1936 *Present* : **Soertsz J. and Fernando A.J.**

# MOHAMED LEBBE *v.* CADER LEBBE

*327—D. C. Kandy, 46,405.*

*Cheetu club—Mortgage bond to secure payment of money due—Bond invalid and unenforceable—Action by assignee.*

A mortgage bond given to secure payment of money due to a cheetu club is invalid. Such a bond is unenforceable in the hands of a *bona fide* assignee for value.

*Sinnathurai v. Chinniah* (*10 N. L. R. 5*) followed.

*Narayani v. Kanapathy* (*6 S. C. C. 68*) referred to.

APPEAL from a judgment of the District Judge of Kandy.

*H. V. Perera* (with him *Rajapakse*), for plaintiff, appellant.

*Navaratnam* (with him *Gratiaen*), for defendant, respondent.

*Cur. adv. vult.*

February 1, 1937. SOERTSZ J.—

The plaintiff (appellant) brought this action against the legal representative of one Seyad Lebbe Noor Mohamadu to recover a sum of Rs. 575 balance principal and Rs. 303 interest said to be due on a mortgage bond given by the said Noor Mohamadu Lebbe to one Ismail Lebbe Seyadu Mohamadu Lebbe and by him assigned to the plaintiff appellant.

The defendant filed answer admitting the execution of the bond but stating that it was not enforceable because it was given by Noor Mohamadu Lebbe to secure contributions due by him to a lottery cheetu, and, therefore, in furtherance of a lottery; that, as a matter of fact, the amount due by way of contributions had been paid, that Ismail Lebbe Seyadu Mohamadu Lebbe, the mortgagee and manager of the cheetu club, acting fraudulently and in collusion with the plaintiff, had assigned the bond to him.

The trial Judge found that the mortgage bond had been given in the circumstances alleged in the answer, and that, therefore, the bond was not enforceable. He also found that the amount due had been paid. He dismissed the plaintiff's action with costs. There is sufficient evidence to support the findings of fact that the bond was given in the circumstances alleged. In my opinion, the evidence on the issue whether the amount due had been paid is altogether unsatisfactory, and the trial Judge should have answered that issue against the defendant. But this is of no practical consequence in this case in view of the conclusions I reach on the earlier question. That question is with regard to the position in law of the plaintiff who had taken an assignment of a bond given to secure payments due to a lottery club in furtherance of a lottery.

I will, in the first instance, consider this question on the assumption that the plaintiff was not aware of the circumstances in which the bond had been given. The evidence led shows that the mortgagor Noor Mohamadu Lebbe was a member of a lottery cheetu club and that the mortgagee Ismail Lebbe Seyadu Mohamadu Lebbe was the manager of the club. There were forty members in all, each contributing monthly Rs. 25. The pool went from time to time to the member who drew the winning number in a lottery. This was clearly against the law. It offends against the provisions of the Lotteries Ordinance, No. 3 of 1844, particularly against sections 3 and 5.

In *Sinnathurai v. Chinniah*[1] a Bench of three Judges held that cheetu club where the prizes were distributed by lot were within the scope of the Lotteries Ordinance. Hutchinson C.J. who delivered the judgment of the Court commenting on the argument that "there were no prizes inasmuch as every person who joins the club simply got back all his money and neither more or less" said the advantage is the getting of the use of the money at the beginning of the term—£10 in hand is better than £10 a year or two hence. The advantage is to get it at once, and getting that advantage by means of lots you get a prize."

In this sense Noor Mohamadu had drawn a prize and when he gave his bond to secure the future payment of contributions, he was promoting

[1] *10 N. L. R. 5.*

this arrangement. He thus entered into an illegal transaction, and the bond was invalid and unenforceable. The mortgagee could not sue upon it. Is the position different now that the bond has been assigned by the mortgagee without the concurrence of the mortgagor to the plaintiff?

After careful consideration, I think the question must be answered in the negative. In *Eaton v. Registrar of Deeds*[1], de Villiers C.J. said :— "I may, however, point out that there is material difference between a negotiable instrument, such as a promissory note, and a mortgage bond in regard to the rights of a transferee. In the case of such a negotiable instrument, if the endorsee who delivers it can by the law of the country in which the delivery takes place, give a valid title to the bill, the endorsee can, as a general rule, recover the debt from the debtor whatever defence such debtor might have against the endorser. In the case of a mortgage bond, however, the cessionary acquires no greater rights than the cedent, so that if the latter cannot sue on the instrument he cannot, as a general rule, transmit a right to the former to sue thereon."

