

1901.
March 1.

KADIJA UMMA *et al.* v. ABDUL RAHIM *et al.*

D.C., Colombo, 12,465.

Bond—Failure of consideration—Sale of bond by Fiscal—Purchase by third party with notice of failure of consideration—Action by grantor for cancellation of bond.

Judgment having gone against A, B, and C, C agreed with A and B to pay their share of the judgment debt, and obtained from them a bond in his favour for the amount due by them. C did not pay the judgment debt. The Fiscal seized the bond in the possession of C and put it up for sale. D bought it, though he had notice that the consideration for the bond had failed.

Held, that A and B were entitled to sue C and D for the cancellation and delivery up of the bond without waiting for D to sue them.

THIS was an action on a bond granted by the two plaintiffs to the first defendant under the following circumstances. Judgment having gone against the plaintiffs and the first defendant in a suit, the latter agreed with the plaintiffs to pay their share of the judgment debt and obtained from them the present bond, in which they acknowledged themselves to be indebted to him in the sum of Rs. 2,500, which was the amount due by them under the judgment. The first defendant did not pay the judgment debt. The judgment-creditor caused the Fiscal to seize this bond and put it up for sale. The second defendant purchased it, though he had notice that the consideration for the bond had failed. The plaintiffs now raised the present suit in the District Court of Colombo against the first and second defendants for the cancellation and delivery of the bond, because it had become inoperative through failure of consideration: The

defendants pleaded that the Court had no jurisdiction to try this case, as the parties resided beyond its limits. The District Judge ruled to the contrary, and entered judgment for plaintiffs.

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The defendants appealed.

Morgan, for first defendant, appellant.—The parties reside beyond the jurisdiction of the District Court of Colombo. On a writ issued against first defendant this bond was sold and bought by second defendant. The judge says the ground for action is the failure of consideration of the bond; that the failure took place in Colombo, and therefore the Court has jurisdiction. He then declared it void and cancelled it. [BONSER, C.J.—The cause of action is failure to pay the money in Colombo.] The action is to set aside the bond. [BONSER, C.J.—Certainly, on the ground of failure of consideration in Colombo.] No cause of action is proved to have accrued. There was no evidence led. The District Judge has decided the case on the pleadings.

Sampayo, for second defendant, appellant.—The second defendant is in a better position than the first defendant. To set aside the bond, the validity of the deed must be impugned. Subsequent developments are no cause of action to set it aside. [BONSER, C.J.—Have you any authority for that statement—that, though a deed is bad, a man cannot come to Court to have it set aside because there was no original defect? All reason and principle are against you.] I have no authority; but why is this bond bad? Failure of consideration is alleged. But as no time was stipulated for the payment of the money by the first defendant, it cannot be said that the first defendant has failed to carry out his undertaking, and the action to set aside the bond is ill-conceived. If the first defendant seeks to enforce it against the plaintiffs, they have the right to plead the circumstances now alleged. They have not yet been injured by anybody. [BONSER, C.J.—Why should they wait till the evidence which they have against the bond is lost? The sooner the action is brought the better.] The second defendant is not trying to enforce the bond, he simply purchased it at a Fiscal's sale. What harm has he done against the plaintiffs that they should drag him into Court? [BONSER, C.J.—If it is liable to be cancelled in first defendant's hands, it is just as liable in your hands.] Then, the Court had no jurisdiction to entertain this suit. The cause of action is not failure of consideration at Colombo, or a breach of the promise to pay money in Colombo, but the mere fact of there being a bond without consideration. That does not give jurisdiction. The action must flow naturally from the cause. Here the action which arises

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H. Jayawardana, for plaintiffs, respondents.—The action is good. The cause of action was failure to pay the money in Colombo. [BONSER, C.J.—How is that proved?] That fact was not disputed. It was conceded that the defendants had no defence on the merits at all.

1st March, 1901. BONSER, C.J.—

This is an appeal on a purely technical point. The action is one for the delivery up and cancellation of a bond on the ground that the bond had become inoperative owing to failure of consideration. The bond was given by the two plaintiffs to the first defendant in the following circumstances. The plaintiffs and the first defendant had been co-defendants in an action in the Court of Colombo, and judgment had gone against them. The plaintiffs thereupon arranged with the first defendant to pay the amount of the judgment with the costs, and gave him a bond for their share. The bond recited that they had borrowed this money from him, treating it as though it was a simple transaction of loan. But the facts were admitted to be as I have just stated. The first defendant did not pay the money in accordance with this agreement. Thereupon the Fiscal seized certain property of his; amongst other things he seized this bond and put it up for sale. The second defendant became the purchaser at the Fiscal's sale for Rs. 200 of this bond for Rs. 2,500. Before purchasing it he was warned by the plaintiffs and informed of the true facts of the case. Yet, in spite of this, he went on to purchase this bond. That being so, he cannot be in a better position than the first defendant, because he had full knowledge of the facts. If the bond was invalid against the first defendant, it was also invalid against the second defendant.

The plaintiffs reside at Galle, and the defendants at Kalutara, which is not far from Colombo. But they are all resident outside the limits of the local jurisdiction of the District Court of Colombo. As I have before said, the defendants did not dispute the facts. The only defence they raised is that there was no jurisdiction in the Colombo Court to deal with the matter, because the parties were all resident outside its jurisdiction, and that no cause of action arose within the jurisdiction of the Colombo Court. Now, it seems to me that the cause of action in this case is the failure of the first defendant to carry out his agreement to pay this money in Colombo, which, it is admitted, was the real consideration of the bond.

That being so, the cause of action arose within the jurisdiction of the Colombo District Court. Then, a further objection was taken, that the plaintiffs were not entitled to sue to have the bond cancelled, but that they ought to wait until they are sued on it. It seems to me that if this bond is invalid, the sooner it is declared to be so the better. The plaintiffs are not, in my opinion, obliged to wait until possibly the evidence of the true nature of this transaction may have perished. They are quite justified in coming to the Court at the earliest moment whilst they are in a position to prove the true nature of the transaction, and asking to have this bond cancelled.

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BROWN, C.J.

BROWN, J.--

I entirely agree with what my lord has said. I disregard the contention of the second defendant altogether, and think that it is not only allowable, but eminently just that the first defendant should be sued in the District Court of Colombo, and thus given a last opportunity to complete his contract at the place at which it was originally agreed it should be fulfilled.
