KADER SAIBU *v.* TEVERAYAN.

1900.
September 12.

C. R., Kandy, 8,337.

Action by plaintiff on an agreement entered into between defendant and third party—Cause of action—Novation of debt.

The defendant, having purchased the goodwill of S. S. & Co.'s business, agreed with them to pay and settle their debts as described in the schedule annexed to the deed of sale. Plaintiff, a creditor of S. S. & Co., whose name appeared in that schedule, having heard of the agreement acquiesced in the arrangement, and consequently sued the defendant for the recovery of his debt.

Held, that this was a case of novation, and that plaintiff was entitled to sue the defendant instead of the original debtor, since the fact of the creditor (plaintiff) instituting an action against the delegated debtor (defendant) is sufficient evidence of the creditor's assent to the novation.

PLAINTIFF alleged that he sold and delivered to Samsudin Saibo & Co. certain goods, and that they sold the goodwill of their business to the defendant, who " in consideration thereof " agreed and undertook to pay and settle the debt due by them " to the plaintiff, to wit, Rs. 212." Plaintiff prayed for judgment against defendant for this amount.

Defendant pleaded that the plaint disclosed no cause of action against him, in that " plaintiff, being a stranger to the contract, " could not bring an action in his own name to enforce the per- " formance between two other parties of a contract, though made " for his benefit," and on the merits he admitted that Samsudin Saibo & Co. had sold their goodwill of their business to him, but stated that the Rs. 212 claimed had been paid.

The Commissioner, after hearing counsel upon the question whether the plaint disclosed a cause of action, called upon the defendant to explain " his position," and being affirmed he stated: " I did not see the plaintiff at the time the deed of sale was signed, " nor did plaintiff agree to take me up as his debtor; the debt " due to plaintiff appeared in the schedule of debts, which I agreed " to pay; I have not since paid it. Samsudin Saibu & Co. must " have paid it."

Thereupon the Commissioner, without hearing the case for the plaintiff, dismissed plaintiff's action, on the ground that plaintiff should sue Samsudin Saibo & Co. and not defendant.

Plaintiff appealed.

Bawa (with *Maartensz*), for appellant.—There was a novation of the debt by the substitution of a new debtor, and it was competent to S. Saibo & Co.'s creditor, with the plaintiff, to sue the new debtor.

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W. Pereira, for defendant, respondent.—The plaintiff was the party to the agreement, and there is nothing to show that he assented to it. If defendant committed a breach of the agreement between him and S. Saibo & Co., it would be open to the latter to sue the defendant for damages, but the plaintiff himself, who is a stranger to the agreement, has no right to seek enforcement of it in regard to his debt. The result would be to deprive the defendant of any defence or claim in reconvention which he may have against S. Saibo & Co.

BONSER, C.J.—

The plaintiff sues the defendant for a sum of money due for goods sold and delivered. It appears that the defendant was not the original debtor, but that the debt had been contracted by a third party. The third party sold his business to the defendant, and upon the sale it was agreed by the defendant with the third party that he would pay all the debts of the business. The debts were scheduled to the deed of agreement, and the debt now sued for was included in that schedule. The plaintiff was not a party to that deed, but, becoming aware of it, he acquiesced in the arrangement and subsequently demanded payment from the defendant, and when the defendant neglected to pay he brought this action.

The defendant raised two defences: one, that he was not liable to be sued at all, because the agreement was made between him and a third party and that the plaintiff was not a party to it; and, secondly, he alleged that the debt was no longer due, but had been paid.

The Commissioner decided that the plaintiff had no cause of action, on the ground that a person for whose benefit a contract is made cannot sue upon that contract if he is not a party to it. That proposition is correct, but, in my opinion, it does not apply to the present case. This appears to me to be a case of what is called "novation," which arises when a debtor requests his creditor to take another person as his debtor in his stead. If the creditor assents to that, the original obligation is gone and a new one substituted. Now, whether there has been a novation is in every case a question of fact; but it seems to me clear that in the present case there was a novation.

Whether the mere demand of the debt was sufficient evidence of the creditor's assent to create a novation, it is unnecessary to decide, but it seems to me that when the creditor brought this action he testified in an unmistakable way that he looked to the defendant, and to the defendant alone, as being his debtor, and thereby discharged the original debtor. If he were now to sue

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the original debtor, it seems to me that the original debtor would have a complete answer to the action. He would be able to say, "You have unequivocally signified your intention of accepting the defendant as your debtor in my stead." Therefore, I am of opinion that the plaintiff is entitled to sue.

On the second issue as to payment there was no decision, and apparently that issue was never tried.

The case must go back to try that issue.

Costs to be costs in the cause.