

1930

Present : Dalton J. and Lyall Grant J.

DAVID & CO. v. DE SILVA.

455—*D. C. Colombo, 30,972.*

Registration of business names—Business name registered — Present business commenced afterwards—Registration of particulars—Action on contract—Ordinance No. 6 of 1918, ss. 7 and 9.

Where a person carries on a business, which is registered under a name other than his true name, and, thereafter, starts another business in his own name, particulars of such other business must also be registered.

No contract in relation to such a business, the particulars of which have not been so registered, may be enforced while the party is in default.

THIS was an action instituted by the plaintiff under the name of J. E. David & Co., on a contract entered into by him with the defendant under which the latter undertook to supply timber. In May, 1925, plaintiff registered the business "J. E. David & Co." under the Business Names Registration Ordinance, No. 6 of 1918, the nature of the business

being given as "accountants and auditors". At the time of registration the plaintiff had no other business occupation. In 1926 while continuing the business already registered, he started business as timber merchant in his own name which was not registered. The main point argued in appeal was whether particulars of such business also should be registered under the Ordinance and if so whether the plaintiff could maintain an action on the contract while he was in default.

F. J. Soertsz (with him *R. C. Fonseka*), for defendant, appellant.—Plaintiff cannot maintain this action because—

- (a) He entered into contract as David & Co. and cannot now be heard to say that "David & Co." was in this instance a misdescription.

If it was a contract entered into by plaintiff as "David & Co." then the action is not maintainable, because "the general nature" of the business registered as David & Co. was described by plaintiff as being that of "accountants and auditors" and this action is based on a timber contract which does not fall within the nature of the business registered. The plaintiff David & Co. not having registered in regard to such a business is in default in terms of sections 4 and 9 of Ordinance No. 6 of 1918, and the action fails.

- (b) Even assuming that though the contract in question was entered into by the plaintiff describing himself as David & Co., the real fact was that it was a contract entered into by the plaintiff in his own name, the action is not maintainable for the following reasons :—

- (1) Plaintiff had registered a business as "David & Co." in compliance with section 2 (b) of 6 of 1918, and had in compliance with section 4 of 6 of 1918 furnished certain particulars where *inter alia* under the heading "other business occupation if any" the plaintiff gave no

details indicating thereby that at the time there was no other business occupation he was engaged in.

- (2) It is common ground that after plaintiff had registered his business as accountant and auditor as David & Co., he began an export business mainly concerned with the export of timber. This was a business occupation other than that of auditor and accountant and by reason of the plaintiff engaging in it, a "change occurred" in the general nature of his business and by section 7 of 6 of 1918, the plaintiff was bound to notify the registrar of this change.

He failed to do so and became liable under sections 8 and 9 of 6 of 1918:

- (3) For the purpose of this case we are concerned only with section 9, which provides that "where any firm or person required to furnish a statement of particulars or of *any change in particular* shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulters in relation to the carrying on of the business, in respect of the carrying on of which particulars were required to be furnished shall not be enforceable", &c.

Here plaintiff was in default in that he had not notified the change in particulars. The only question that remains is whether the contract sued upon comes within the terms of the section.

It is submitted, it does, because the business in respect of which particulars are required to be furnished is the aggregate of the business carried on by J. E. David. "The business" in section 9 cannot mean the business of J. E. David & Co., only, for if that was the intention the section would have run "the

business in respect of which registration is required", a phrase which has been used in the Ordinance. See section 6.

The change in phraseology in section 9 is, therefore, significant and must be given effect to.

This view is supported by *Mohideen v. Meera Saibo*.¹

Clearly the intention of the Legislature was to "catch up" all the business activities of a person who has registered under section 2 of the Ordinance.

Keuneman, for plaintiff respondent.—J. E. David carried on two businesses, one as "accountants and auditors" under the name of David & Co. and another in timber under his true full name J. E. David. It was only in respect of the first business that registration was necessary under section 2 and particulars had to be furnished under section 4. As regards the timber business, no registration was necessary nor had particulars to be furnished.

