1920.

Present : Bertram C.J. and De Sampayo J.

JAMAL MOHIDEEN & CO. *v.* MEERA SAIBO *et al.*

85—D. C. (Inty.) Colombo, 174.

Registration of Business Names Ordinance, No. 6 of 1918, s. 9—Partnership—Non-compliance with the provisions of s. 9—Action on a note—May action be suspended till provisions are complied with ?

The plaintiffs, who were partners carrying on business under the name of Jamal Mohideen & Co., brought this action for the recovery of the balance due on a promissory note. At the time the action was brought the first plaintiff had registered his business name. The District Judge held that the second plaintiff joined the firm after the note was given, but before the action was brought. Upon the second plaintiff joining the firm, the additional particulars required by section 7 of Ordinance No. 6 of 1918 were not furnished.

The District Judge made an order suspending the action until the plaintiffs complied with the provisions of the Ordinance.

Held, that (1) the plaintiffs' rights were their rights at the date of the institution of the action.

(2) If the second plaintiff joined the firm after the execution of the note, section 9 did not apply, and the action was maintainable.

(3) If, however, the second plaintiff joined the firm before the execution of the note, the action ought to be dismissed; but the plaintiff might, with the leave of Court, withdraw the action under section 406 of the Civil Procedure Code and commence a fresh action after complying with the provisions of the Ordinance.

THE facts appear from the judgment.

Keuneman (with him *H. E. Garvin*), for defendants, appellants.—Section 9 of Ordinance No. 6 of 1918, the Registration of Business Names Ordinance, says that "the rights of the defaulter . . . . shall not be enforceable at any time while he is in default by action or other legal proceeding." "Enforceable by action" means that no action can be instituted. *Cf.* section 4 of the Sale of Goods Ordinance. See *Britain v. Rossiter*,[1] *Taylor v. G. Eastern Railway*,[2] *Bill v. Bameul*.[3] These are cases under the Statute of Frauds ("shall not be allowed to be good"), but the words have been held to have the same meaning as "shall not be enforceable. [Bertram C.J. referred to *Godfrey v. George*[4] and *Pritchett v. English and Colonial Syndicate*.[5]] The case of *Lucas v. Dixon*[6] emphasizes this point. The local decisions under section 547, Civil Procedure Code, are not applicable, as the language there is "shall not be maintainable." "Maintainable" has a technical meaning, "capable of being proceeded with." See Wood Renton C.J. in *Hassen Hadjiar v. Levane Marikar*.[7] Further, it has been held that the rights of parties must be adjudged at the commencement of the action. *Silva v. Fernando*.[8]

There is a significant alteration in our Ordinance. The English Act of 1916 enacts that "any contract made by the defaulter while he is in default shall not be enforceable by action." Under our Ordinance all contracts made by the defaulter are attacked whether made while he was in default or before, but the defaulter may at any time before action brought purge his default by registration and obtain the right to sue.

[BERTRAM C.J.—Do not the words "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 are required to be furnished" restrict the disability to contracts made after the default?]

[1] (*1879*) *11 Q. B. D., at 128, 130.*
[2] (*1901*) *1 Q. B. 774, at 778, 779.*
[3] (*1841*) *9 M. & W. 36.*
[4] (*1896*) *1 Q. B. D. 48.*
[5] (*1899*) *2 Q. B. D. 428.*
[6] (*1889*) *22 Q. B. D. 357, at 360; 58 L. J. Q. B. 161.*
[7] (*1912*) *15 N. L. R. 275.*
[8] (*1918*) *15 N. L. R. 499.*

1920.

Jamal Mohideen & Co. v. Meera Saibo

The effect of these words is to restrict the disability to business contracts, and not to affect private contracts. The business is that which is continuously carried on. The fact that the business is required to be registered or not does not affect the identity of the business. Registration can only affect the "carrying on" of the old business.

