14, 1955

No. 39 of 1954.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

T. A. K. DE SILVA . . . . (Plaintiff) *Appellant*

AND

HIRDRAMANI LIMITED . . (Defendants) *Respondents.*

Case for the Respondents.

RECORD.

1. This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon dated the 3rd March 1953 whereby, reversing a Judgment and Decree of the District Court of Colombo dated the 3rd November 1950, it was ordered that the action brought by the Appellant against the Respondents should be dismissed with costs in both Courts. pp. 42, 47. pp. 32, 38.

2. Prior to 1946 one Parmanand Tourmal (hereinafter referred to as Mr. Parmanand) was carrying on business as a dealer in silks, curios, carpets and jewellery in Colombo under the trade name of Hirdramani. His leading jeweller up to 1944 was the Appellant T. A. K. de Silva. At some time prior to 1944 the Appellant introduced his wife's younger brother, one Wijeratne, to the firm as a jewellery assistant, and he became employed in that capacity. At the beginning of 1944 the Appellant was minded to retire. p. 69, l. 18. p. 20, l. 20. p. 20, l. 21. p. 10, l. 16.

3. In these circumstances an agreement was entered into on the 29th January 1944, referred to as P. 1 in the action, between Mr. Parmanand (which term was defined to mean and include himself, his heirs, executors and administrators) of the one part, and the Appellant and the said Wijeratne of the other part. This agreement provided as follows :— pp. 10–11.

> " Whereas the said Silva and Wijeratne have for some time past been employed under Mr. Parmanand as leading jewellery maker and Assistant respectively.
>
> And whereas Silva has agreed with Mr. Parmanand to retire from service as leading jewellery maker in the firm of Hirdramani and has requested Mr. Parmanand to employ Wijeratne as his leading jewellery maker which Mr. Parmanand has agreed to do subject to the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH and it is hereby mutually covenanted and agreed between the parties hereto as follows :—

(A) The said Silva shall retire as leading jewellery maker in the firm of Hirdramani as from the first day of February One thousand nine hundred and Forty-Four and shall in consideration of the sum of Rupees Four Hundred and Seventy-five (Rs. 475/–) being the purchase price, deliver to Mr. Parmanand all machine tools and other implements that are now at Hirdramani and owned by Silva.

(B) The said Wijeratne shall as from the 1st day of February One thousand nine hundred and forty-four serve under Mr. Parmanand as leading jewellery maker on such remuneration as may be agreed upon from time to time and shall devote his whole time and attention to such work and shall not work for any other person or firm whomsoever without the consent first had and obtained from Mr. Parmanand.

(C) In consideration of the services rendered as aforesaid by Silva and as long as Wijeratne is employed under Mr. Parmanand he Mr. Parmanand shall as from 1st February One thousand nine hundred and forty-four pay to Silva monthly at the end of each and every month a sum of Rupees One hundred and Fifty (Rs. 150/–) during the life time of Silva.

(D) Towards the payment of the aforesaid monthly sum of Rupees One hundred and Fifty (Rs. 150/–) by Mr. Parmanand he the said Wijeratne shall contribute a sum of Rupees Seventy five (Rs. 75/–) monthly from his remuneration.

(E) The said Silva shall be at absolute liberty to undertake orders and carry on his usual business of jewellery maker.

(F) In the event of the said Wijeratne dying or being dismissed from service or being incapacitated by illness or otherwise or leaving the service of Hirdramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rupees One hundred and Fifty (Rs. 150/–) shall immediately cease anything herein contained to the contrary notwithstanding.

(G) In the event of the said Wijeratne proving at any time hereafter in the opinion of Mr. Parmanand incompetent, insubordinate, negligent or dishonest then it shall be lawful for Mr. Parmanand to dismiss Wijeratne immediately and in that event this Agreement shall cease and be of no avail.

(H) In addition to any other remuneration that Mr. Parmanand shall pay to Wijeratne for his service as leading jewellery maker and as long as the said Wijeratne shall serve Mr. Parmanand he Mr. Parmanand shall pay to Wijeratne monthly at the end of each and every month as from 1st February One thousand nine hundred and Forty-four the sum of Rupees Fifty (Rs. 50/–) as salary."

p. 21, l. 3. 4. Pursuant to this agreement Mr. Parmanand duly paid the stipulated Rs. 150/– per month to the Appellant from 1944 until after the middle of 1946.

