[PRIVY COUNCIL]

1955 *Present :* **Lord Oaksey, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

T. A. K. DE SILVA, Appellant, *and* HIRDRAMANI LTD., Respondent

PRIVY COUNCIL APPEAL NO. 39 OF 1954

S. C. 94—D. C. Colombo, 21,772 M

Contract—Novation—Delegation.

The names given to different kinds of novation in Roman-Dutch law introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

S (the plaintiff appellant) had for several years been employed as leading jewellor in a business owned by P. There was also employed in the business S's brother-in-law, W, whom S had earlier introduced into the business. In 1944, S decided to retire from his employment and an agreement was entered into on January 29, 1944, between P, S and W the effect of which was to give S a conditional annuity of Rs. 150 a month during his life and to put W into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties expressly provided, *inter alia*, that (1) towards the payment of the aforesaid monthly sum of Rs. 150 by P to S, W should contribute a sum of Rs. 75 monthly from his remuneration, (2) in the event of W dying or being dismissed from service the payment to S of the "said sum of Rs. 150 shall immediately cease anything herein contained to the contrary notwithstanding". S thereafter received the sum of Rs. 150 monthly in terms of the agreement.

On June 27, 1946, a private limited company (the defendant respondent) was formed, with P as managing director and chairman of the Board of Directors. It was not in dispute that this company took over the business that had been owned by P. When the company took over the business, W ceased to be in P's employment and became an employee of the company. In July, 1946, soon after the Company was formed, S spoke to P, who then, as managing director of the Company, undertook to make the payments due to S under the agreement. Following on this undertaking, S continued to receive his monthly payments of Rs. 150 which were made by Company cheques, occasionally sent to him under covering letters from the Company.

P died on March 23, 1948. The Company then took the view that there was no longer any liability on it to make payments to S under the agreement of January 29, 1944. S thereupon instituted the present action claiming from the Company payment of Rs. 150 per month.

Held, that, irrespective of any condition with regard to W's employment, a completely new form of contract was made between the Company and the appellant (S) when the Company undertook to pay the appellant for his life an annuity of Rs. 150 per month. Such a contract might be regarded as a mixture of novation and delegation.

2——J. N. B 45709-1,592 (7/55)

APPEAL from a judgment of the Supreme Court reported in *55 N. L. R. 294.*

L. G. Weeramantry, with *Biden Ashbrooke*, for the plaintiff appellant.

Stephen Chapman, for the defendant respondent.

Cur. adv. vult.

May 9, 1955. [*Delivered by* LORD KEITH OF AVONHOLM]—

This is an appeal from a judgment of the Supreme Court of Ceylon reversing a judgment of the District Court of Colombo in favour of the appellant and dismissing his action.

The facts of the case can be briefly stated.

The appellant had for some 11 years been employed as leading jeweller in a business known as Hirdramani which in 1944 was owned by one Parmanand Tourmal. There was also employed in the business the appellant's brother-in-law, Wijeratne, whom the appellant had earlier introduced into the business.

In 1944 the appellant decided to retire from his employment and an agreement was entered into between Parmanand, the appellant and Wijeratne the effect of which was to give the appellant a conditional annuity of Rs. 150 a month during his life and to put Wijeratne into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties and witnessed was in the following terms :—

"This Agreement made and entered into between Parmanand Tourmal carrying on business at No. 65/69, Chatham Street, Colombo, under the name and style of Hirdramani hereinafter referred to as 'Mr. Parmanand' (which term as herein used shall mean and include the said Parmanand Tourmal his heirs, executors and administrators) of the one part and Thenuwera Acharige Karnolis de Silva of Ambalangoda (hereinafter referred to as 'Silva') and Alahendrage Acharige Charles Perera Wijeratne of Kalutara (hereinafter referred to as 'Wijeratne') of the other part.

Whereas the said Silva and Wijeratne have for some time past been employed under Mr. Parmanand as leading jewellery maker and Assistant respectively.