H. J. C. Pereira (with him *Tisseverasinghe*), for plaintiffs, respondents.—Section 9 does not avoid the contract. It only precludes action being maintained, that is, proceeded with. It does not prevent institution of the action, but only requires a particular kind of evidence when it is sought to prove the contract. When objection is taken to the maintainability of the action, the Court has the right to allow the plaintiff an opportunity to correct the deficiency. There are several decisions under section 547 of the Civil Procedure Code to the same effect. This is a purely technical objection, and not one of substance. When title derived under a will was put in issue and it was found that the will had not been proved, the Supreme Court held that the action should have been suspended and the party allowed an opportunity to have the will proved. *7 C. W. R. 101.* The words "at any time he is in default" postulate a time not necessarily antecedent to action when the default can be purged. Section 9 should be construed reasonably. Time has been allowed to correct a deficiency where it is a question of revenue only. (*21 N. L. R. 165, at 172.*) There the omission in section 9 of the words "by action or other legal proceedings," after "enforceable" running in section 8, sub-section (51), of the English Act, 6 and 7 Geo. V., c. 58, is significant. Besides, the transaction in question was antecedent to the default, and section 9 does not extend to transactions antecedent to default. It is only rights of a defaulter arising under a contract made at a time when he was in default that is not enforceable. *In re a Debtor.*[1]

The words are "contract made or entered into by such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished." At the time the contract was entered into particulars were not required to be furnished in relation to the business, and the contract was therefore not made by a defaulter.

Keuneman, not called upon in reply.

Cur. adv. vult.

September 2, 1920. BERTRAM C.J.—

The question in this case is a question of the interpretation of section 9 of the Registration of Business Names Ordinance, No. 6 of 1918. The action is brought on a promissory note by two partners now trading under the business name of Jamal Mohideen & Company. The second partner joined the firm before action brought,

[1] (*1919*) *Weekly Notes 293.*

but, it is said by the plaintiff, after the cause of action arose. The action is brought for the recovery of the balance alleged to be due on a promissory note. If this promissory note was executed before the second plaintiff joined the firm, then it seems that there must be some misapprehension in his being made the second plaintiff in the action. The District Judge has found on the evidence before him that the second plaintiff joined the firm after the note was in fact given. As to whether that finding is justified, I will make certain observations presently.

At the time when the action was brought, the first plaintiff had registered his business name Jamal Mohideen & Company. But upon the second plaintiff joining the firm, he did not furnish the additional particulars required under section 7 of the Ordinance. It is because of that default that exception is now taken to his right to sue, and it is said that under section 9 this action does not lie at all, because at the date when it was instituted the first plaintiff, and, possibly in a certain view of the facts, the second plaintiff also, were in default. The material words which we have to interpret are " 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 to the carrying on of which particulars were required to be furnished shall not be enforceable at any time he is in default by action or other legal proceedings either in the business name or otherwise." More specifically the important words are " the rights of that defaulter shall not be enforceable by action."

The District Judge has thought himself justified in interpreting the word " enforceable " in the same manner as the word " maintainable " has been interpreted under section 547 of the Civil Procedure Code, and on that basis he has made an order which in effect suspends the action until the plaintiffs have complied with the provisions of the Ordinance. This condition they have now carried out. But Mr. Keuneman maintains that the words " the rights shall not be enforceable by action " means that no action shall be " brought to enforce the rights." Here I have come to the conclusion that he is right. The words " enforceable by action " are a definite legal phrase used in many different contexts. They appear in section 4 of the Sale of Goods Ordinance, No. 11 of 1896. They are used in a series of cases dealing with a question of procedure under the English law. Under Order 42, Rule 24, of the English Rules of Practice, there is a reference to the manner in which a judgment may be enforced, and in the cases decided upon those and the connected rules it is always pointed out that a judgment may be enforced, not only by execution, but also by a separate action, and that an order under this rule may also be enforced by action, and wherever that phrase is used, it means that an action may be brought to enforce the right in question. I may refer as authorities on this

1920.