5. On the 27th June 1946 Mr. Parmanand's business was turned into a limited company, the present Respondents, Mr. Parmanand being managing director and chairman of the Board of Directors. The Appellant, who still used to go to the shop frequently, heard that the business had been turned into a limited company, apparently fairly soon afterwards, and he then spoke to Mr. Parmanand about his position. His evidence about the conversation was as follows : " I spoke to him about the payments that were being made to me. I asked him whether there would be any change in the payments made to me according to the agreement after the business had been converted into a limited liability company. He said he was the Managing Director and Chairman of the Board of Directors and that there would be no change, and that the Company would pay. The Company continued to pay me according to the agreement. Wijeratne continued to work in Hirdramani Ltd. He is working there up to date." In cross examination he put it slightly differently : " After the Company was formed I spoke to Mr. Tourmal. He said that he was the Managing Director of the Defendant Company and that there would not be any change in regard to the payment on the agreement and that he would continue to pay me. That was a very important matter so far as I was concerned. I had no misgivings in my mind that he would continue to pay me." p. 14, l. 7. p. 21, l. 14. p. 21, l. 8. p. 21, l. 10. p. 21, ll. 10–18. p. 22, ll. 33–38.

In answer to the Judge at the trial on this topic the Appellant's evidence was as follows :— p. 22, ll. 14–20.

> " Q. When the business was formed into a limited liability company if you were informed by the Company that they were not liable to pay this amount on the agreement, what would you have done ?
>
> A. I would have discussed matters with Mr. Tourmal and entered into a fresh agreement."

There was no dispute that subsequent to incorporation of the limited company the payments were made by cheques drawn by the Company. p. 21, l. 27.

6. This state of affairs continued until the death of Mr. Parmanand on 23rd March 1948. The Respondents took the view that there was no longer any liability on anyone to make payments to the Appellant under the agreement, but they were prepared to continue to do so on an *ex gratia* basis. They accordingly wrote on the 9th April 1948 to the Appellant :— p. 8, l. 33.

> " We enclose herewith a cheque for Rs. 150/– being the amount paid to you monthly by the late Mr. T. Parmanand. p. 84, l. 10.
>
> As you are aware of Mr. Parmanand died recently and before his death our Company was formed.
>
> We are therefore continuing this payment without any obligation or binding on our part.
>
> Please acknowledge receipt."

There was no answer to this letter. p. 21, l. 36.

p. 84, l. 30. On the 30th April 1948 the Respondents wrote again :—

"By our letter of 9th inst., we informed you the condition subject to which we will be paying you your monthly payment and you have doubtless accepted the payment subject to that condition.

We are enclosing herewith cheque for Rs. 150/- being April payment and shall be glad if you will acknowledge receipt.

Please note that all future payments will be subject to that condition."

p. 21, l. 38. Again there was no answer.

On the 31st May 1948 the Company wrote :—

p. 85, l. 8. "Enclosed please find cheque No. T.174596 on Chartered Bank for Rs. 150/- drawn in your favour subject to the condition mentioned in our previous letter and which you have accepted.

Please acknowledge receipt."

p. 85, l. 26. On the 28th June 1948 the Appellant wrote :—

"I am in receipt of your letters dated 9–4–48, 30–4–48 and 31–5–48 enclosing cheques due to me and thank you for same.

However, I find it difficult to understand why you state that these payments are being made without any obligation or binding on your part and I shall be glad if you will explain your position clearly for my future guidance.

I have not in any way accepted this position of yours although you state that I have done so.

I feel that the Company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to continue the payment of the said sum throughout my life."

In answer to this the Respondents wrote on the 29th June 1948 (*inter alia*) :—

p. 86, l. 21. "The agreement is now at an end and I continued paying you the sum without any binding or obligation merely as I did not want to deprive any person of any sum which he was receiving during the lifetime of the late Mr. Parmanand.

