

Present : Ennis J. and De Sampayo A.J.

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MOHIDEEN v. SAIBO.

372—D.C. Kandy, 21,854.

*Sale of mutton—Agreement to take over the business of a stall holder and to pay Rs. 100 per mensem—Is agreement illegal?—By-laws of Municipal Council, Kandy—Ordinance No. 6 of 1910.*

The plaintiff, who was the occupant of two stalls for the sale of mutton in the Kandy public market, entered into an agreement with the defendant, whereby it was agreed that the defendant should take over plaintiff's wholesale and retail trade in the said stalls, and should carry on such trade under the license issued to plaintiff; that he should pay the rent for the said stalls and obtain receipt in the plaintiff's name, and that he should carry on such trade under the license issued to the plaintiff; that he should pay the rent for the stalls and obtain receipt in the plaintiff's name, and that he should pay as plaintiff's profit Rs. 100 a month to plaintiff or his agent and obtain receipts; and that after two years, if the defendant no longer required the stalls, the plaintiff should take over the stalls together with the defendant's own business.

Plaintiff brought this action to recover, *inter alia*, the instalments due under the agreement.

*Held*, that plaintiff was not entitled to succeed, as the agreement sued upon was illegal, being in contravention of the by-laws of the Municipal Council of Kandy.

**T**HE facts are set out in the headnote. The agreement was in Pl. these terms:—

January 31, 1910.

The agreement executed by Sena Mohamado Kany Saibo of Kandy in favour of Muna Kuna Gulamohidin Marikar of Colombo.

I have taken over from you from February 1, the wholesale and retail trade you have been carrying on in goats (and sheep) in stalls Nos. 75-77 of the Municipal Market, Kandy, and I will carry on the trade in the said stalls of the goats (and sheep) passed and slaughtered on the license which is in your name. As profit therefor I will pay to you or to your agent at the rate of Rs. 100 per month on or before the 30th of the ensuing month and obtain receipts. In failure of so paying the instalments (within the period agreed upon), I will pay at the rate of Rs. 150 for the said Rs. 100. In default, too, of this, the said sum of Rs. 150 shall be recoverable at law. Such profits shall be continued to be paid only so long as I trade in Kandy in my name (vilasam).

That after the expiry of two years from date hereof, if I do not happen to require the said stalls 75-77, you shall either on notice or within a month's time take them over from me, together with the trade bearing my mark.

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That in continuation of our agreement that I shall continue to pay you as I did, if, in the meantime, any big traders chance to come and open business, both of us shall without regard to profits join and establish the trade in rivalry. We have agreed and consented to the above. I shall pay rent for the stalls Nos. 75-77 and obtain receipts in your name and keep same. That in the event of your failure to come on service of notice as aforesaid, my agreement to pay you Rs. 100 a month as aforesaid shall become null and void (i.e., my liability to do so shall stand cancelled). I shall consider this as a valid and binding receipt, and you are giving me a written agreement.

SENA MOHAMADO KANY SAIBO.

*H. J. C. Pereira*, for plaintiff, appellant.*Bawa, K.C.*, for defendant, respondent.*Cur. adv. vult.*

December 3, 1913. ENNIS J.—

The point for determination in this appeal is whether the agreement filed is contrary to public policy. Following the rule laid down in *Meyappa Chetty v. Ramanathan*<sup>1</sup> and *Fernando v. Ramanathan*<sup>2</sup> the agreement will be unenforceable, if it is in contravention of an expressed provision of law or a prohibition implied by the imposition of a penalty.

Section 202 of the Municipal Councils Ordinance, No. 6 of 1910, imposes a penalty on a person who exposes articles for sale in a public market without the permission of the Chairman. By-laws 65, 68, 69, and 70, made under the repealed Ordinance, continued by section 2 of the Ordinance No. 6 of 1910, and by section 109 made as effectual if enacted in the Ordinance, expressly prohibit the occupation of a stall in the market by any person who does not hold a license, or by any agent of the licensee whose name is not endorsed on the license.