And whereas Silva has agreed with Mr. Parmanand to retire from service as leading jewellery maker in the firm of Hirdramani and has requested Mr. Parmanand to employ Wijeratne as his leading jewellery maker which Mr. Parmanand has agreed to do subject to the terms and conditions hereinafter set forth.

Now this Agreement witnesseth and it is hereby mutually covenanted and agreed between the parties hereto as follows :—

(*a*) The said Silva shall retire as leading jewellery maker in the firm of Hirdramani as from the first day of February One thousand nine hundred and forty-four and shall in consideration of the sum of Rupees Four hundred and seventy-five (Rs. 475) being the purchase price, deliver to Mr. Parmanand all machines, tools and other implements that are now at Hirdramani and owned by Silva.

(*b*) The said Wijeratne shall as from the 1st day of February One thousand nine hundred and fourty-four serve under Mr. Parmanand 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. Parmanand.

(*c*) In consideration of the services rendered as aforesaid by Silva and as long as Wijeratne is employed under Mr. Parmanand he Mr. Parmanand shall as from 1st February One thousand nine hundred and forty-four pay to Silva monthly at the end of each and every month a sum of Rupees One hundred and fifty (Rs. 150) during the life time of Silva.

(*d*) Towards the payment of the aforesaid monthly sum of Rupees One hundred and fifty (Rs. 150) by Mr. Parmanand he the said Wijeratne shall contribute a sum of Rupees seventy-five (Rs. 75) monthly from his remuneration.

(*e*) The said Silva shall be at absolute liberty to undertake orders and carry on his usual business of jewellery maker.

(*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 Hirdramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rupees One hundred and fifty (Rs. 150) shall immediately cease anything herein contained to the contrary notwithstanding.

(*g*) In the event of the said Wijeratne proving at any time hereafter in the opinion of Mr. Parmanand incompetent, insubordinate, negligent or dishonest then it shall be lawful for Mr. Parmanand to dismiss Wijeratne immediately and in that event this Agreement shall cease and be of no avail.

(*h*) In addition to any other remuneration that Mr. Parmanand shall pay to Wijeratne for his service as leading jewellery maker and as long as the said Wijeratne shall serve Mr. Parmanand he Mr. Parmanand shall pay to Wijeratne monthly at the end of each and every month as from 1st February One thousand nine hundred and forty-four the sum of Rupees Fifty (Rs. 50) as salary.

In witness whereof the said Parmanand Tourmal, the said Thenuwera Acharige Karnolis de Silva and the said Alahendrage Acharige Charlis Perera Wijeratne do set their respective hands hereunto at Colombo on this twenty-ninth day of January One thousand nine hundred and forty-four."

The appellant left the service of Hirdramani on the 1st February, 1944, and Wijeratne took the appellant's place in the business. The appellant thereafter received the sum of Rs. 150 monthly in terms of the agreement.

On the 27th June, 1946, the private limited company of Hirdramani Limited (the defendant in this action) was formed, with Parmanand as managing director and chairman of the Board of Directors. He and various relatives were also appointed by the Articles of Association first directors and life directors of the company and were allotted shares in the issued and subscribed capital of the company. It is not in dispute that the company took over the business of Hirdramani.

The appellant came to know that the business had been converted into a limited company and in or about July, 1946, he spoke to Parmanand. His evidence (the only evidence in the case) in this matter is contained of the following passages. In examination-in-chief he said :—

"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. The Company continued to pay me according to the agreement. Wijeratne continued to work in Hirdramani Ltd. He is working there up to date. I spoke to Mr. Tourmal about my payments on the agreement in June or July, 1946. By that time Mr. Tourmal was the Managing Director of the Defendant-Company."

In cross-examination he said :—

"After the Company was formed I spoke to Mr. Tourmal. He said that he was the Managing Director of the Defendant-Company and that there would not be any change in regard to the payment on the agreement, and that he would continue to pay me. That was a very important matter so far as I was concerned. I had no misgivings in my mind that he would continue to pay me."

