

(Sgd.) Illegibly,
Secretary,

10.2.51

District Court, Colombo.

" 1.D14 "
Letter,
Second
Defendant
to Plaintiff,
15th June
1949.

" 1 D.14 " LETTER. Second Defendant to Plaintiff.

1 D 14.

Vernon Pieres,
No. 32, Dickman's Road,
15th June, 1949.

G. E. Misso Esq.,

20

Dear Sir,

I am informed by Mr. Abdul Cader that you had inquired above 2 case numbers this morning in view of his telephone message last night.

This is to inform you that it has been decided and agreed that we should meet at 4 p.m. tomorrow evening the 16th June, 1949, in respect of the settlement at Mr. Abdul Cader's office.

Please be good enough to keep this appointment and also produce the note and receipt which is in your custody.

Acceptance of this letter will be appreciating.

You will be paid by cheque duly endorsed by me.

30

Yours faithfully,
(Sgd.) VERNON PIERES.

Typed by : V.S.

Compared by : Intd. Illegibly.

True copy of the document marked P4 filed of record in Case No. 11594/S D.C. Colombo.

Sgd. Illegibly,
Secretary,
District Court, Colombo.

10.2.51.

40

“ 1 D.6 ” SETTLEMENT of Suit No. 257/Z.

1 D 6.

IN THE DISTRICT COURT OF COLOMBO.

No. 257/Z.

B. MOHAMEDALLY of No. 4, Charlemont Road,
Wellawatte, Colombo Plaintiff

vs.

C. VERNON PIERES of No. 16, Clifford Place,
Bambalapitiya Defendant.

Exhibits.
—
Defendant-Appellant's Exhibits.
—
“ 1.D6 ”
Settlement
of Suit
No. 257/Z,
4th July
1949.

10 The parties having settled the case and Bond No. 44, dated 15th January, 1948, attested by Mr. S. Coomaraswamy Notary Public of Colombo, having been cancelled and discharged by the Defendant, I move that the Plaintiff's action be dismissed with costs.

It is further agreed that all claims including those arising from any promissory notes mortgage bonds or other instruments to which either the Plaintiff or Defendant is a party have been waived and cancelled and that there are no outstanding claims.

Colombo, 4th July, 1949.

(Sgd.) S. SIVASUBRAMANIAM,
Proctor for Plaintiff.

20

We consent.

(Sgd.) B. MOHAMEDALLY.

(Sgd.) K. KANAHARATNAM,
Proctor for Defendant.

(Sgd.) VERNON PIERES,
Defendant.



Exhibits.

" 1 D.10 " SETTLEMENT of Suit No. 2101/M.B.

*Defendant-
Appellant's
Exhibits.* 1 D 10.

No. 2101/M.B.

" 1.D10 " IN THE DISTRICT COURT OF COLOMBO.

Settlement
of Suit
No.
2101/M.B.,
4th July
1949.C. VERNON PIERES of Dickman's Road,
Bambalapitiya Plaintiff*vs.*BADRUDEEN MOHAMEDALLY of No. 50 Dam
Street, Colombo Defendant.

The parties have settled this case. I move that the Plaintiff's action 10 be dismissed without costs.

I further move to place on record that Bond No. 44 dated 15th January, 1948 attested by Mr. S. Coomaraswamy, Notary Public of Colombo has been cancelled and discharged.

It is further agreed that all claims including those arising from any promissory notes mortgage bonds or other instruments to which either the Plaintiff or Defendant is a party have been waived and cancelled and that there are no outstanding claims.

Colombo, 4th July, 1949.

(Sgd.) K. KANAHARATNAM, 20
Proctor for Plaintiff.

We consent.

(Sgd.) C. VERNON PIERES,
Plaintiff.(Sgd.) S. SIVASUBRAMANIAM,
Proctor for Defendant.(Sgd.) BADRUDIN MOHAMEDALLY,
Defendant.

" 1 D.7 " DECREE in Suit No. 257/Z.

Exhibits.

DECREE.

No. 257/Z.

*Defendant-
Appellant's
Exhibits.*

IN THE DISTRICT COURT OF COLOMBO.

B. MOHAMEDALLY of No. 4, Charlemont Road,
Wellawatte, Colombo Plaintiff

Vs.

C. VERNON PIERES of No. 15, Clifford Place,
Bambalapitiya Defendant.

" 1.D7 "
Decree in
Suit No.
257/Z,
5th July
1949.