The agreement in the case was that the defendant should occupy certain stalls in the Kandy market for which the plaintiff had licenses. It was urged that the defendant was the agent of the plaintiff for this purpose, and that the failure to get his name endorsed on the license was an irregularity, which would not render the contract illegal, as the Chairman was bound to endorse the agent's name if so requested. I am quite unable to construe the agreement as constituting an agency. It is virtually a transfer of the license to occupy the stalls, and the consideration was to be paid by the defendant to the plaintiff "or his agent," which itself seems to negative the proposition that the defendant was the plaintiff's agent. Not only is it illegal for a person to convey a stall without a license, but the transfer of the license is also illegal, as it is expressly prohibited by the by-laws. The agreement was therefore illegal, and the present action cannot be maintained.

I would affirm the decree and dismiss the appeal with costs.

<sup>1</sup> (1913) 16 N. L. R. 33.<sup>2</sup> (1913) 16 N. L. R. 337.

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The plaintiff, who was the occupant of two stalls for the sale of mutton in the Kandy public market under a license issued to him by the Municipal Council of Kandy, entered into an agreement dated January 31, 1910, with the defendant, who appears to have been also engaged in the meat trade in Kandy, whereby it was agreed that the defendant should take over from February 1, 1910, the plaintiff's wholesale and retail trade in the said stalls, and should carry on such trade under the license issued to plaintiff; that he should pay the rent for the said stalls and obtain receipts in the plaintiff's name; that he should pay as plaintiff's profit a sum of Rs. 100 a month to plaintiff or his agent and obtain receipts; and that after the expiration of two years, if the defendant no longer required the said stalls, the plaintiff should take over the said stalls together with the defendant's own business. These in substance are the terms of the agreement which are relevant to this action. It appears that the license for the following year was also issued in the plaintiff's name, and the defendant occupied the said stalls and carried on business under the plaintiff's license for both years. The plaintiff brings this action alleging that the defendant failed to pay the instalments due under the agreement since June, 1911, and also failed to give over the said stalls and his own business at the expiration of the two years though duly noticed, and he claims the amount of the instalments and also damages calculated on the same basis. The defendant has raised the defence that the agreement was illegal, and that therefore the plaintiff is not entitled to recover thereon. The point of the objection is that the agreement is in effect a transfer to defendant for the period of two years of the license held by the plaintiff and his right of occupation of the stalls and of selling mutton therein in contravention of the Municipal Councils Ordinance, No. 6 of 1910, and the by-laws of the Municipal Council of Kandy. The by-laws in operation are those published in the *Government Gazette* No. 6,165 of January 11, 1907, and under the provisions of the Municipal Councils Ordinance they are "as legal, valid, effectual, and binding as if the same had been enacted in the Ordinance." Now, section 202 of the Ordinance makes it an offence for any person to sell or expose for sale any article within a public market without the permission of the Chairman. By-law No. 65 prohibits a person from holding, using, or occupying a stall in any public market without a license. By-law No. 68 prohibits a stall holder from transferring his license to any other person. By-law No. 69 provides that no person other than the licensee shall use or occupy any stall, unless such person shall be named in the license as a person authorized to sell on behalf of the licensee. By-law No. 70 further prohibits a licensee from permitting any other person (except a person authorized as in the preceding by-law provided) to use or occupy his stall, or to sell or expose for sale any goods, without the

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authority of the Council. The observance of these by-laws is, of course, enforced by the imposition of penalties. It is clear that the agreement between the plaintiff and the defendant contravenes not only the policy but the express provisions of the Ordinance and the by-laws above referred to. The argument that the defendant may be regarded as the agent of the plaintiff, with an interest in the business which he was to manage, cannot, I think, be maintained. The effect of the agreement is not to create an agency, but to assign the entire business and the right of occupation of the stalls for the space of two years in consideration of a monthly sum of Rs. 100 to be paid by defendant to plaintiff. Moreover, I think the absence of the defendant's name in the license issued to plaintiff, as required by by-laws Nos. 69 and 70 in the case of an agent, is not a mere irregularity which can be overlooked. Even if such an arrangement had been contemplated by the parties, which clearly was not, the Council would not be bound to insert the defendant's name in the license as a matter of course; and considering the policy of these by-laws, the Council would probably have refused to be a party to the contravention in that indirect way of their own by-laws. The question in this case is covered by the authority of the decision in *Fernando v. Ramanathan*<sup>1</sup>. The plaintiff's action cannot be maintained, and has been rightly dismissed.

*Appeal dismissed.*