44 Phil. 713

[G.R. No. 19461. March 28, 1923]

CHARLES A. FOSSUM, PLAINTIFF AND APPELLANT, VS. FERNANDEZ HERMANOS, A GENERAL PARTNERSHIP, AND JOSE F. FERNANDEZ Y CASTRO AND RAMON FERNANDEZ Y CASTRO, MEMBERS OF THE SAID PARTNERSHIP OF FERNANDEZ HERMANOS, DEFENDANTS AND APPELLEES.

D E C I S I O N

STREET, J.:

Prior to the date of the making of the contract which gave rise to this litigation the plaintiff, Charles A. Fossum, was the resident agent in Manila of the American Iron Products Company, Inc., a concern engaged in business in New York City; and on February 10, 1920, the said Fossum, acting as agent of that company, procured an order from Fernandez Hermanos, a general commercial partnership engaged in business in the Philippine Islands, to deliver to said firm a tail shaft, to be installed on the ship *Romulus*, then operated by Fernandez Hermanos, as managers of La Compañia Maritima. It was stipulated that said tail shaft would be in accordance with the specifications contained in a blueprint which had been placed in the hands of Fossum on or about December 18, 1919; and it was further understood that the shaft should be shipped from New York upon some steamer sailing in March or April of the year 1920.

Considerable delay seems to have been encountered in the matter of the manufacture and shipment of the shaft; but in the autumn of 1920 it was dispatched to Manila, having arrived in January, 1921. Meanwhile the American Iron Products Company, Inc., had drawn a time draft, at sixty days, upon Fernandez Hermanos, for the purchase price of the shaft, the same being in the amount of $2,250, and payable to the Philippine National Bank. In due course the draft was presented to Fernandez Hermanos for acceptance, and was accepted by said firm on December 15, 1920, according to its tenor.

Upon inspection after arrival in Manila the shaft was found not to be in conformity with the specifications and was incapable of use for the purpose for which it had been intended. Upon discovering this, Fernandez Hermanos refused to pay the draft, and it remained for a time dishonored in the hands of the Philippine National Bank in Manila. Later the bank indorsed the draft in blank, without consideration, and delivered it to the plaintiff, Charles A. Fossum, who thereupon instituted the present action on the instrument against the acceptor, Fernandez Hermanos, and the two individuals named as defendants in the complaint, in the character of members of said partnership.

On the foregoing statement it is evident that the consideration for the draft in question and for the acceptance placed thereon by Fernandez Hermanos, has completely failed; and no action whatever can be maintained on the instrument by the American Iron Products Company, Inc., or by any other person against whom the defense of failure of consideration is available. In recognition of this fact, and considering that the plaintiff Fossum, in whose name the action is brought, was the individual who had acted for the American Iron Products Company, Inc., in the making of the contract, the trial court held that the action could not be maintained and absolved the defendants from the complaint. From this judgment the plaintiff appealed.

We are of the opinion that the trial judge has committed no error. To begin with, the plaintiff himself is far from being a holder of this draft in due course. In the first place, he was himself a party to the contract which supplied the consideration for the draft, albeit he there acted in a representative capacity. In the second place, he procured the instrument to be indorsed by the bank and delivered to himself without the payment of value, after it was overdue, and with full notice that, as between the original parties, the consideration had completely failed. Under these circumstances recovery on this draft by the plaintiff by virtue of any merit in his own position is out of the question. His attorney, however, calls attention to the familiar rule that a person who is not himself a holder in due course may yet recover against the person primarily liable where it appears that such holder derives his title through a holder in due course.

The difficulty of the plaintiff’s position from this point of view is that there is not a line of proof in the record tending to show as a fact that the

bank itself was ever a holder of this draft in due course. In this connection it was incumbent on the plaintiff to show, as an independent matter of fact, that the person under whom the plaintiff claims, i. e., the bank, was a holder in due course; and upon this point the plaintiff can have no assistance from the presumption, expressed in section 59 of the Negotiable Instruments Law, to the effect that every holder is deemed *prima facie* to be a holder in due course. The presumption expressed in that section arises only in favor of a person who is a holder in the sense defined in section 191 of the same Law, that is, a payee or indorsee who is in possession of the draft, or the bearer thereof. Under this definition, in order to be a holder, one must be in possession of the note or the bearer thereof. (Night & Day Bank *vs*. Rosenbaum, 191 Mo. App., 559, 574.) If this action had been instituted by the bank itself, the presumption that the bank was a holder in due course would have arisen from the tenor of the draft and the fact that it was in the bank's possession; but when the instrument passed out of the possession of the bank and into the possession of the present plaintiff, no presumption arises as to the character in, which the bank held the paper. The bank's relation to the instrument became past history when it delivered the document to the plaintiff; and it was incumbent upon the plaintiff in this action to show that the bank had in fact acquired the instrument for value and under such conditions as would constitute it a holder in due course. In the entire absence of proof on this point, the action must fail.

