Madras High Court
Swaminatha Odayar vs Subbarama Aiyar And Anr. on 8 September, 1926
Equivalent citations: (1926) 51 MLJ 856
Author: Ramesam
JUDGMENT Ramesam, J.

1. The facts out of which this appeal arises are in the main undisputed and may be shortly stated The 1st plaintiff obtained some lands under a will. On 16th August, 1917 he entered into an agreement to sell the said lands to the defendant for Rs. 15,250 and on that day obtained a cash advance of Rs. 1,250 towards the consideration. On the 24th August a further sum of Rs. 220 was paid towards the consideration. On the 5th September, 1917 a sale deed was executed, a further sum of Rs. 1,780 being paid in cash. There remained an amount of Rs. 12,000 due towards the consideration. The sale deed provided that Rs. 6,000 was to be paid before the Sub-Registrar and the other Rs. 6,000 was to be paid to the 1st plaintiff's mother Sitalakshmi Ammal, who is the 2nd plaintiff. Accordingly on the same day the defendant executed a promissory note for Rs. 6,000 in favour of the 2nd plaintiff. Soon after the 1st plaintiff refused to register the sale deed contending that it was. nominal. The defendant obtained compulsory registration of the sale deed. But the Rs. 6,000 was not paid before the Sub-Registrar. The defendant then filed a suit O.S. No. 269 of 1919 in the Court of the District Munsif of Valangiman for possession of the lands sold. The 1st plaintiff who was the only defendant in that suit contended that the sale deed was a nominal transaction. The District Munsif dismissed the suit. On appeal by the plaintiff therein (the present defendant) the Subordinate Judge of Kumbakonam decreed the suit. He also passed a decree for the payment of Rs. 6,000 which was originally intended to be paid before the Sub-Registrar, to the defendant therein (the present 1st plaintiff). This was on 21st January, 1921. There was a second appeal to the High Court which was dismissed on the merits of that suit. One of the grounds in second appeal was that the learned Judge ought to have recorded a distinct finding in regard to the six thousand rupees promissory note and made provision for its payment also. On this ground the learned Judges who disposed of the second appeal said:

As regards the sum of Rs. 6,000 payable to the defendant's mother it is admitted a promissory note has been executed and that a suit is pending. There is no necessity to provide for payment to her in this suit especially as she is not a party.

2. In the interval between the disposal of the appeal by the Subordinate Judge and the disposal of the second appeal the present suit was filed on 11th February, 1922 to recover the sum due on the promissory note (Ex. B.). It is alleged in the plaint that the 2nd plaintiff was not a party "to the contract, that the promissory note was executed by the defendant in the name of the 2nd plaintiff but really for the benefit of the 1st plaintiff. It is also alleged that the promissory note was not delivered to the 1st plaintiff at the date of the execution, that the note was kept with one Nataraja Pillai as an inter mediary and that it was obtained from Nataraja Pillai long after the appeal judgment of the Subordinate Judge in the former suit. This last allegation is denied by the defendant. The Subordinate Judge said nothing on this point. He found that the 2nd plaintiff is a mere benamidar for the 1st plaintiff, that the suit was not barred and decreed the suit. He also found that the plaintiff is entitled to the vendor's lien for unpaid purchase money and gave a decree for

sale. The defendant appeals. It may be observed at the outset that the burden of proving that the promissory note was not delivered on the date of the execution is on the plaintiffs. No attempt has been made to prove the allegation and I think it must be found that the promissory note was delivered to the 1st plaintiff on the date of the execution and that the story about its being kept with Nataraja Pillai is a myth.

3. One point argued by the appellant is, that as a result of the former litigation it must be taken as having been impliedly decided in it that the 2nd plaintiff was the person entitled to thebeneficial interest in Ex. B. I do not think so. Any question relating to the note arose for the first time only after the Subordinate Judge found that the sale deed was not nominal. We do not know what happened before the Subordinate Judge at the time of delivering the judgment in that suit. The High Court merely abstained from expressing any opinion on this matter for the reason that a separate suit had been filed and that the present 2nd plaintiff was not a party to that litigation. It cannot be said that any conclusion is necessarily implied in the course taken by the learned Judges.