If you do not accept this position you are at liberty to take whatever steps you like and we shall not in future send you the remittance unless and until you accept the position that the payment made by us is purely an *ex gratia* payment without any obligation or binding on our part."

p. 22, l. 1. 7. The Appellant, not being prepared to accept payments on an
p. 7, l. 30. *ex gratia* basis, commenced the present proceedings on the 14th September
pp. 13–15. 1949. By Plaint as amended on the 19th June 1950 he referred to the

agreement and to the fact that Mr. Parmanand paid to the Appellant every month the sum of Rs. 150/- until the limited liability company was incorporated. He then asserted in paragraph 6 :—

> " Thereafter the Defendant Company undertook the liability of Parmanand Tourmal to pay the said sum of Rs. 150/- per month to the Plaintiff and continued to pay the Plaintiff the said sum monthly without default " ;

but added in paragraph 8 that after the death of Mr. Parmanand on the 23rd March 1948 they had wrongfully and unlawfully refused to continue the payments in terms of the agreement. He also alleged in paragraph 8 (A) of the amended Plaint :—

> " The Plaintiff specially pleads that in law the Defendant Company is estopped from denying its liability to pay to the Plaintiff the said monthly sum of Rs. 150/- by reason among others of the fact that the Defendant Company unconditionally continued to pay the said sum to the Plaintiff from the date of its incorporation until the death of the said Parmanand Tourmal." p. 15, l. 1.

The Appellant accordingly prayed for judgment for the sum of Rs. 2,250/- with legal interest thereon, and for judgment declaring the Appellant entitled to monthly payments of Rs. 150/- from the month of September 1949 (i.e., the commencement of the suit) up to the date of Decree with interest thereon.

8. The Answer of the Respondents as amended asserted that under the agreement referred to the liability of Mr. Parmanand to pay the Plaintiff Rs. 150/- a month ceased when the said Wijeratne entered the service of the Respondents in or about June 1946 and that payments thereafter were made without any legal obligation to do so. They denied specifically that they ever undertook the liability of Mr. Parmanand to pay the Plaintiff. pp. 16–18.

9. On these dealings accordingly the two substantial issues, the facts being in the main undisputed, were :—

> (A) whether in point of law the limited liability company formed in 1946 (i.e., the Respondents) were ever under any obligation to make payments to the Appellant under the agreement ;
>
> (B) whether there was an estoppel prohibiting the Respondents from contending that they were not liable to pay the Appellant.

10. The only evidence given at the trial was that by the Appellant, the substance of which has already been set out above. pp. 20–25.

11. By Judgment delivered by da Silva, A.D.J., in the District Court of Colombo on the 3rd November 1950 the learned Judge found in favour of the Appellant. He pointed out that the Respondents had not adduced any evidence to contradict the Appellant's testimony as to the conversation between the Appellant and Mr. Parmanand after the incorporation of the Respondents, and said that the fact that payments were continued after pp. 32–38. p. 35, l. 1. p. 35, l. 15.

the formation of the Respondent Company supported the Appellant's story that Mr. Parmanand, as Managing Director, gave him an undertaking
p. 35, l. 17. that the payments would be continued by the Company, and commented on the fact that the Company's account books and minute books had not
p. 35, l. 21. been produced. He said that pursuant to its Articles of Association the Company was entitled to take over a liability such as that contained in
p. 35, l. 37. the agreement and held that such an undertaking as, in his view, had been given by Mr. Parmanand, amounted to a novation of the original contract by the substitution of the limited company as a new debtor in place of the
p. 36, l. 3. original debtor, Mr. Parmanand. He thought also that it was legitimate 10
p. 36, ll. 27-33. to presume that Wijeratne agreed to the novation. On this view he thought it was immaterial what would have been the position if after the death of Mr. Parmanand, the business had not been carried on by his heirs, executors or administrators.