The contract in question in this case was entered into in respect of the timber business.

At the time of the original registration the timber business was not in existence and there was no "other business occupation" of which particulars could be furnished under section 4 (e).

Under section 7 the "change" in the particulars registered in respect of the firm or person relates to the particulars of the registered business, and not other particulars as regards business in respect of which registration is unnecessary.

Even if the starting of a new business in his true full name can be regarded as a "change", particulars of which should be given, yet the present action by J. E. David cannot be affected. Under section 9 the rights of the defaulter under or

arising out of any contract made . . . by . . . such defaulter in relation to the business, in respect of the carrying on of which particulars were required to be furnished shall not be enforceable at any time while he is default. In this case particulars were only required to be furnished in respect of the carrying on of the business as David & Co. It was only because this business was carried on in a business name which did not consist of the true full name of the owner that this firm had registered and particulars furnished. The timber business was carried on under the true full name of the owner and accordingly it was not required to be registered, nor had particulars to be furnished in respect of the carrying on of it. The present contract, being in respect of the timber business, is unaffected by section 9. It is only contracts in respect of the business of "accountants and auditors" carried on the name of David & Co. that can be affected by that action. (*In re a Debtor*¹; *Daniel v. Rogers*.²)

September 1, 1930. DALTON J.—

This appeal raises a question of construction under the Registration of Business Names Ordinance, 1918.

The parties to the action entered into a contract dated December 10, 1927, by which the defendant undertook to supply timber to the plaintiff. The action is brought by plaintiff as "J. E. David carrying on business under the name, style, and firm of J. E. David and Company". He is described in the same way in the contract, although he signed it "J. E. David" only.

On May 20, 1925, he registered the business name of "J. E. David & Co." under the Ordinance, the general nature of the business being given as "accountants and auditors". In the statement of particulars supplied under section 4 of the Ordinance, the eleventh item, the other business occupation (if any) of the individual, is left blank. The form of

¹ 22 N. L. R. 268.

¹ (1918) 2 K. B. 228.

² 89 L. J. K. B. 40.

particulars to be supplied will be found in the rules made under the provisions of section 17 of the Ordinance, and reference to the form of register kept by the registrar will show that this particular information, namely, any other business occupation of the person or firm, is entered in the register under item 9 (*Gazette* of October 25, 1918). It is admitted that at the time of registration J. E. David had no other business occupation than that registered. In the year 1926, whilst continuing the business already registered under the registered name, he started business as a timber merchant in his own name. He was therefore required to furnish particulars of the change in the prescribed form (*vide* rules under the Ordinance) under section 7. He, however, did not supply to the registrar any information of any change in any of the particulars registered in respect of J. E. David & Co. nor was any change registered, as required by the Ordinance, at any time.

Two questions arise on this appeal—

- (a) Was the trial Judge wrong in holding that the plaintiff did not in fact carry on the timber business under the name of J. E. David & Co. ?
- (b) Can the plaintiff maintain any action that may arise for breach of contract in view of his failure to register a change in the particulars registered by him ?

On the first point the learned Judge has come to the conclusion that the timber business was carried on by J. E. David in his own name. Counsel for appellant has very naturally laid great stress upon the description of plaintiff as set out in the contract and also in the plaint. The action still stands as brought by J. E. David carrying on business as J. E. David & Co. No amendment has been made at any time in the caption, and the decree stands as obtained by J. E. David & Co. All this however the trial Judge has duly taken into consideration and yet has without any hesitation come to the

conclusion that the timber business was carried on by J. E. David in his own name. It must be conceded that there is a fair amount of evidence to support his conclusion, in spite of the disability under which plaintiff necessarily starts, having regard to the name in which he brought the action. It is possibly true, as the learned Judge states, that neither he nor his legal advisers gave a thought to the difference between "J. E. David" and "J. E. David & Co." and its bearing on the case, when the action was started. After a careful consideration of the evidence I can only say that I do not think sufficient ground has been shown for interfering with the learned Judge's finding on this question of fact. On that question the appeal must fail.