4. The next important point argued by the appellant is, that the and plaintiff is the only person competent to sue on Ex. B, and therefore the vendor's lien was extinguished. On the other hand, it is contended for the respondents that there is nothing to show that the 2nd plaintiff ever accepted the note and therefore the right to the balance of the purchase money remained with the 1st plaintiff and with it the vendor's lien. It is admitted by the defendant in his former deposition now filed as Ex. E, that the 2nd plaintiff was not present when Ex. A was executed. Until therefore the 2nd plaintiff accepts the note the note has not become operative. Seeing that the defendant has performed what was required of him by the 1st plaintiff at the time of the transaction one would expect that, if the 2nd plaintiff refused to accept the note, the 1st plaintiff would have communicated such a fact within a reasonable time to the defendant and demanded the balance of the purchase money as on a failure of consideration. It is doubtful whether in such a case, the vendor's lien was at first extinguished, and if so, would revive. But it is unnecessary to express any opinion on that matter. No such notice was given by the 1st plaintiff and he behaved throughout as if he was content that the right in the note should remain in the 2nd plaintiff. It is really unnecessary to consider whether the 1 st plaintiff was the person beneficially interested in the note. Probably, he was and is, though, at the same time, it must be remarked that no formal evidence has been adduced by the plaintiffs on the matter as they ought to have done. But whoever the person entitled to the beneficial interest may be, the only person that is entitled to sue on it is the 2nd plaintiff, though it may be that after the money was recovered she would have to pay it to the 1st plaintiff. It was held in Reoti Lal v. Manna Kunwar (1922) I.L.R. 44 A 290 that a person whose name does not appear in the promissory note cannot sue on it alleging that the payee was a benamidar for himself. [See also Subramania Thevan v. Arunachala Thevan (1907) 18 MLJ 186]. Mr. T.M. Krishnaswami Aiyar appearing for the respondents contended that the note itself not having been delivered to the payee who was not present at the time was a void note. I cannot agree with this contention. The 1st plaintiff purported to act as agent of the 2nd plaintiff in taking the note and it was open to the 2nd plaintiff to ratify his act, though until it is so ratified the 2nd plaintiff does not step into the transaction. In the present case, the 2nd plaintiff is willing to have a decree in her favour if the Court finds that the 1st plaintiff is not entitled to sue. This ratification is good enough. I must therefore hold that the 2nd plaintiff is the only person entitled to sue on Ex. B. The question that arises on this finding is, whether the

vendor's lien is lost. The following propositions are undisputed:

1. A mere direction by the vendor to the vendee to pay the whole or a part of the purchase money to a third person does not extinguish the lien [vide Sivasubramania Aiyar v. Subramania Aiyar (1916) I.L.R. 39 M 997 : 31 M L J 530 (F B)].

2. If such direction is followed by mere payment of the 3rd person but not by a fresh contract by the vendee with the 3rd person so as to effect a complete novation, the lien is not lost [vide Theyagaraja Mudaliar v. Seshappier (1919) 10 L W 518]

3. Where it: was intended that the vendee should execute a mortgage deed and extinguish the lien but the mortgage deed was not completed by registration and remained a simple' bond, the lien is not extinguished [vide Ranganayaki Ammal v. Parthasarathi Aiyangar (1919) 10 L W 550]

4. Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee and the third person did not pay, even then, if the third person's note or bond was only an additional security to the vendee's liability and not in substitution of it, the lien is not lost [cf. Ralagurumoorthi v. Nagulu (1921) 14 LW 191].

5. Where the vendor himself takes a promissory note or bond and where the right in it was assigned by him to a third person or where his right was attached in execution of a decree and purchased by a third person [vide Sambasiva Aiyar v. Venkatarama Aiyar (1926) M.W.N. 569] the vendor's right to the lien passes to the third person under Section 8 of the Transfer of Property Act and is available to the assignee or purchaser.

5. But if in this last case the vendor took a negotiable instrument and the instrument is not assigned but endorsed under theLaw Merchant it is doubtful if Section 8 of the Transfer of Property Act will apply and the endorsee will be entitled to the lien. It is unnecessary to express an opinion on that matter now.

6. But where a complete novation is effected and a new contract between the vendee and a third person was effected in substitution of the vendee's liability to the vendor this amounts to a contract to the contrary within the meaning of Section 55 of the Transfer of Property Act and the lien is extinguished. I am willing to concede that even in such a case if the document taken is not a negotiable instrument but only a bond and if it is taken benami for the benefit of the vendor so that he may still sue on it the arrangement: being known to the vendee and the vendor's lien remains provided he is not prejudiced. But where the document taken is a negotiable promissory note so as to disable the vendor from suing even if he is the person beneficially interested in the money after its recovery the lien must be held to be lost as ostensibly the payee of the note is the only person entitled to sue. The note might have been endorsed not to the Vendor but to any third person. To say that the note in the hands of the payee has got the lien attached to it involves anomalous positions. Anyhow, there is nothing to show that the vendee knew the benami nature of the note. 1 therefore hold that the and plaintiff is not entitled to the 'vendor's lien in this case.