On the estoppel point, the learned Judge upheld the Appellant's contention that the payments made by the Company after incorporation up to the time of Mr. Parmanand's death had lulled the Appellant into a false sense of security on the basis that if he had been told at that time that the Company were not going to pay he could have taken the necessary steps to enter into a fresh agreement with Mr. Parmanand. In his view 20 a representation was made by the limited company by reason of the continued payments and there was no uncertainty about such representation. Accordingly the estoppel was established.

p. 38. 12. In accordance with the Judgment delivered in the District Court on the 3rd November 1950 a Decree of the District Court was entered on the same date which ordered that the Defendants do pay to the Plaintiff Rs. 2,250/- with legal interest and in addition the sum of Rs. 150/- per month from September 1949 up to the date of the Decree with interest.

pp. 42-46. 13. On appeal by the Respondents to the Supreme Court this Judgment of the District Judge was reversed. In the leading Judgment 30
p. 44, ll. 19-29. given by Gratiaen, P.J., on the 3rd March 1953, it was pointed out " that the Company could not be held liable under the original agreement to which it was not a party by reason only of the assignment in its favour of the business which had previously been carried on by Parmanand Tourmal personally. The contractual liability was primarily his alone, and was limited in point of time to the continuation of the contract of service between himself and Wijeratne, although I agree, as a matter of interpretation, that if his executors or administrators had carried on the business of Hirdramani after his death, they too would be obliged in law to pay the Plaintiff's allowance so long as Wijeratne continued to serve them." 40

The main issue therefore was whether the evidence accepted by the learned District Judge as to the conversation between Mr. Parmanand
p. 45, ll. 13-16. Tourmal and the Appellant could amount to a novation. The learned Judge pointed out that novation ought to be specifically pleaded, but was content to assume that the plaint did sufficiently comply with the rules. He held, however, that in law no novation was established. He said :—

p. 45, ll. 26-37. " The Plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of

Parmanand Tourmal under the agreement dated 29th January 1944 for even upon an interpretation most favourable to the Plaintiff, that particular obligation was no longer subsisting after the date of Parmanand Tourmal's death. Indeed, the action could not be maintained except upon the basis of a fresh contract whereby the Company undertook an obligation not measured by the limits of Parmanand Tourmal's extinguished liability but continuing for a period of time extending far beyond that which had been contemplated in the terms of the original contract, namely, so long as Wijeratne served Hirdramani Ltd. as its leading jeweller. No such contract has been pleaded or proved by the Plaintiff."

In his view the suggested novation was completely refuted by the terms of the Appellant's own letter of the 28th June 1948 in which he said: "I feel that the company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to continue the payment of the said sum throughout my life." p. 46, ll. 5–12.

With regard to the estoppel, the learned Judge said that there was no evidence to support the view that the Appellant was misled into the belief that the Company would continue the payments throughout his lifetime, a view which was again refuted by his letter. The learned Judge concluded by saying that it was unfortunate that the Appellant had rejected the Company's offer to continue payments on the clear understanding that they would be made on an *ex gratia* basis, choosing instead to obtain an adjudication of his legal rights. In the learned Judge's view the claim was insupportable in law. Gunasekara, P.J., agreed. p. 46, ll. 13–22. p. 46, ll. 29–33. p. 46, l. 34.

14. In accordance with the foregoing Judgment delivered on the 3rd March 1953 a Decree of the Supreme Court of the same date was entered by which it was ordered that the appeal should be allowed and the Appellant's action dismissed with costs, both in the Supreme Court and in the Court below. p. 47.

15. The Appellant, after considerable controversy in the Supreme Court as to whether there was a right of appeal to Her Majesty in Council and whether the necessary conditions as to giving notice had been fulfilled, was granted conditional leave to appeal to Her Majesty in Council by a Decree of the Supreme Court dated the 14th September 1953 and this leave was made final by Decree of the Supreme Court dated the 15th October 1953. pp. 50–64. p. 65. p. 68.

16. The Respondents respectfully submit that the view of the Supreme Court in this matter was plainly right. It was no doubt unfortunate from the point of view of the Appellant that in the agreement the term "Mr. Parmanand" was defined to include his heirs, executors and administrators without making any mention of assigns, but this may well have been deliberately intended: one can only assume that it was, although it would be speculation to surmise what sort of considerations or possibilities were in mind when the term was omitted. In the result the whole obligation hinged upon Wijeratne continuing to be employed under Mr. Parmanand or under his heirs, executors or administrators.

If, therefore, during his lifetime, Mr. Parmanand had chosen to sell his business, his doing so would automatically terminate the agreement. Similarly, if on the death of Mr. Parmanand, his heirs, executors or administrators decided not to carry on the business themselves but to realise it by sale, the agreement would cease to operate. The formation of the limited company was in fact and in law a sale by Mr. Parmanand in his lifetime, the consideration being the shares received by him in the limited company. There was, therefore, *prima facie*, from that moment no more than a moral obligation on the part of the limited company.