There is another circumstance which exerted a decisive influence on the mind of the trial judge in deciding the case for the defendants. This is found in the fact that the plaintiff personally made the contract which constituted the consideration for this draft. He was therefore a party in fact, if not in law, to the transaction giving origin to the instrument; and it is difficult to see how the plaintiff could strip himself of the character of agent with respect to the origin of the contract and maintain this action in his own name where his principal could not. Certainly an agent who actually makes a contract, and who has notice of all equities emanating therefrom, can stand on no better footing than his principal with respect to commercial paper growing out of the transaction. To place him on any higher plane would be incompatible with the fundamental conception underlying the relation of principal and agent. We note that in the present case there is no proof that the plaintiff Fossum has ceased

to be the agent of the American Iron Products Company, Inc.; and in the absence of proof the presumption must be that he still occupies the relation of agent to that company.

It is a well-known rule of law that if the original payee of a note unenforceable for lack of consideration repurchases the instrument after transferring it to a holder in due course, the paper again becomes subject in the payee's hands to the same defenses to which it would have been subject if the paper had never passed through the hands of a holder in due course. (Kost *vs*. Bender, 25 Mich., 515; Shade *vs*. Hayes, L. R. A. [1915D], 271; 8 C. J., 470.) The same is true where the instrument is retransferred to an agent of the payee (Battersbee *vs*. Calkins, 128 Mich., 569).

In Dollarhide *vs*. Hopkins (72 Ill. App., 509), the plaintiff, as agent of a corporation engaged in manufacturing agricultural implements, sold to the defendant a separator for threshing small grain, with a general warranty that the machine, properly handled, would thresh and clean grain as well as any other separator of like size. The notes in suit were executed by the defendant in payment of the separator, and were assigned to the plaintiff before maturity. They were then indorsed by the plaintiff to a bank which became holder in due course; but afterwards, and before the commencement of the action, the notes were retransferred by the bank to the plaintiff. In an action upon the notes the defendant alleged and proved breach of warranty and showed that the plaintiff knew of the defect in the separator at the time he purchased the notes. It was held that the plaintiff could not recover, notwithstanding the fact that the notes had passed through a bank, in whose hands they would not have been subject to the defense which had been interposed (54 L. R. A., 678).

We find nothing in the Negotiable Instruments Law that would interfere with the application of the doctrine applied in the cases above cited, for the rule that identifies the agent with the principal, so far as the legal consequences of certain acts are concerned, is a rule of general jurisprudence that must operate in conjunction with that Law. We consider the situation to be the same in practical effect as if the action had been brought in the name of the American Iron Products Company, Inc., itself; and the use of the name of Fossum strikes us as a mere attempt at an evasion of the rule of law that would have been fatal to the success of an action instituted by that company.

It appears from statements of Mr. Fossum on the witness stand that the draft in question was indorsed and delivered to him by the bank in order that suit might be brought thereon in his name for the use and benefit of the bank, which is said to be the real party in interest. In addition to this it appears that during the pendency of the cause in this court on appeal a formal transfer, or assignment, to the bank was made by Fossum of all his interest in the draft and in the cause of action.

Assuming that the suggestion thus made is true, and that the bank is the real party in interest, the result of the lawsuit in this court is not thereby affected, since it has not been affirmatively shown that the bank is an innocent purchaser for value. It is therefore unnecessary to discuss the bearing of this circumstance on the second feature of the case discussed in this opinion.

For the reasons stated the judgment appealed from must be affirmed, and it is so ordered, with costs against the appellant.

Araullo, C.J., Avanceña,
Villamor, Johns, and *Romualdez, JJ.,* concur.
Ostrand, J.,
concurs in the result.

DISSENTING

MALCOLM, J.:

The bill of exchange mentioned in the majority opinion, and here in question, was drawn by the American Iron Products Company, Inc., in New York, payable sixty days after sight to the order of the Philippine National Bank, and addressed to Fernandez Hermanos of Manila as drawee. The said bill of exchange was accepted by Fernandez Hermanos, as appears from the following: “Accepted, 15th Dec., 1920, Due, 13 February, 1920, A/C Varadero de Manila. (Sgd.) Fernandez Hermanos.” The Philippine National Bank later indorsed the bill of exchange to Charles A. Fossum, as appears from the following: “Philippine National Bank, Manila, P. I., (Sgd.) E. O. Kaufman.” Such are the facts.

Section 58 of the Negotiable Instruments Law provides: "* * * A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Under the provisions of this section, Fossum is in exactly the same situation as the Philippine National Bank would be. Fossum is entitled to all the rights that pertain to the Philippine National Bank as holder in due course. Such is the law.

The absence or failure of consideration is not a defense against a holder in due course, although it is a defense against a holder not in due course, as clearly appears from the Negotiable Instruments Law. (Act No. 2031, secs. 28, 51, 52, 57, 58, 59.)

The plain provisions of the Negotiable Instruments Law should not be ignored and they should be construed and applied in accordance with the language of the Act and in accordance with precedents construing and applying the Uniform Negotiable Instruments Law. Accordingly, I must dissent.

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