7. As the suit was filed more than four years after the execution of Ex.- A the question next arises whether the suit is barred by limitation. The plaintiffs rely upon the defendant's deposition, Ex. E, as an acknowledgment to save limitation. The material passage in the deposition runs thus:

I was directed to pay Rs, 6,000 to defendant's1 mother Seethalakshmi Ammal in Ex. B. I executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro-note to Subba-rama Aiyar. I owed Rs. 6,000 more under Ex. B.

* * * *

Defendant did not tell me why he wanted me to pay Rs, 6,000 to his mother. I have not re

8. The appellant contends that this does not amount to an acknowledgment. A case decided
It'may not necessarily always be that deduction to be drawn.

9. In Kandasami Reddi v. Suppammal (1921) I.L.R. 45 M 443 : 42 ML J 368 Ayling, J., afte
Each case must be treated on its own merits and then said
From the language used and the circumstances in which the acknowledgment is made, it mu

10. Earlier in the judgment he observed after citing the decision of the Privy Council i
I can see no ground whatever for holding that their Lordships were considering anything

11. Mr. Rajagopala Aiyangar in replying for the appellant contended that the acknowledgment in a deposition must be expressed and not implied. He relied on Venkata v. Parthasaradhi (1892) I.L.R. 16 M 220 : 3 M L J 35. But the authorities cited in this decision m Venkata v. Parthasaradhi (1892) I.L.R. 16 M 220 : 3 M L J 35 in the language of Ayling, J., already cited and the decision in Maniram Seth v. Seth Rupchand (1906) I.L.R. 33 C 1047 : 16 MLJ 300 (P C) show that it need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a matter of law as Miller, J. seemed to have thought. This is also the view of Schwabe, C.J., and Krishnan, J., in The Official Assignee of Madras v. Subramania Aiyar (1923) 46 M L J 1.

12. When we look at the circumstances of this case, we find that the defendant when he was examined as his 1st witness in the former suit was anxious to show that the sale deed was not nominal and that some consideration was paid for it. If any payment was made towards the promissory note he would have stated it. It no payment was made, his position in that case was one of willingness to pay the amount due on the note and the amount: to be paid before the Sub-Registrar The whole tenor of the deposition was that while he was willing to perform his side of the contract the vendor would not allow him to do so and prevented him from making further payments by the attitude he took. The deposition clearly implies that the note was real and subsisting and on account of fault of his, no further payments were, made towards it, but that he is

willing to pay it if the other side was willing to receive it. I think there is an acknowledgment of subsisting liability in this case. This case is stronger than the decision of Schwabe, C.J., and Krishnan, J., above mentioned, where, an omission in a written statement to deny the allegation in a plaint is all that we have. This case is similar to the decision in Maniram Seth v. Seth Rupchand (1906) I.L.R. 33 C 1047 : 16 MLJ 300 (P C) where also it was an inference from the circumstances. Mr. Rajagopala Aiyangar relied on the case Mithukumara Mudaliar v. Chockalinga Mudaliar (1923) 17 L W 674. Neither from the report nor from the printed papers it is clear why the former deposition was made and I do not think that case helps us in deciding the present case.

13. In the result, I hold that the suit is not barred by limitation. The decree of the Lower Court will be vacated and a personal decree will be passed for the amount sued for in favour of 1st plaintiff, as the 2nd plaintiff consents to such a decree.

14. The order as to costs in the Court below will stand. In appeal, each party will bear its own costs.

Reilly, J.

15. So far as this suit is a suit on the promissory note, Ex. B, the learned Subordinate Judge has found that it is not time barred because it is saved by an acknowledgment made by defendant in his deposition, Ex. E, in the previous suit, which contains a statement that he executed the note without any denial that the liability under the note was then subsisting. The Subordinate Judge has relied on Subbarama Aiyar v. Veerabhadra Pillai (1921) 41 MLJ 217. One of the reasons for the decision of the learned Judges in that case was a dictum of Miller, J. in Ranganayakulu Aiya v. Subbayan (1908) 5 M L T 71.

An acknowledgment of liability existing at a past date without any allegation that the liability has since ceased is presumed to be an acknowledgment of liability when the statement is made.