10 This action coming on for final disposal before H. A. de Silva Esqr., on the 5th day of July, 1949, in the presence of Proctor on the part of the Plaintiff and of Proctor on the part of the Defendant it is ordered and decreed of consent that the Plaintiff's action be and the same is hereby dismissed without costs.

(Sgd.) H. A. DE SILVA,
District Judge.

The 5th day of July, 1949.

" 1 D.11 " DECREE in Suit No. 2101/M.B.

" 1.D11 "
Decree in
Suit No.
2101/M.B.,
5th July
1949.

No. 2101/M.B.

20

DECREE.

IN THE DISTRICT COURT OF COLOMBO.

C. VERNON PIERES of 32, Dickman's Road,
Bambalapitiya Plaintiff

Vs.

BADRUDIN MOHAMEDALLY of No. 50, Dam
Street, Colombo Defendant.

30 THIS action coming on for final disposal before N. Sinnatamby Esquire, Additional District Judge of Colombo on the 5th day of July, 1949 in the presence of Mr. K. Kanagaratnam Proctor, on the part of the Plaintiff and Mr. S. Sivasubramaniam, Proctor, on the part of the Defendant.

IT IS ORDERED AND DECREED of consent that the Plaintiff's action be and the same is hereby dismissed without costs.

IT IS FURTHER ORDERED AND DECREED that the Bond No. 44 dated the 15th day of January, 1948, and attested by S. Coomaraswamy, Notary Public, be and the same is hereby cancelled and discharged.

*Exhibits.**Defendant-
Appellant's
Exhibits.*

AND IT IS FURTHER ORDERED AND DECREED that all claims including those arising from Promissory Notes, Mortgage Bonds or other instruments, to which either the Plaintiff or Defendant is a party be waived and cancelled and that there be no outstanding claims.

" 1.D11 "
Decree in
Suit No.
2101/M.B.,
5th July
1949,
continued.

(Sgd.) M. C. SANSONI,
Additional District Judge.
8.2.51.

The 5th day of July, 1949.

Drawn by me.

(Sgd.) S. SIVASUBRAMANIAM,
Proctor for Defendant.

10

" 1.D15 "
Letter,
Plaintiff's
Proctor to
First
Defendant,
17th
October
1949.

" 1 D.15 " LETTER. Plaintiff's Proctor to First Defendant.

Herman J. C. Perera.
Proctor S. C. & Notary Public.
Offices : No. 397, Dam Street,
Hultsdorf and
Roseneath.

Uyana, Moratuwa.
Colombo, 17th October, 1949.

Badrudin Mohamedally Esqr.,
50, Dam Street, Pettah.

20

Dear Sir,

I am instructed by my client Mr. G. E. Misso of " Clovelly " Dickman's Road, Havelock Town, to demand of you the immediate payment of the sum of Rs.35,450/- being amount due on your promissory note dated 16th October, 1947 in favour of Vernon Pieres Auctioneer and Broker of 6, Ferry Street, Hultsdorf which note was endorsed to my client on the 18th December, 1948 for value paid.

In the event of your failing to comply with this demand within 7 days from date hereof I am further instructed to institute legal 30 proceedings against you, for the recovery of same.

Yours faithfully,
(Sgd.) HERMAN J. C. PERERA.

" 1 D.16 " LETTER. First Defendant's Proctor to Plaintiff's Proctor.

Exhibits.

24th October, 1949.

*Defendant-
Appellant's
Exhibits.*

Herman J. C. Perera Esq.,
Proctor,
397, Dam Street,
Colombo.

" 1.D16 "
Letter,
First
Defendant's
Proctor to
Plaintiff's
Proctor,
24th
October
1949.

Dear Sir,

Your letter of the 17th instant addressed to Mr. Badrudin Mohamedally at the instance of Mr. G. E. Misso has been handed to me for attention.
10 My client is surprised at the claim made by your client and has instructed me to deny that a sum of Rs.35,450/- or any sum whatsoever is due from him to your client.

Yours faithfully,
(Sgd.) S. SIVASUBRAMANIAM.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN
BADURDIN MOHAMEDALLY (First Defendant) *Appellant*
AND
G E MISSO (Plaintiff) VERNON PIERIS (Second
Defendant) *Respondents.*

RECORD OF PROCEEDINGS

A. L. BRYDEN & WILLIAMS,
53 VICTORIA STREET,
LONDON, S.W.1,
Solicitors for the Appellant.
T. L. WILSON & CO.,
6 WESTMINSTER PALACE GARDENS,
ARTILLERY ROW,
LONDON, S.W.1,
Solicitors for the First Respondent.