Later in cross-examination with reference to a passage in a letter which he wrote on the 28th June, 1948, he was asked :—

"You stated there 'I feel that the Company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to pay me the said amount throughout my life'. Why did you say that ?

A. I expected either the Company or the estate of Mr. Parmanand to pay me according to the agreement, because Mr. Parmanand had told me so.

To Court:

Q. **What did Mr. Tourmal tell you ?**

A. **He said the Company would continue to pay. ''**

Following on this meeting with Parmanand the appellant continued to receive his monthly payments of Rs. 150 which were made by company cheques, occasionally sent to him with covering letters from the company.

Parmanand died on the 23rd March, 1948. The company then took the view that there was no longer any liability on anyone to make payments to the appellant under the agreement but was prepared to continue to do so, on an *ex gratia* basis, and accordingly sent to the appellant two letters dated the 9th and 30th April, 1948, respectively :—

The first was in the following terms :—

" Dear Sir,

We enclose herewith a cheque for Rs. 150 being the amount paid to you monthly by the late Mr. T. Parmanand.

As you are aware of Mr. Parmanand died recently and before his death our Company was formed.

We are therefore continuing this payment without any obligation or binding on our part.

Please acknowledge receipt.

Yours faithfully,
Hirdramani, Ltd. ''

The second was as follows :—

" Dear Sir,

By our letter of 9th inst., we informed you the condition subject to which we will be paying you your monthly payment and you have doubtless accepted the payment subject to that condition.

We are enclosing herewith cheque for Rs. 150 being April payment and shall be glad if you will acknowledge receipt.

Please note that all future payments will be subject to that condition.

Yours faithfully,
Hirdramani, Ltd. ''

The appellant did not at this time reply to these letters but after receiving the second letter he called on Parmanand's son, Bagawandas, who was one of the directors of the company. In his evidence the appellant says he told Bagawandas that according to the agreement the payment could not be stopped and that he was trying to do an injustice to him by including a condition in the letter in regard to future payments and that he, the appellant, expected to receive payment. Bagawandas told him that the company was not bound to pay.

Thereafter the company sent the appellant a further cheque along with the following letter dated the 31st May, 1948 :

" Dear Sir,

Enclosed please find cheque No. T. 174596 on Chartered Bank for Rs. 150 drawn in your favour subject to the condition mentioned in our previous letter and which you have accepted.

Please acknowledge receipt.

Yours faithfully,
Hirdramani, Ltd. "

To this the appellant replied by the following letter dated the 28th June, 1948 :

" AGREEMENT DATED 29–1–44, BETWEEN THE LATE MR. PARMANAND TOURMAL AND K. DE SILVA.

Sirs,

I am in receipt of your letters, dated 9–4–48, 30–4–48, and 31–5–48, enclosing cheques due to me and thank you for same.

However, I find it difficult to understand why you state that these payments are being made without any obligation or binding on your part and I shall be glad if you will explain your position clearly for my future guidance.

I have not in anyway accepted this position of yours although you state that I have done so.

I feel that the company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to continue the payment of the said sum throughout my life.

Yours faithfully,
T. A. K. de Silva. "

This correspondence is concluded by a letter from the company to the appellant dated the 29th June, 1948, re-affirming its position and stating that "the agreement is now at an end". No payment has been made to the appellant since May, 1948.

In September, 1949, the appellant began the present suit claiming Rs. 2,250 arrears of payment from June, 1948, to September, 1949, and payment of Rs. 150 per month from September onwards.

The learned District Judge (K. D. de Silva, A.D.J.) in an able and careful judgment found for the appellant. On appeal the Supreme Court set aside his judgment and dismissed the appellant's action with costs.