On the second question there is no doubt that plaintiff is in default of registering a change in the particulars registered of the business "J. E. David & Co.", for in 1926 he as an individual commenced another business in his own name. Had he been carrying on that business in May, 1925, he would have had to disclose the fact in the particulars to be registered in respect of "J. E. David & Co." The commencement of the timber business in his own name after May, 1925, during the continuance of his also carrying on other business as "J. E. David & Co.", is a change which is required to be registered under the Ordinance. For that default a penalty may be exacted under section 8 of the Ordinance. The question to be decided here, however, is whether there is any further disability under the circumstances of this case under the provisions of section 9. That section provides that the rights of any defaulter *under or arising out of any contract made . . . by . . . such defaulter in relation to the business in respect of the carrying on of which particulars were required to be furnished* shall not be enforceable at any time while he is in default. Does the contract, for breach of which plaintiff has sued the defendant, come within the terms of this section ?

For the defendant-appellant it is urged, assuming that the contract was by J. E. David in his own name as has been found, that the business in respect of which particulars are required to be furnished is the aggregate of the business carried on by J. E. David, that is, his business regarded as a whole, in other words, that for the purpose of this section the whole business carried on under the name of "J. E. David & Co." and under the name of "J. E. David" must be considered. He urges that the words "the business" cannot mean "J. E. David & Co." alone, otherwise the section would have said "the business in respect of which registration is required", using words that are also used in other sections of the Ordinance; he draws attention to the fact that the words used in section 9 are the business in respect of the carrying on of which particulars were required to be furnished" and not "the business in respect of which registration is required".

In support of his contention we have been referred to the case of *Jamal Mohideen & Co. v. Meera Saibo*.¹ Bertram C.J. there has expressed a very definite opinion as to the meaning of the words "the business" in section 9, so far as it applied to the facts of that case. The facts there were as follows: One person (first plaintiff) registered his business name as Jamal Mohideen & Co. At that time he was the only person in the business. Later another person (second plaintiff) joined the business as a partner, but no additional particulars as required by section 7 of the Ordinance were furnished to the Registrar for registration. An action was brought by the two partners trading under the business name of Jamal Mohideen & Co. on a promissory note. Exception was taken to the second plaintiff's right to sue in view of the provisions of section 9. The trial Judge found that the second plaintiff joined the firm after the note was in fact given, but the case was sent back as this aspect of the case had

not been sufficiently investigated. Bertram C.J. before making this order discusses the effect of section 9 if the trial Judge's finding on this point be not correct, stating that in his opinion the words "the business in respect of which particulars were required" mean "business carried on in circumstances requiring either the original registration or the further particulars", as the case may be. The opinion is of course under the circumstances *obiter*, but it is one to which this Court will naturally have due regard. If correct, and I have heard nothing to satisfy me it is not correct, applying it as I understand it to the facts before us, it would mean that the words "the business" apply not only to the business of the plaintiff carried on under the name of "J. E. David & Co." but also to the business carried on by him under his own name. In that event, being in default, the rights arising out of the contract before us cannot be enforced while he is in default.

The words of section 9 dealing with this question are not easy of interpretation, but I have come to the conclusion, though I must admit with some little hesitation, that Mr. Soertsz's contention is correct and that this is the proper construction of the section. It is true that if plaintiff were carrying on business under his own name alone nothing would be required to be done by him under this Ordinance, but inasmuch as he is carrying on a business under a name other than his true name, which requires to be registered, particulars as to whether or not he has any other business whether under his own name or any other name also require to be registered. The Ordinance requires under these circumstances details of all his business activities. Having regard also to the intention of the Ordinance, I think that the construction for which Mr. Keuneman contends is too narrow and restricted having regard to the words used. The cases cited by him, *In re Debtor*¹ and *Daniel v. Rogers*², do not

¹ 22 N. L. R. 268.