This is the logical result of the history of the assignment of obligations.

The Roman law did not permit the assignment of an obligation which was considered an essentially personal relation. The only way in which an obligation could have been transferred was by novation which by its very nature required the consent and participation of the debtor. The first step towards making assignments of obligation possible was taken when the Roman law under the formulary procedure, enabled a man to sue for another or on his behalf. But a person suing through another could be repelled by all the defences available against him, for, although not nominally, he was really the plaintiff. The other was acting as on *mandatum actionis*. Sande observes, "The Roman jurists held that such *mandatum actionis* did not necessitate a transference of an obligation, for the original creditor still remained the true and only creditor; the sole result was that the right of action passed, to wit, that the procurator was invested with the capacity of exercising the original creditor's right of action, and that the procurator could only assert or realize the claim of another person. Though this *cessio nominum* or *actionum* dispensed with the debtor's consent, it was extremely imperfect and defective, for until *litis contestatio* the assignee of the *nomen* has no direct relation with the debtor. Moreover, the appointment of the creditor's procurator was governed by the rules of Mandatum. If the creditor revoked the mandate or if he died, the mandate was extinguished. The *mandatarius in rem suam* has no right in respect of the debt he sues for, and in the eye of the law he is not the creditor, but only the agent, with the difference that as against the mandator he is not bound to hand over what he recovers from the debtor.

"The praetor desiring to make transactions of this nature more elastic, introduced the fixed rule that a *mandatum in rem suam* should be irrevocable not only from the moment of *litis contestatio*, but from the

[1] *7 S. C. 254.*

moment the debtor received notice of the *mandatum actionis*. From the moment of such notice being given the procurator has an incontestible right to claim payment from the debtor, who could then no longer make a valid payment to the original creditor. Here we have the first indications of the idea of assignment. In course of time the *mandatum ad agendum* granted in pursuance of a transaction by which the parties purported to transfer the obligation was immaterial. The essential part was the transaction itself, in a word, the act of assignment."

But all along the position of the procurator was no better than that of his principal. "The complete transferability of obligations was unknown to jurisprudence until modern legislation gave validity to contracts with an *incerta persona*, *e.g.*, bills of exchange or other negotiable instruments".

I have made these lengthly quotations because they elucidate the reason for the distinction drawn by de Villiers C.J. in *Eaton v. Registrar of Deeds* (*supra*) and help us to overcome such surprise as was felt by Burnside C.J. when in *Narayani v. Kanapathy*[1], he said in circumstances somewhat similar to these—that is on the hypothesis that the plaintiff in this case took assignment for value and without notice of the defect—"We must confess that it does seem contrary to natural justice that a defendant should by his solemn act or deed admit and thus hold out to others that he had received money consideration for his bond, and promise to pay the amount to the obligee and his assigns and afterwards be permitted to say that he had in fact received no consideration". He refers to Burge who says, "All defences competent to a debtor on a movable debt against the original creditor . . . . continue relevant even against an onerous assignee because *no* assignee can be in better position than his cedent—that was a case where the plea was a total failure of consideration—but the learned Chief Justice went on to state that the authorities were clear that it was open to the defendant so to contend. This state of the law entails no real hardship, for assignees can always secure their positions by requiring the consent of the debtor to the assignment.

In this case there was no such concurrence on the part of the debtor that is the mortgagor, and inasmuch, therefore, as it was open to him to plead or prove this defence against his mortgagee, notwithstanding the statement in the bond that it was given for money borrowed and received, it remains open to the present defendant who is the legal representative of the mortgagor to set it up against the assignee of the mortgage bond.

English jurisprudence reached the same position by a different route and the law is that the "assignee takes subject to equities, that is subject to all such defences as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got". (*Anson.*)

I, therefore, am of opinion that the plaintiff's action fails because the bond he sues upon is tainted with illegality. The appeal must be dismissed with costs.

[1] *6 S. C. C. 68.*

I only wish to add that in this case even the *argumentam ad misercordiam* of hardship to the plaintiff does not ring true because there is evidence to show that the plaintiff who was himself a member of the cheetu club knew full well the circumstances in which the bond was given.

FERNANDO A.J.—I agree.

*Appeal dismissed.*