The crucial question for consideration is what happened to the agreement when the business of Hirdramani was turned into a limited company? The District Judge has found that at the meetings between the appellant and Parmanand in July, 1946, "Parmanand as managing director of the defendant-company undertook to make the payments due to the plaintiff under the agreement" and answered affirmatively the relevant issue on this point, "Did the defendant-company undertake to pay the plaintiff the sum of Rs. 150 per month mentioned in the said agreement?". As their Lordships read the opinion of Gratiaen J., in the Supreme Court, concurred in by Gunasekara J., the other member of the Court, the Supreme Court has also accepted this finding. It is not their Lordships' practice to upset concurrent findings in fact of two courts, but their Lordships would observe that the evidence already quoted amply supports the findings so made.

The real controversy is as to what the effect of this undertaking was on the rights of the appellant under the agreement. Both Courts below treated the matter as falling to be determined on an application of the doctrine of novation under Roman-Dutch law. Their Lordships were referred to two species of novation recognised under the Roman-Dutch system. One is novation properly so called by which the obligations under an agreement are altered, the new obligations being substituted for the old while the parties remain the same. Another is known as delegation, by which the obligations remain the same but a new debtor is substituted for the original debtor, with the consent of both and of the creditor, the original debtor being discharged of his obligation. The terms of the agreement thus remain the same, but the parties are altered. Other species of novation are recognised under Roman-Dutch law but need not for the purposes of this case be considered. In the present case the Supreme Court considered the form of novation relied on to be "a transaction described by the Roman-Dutch jurists as delegation".

The principle of novation in contract is not foreign to English law. As was pointed out in *Scarf v. Jardine* (1882) 7 App. Cas. 345 it frequently operates on a change of partnership where the new partners take over the obligations of the old partners with the consent of the creditors. But Lord Selborne, L.C. recognised also that novation might include a new contract substituted for the original contract between the same parties

(p. 351). The names given to different kinds of novation in Roman-Dutch law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transaction but, as their Lordships apprehend, introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

The agreement here was a tripartite agreement. But the contractual relationships set up were between Parmanand and the appellant on the one hand and Wijeratne and Parmanand on the other, although the contractual obligation of Parmanand to the appellant might be conditioned in certain circumstances by what happened within the contractual relationship existing between Parmanand and Wijeratne. When, therefore, on the formation of the company, the company took over Parmanand's obligation to the appellant the immediate result was to substitute the company for Parmanand as the appellant's debtor and to release Parmanand from his obligation for, on their Lordships' view of the effect of the evidence, it must be assumed that the appellant was a consenting party to this transaction. It is to be observed, however, that one of the conditions of Parmanand's liability to the appellant under the original agreement was that Wijeratne should be in his employment. When the company took over the business of Hirdramani, Wijeratne ceased to be in Parmanand's employment and became an employee of the company. It is upon this fact that the defence to this case and the judgment of the Supreme Court are based.

Their Lordships would here observe that if the defence is well founded the undertaking given by the company to the appellant had no meaning at all, for at that time Wijeratne was in fact no longer employed by Parmanand and was employed by the company. None the less the company as from the date of the undertaking made payment to the appellant without condition or qualification for some two years until the death of Parmanand. Their Lordships are quite unable to hold in these circumstances and taking the evidence as a whole that some form of new contract was not made on the formation of the company whereby the company became bound to the appellant. In certain eventualities it might be necessary to determine what the precise terms of this new contract were but, in their Lordships' opinion, on any view of the contract the company is bound, as matters at present stand, to fulfil the obligation undertaken by them to pay the appellant Rs. 150 a month.

Two possible views, in their Lordships' opinion, are alone tenable on the evidence. One is that a completely new form of contract was made by which the company undertook to pay the appellant for his life an annuity of Rs. 150 per month, irrespective of any condition with regard to Wijeratne's employment. This it may be observed would not be novation proper according to Roman-Dutch law, because there would be a change of debtor, as well as a change in the terms of the obligation. Nor would it be delegation, because there would be a change of the terms of the contract, as well as a change of debtor. It might be regarded as a mixture of novation and delegation, and in principle their Lordships see no reason why this could not be so.