Was that situation altered by the conversation between the Appellant and Mr. Parmanand ? It is submitted that it was not. It is to be observed that the conversation is in fact put in two quite inconsistent ways, namely—

(A) that the Company would pay ;

(B) that he, Mr. Parmanand, would continue to pay.

Mr. Parmanand may well have thought that notwithstanding the incorporation of the limited company, Wijeratne was still employed under himself, Mr. Parmanand, as being the Managing Director and Chairman and almost, if not in fact, the *alter ego* of the Company ; and it would not be inconsistent with this that the cheques were drawn as Company cheques, leaving any adjustment required to be made between Mr. Parmanand and the Com any as a personal matter between themselves. Alternatively, it may well have been the situation that by forming the Company Mr. Parmanand committed breach of the agreement by putting it outside his power to perform it. However this may be, where two alternative versions of the arrangement are put forward by the only person who can speak about it, there being no means of deciding which is the accurate one, it cannot be said that there was adequate proof of a new arrangement by which the Company assumed the original obligation. The Appellant's letter of the 28th June 1948 also militates strongly against the arrangement (if any) being as now alleged.

17. Furthermore, even if the Company did in 1946 assume the original obligation, it could only be the obligation as defined in the agreement, i.e., an obligation commensurate with employment of Wijeratne under Mr. Parmanand. Once Mr. Parmanand was dead, the obligation died with him unless his heirs, executors or administrators continued the employment of Wijeratne, which they did not. A novation, as postulated by the Appellant, is not and cannot be more than a transfer from one obligor to another : it does not and cannot change the nature of the obligation. But here, as the Supreme Court pointed out, the whole essence of the Appellant's case was and had to be that the nature of the obligation had changed, i.e., what was now to be the governing factor was employment of Wijeratne by the limited Company—an entirely different yardstick.

18. Yet another difficulty in the way of the Appellant was that whereas the original agreement was tripartite, Wijeratne being (as he had to be) a party to it, there was no evidence that he was ever even consulted about the alleged novation. Yet the matter directly affected him, particularly if the measure of the obligation was going to be altered,

because he had to provide half the agreed monthly payment to the Appellant. It is not sufficient to assume or infer, as the learned District Judge did, that he had no objections. In a matter of this kind his formal agreement ought to have been strictly pleaded and proved.

19. There remains the question of estoppel. The difficulty here from the Appellant's point of view is that no representation of any sort or kind was either pleaded or proved. The Company month by month made payments—whether because asked to do so by Mr. Parmanand or for any other reason—but that did not and could not amount each time to a promise to make further payments on an assumption of any specific obligation, still less of a new and entirely different obligation. Nor was there evidence of any acting to his detriment by the Appellant in reliance on the supposed representations; he said he was lulled into a sense of false security, but there was nothing to prevent him, when Mr. Parmanand died and the Respondent Company made its attitude clear, from claiming against the heirs, executors or administrators, the only people who could be liable after Mr. Parmanand's death.

20. The Respondents will therefore humbly submit that this appeal ought to be dismissed for the following amongst other

REASONS.

(1) BECAUSE from and after the incorporation of the Respondent Company there was no employment of Wijeratne under Mr. Parmanand, which employment was the criterion of liability to make payments under the agreement relied on.

(2) BECAUSE from and after the death of Mr. Parmanand there was no employment of Wijeratne under the heirs, executors or administrators of Mr. Parmanand, which employment was from that date the criterion of liability to make payments under the agreement relied on.

(3) BECAUSE there was no reliable evidence of any legally binding assumption by the Respondent Company, whether by novation or otherwise, of the alleged or any obligation of Mr. Parmanand to the Appellant.

(4) BECAUSE the alleged novation was defective in the absence of proved concurrence therein by Wijeratne.

(5) BECAUSE no representations capable of founding an estoppel were proved to have been made by the Respondent Company.

(6) BECAUSE no reliance to his detriment on the alleged representations on the part of the Appellant was proved.

(7) BECAUSE the decision of the Supreme Court was right and ought to be affirmed.

STEPHEN CHAPMAN.

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