BERTRAM C.J.

Jamal Mohideen & Co. v. Meera Saibo

point to the cases of *Godfrey v. George*[1] and *Pritchett v. English and Colonial Syndicate*.[2] Mr. Keuneman has also drawn our attention to an interesting case decided under the Statute of Frauds, namely, *Lucas v. Dixon*.[3] That was a decision, not upon section 4 of the Sale of Goods Act, but upon section 17 of the Statute of Frauds, and there the phrase was not that a contract should not be "enforceable by action," but that it should not be "allowed to be good." It has been held that those two phrases mean the same thing. Still the judgment of the Court cannot be cited as an interpretation of the phrase now under discussion. But in the judgment of Bowen L.J. there is this passage: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts under them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. That still leaves it open to question as to what is the time at which it can be said the contract is sought to be enforced—when the action is brought, or when it is sought to prove the case by adducing the evidence. I cannot help thinking that the view of Lord Blackburn was that at the time the action is brought the evidence ought to be in existence." This passage well illustrates what is meant by the enforcement of a right by action.

I have come to the conclusion, therefore, that on that particular argument Mr. Keuneman is right, and that when our Ordinance says "the rights of that defaulter shall not be enforceable by action," it means that "the defaulter shall not be entitled to bring any action to enforce his rights." This is in accordance with the general principle that a litigant's rights in an action are his rights at the date of the institution. With regard to the interpretation given by this Court to the word "maintainable" under section 547 of the Civil Procedure Code—see in particular the judgment of Wood Renton C.J. in the case of *Hassen Hadjiar v. Levane Marikar*[4]—this Court has laid down that in saying "that an action shall not be maintainable," what the Legislature intended was that it shall not be capable of being proceeded with at any time when attention was called to the defect.

I have little doubt that in adopting this interpretation our Court had in view the special meaning of the word "maintain" in regard to an action as contra-distinguished from the word "bring." There is a well-known authority on that point, the case of *Moon v. Durden*,[5] where Platt B. made this observation: "The verb 'to maintain' in pleading has a distinct technical signification. It signifies to support what has already been brought into existence. Thus, a defendant who admits the right of a plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter

[1] (1896) 1 Q. B. D. 43.
[2] (1899) 2 Q. B. D. 428.
[3] (1889) L. R. 22 Q. B. D. 357.
[4] (1912) 15 N. L. R. 275.
[5] (1848) 2 Ex. 22.

disabling him from further proceeding, insists that the plaintiff ought not, by reason of such matter, further to maintain his action." I think that that principle may explain the interpretation our Court has thought itself justified in giving to the word "maintainable." But I do not think that the word "enforceable" can be construed in that manner. So much for that point.

There is a further point. The District Judge is of opinion that this particular transaction on which the action is brought was antecedent to the default. He has not considered the effect of that finding, but this is a question that requires to be considered. Does the disability established by section 9 extend to transactions antecedent to the default? To answer that question we must compare our own enactment with the corresponding enactment in the Registration of Business Names Act, 1916, on which our own Ordinance is based. The corresponding section under that Act is section 8. Our Legislature has departed from the words of that section in a very important particular. Under the English Act it is declared "that any contract made by the defaulter at any time while he is in default shall not be enforceable by action." Our own Ordinance says that the rights of a defaulter under or arising out of any contract made by such defaulter shall not be enforceable at any time while he is in default." The intention of our Legislature was obviously to mitigate the rigour of the English enactment, to enable the defaulter at any time to purge his default by complying with the Ordinance, and upon this being done to set him free to enforce his rights. Under the English Act the defaulter was debarred absolutely so long as he was in default. He could only obtain relief by a specific application, and this relief the Court was free to give or withhold. Now, it is suggested that, in thus mitigating the disability imposed by the English Act, our Legislature at the same time greatly enlarged the scope of that disability. Whereas the English enactment limited the disability to transactions entered into while the person was actually in default, our own Ordinance, so it is contended, extended those disabilities to all transactions entered into for the purpose of the business of any partner in default, whether before or after the default. Such an intention is a very unlikely one to impute to the Legislature. Of course, that may be the effect of the words actually used. I do not think, however, that the words should be so construed.