The other view is that the company was substituted for Parmanand at all points of the agreement, so that not only did the company become the debtor of the appellant for the payment of Rs. 150 per month, but also became the employer of Wijeratne, with the benefit of all the rights and subject to all the obligations previously existing between Parmanand and Wijeratne under the agreement and with the right to terminate the payment to the appellant on Wijeratne's ceasing to be in the company's employment for a reason contemplated in the agreement. This would be difficult to bring under any single category of novation in Roman-Dutch law. It would be novation of a somewhat composite character. But again there is no reason in principle why such a new arrangement could not be made with the consent of all the parties.

Prima facie the facts of the case so far as brought out by the evidence suggest that the latter was the true view of the arrangement come to on the formation of the company. The evidence that Parmanand said there would be no change made to the appellant according to the agreement and that the company would pay may be thought to support that view. Wijeratne also in fact became an employee of the company and is still employed by the company. But there is no evidence of Wijeratne or of the company as to what are the contractual relations between them and in the absence of such evidence it would be improper to make any assumption in this matter. Their Lordships, however, see no escape from the view that in fact and in law the company took over Parmanand's obligation to the appellant. Their Lordships are unable to hold that this obligation was subject to a condition which was impossible of fulfilment at the time of the novation, namely that Wijeratne should continue in the employment of Parmanand. If it was subject to any other condition, or conditions, it was for the company to prove this by evidence.

The learned District Judge said that it was necessary to consider whether the other party to the agreement, namely Wijeratne, was a consenting party to the novation and held that in the absence of evidence to the contrary it was legitimate to presume that he was. This may well have been so but as already observed it is not, in their Lordships' view, necessary so to find. Wijeratne's obligation to pay half of the monthly payment to Parmanand was a separate obligation from Parmanand's obligation to make the monthly payment to the appellant and there was no interdependence between the two obligations. The appellant could not have sued Wijeratne for half the annuity and Wijeratne's failure to pay his share would not have excused Parmanand from paying the full annuity to the appellant. Wijeratne's position on the formation of the company was a matter for agreement between Wijeratne, Parmanand and the company with which strictly the appellant had no concern, except in so far as it affected the receipt of his monthly payment.

The ground of judgment of the Supreme Court would seem to be contained in the following passage in the opinion of Gratiaen, J. :—

" The plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of Parmanand

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 Parmanand 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 Parmanand 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 'Hirdramani Limited' as its 'leading jeweller'. No such contract has been pleaded or proved by the plaintiff."

The words emphasised in italics are so emphasised by the learned judge, not by their Lordships' Board.

As their Lordships understand this passage the learned judge is intending to convey that, as the original obligation of Parmanand, or his heirs, executors and administrators, under the agreement was confined to the period during which Wijeratne served him or his heirs, &c., the company's obligation could not be extended beyond that period, for Wijeratne had ceased to serve Parmanand and was now in the service of the company. But that event happened when the company was formed and their Lordships do not appreciate the significance of looking at things as at the date of Parmanand's death. By that time the company had assumed the liability and there is nothing to suggest that it was limited to the period of Parmanand's life. If on the other hand Gratiaen, J., means that all liability ceased on the formation of the company and the transfer of Wijeratne's services to it, that, as has already been pointed out, gives no meaning to the evidence that the company would take over Parmanand's liability and that there would be no change in the payments.

Some importance was attached by Gratiaen, J., to the correspondence already quoted that took place between the company and the appellant after Parmanand's death. The learned judge appears, however, to have omitted to notice the evidence of the meeting of the appellant with Bagawandas when the appellant protested against the attitude taken up by the company. But in any event what the company wrote after Parmanand's death could not affect a liability which had already been accepted by the company during his life.

An argument was addressed to their Lordships for the appellant, based on the doctrine of estoppel, but, in their Lordships' view, there are no circumstances in this case which call for any consideration of that doctrine.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Supreme Court be set aside with costs and the judgment of the District Court be restored. The respondent must pay the costs of this appeal.

Appeal allowed.