¹ 89 L. J. K. B. 40.

² (1918) 2 K. B. 228.

afford any real assistance on the point before us. It was not contended that the words "made or entered into by" and finishing with the words "required to be furnished" are not words of description governing the word "contract". They clearly therefore show that not every contract made comes within the terms of the section. It was not contended otherwise.

I would therefore hold that the plaintiff being in default under section 7 his rights under the contract upon which he bases his action, being a contract in relation to the business in respect of the carrying on which particulars are required to be furnished, are not enforceable while he is in default. On this second ground the appeal must be allowed.

The decree entered in the lower Court must therefore be set aside and the plaintiff's action be dismissed with costs, without prejudice however to his right to bring the action afresh, if the default be cured.

The appellant under the circumstances is entitled to costs of the appeal.

LYALL GRANT J.—

This is an appeal from the District Court of Colombo.

The first point to be decided is whether the plaintiff can maintain this action. The plaintiff's name is J. E. David and in 1925 he registered himself under the Business Names Ordinance, No. 6 of 1918, as "J. E. David & Co."

The general nature of the business was given as "accountants and auditors", the heading "the other business occupation (if any) of the individual" was left blank.

The present action is brought claiming damages in respect of breach of an agreement entered into between the plaintiff and the defendant for the supply of satinwood timber by the latter to the former.

In the agreement the plaintiff describes himself as "Jonathan Edward David carrying on business under the name,

style, and firm of J. E. David & Co. of Queen Street, Colombo", and the plaintiff is so described in the caption of this action.

The transaction admittedly was one which did not fall within the business of accountants and auditors. It was entered into in connection with an export business carried on by the plaintiff. A question has arisen whether the business was carried on in the name of David & Co. or in the plaintiff's own name.

The learned District Judge has decided on the evidence that the business was carried on under the plaintiff's own name and not under the name of David & Co.

There are circumstances proved which point in the other direction, but assuming that the District Judge has rightly decided this issue, the question remains whether in view of the provisions of the Business Names Ordinance the plaintiff can enforce his rights under this contract.

Section 9 of the Ordinance provides that where a person, required by the Ordinance to furnish a statement of particulars or of any change of particulars, shall have made default in so doing then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect of the carrying on of which particulars were required to be furnished shall not be enforceable at any time while he is in default by action or legal proceedings either in his business name or otherwise.

The question to be decided is whether this section means that the plaintiff while in default cannot sue on any business contract in his own name, or whether it only means that he cannot sue in respect of the business in respect of which he is already registered.

I may here say that I have some difficulty in holding that a formal contract made by the plaintiff stating that it is made by him trading as David & Co. can be said to be other than a contract entered into by David & Co.

If the contract is made by or on behalf of David & Co., the plaintiff is clearly out of Court as his registration only entitles David & Co. to do business as accountants and auditors.

Assuming however that the words in the contract "carrying on business under the name, style, and firm of J. E. David & Co. of Queen Street, Colombo" are to be disregarded, I think that the words of section 9 of the Ordinance "in respect of the carrying on of which particulars were required to be forwarded" refer to all businesses conducted by David in his own name.

Section 4 requires him as a condition of being allowed to trade as David & Co. to state his "other business occupation (if any)". That entry was left blank.

Section 7 requires him to notify the registrar of any change in the particulars registered in respect of himself—"the particulars registered in respect of any person" not of "any business".

Among the particulars required to be provided by sections 4 and 7 were particulars relating to the other business and occupation of any such individual. When therefore he began to carry on the business of exporters it was his duty to give particulars of this business to the registrar.

The plaintiff made default in notifying these particulars to the Registrar.

I have come to the view that the export and import business was a business in respect of the carrying on of which particulars were required to be furnished by virtue of these two sections, and that by section 9 any contract made by the plaintiff in connection with this business cannot be enforced until he has purged his default.

I agree with the order proposed by my brother Dalton.

Set aside.