1933 *Present :* **Dalton A.C.J. and Maartensz A.J.**

FERNANDO *et al. v.* JAYASINGHE *et. al.*

92—D. C. Colombo, 30,181.

Registration of Business Names—Contract entered into by person in default—Assignment of rights under contract—Action by assignee—Ordinance No. 6 of 1918, s. 9.

The disability imposed by section 9 of the Business Names Registration Ordinance upon a person who has failed to comply with the provisions of the Ordinance does not extend to a *bona fide* assignee of the contractual rights of the defaulter.

THIS was an action instituted for the recovery of arrears of rent on a hire purchase agreement entered into by the plaintiff, who was carrying on business as Ceylon Auto-Carriers Company, and the defendants on May 28, 1926, by which the plaintiff hired to the defendants a Stewart bus according to certain terms.

On November 7, 1930, the plaintiff by deed No. 1,039 assigned the business carried on by him to Avitchi Chettiar, who was added as a plaintiff on February 18, 1931. The added plaintiff filed his plaint on March 6, 1931, in which he claimed the arrears of rent sued for by the plaintiff. The defence to the action were (1) that the District Court had no jurisdiction to entertain it, (2) that the plaintiff had failed to comply with the requirements of the Business Names Registration Ordinance. The learned District Judge overruled the first objection and upheld the second. He held that the added plaintiff being an assignee of the plaintiff could be in no better position and could not maintain the action.

H. V. Perera (with him *Rajapakse, Nadesan,* and *D. W. Fernando*), for plaintiff-appellant and added plaintiff-appellant.—The plaintiff is not a defaulter under section 9 of Ordinance No. 6 of 1918. *Prima facie* he has purged his default by the registration effected on May 14, 1928 (P 5). The plaintiff and one Thambyah were carrying on business under the name of Ceylon Auto-Carriers Company at the date of the execution of the hire purchase agreement sued upon. There is nothing to show that they had not registered their business name under the provisions of Ordinance No. 6 of 1918. On the contrary there is documentary evidence from which it may be inferred that the business of plaintiff and Thambyah was registered. P 5 is a certificate of registration granted pursuant to a statement of change under section 7 of the Ordinance. A certificate in the Form P 5 can only be granted if there has already been a prior registration of a business and a change has taken place in respect of such business. Therefore the registration (P 5) cured not merely the default of the plaintiff but also the default of the plaintiff and Thambyah, if there was any default at all.

The added plaintiff is the assignee of the business of the plaintiff. He is an innocent assignee for value. Even if plaintiff is a defaulter under section 9 of the Ordinance an innocent assignee for value from him is not affected by such default. This point is covered by cases decided in the English Courts. Section 8 (1) of the Registration of Business Names Act, 1916, is the same as section 9 of our Ordinance. It has been held under section 8 (1) of the English Act that the disability imposed by section 8 is limited to the defaulter and does not pass to his innocent assignees. (*Daniel v. Rogers*[1]; *Hawkins and another v. Ducho.*[2]) These cases are in point and support the contention that the added plaintiff is not affected by the default of the plaintiff.

H. E. Garvin (with him *S. Alles*), for defendants, respondents.—The default committed is the default of plaintiff and Thambyah and it cannot be cured by registration by the plaintiff alone. Registration to purge this default must be by both plaintiff and Thambyah. Until such registration the hire purchase agreement is not enforceable.

The added plaintiff is not an innocent assignee. He had notice of the default on the part of the plaintiff. Even if he is not affected by the default of the plaintiff he cannot maintain this action, for the right to sue on contracts did not pass to him under the deed of assignment (P 3).

[1] (1919) 2 *K. B.* 243. [2] (1921) 3 *K. B.* 226.

The agreement sued upon is one of sale and the plaintiff under such an agreement cannot keep the bus and also recover the rent which represents the value of the bus.

September 8, 1933. DALTON A.C.J.—

I have had the advantage of reading the judgment of my brother Maartensz, and I agree that the appeal must be allowed.

The issue raised in the lower Court, having reference to Ordinance No. 6 of 1918, was whether the plaintiff or added plaintiff had complied with the requirements of the Business Names Ordinance. From a practical point it is clear that it is of no assistance to defendants' case if the Court holds that the added plaintiff, as an assignee, is not subject to the disabilities of that Ordinance, even if the plaintiff himself was in default when the action was instituted. With regard to the plaintiff, there would seem to be no doubt that at the time the contract sued on was completed and the action was instituted by him, he had complied with the provisions of the Ordinance, for he produced a certificate of registration (P 5) dated May 14, 1928. It is not, I think, questioned that the particulars then furnished and registered disclosed a correct and complete account of the firm as required by the Ordinance as at the date of this registration. That registration was made pursuant to a statement of change furnished under section 7 of the Ordinance, but the certificate of registration issued on that date is the only certificate given to the person registering, the old certificate being handed in with notice of any changes required to be made. There must necessarily in this case have been some earlier registration under the Ordinance, but no evidence was given of the particulars registered earlier. If there was however any earlier default, which is not clear, it seems to me, so far as plaintiff is concerned, that default has been cured.