16. That Miller, J., stated as the effect of the decision of the Privy Council in Maniram Seth v. Seth Rupchand (1906) I.L.R. 33 C 1047 : 16 M L J 300 (P C). With the greatest respect I do not think it can be doubted that Miller, J., read more into the decision in Maniram Seth's case (12) than can be found in it and stated his proposition too widely. 1 entirely agree with Ayling, J.'s interpretation of Maniram Seth's case (12) in Kandasami Reddi v. Suppammal (1921) I.L.R. 45 M 443 : 42 ML J 268 which has been approved in The Official Assignee of Madras v. Subramania Aiyar (1923) 46 M L J 1. In some cases an admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues. Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission we must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of that admission had any need or incentive in the circumstances to deny the continuance of the liability, if he would do so, and whether he had an opportunity of denying it. When the admission of a liability in the past is made in a deposition given in Court we must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability, remembering that a witness under examination is not always at liberty to say all that he may wish to say or all that he may think it

necessary to say in order to protect his own interests but has to answer the questions put to him. With this warning in mind let us examine what defendant said in his deposition in the previous case. The important words appear to me to be I was directed to pay Rs. 6,000 to defendant's mother, Sitalakshmi Ammal, in Ex. B (the sale deed). 1 executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro-note to Subbarama Aiyar.

17. Now in that suit the present defendant was trying to show that the sale was a real transaction, which the present plaintiff 1 denied. Defendant was anxious to show that he had done his part in the matter and was explaining in his deposition all that he had done in making part payments and in other ways. He had just mentioned that he had made three such payments. And he went on after the part of his deposition now in question to explain why he did not pay the remaining Rs. 6,000 of the purchase money, as intended, before the Sub-Registrar. In the circumstances it is clear that it was very much to his interest, when he mentioned this promissory note, to mention also any payment which he had made under it, And it must be noticed that the part of his deposition which I have quoted was made in examination-in-chief. Defendant's vakil, who had just elicited his evidence about part payments made, must have been fully aware that evidence that any payment had been made towards the discharge of the promissory note would strengthen his case, and it cannot be supposed that he would not have given defendant an opportunity of mentioning any such payment. In the circumstances I think it is clear that defendant's statement that he executed the promissory note coupled with his failure to mention any payment towards the discharge of it was an implied admission that the liability under the note was then subsisting. I agree therefore in finding that defendant made an acknowledgment within the meaning of Section 19 of the Limitation Act, which saves the suit on the note from being time-barred.

18. Curiously enough Mr. Krishnaswami Aiyar for plaintiffs has been at pains to argue before us that the promissory note, Ex. B, though it is in part the basis of plaintiffs' suit, is not valid because it was never delivered to plaintiff 2, the payee named in it. In the plaint it is stated that Ex. B was not delivered to either plaintiff but was left with one Nataraja Pillai. In the defendant's written statement it is alleged that Ex. B was delivered to plaintiff 1 on behalf of plaintiff 2, who is his mother. The only oral evidence on this question is that of defendant, whose deposition, Ex. E, in the previous suit was admitted by consent. In that deposition defendant states that he delivered the promissory note to plaintiff I immediately after the sale-deed was written. Plaintiff I did not go into the witness-box to deny this. Nataraja Pillai was not examined, and it appears that, though he had given evidence in the previous suit, plaintiffs omitted to apply, perhaps advisedly, that his deposition should be admitted as evidence in this suit. On the record as it stands the only reasonable finding is that the promissory note, Ex. B, was delivered by defendant to plaintiff No. I on the date of its execution, which is the date of the sale deed. The sale deed, Ex. A, recites that plaintiff No. I had directed defendant to pay the Rs. 6,000 which is represented by this promissory note to plaintiff No. 2, his mother. It is admitted that plaintiff No. 2 was not present when the sale deed and the promissory note were executed. In the circumstances it may clearly be inferred that plaintiff No. 1, when he took delivery of the promissory note from defendants, represented himself as his mother's agent in this matter. There is no evidence when plaintiff No. 1 handed the, note over to plaintiff No. 2; but it must be held to have reached her eventually because she and plaintiff No. 1 jointly have produced it in this suit. And the fact that she has sued on the note shows that she ratified plaintiff

No. i's action in taking delivery of it as her agent. Whether plaintiff No. 2 as payee of the note was only a benamidar for plaintiff No. 1, as now represented by them, or not, the contention that the note is not valid because it was never delivered to the payee fails.

