

1953

Present : Gratiaen J. and Gunasekara J.

HIRDARAMANI LTD., Appellant, and T. A. K. DE SILVA,
Respondent

S. C. 94—D. C. Colombo, 21,772M

Contract—Novation—Ingredients necessary.

P. T., who was carrying on a business, bound himself and his heirs, executors and administrators to pay monthly a certain sum of money to the plaintiff. Subsequently a private limited liability company acquired the business. P. T. who was the managing director of the company, continued the monthly payments notwithstanding the cessation of his private business. After he died the company made similar payments subject however to the express qualification that the payments were *ex gratia*. In an action instituted by the plaintiff for a declaration that the company was liable to continue to make such monthly payments—

Held, that the claim of the plaintiff was insupportable in law. A novation of a debt cannot, in the absence of any express declaration by the parties, be held to exist except by way of necessary inference from all the circumstances of the case.

APPPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

Sir Ukwatte Jayasundera, Q.C., with *L. G. Weeramantry* and *O. M. de Alwis*, for the plaintiff respondent.

Cur. adv. vult.

March 3, 1953. GRATIAEN J.—

On 29th January, 1944, an agreement was entered into between three persons named Paramanand Tourmal, T. A. K. de Silva (who is the plaintiff) and A. C. P. Wijeratne (who is the plaintiff's brother-in-law). Paramanand Tourmal had for many years been carrying on business in Colombo under the name style and firm of "Hirdaramani". He employed the plaintiff as his "leading Jeweller", and Wijeratne as "assistant Jeweller".

The agreement arrived at between these three parties was, *inter alia*, to the following effect :

- "(a) The said Silva shall retire as leading jewellery maker in the firm of Hirdaramani as from the 1st day of February, 1944, and shall in consideration of the sum of Rs. 475, being the purchase price, deliver to Mr. Paramanand all machines tools and other implements that are now at Hirdaramani and owned by Silva.

- (b) The said Wijeratne shall as from 1st February, 1944, serve under Mr. Paramanand 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. Paramanand.
- (c) In consideration of the services rendered as aforesaid by Silva and as long as Wijeratne is employed under Mr. Paramanand he Mr. Paramanand shall as from 1st February, 1944, pay to Silva monthly at the end of each and every month a sum of Rs. 150 during the lifetime of Silva.
- (d) Towards the payment of the aforesaid monthly sum of Rs. 150 by Mr. Paramanand he the said Wijeratne shall contribute a sum of Rs. 75 monthly from his remuneration.
- (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 Hirdaramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rs. 150 shall immediately cease anything herein contained to the contrary notwithstanding.”

The term “Paramanand Tourmal” was expressed to include his heirs, executors and administrators, but no provision was made for the eventuality of an assignment of the business by the proprietor during his lifetime.

Paramanand Tourmal ceased to carry on the business of “Hirdaramani” in his own right in 1946, and a private limited liability company, known as *Hirdaramani Ltd.*, and incorporated on 27th June, 1946, acquired the business. In fact he was the Managing Director of the new Company until he died in March, 1948.

It is common ground that, notwithstanding the cessation of his private business in 1946, Paramanand Tourmal continued the monthly payments of Rs. 150 to the plaintiff until the date of his death. The learned District Judge has held as a fact that he did so as the Managing Director of the Company. After he died, the Company continued to make similar payments until May, 1949, subject however to the express qualification that the payments were *ex gratia*.

The plaintiff sued the Company on 27th October, 1949, (a) for the recovery of a sum of Rs. 2,250 alleged to be due to him in respect of monthly payments since the month of June, 1948, under the agreement dated 29th January, 1944, and (b) for a declaration that the Company was liable to continue to make such monthly payments to him “in terms of the said agreement”. After trial the learned District Judge entered judgment in favour of the plaintiff as prayed for. The present appeal is from this judgment.

It is conceded 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 Paramanand 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 "Hirdaramani" after his death, they too might have been obliged in law to pay the plaintiff's allowance so long as Wijeratne continued to serve them.