Mr. Keuneman seems to suggest that the word "business" in this section must be construed as referring to a sort of personification. A business goes on under various names, and in the conception of the Legislature, so he contends, it is itself a personality, and the words "entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished" must be considered to apply to this continuous unembodied personality. Thus, supposing a man of the

1920.

BERTRAM C.J.

Jamal Mohideen & Co. v. Meera Saibo

name of James Brown carried on a business in his own name and then took his son into partnership under the name of James Brown & Company, in such a case he has to furnish particulars consequent upon the adoption of this business name. Supposing he fails to do so, the business, whether conducted by James Brown or James Brown & Son is in Mr. Keuneman's view the same business, and any transaction of that business, whether before or after the change, would be subject to the disability.

I do not take this to be the meaning of the words. I think that the words "the business" in section 9 means "the aggregate of the commercial transactions carried on by the partners." There is a somewhat similar phrase used in section 6, "the business in respect of which registration is required." "The business in respect to the carrying on of which particulars were required" means, in my opinion, "business carried on in circumstances requiring either the original registration or the further particulars," as the case may be. No doubt those words are also intended to draw a distinction between the private transactions of the partners and their business transactions. But I think they are further intended to draw a distinction between transactions carried on before and after the use of the business name, or before and after the variation in the constitution of the firm, as the case may be.

In this view of the case, if the District Judge's finding is correct, the action is maintainable, subject to the point that in that view of the case it is difficult to understand why the plaintiff is plaintiff at all. But it does not seem to me that the District Judge has very fully investigated the facts. The only material evidence is that of the manager of the plaintiffs' firm, who says in chief "the second plaintiff joined the firm in January, 1920," that is, after the execution of the note; whereas in cross-examination he says: "I do not know whether the plaintiffs were partners when the note was made."

I think, therefore, that the case should go back to the District Judge for the further investigation of that point. If he finds on further inquiry that the second plaintiff joined the firm after the execution of the note, then I think that section 9 should not be held to apply. If, on the other hand, he finds that the second plaintiff joined the firm before the execution of the note, and both plaintiffs were in default at that date, then other considerations would arise.

Mr. Keuneman has hinted that in such a case the action ought to be dismissed, and that the question would then become *res judicata* between the parties. I do not think that anything so unreasonable as that should be held to be the law. This very point was mentioned in the case I have already referred to—*Lucas v. Dixon*.[1] There it was a condition of the action, which was an action brought under section 17 of the Statute of Frauds, that a note or memorandum of a

[1] *(1889) L. R. 22 Q. B. D. 357.*

contract should be in existence. Such a note or memorandum did come into existence after the action was brought. It was maintained that that entitled the plaintiff to continue the action. That contention was disallowed. But Fry L.J., on concurring in the judgment disallowing the contention, said : " The Statute requires the memorandum as evidence, but requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another."

Our own Code provides for this very contingency in section 406, by which it is declared that " if at any time after the institution of the action the Court is satisfied on the application of the plaintiff that the action must fail by reason of some formal defect, or that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim, with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

I have no doubt that, in the event of the Court finding on investigation that both partners were in default in respect of the action, it would accede on reasonable terms to any application that the plaintiffs may make for leave to withdraw from the action and to commence a fresh one. I would, therefore, deal with the case in the manner I have indicated. I would send the case back to the District Judge for further inquiry as to the date on which the second plaintiff joined the firm, and for such further action as he may think fit on the principles I have indicated.

This seems to be a case in which the honours are divided. In my opinion there should be no order as to costs of appeal. With regard to the costs in the Court below, I think they should be in the discretion of the District Judge.

DE SAMPAYO J.—I agree.

Sent back.