

1929

*Present* : Dalton and Akbar JJ.DHARMADASA *v.* ABDUL CADER.

371—D. C. Batticaloa, 6,309.

*Fiscal—Bond of indemnity—Mandate of sequestration—Assignment of decree—Deputy Fiscal's right to assign indemnity bond to assignee of decree—Ordinance No. 4 of 1867, s. 83.*

In execution of a mandate of sequestration issued in an action before judgment, the Fiscal seized a motor bus, when the defendants entered into a bond with the Fiscal, whereby they undertook to produce the motor bus in the same state as at the time of seizure. The defendants having failed to observe the condition of the bond, the Fiscal assigned the bond to the plaintiff, who was the assignee of the decree entered in the action,—

*Held*, that the plaintiff was entitled to obtain an assignment of the rights of the Fiscal under the bond.

The Deputy Fiscal may assign a bond entered in favour of the Fiscal.

*Chinniah v. Ahamadu Levvai*,<sup>1</sup> followed.

THE plaintiff was the assignee of a decree entered in case No. 1,864 of the District Court of Matara, whereby the judgment-creditor assigned the sum of Rs. 1,727·48, less a sum of Rs. 344·35. It would appear that a motor bus was seized on a mandate of sequestration issued in case No. 1,864 at the instance of the plaintiff. Thereupon the defendants entered into an agreement with the Fiscal, whereby they undertook to be responsible for the production of the motor bus in the same condition and state as at the time of seizure. They entered into a bond with the Fiscal in the penal sum of Rs. 4,000. As the bus was not carefully kept by the defendants, the Fiscal took possession of it and put it up for sale, when it realized only a sum of Rs. 355 owing to improper use on the part of the defendants. The plaintiff, who was the assignee of the decree in case No. 1,864, obtained an assignment of the bond from the Deputy Fiscal and sued the defendant claiming the sum of Rs. 3,645, namely, the sum covered by the bond less the value of the bus. The learned District Judge gave judgment for the plaintiff for the sum of Rs. 750.

*Tisseverasinghe*, for defendant, appellant.—The Fiscal had no right to sell the bus unless he considered it subject “to speedy and natural decay,” as provided for by section 227 of the Civil Procedure Code. The bond and the sale thereunder before the

<sup>1</sup> 24 N. L. R. 90.

date of the decree were irregular and of no force in law. The plaintiff has been given credit for the sum of Rs. 344·35 realized by the sale of the bus. Plaintiff was apparently satisfied with the sale; and as there is no reference to the bond in the decree, the plaintiff had no further right or interest in the bond, and the assignee therefore had none. There was no consideration for the assignment of the bond, which has not been registered under Ordinance No. 8 of 1871. The bond was entered into with the Fiscal, and the Deputy Fiscal had no right to assign (*Ibrahim Saibo v. Weerappen et al<sup>1</sup>, Abdul Cader v. Valliappa Pillai<sup>2</sup>*).

1929.  
Dharmadasa  
v. Abdul  
Cader

If the Fiscal considered that the defendants had committed a breach of the bond, he should have refused to take delivery and sought his recovery on the bond. He cannot take the bus and also sue for damages.

*Peri Sunderam*, for plaintiff, respondent.—It is not competent for the appellant to raise points in appeal which are outside the issues agreed upon. The first issue raised was as to whether the liability on the bond was discharged by the delivery of the bus for sale by the Fiscal and the Fiscal's acceptance of it.

The liability can only be discharged if the bus was discharged in the same state and condition. There is evidence that it was not so delivered, and the learned District Judge has found in favour of the plaintiff.

The assignment is good under section 83 of Ordinance No. 4 of 1867. A Deputy Fiscal can assign a bond entered in favour of the Fiscal. (*Chinniah v. Ahamadu Levvai (supra)*.)

*Tisseverasinghe*, in reply.—The words of section 83 have not been considered in *Chinniah v. Ahamadu Levvai (supra)*. They negative the contention that the generality of the powers and duties of the Fiscal devolve on a Deputy Fiscal in such a matter as the assignment of a security.

February 5, 1929. AKBAR J.—

This is an appeal from the judgment of the District Judge awarding the plaintiff the sum of Rs. 750 against the defendants severally and jointly, and the costs of the action.

The plaintiff was the assignee of a decree entered in case No. 1,364 of the District Court of Matara by the judgment-creditor in that case, whereby the judgment-creditor assigned the sum of Rs. 1,727·48, less the sum of Rs. 344·35 raised by the sale of the motor bus pending the decision of the Matara case, and all the rights of the assignor under the said decree.

<sup>1</sup> *Wendt 226.*

<sup>2</sup> *5Balasingham 95.*

1929  
 AKBAR J.  
 Dharmadasa  
 v. Abdūl  
 Cader

It appears that the bus was seized on a mandate of sequestration issued by the District Judge of Matara in the Matara case at the instance of the plaintiff. Upon this seizure, the defendants in this case entered into an agreement with the Fiscal, whereby they undertook to be responsible for the production of the motor bus whenever required in the same condition and state as at the time of seizure, or to pay double its value. The defendants in this case thereupon entered into a bond with the Fiscal in the penal sum of Rs. 4,000, which was double the value of the bus, on August 3, 1925. By this same bond this bus was hypothecated to the Fiscal.

The second defendant in this case appears to have preferred a claim to this bus on the strength of a deed of assignment by the defendants in the Matara case, and the claim inquiry was inquired into on February 9, 1926, and apparently dismissed. The Fiscal then appears to have taken possession of the bus, because the bus was not taken proper care of by the defendants, in terms of the deed of hypothecation entered into by the defendants with the Fiscal.