The basis of the plaintiff's cause of action is, as alleged in paragraph 6 of the annexed plaint, that the Company "undertook the liability of Paramanand Tourmal". In support of this allegation the plaintiff stated as follows in the course of his evidence at the trial: "After I came to know that the business had been converted into a limited liability company I spoke to Mr. Tourmal. 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 was incorporated 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." This evidence has been accepted by the learned District Judge as a truthful account of the conversation which took place between the plaintiff and Paramanand Tourmal shortly after the Company was incorporated. He decided that the Company was therefore liable *by novation* to discharge Paramanand Tourmal's obligations under the original contract.

If the averment that the Company "undertook the liability of Paramanand Tourmal" was intended to plead a novation, it is, to say the least, lacking in precision as to the terms of the agreement whereby Paramanand Tourmal is alleged to have agreed to the extinction, by a contract of novation of his personal obligation and the imposition of a substituted obligation on a different debtor, namely, the Company. I shall assume for the purposes of the present appeal that the plaint sufficiently complies with the wholesome rule that novation must be specially and precisely pleaded.

In the facts of the present case, the form of novation relied is a transaction described by the Roman-Dutch jurists as *delegation*, i.e., a contract between the debtor and the creditor of an obligation and a third party, by which the third party, with his own consent and the consent of the creditor, is substituted for the original debtor in such a way that the obligation between the original creditor and the original debtor is extinguished and a new obligation established between the original creditor and the third party"—*Wessels on Contract*, Vol. 1, p. 728, para. 2433 (citing *Voet* 46.2.11).

The plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of Paramanand 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 Paramanand 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 Paramanand 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 "*Hirdaramani Ltd.*" as its "leading jeweller". No such contract has been pleaded or proved by the plaintiff.

"A novation cannot, in the absence of any express declaration by the parties, be held to exist except by way of necessary inference from all the circumstances of the case". *Darling v. Registrar of Deeds* (1912) S. A. A. D. 28 at 35. To my mind the correspondence between the plaintiff and the Company after the death of Paramanand Tourmal rules out the inference (and far less the necessary inference) that the Company had unequivocally undertaken an obligation of the kind which has now been suggested. For three successive months the Company sent him a cheque for Rs. 150 stating expressly that this was being done "without any obligation on our part". On the first two occasions the plaintiff accepted the money without registering any protest against the conditions attaching to it. On the third occasion, nearly a month after he had realised the cheque, he wrote to say that he felt "that the Company or in the alternative the estate of the late Mr. Paramanand Tourmal is liable to continue the payment throughout my lifetime". That suggestion was admittedly made after he had obtained legal advice. As far as the Company was concerned, it was promptly repudiated by its new Managing Director.

The learned District Judge has also held that the Company was estopped by its conduct from denying its obligation to continue the payments after the death of the original debtor. While I accept unreservedly the principle of estoppel by representation enunciated in *Hailsham*, Vol. 1, p. 479, para. 547, I do not see how it can be applied to the facts of the present case. There is no evidence to support the view that the plaintiff was misled into the belief that the Company would continue the payments "throughout (his) lifetime". On the contrary, the letter dated 23th June, 1949, negatives the theory that he entertained such an unqualified belief.

In the view which I have taken, it is unnecessary to decide (1) whether a novation could have taken place without the concurrence of Wijeratne, who himself had undertaken certain obligations under the previous agreement, and (2) whether Wijeratne was in fact a party to the new agreement whereby, presumably, the scope of his liability was substantially enlarged.

It is indeed unfortunate for the plaintiff that he rejected the Company's offer to continue the payments upon the clear understanding that they would be made on an *ex gratia* basis. The plaintiff has chosen instead to obtain an adjudication of his legal rights, and I find myself constrained to decide that his claim is insupportable in law. I would therefore allow the Company's appeal and dismiss the plaintiff's action with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.