19. But in spite of the existence of the promissory note, Ex. B, plaintiff No. 1 contends that he is still entitled to enforce his charge under Section 55 (4)(b) of the Transfer of Property Act for the part of the purchase money for which Ex. B was executed, and the learned Subordinate Judge has found that he is so entitled. On this part of the case Mr. Krishnaswami Aiyar for plaintiff, as I understand him, has argued alternatively (1) that the promissory note, Ex. B, is invalid and therefore the statutory charge for unpaid purchase money has never been affected by it, (2) that, even if Ex. B is valid, the statutory charge persists concurrently with the liability under Ex. B, and (3) that on plaintiffs giving up their claim under Ex. B, as they are prepared to do, the charge, if it was ever defeated or affected by Ex. B, revives and can be enforced. The first of these contentions has been disposed of by the finding that Ex. B is valid. In regard to the second contention it is true that, when the vendor of immoveable property takes a promissory note from the vendee in his own favour for the whole or part of the purchase money or when he directs the vendee to pay the whole or part of the purchase money to a third party, the vendor does not thereby lose the charge for unpaid purchase money given by Section 55(4)(b) of the Transfer of Property Act. In neither of those cases, it will be seen, does the vendee put himself under liability to any one but the vendor. But, when the vendee at the instance of the vendor executes a promissory note for the purchase money or part of it in favour of a third party, the position is altered. The vendee in that case puts himself at the mercy of the third party, even if that party is only a benamidar for the vendor. If in those circumstances the vendor's charge on the property for the amount of the promissory note remained, the vendee would be liable to be sued for the same purchase money by two parties independently. In my opinion there is no doubt that, if by agreement between the vendor and vendee the vendee puts himself under an enforceable liability to a third party for the whole or part of the purchase money, then in respect of the whole purchase money or the part of it, as the case may be, there is a " contract to the contrary " within the meaning of Section 55 of the Act and the vendor's statutory charge on the property is so far defeated. A contract between the vendor and vendee by which a third party obtains the right to exact by suit the purchase money or part of it from the vendee is inconsistent with the vendor retaining a charge to enforce payment to him of the same purchase money. The right to sue for the purchase money cannot reside in one person and the right to enforce the security for its payment in another. The position, in my opinion, is the same so far as the vendee is concerned, whether the third party is a benamidar for the vendor or not, unless it is shown that the vendee was aware that the third party was only a benamidar for the vendor and knowingly dealt with the vendor under the benamidar's name, in which case there would be no " contract to the contrary " within the meaning of Section 55 of the Act. If the third party to whom the vendee puts himself under an enforceable liability for the purchase money is a benamidar for the vendor but the vendee is unaware of that, I do not see how the nature of the document which the vendee executed in favour of the third party, whether it be a bond or a promissory note, can affect the question whether the vendor's charge is extinguished.

20. Though the vendor may sue the vendee on a bond of which he is the real obligee but which runs in favour of a benamidar, the benamidar may sue on it in his own name without making the vendor

a party and the vendee cannot resist his suit. A contract between the vendor and the vendee by which the vendee makes himself liable to be sued for the purchase money by a third party, whom he does not know to be a mere benamidar for the vendor, or by the assignee of that third party is, in my opinion, essentially inconsistent with the retention by the vendor of his charge to secure the payment of the purchase money even when it may be open to the vendor to prove that the third party is a mere benamidar for him and to sue the vendee on his obligation to the third party. It is the nature of the contract between the vendor and the vendee to which we must look, and that is not affected by the existence of an undisclosed benamidar. In this case it is not pleaded that defendant was aware that plaintiff No. 2 was a benamidar for plaintiff. In regard to Mr. Krishnaswami Aiyar's third contention, when once there is a " contract to the contrary " within the meaning of the section and the vendor's charge is so defeated, I do not see how the statutory charge can be revived. There appears to be no provision in the Act which could have that effect. Nor in my opinion is the position altered if the vendor takes a promissory note executed by the vendee in favour of a third party for the purchase money or part of it but afterwards fails to hand it over to the payee : so far as the vendee is concerned the " contract to the contrary " has been made, and it cannot be rescinded by the vendor. This last point, though mentioned in the argument, does not really arise for decision in the present case as it has been found that the promissory note, Ex. B, was delivered to plaintiff 2, who sues on it.

21. I agree therefore that plaintiff No. 1 has no charge on the property sold for the Rs. 6,000 now in question but that plaintiff 2 is entitled to a personal decree against defendant for the amount due under the promissory note, Ex. B, and that, as she is billing that the decree be made in favour of plaintiff No. 1, it should be so made. The Subordinate Judge has made only an ordinary mortgage decree for sale in favour of plaintiff. That should be set aside and a personal decree made against defendant in favour of plaintiff No. 1 in its stead with costs in the Lower Court. I agree that in this Court each party should bear his own costs.