On June 5, 1926, the bus was duly put up for sale and only fetched the sum of Rs. 355, owing, it is stated, to the depreciation in its value due to exposure and the improper care bestowed on the bus by the defendants in this case. In the Fiscal's report to Court, the Fiscal reported that some parts of the bus and the cushions were missing, and that the iron parts had rusted, and that the depreciation in value was due to this.

The plaintiff then obtained the assignment in the Matara case, as mentioned by me above, and he further fortified his position by getting an assignment from the Deputy Fiscal, of the bond of hypothecation entered into by the defendants in this case and the Fiscal of the Eastern Province.

In the present action the plaintiff set forth the assignment and claimed to be entitled to receive Rs. 3,645, being the difference between Rs. 4,000 secured by the assignment of the Fiscal's bond and the sum of Rs. 355, the value of the bus when sold. The case went to trial on the following issues, which were agreed to by the parties :—

- (1) Had the liability of the defendants on the bond been discharged by the delivery by them of the bus for sale by the Fiscal and by the Fiscal's acceptance of it ?
- (2) Was the bus not delivered by the defendants to the Fiscal in the same state and condition in which they received it ?  
 (a) If so, to what amount (if any) are they liable in damages ?
- (3) Had the Deputy Fiscal, Eastern Province, the lawful right to assign the security bond " P 2 " to the plaintiff ?

Mr. Tisseverasinghe, for the defendants-appellants, raised many points of law during the course of his argument, but it is necessary to mention here that all the points of law he raised cannot, I think, fairly be dealt with in appeal, because the issues were confined, by the consent of the parties, to the three issues I have mentioned above. Even so I propose to deal with the points raised by Mr. Tisseverasinghe.

1929  
 AKBAR J.  
 Dharmadasa  
 v. Abdul  
 Cader

As regards the first issue, I do not see how it can be contended that the liability of the defendants on the bond of hypothecation given by them to the Fiscal was discharged merely by the delivery by them, of the bus for sale. It would have been more proper if the Fiscal or his representative had definitely informed the defendants that the bus was not in the condition in which it was at the time the bond was entered into, and that the defendants were answerable for the depreciation in the value of the bus owing to the negligence of the defendants in not taking proper care of it. There is, unfortunately, no evidence that such notice was given, but what I have got to deal with is, whether there was a discharge of this bond. Such discharge can only be pleaded by way of estoppel, and I fail to see how the defendants have suffered any damage by the action of the Fiscal in not giving such notice. If the Fiscal or his assignee can prove as a matter of fact that the bus has suffered from exposure and had considerably deteriorated in value owing to it, defendants would, in my opinion, be liable to be sued on the bond of hypothecation.

As a matter of fact, the second issue did raise this point, and the District Judge has definitely found that the deterioration in value could be reasonably assessed at the sum of Rs. 750, for which amount he has given judgment for the plaintiff. I see no reason why the District Judge's finding on this point should be disturbed.

The main ground of argument was under issue (3), under which issue Mr. Tisseverasinghe raised a number of interesting law points. In the first place, he contended that the assignment was not properly stamped, and that the Deputy Fiscal had no right to assign the bond on behalf of the Fiscal by a mere endorsement, and he quoted in support a case reported in *3 Appeal Court Reports 46*. The short answer to this case is that the law has since been amended, making the Fiscal a corporation sole (see section 83A of Ordinance No. 4 of 1867, amended by Ordinance No. 24 of 1908).

Mr. Tisseverasinghe cited cases reported in *Wendt's Reports 266 and 5 Bal. Reports 95* to support his argument that the Deputy Fiscal had no right to assign the bond. The Counsel for the respondent, however, cited a later case reported in *24 N. L. R. 90*. This last case is a judgment of two Judges, and the case in *Wendt's Reports* was cited to the Court. It is unfortunate that the case in *5 Bal. Reports 95* was not cited. Even so, the case in *5 Bal. Reports 95*

1929  
 AKBAR J.  
 Dharmadasa  
 v. Abdul  
 Cader

was only as regards an assignment under section 279 of the Civil Procedure Code, and refers to a debt or negotiable instrument sold at an execution sale by the Fiscal and is not exactly in point.

I prefer to follow the last decision of the Supreme Court, reported in 24 N. L. R. 90, because I agree with Ennis J. in his opinion that section 5 is wide enough to enable the Deputy Fiscal to exercise the powers and perform the duties required by the Fiscal's Ordinance to be exercised and performed by the Fiscal. It will be seen from a perusal of that judgment that it applies to this case, and that the Deputy Fiscal may endorse by writing any indemnity bond without its being stamped. The only difficulty I had was that the deed assigning the decree to the plaintiff deducts the value of the bus realized by the sale. On the other hand, this assignment also assigns all right, title, and interest in the decree to the plaintiff in the case. Section 83 of the Fiscal's Ordinance of 1867, empowers the Deputy Fiscal or Fiscal to endorse by mere writing all the rights which the Fiscal has in any indemnity bond, and such assignment will be sufficient to convey to the assignee the right to sue on the bond, and to derive all the benefits and advantages arising therefrom.

There is no mention of any consideration. That being so, if I am of opinion—and I am of opinion—that the Fiscal had the right to sue on the bond, the Fiscal could convey this right by assignment to the plaintiff without any question of consideration. The mere fact that the assignment of the decree sets off the value realized by the sale of the bus does not, in my opinion, take away the right the judgment-creditor or his assignee had of asking the Fiscal to assign the Fiscal's rights on the hypothecation bond to him. This the Fiscal has done.

In my opinion the judgment is correct, and I would dismiss the appeal with costs.

DALTON J.—I agree.

*Appeal dismissed.*