

Present : Bertram C.J. and Schneider J.

1924.

GARVIN v. ABAYAWARDENE.

487—D. C. Matara, 421.

Sum of money hypothecated by bond by toddy-renter as security—Money deposited by Government at a bank at request of renter—Failure of bank—Is Government responsible for loss?—Is Government bound to take steps to recover sum from the bank?—Trust.

A toddy renter deposited with the Government Agent a sum equivalent to two months' instalments of the purchase money and executed a bond purporting to hypothecate this sum as security for the discharge of his obligations under the contract. The Government Agent at the renter's request deposited the amount in the Bank of Colombo on fixed deposit. The bank failed.

Held, that the Government was not responsible for the loss, and that the Government Agent was not under any obligation to take steps to get back what he could from the bank.

Any person acting at the request of another in this way would be entitled to refuse to bring an action of the nature suggested, unless he were indemnified against all possible expenses.

THE Attorney-General, plaintiff, appellant, sued the defendant, respondent, to recover the sum of Rs. 1,341.66, being the balance due to the appellant on the purchase by the respondent of the privilege of selling toddy by retail in the village of Weligama for one year from October 1, 1920. The respondent pleaded, *inter alia*, that at the time he bought the said privilege he deposited a sum equal to the amount claimed by the appellant as a security deposit, and that the deposit was available to the appellant.

It was found at the trial that the respondent has in fact deposited certain money with the Assistant Government Agent, Matara, and that soon afterwards he had requested the Assistant Government Agent to deposit the money in the Colombo Bank so as to enable the respondent to earn interest on the money. The money was in accordance with this request deposited in the said bank on May 20, 1920, and on July 7, 1920, the respondent by his bond purported to hypothecate the sum so deposited and dealt with as security. It was further proved that the bank stopped payment in June, 1921, and the deposit ceased thereupon to be available to the Crown as security for the said privilege.

The learned District Judge (E. Rodrigo, Esq.) dismissed the plaintiff's action with costs, holding, *inter alia*, that in the circumstances the appellant must bear the loss of the money deposited in the Colombo Bank.

The Attorney-General appealed.

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Elphinstone, K.C., Solicitor-General (with him *Akbar, C.C., and Illangakoon, C.C.*), for plaintiff, appellant.

Samarawickreme (with him *H. V. Perera*), for the defendant, respondent.

July 23, 1924. BERTRAM C.J.—

This case raises a question of law on which unfortunately there appears to be no authority, and we must accordingly decide it upon a first impression according to principles which seems to us to be applicable to the case. The facts briefly stated are these: The defendant was a toddy renter, and in pursuance of the usual system of obtaining the rent he deposited with the Government Agent a sum equivalent to two months' instalments of the purchase money, and, again, in pursuance of the usual system, he subsequently executed a bond purporting to hypothecate this sum in the hands of the Government Agent as security for the discharge of his obligations under this contract. Before the bond was actually executed, the defendant on April 30, 1920, by a letter to the Government Agent, requested him to deposit the amount above referred to in the Bank of Colombo on fixed deposit, where it would earn on his account interest at 6 per cent. This was accordingly done. Before the expiration of the rent, the Bank of Colombo stopped payment. The learned District Judge says: "After a few months the bank became insolvent and failed to pay its creditors any dividend whatever on their claims." The amount thus deposited by the Government Agent at the request of the defendant with the Bank of Colombo thus disappeared. And the real question is who is to be responsible for the loss of this sum, the Government or the defendant?

The case set up on behalf of the defendant and adopted by the learned District Judge was that, on the deposit of this sum with the Government, all that happened was that the relation of debtor and creditor arose between the defendant and the Crown. It appears to be conceded that the defendant was liable to the Government Agent upon the contract. The contract is explicit and certain specific sums were due. It also appears to be admitted that the fact that the Government had taken security for the due performance of the defendant's obligations did not make it necessary for the Government to resort to that security unless it was so disposed. But it was contended that, nevertheless, the defendant was entitled to claim in reconvention the return of the sum which he had deposited as security for the performance of his contract, and it is urged that nothing has happened to discharge the Government from its obligations to refund that money.

It is very singular that there is complete dearth of authority both in the Roman-Dutch and in the English law on the point we have to determine. It is not possible to find in the Roman-Dutch

authorities, which have been cited to us, any reference to what is a common every-day occurrence in Ceylon. viz., the hypothecation of a sum of money or a fund. A fund of course is an abstraction. The word does not represent any tangible thing, but, nevertheless, in all commercial transactions funds of money are daily treated as if they were entities, and we must deal with this question according to the realities of the situation. In effect we have here a pledge or hypothecation of a fund, and it would surely be reasonable to deal with it upon the analogy of a pledge or a tangible article or a hypothecation of any other property which can be made the subject of hypothecation. If this was a case in which an article, either of plate or jewellery, had been deposited by the debtor with the creditor, and if while this plate or jewellery was in the hands of the creditor, the debtor had approached him and said: "Kindly hand over my plate or my jewellery for the time being to such and such a person with whom I have made an arrangement," and if the creditor, in pursuance of the request of the debtor, did so hand over the property, and if that person thereupon absconded, it would be perfectly clear that the creditor could not be held responsible for the loss. So here, if we consider the realities of the situation, what has happened in this case is that a fund had been hypothecated with the Government Agent. The Government Agent had, at the request of the renter, deposited that fund with the bank, and owing to the failure of the bank the fund had disappeared. That this does represent the reality of the situation may be gathered by a reference to a letter written to the Government Agent (P 4), where the defendant says: "We expected Government to look after our money, although we wanted the money to be placed in the bank." He really regarded this sum of money as a fund in the hands of the Government, held by it as security for the due performance of his contract. It seems to me, therefore, that on the analogy of the pledge of a tangible chattel, the Government Agent ought not to be held responsible for the disappearance of the fund deposited at the defendant's request in the Bank of Colombo.

The transaction may be looked at in another way. This money was deposited with the Government Agent. The Government Agent held this fund as a trust fund on behalf of the toddy renter, subject to his rights in connection with it. While he was so holding it, at the request of the person, in trust for whom he held it, he deposited the fund in a particular bank for the benefit of that person. It surely follows on all principles of equity that a trustee in that position ought not to be held responsible for the loss which occurred through his acting upon the special request.

As has been already indicated, however, Mr. Samarawickreme insists that the real position according to the strict principles of the law is this: that a sum of money had been paid to the Government, that the Government has taken this money and dealt with it as part

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of the ordinary revenue and remains the creditor of the toddy renter to the extent of this amount. Even if we take this view of the case, it seems to me that the result is the same. By the letter to which I referred, the toddy renter wrote to the Government, and in effect made this request: That a sum of money should be set aside to represent the amount of his deposit and should be deposited for his benefit in the Bank of Colombo. This being done, is it equitably possible that when this sum of money disappeared, the toddy renter should be entitled to claim it back from the Government?

There remains the further question to which the learned District Judge attributes some importance: Whether the Government Agent was under any obligation to undertake salvage operations to get back what he could out of the wreck. As a matter of fact there is no express authority on this point, but it seems clear that any person acting at the request of another in this way, and particularly any trustee acting in pursuance of an express request by a *cestui que* trust, competent to make such a request, would be entitled to refuse to bring an action of the nature suggested, unless he were indemnified against all possible expenses.

For these reasons I am of opinion that the appeal must be allowed, with costs.

SCHNEIDER J.—Agreed.

Appeal allowed.