With respect to the added plaintiff, the learned Judge, having found that plaintiff was in default of complying with the provisions of the Business Names Ordinance, held that the added plaintiff, as an assignee, could not be in any better position than the assignor. On this point he was however at a disadvantage in not having certain English authorities which decide this question brought to his notice. The local Ordinance is based upon the Registration of Business Names Act, 1916,[1] and with little change reproduces the provisions of that Act. There is a provision in section 8 of the Act enabling the Court, during an action, to give relief to a defaulter which is not enacted in the local Ordinance, but I think a mistake has been made in the case of *Jamal Mohideen & Co. v. Meera Saibo*[2], cited in the course of the argument before us, in comparing section 9 of the Ordinance with section 8 of the Act. That case purports to point out a further distinction between the provisions of the two sections but I cannot find the words which appear to be quoted in the judgment from section 8 in section 9, nor do they seem to be a correct paraphrase of the words used in the section. However that may be, I can find no variation between the provisions of the Act and Ordinance which would suggest that whereas the disability imposed by the Act is imposed on the defaulter only and does not extend to his assignees, the disability imposed by the Ordinance extends also to his assignees.

[1] *6 & 7 Geo. V. c. 58.* [2] *22 N. L. R. 268.*

It has been held in England that the disability does not extend to the assignees of a person in default under the Statute. In *Hawkins and another v. Ducho & Son and another*[1] McCardie J. adopted the dicta of the Judges in the Court of Appeal in an earlier case *Daniel v. Rogers*[2]. Incidentally he compares section 8 of the Act with section 4 of the Sale of Goods Act, 1893. The latter provides that "a contract . . . . shall not be enforceable by action unless . . . ." Section 8 of the Act of 1916, however, says that the "rights of that defaulter under or out of any contract" shall not be enforceable. He then goes on to quote the dicta referred to, subsequently giving his own reasons for his conclusion. In the earlier case Pickford L.J. states: "I entertain considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it". He certainly adds "but it is unnecessary to decide this point and I do not propose to do so". Bankes L.J. points out a distinction in the Money Lenders Act, 1900, as compared with the Registration of Business Names Act, 1916, and states that *primâ facie* section 8 of the latter Act means that the rights under or arising out of the contract are not to be enforceable against the other party to the contract. Scrutton L.J. whilst also pointing out that it is not necessary finally to decide this point, expresses a strong opinion that the application of section 8 is limited to proceedings between the parties to the contract, the language of the section being amply satisfied by applying it only to proceedings between those parties.

I would therefore apply that decision and those dicta to the case before us, with the result that the disability, if any, extending to plaintiff, does not apply to the added plaintiff. There is no question raised as to the *bona fide* nature of the assignment.

I have nothing that I can usefully add to what my brother has stated on the further points raised, and agree with his conclusions thereon. The appeal must therefore be allowed with costs, and I concur in the order proposed.

MAARTENSZ A.J.—

This was an action for the recovery of the arrears of rent due on a hire purchase agreement entered into by the plaintiff, who was carrying on business as the Ceylon Auto-Carriers Company, Colombo, and the defendants on May 28, 1926, by which the plaintiff hired to the defendants a Stewart "bus" in consideration of the payment of Rs. 1,500 when the agreement was executed and an undertaking to pay Rs. 5,885 by monthly instalments of Rs. 392.33 commencing from June 28, 1926. When the action was filed on October 8, 1928, there was due as monthly rental the sum of Rs. 3,239.36.

On November 7, 1930, the plaintiff by deed No. 1,039 assigned the business carried on by him under the name of the Ceylon Auto-Carriers Company to S. V. S. T. Avitchi Chettiar, who was added as a plaintiff on February 18, 1931.

The added plaintiff filed his plaint on March 6, 1931, in which he claimed the arrears of rent sued for by the plaintiff. The main defences to the claim were (1) that the District Court of Colombo had no jurisdiction

[1] (1912) 3 *K. B.* 226. [2] (1918) 2 *K. B.* 228.

as the agreement was executed in Lindula outside the jurisdiction of the Court, and (2) that the plaintiff at the date the hire purchase agreement was executed, was carrying on business in partnership with one Thambyah and did not register it under the Business Names Ordinance, No. 6 of 1918.

The learned District Judge overruled the first objection and upheld the second. He further held that the added plaintiff being an assignee of the plaintiff could be in no better position and could not maintain the action although he had himself complied with the provisions of the Registration of Business Names Ordinance.

The District Judge's decision on the question of jurisdiction was not questioned by the respondents. The appellant's counsel contended that the learned District Judge was wrong in holding that the plaintiff had not complied with the provisions of the Ordinance and that he was also wrong in holding that the added plaintiff was in no better position than the plaintiff in regard to the maintainability of the action.

I am of opinion that both contentions must be upheld. W. D. Fernando, the plaintiff, was, when the agreement was executed, carrying on business with one Thambyah. According to the evidence this Thambyah was a man, and we are therefore unable to accept a certificate of registration produced at the argument of the appeal according to which W. D. Fernando and Minambikai Thambyah were registered as partners carrying on the business of Motor Mail and Transport Contractors, because, as was admitted in appeal, Minambikai is a woman's name. But by May, 1928, Thambyah, whether a lady or a man, had ceased to be a partner, and Daniel Fernando has produced a certificate (P 5) according to which he was registered as carrying on the business of Motor Mail and Transport Contractors under the name of the Ceylon Auto-Carriers Company, Colombo. *Primâ facie,* therefore, he had purged his default. But it was contended for the defendants that the default committed by himself and Thambyah had not been cured by the subsequent registration evidenced by P 5.

I do not think this contention is a sound one. The default, if there was a default, which is doubtful as P 5 indicates that the registration referred to in it was made pursuant to a statement of change under section 7, was I think cured by the registration effected on May 14, 1928.

However that may be, the added plaintiff's contention that he was not in default and that he was therefore entitled to maintain the action is, in view of the authorities cited to us, clearly right. These authorities were not cited to the learned District Judge, and I must confess that but for these authorities I would have arrived at the same conclusion as the District Judge.

The authorities we were referred to were *Daniel v. Rogers*[1] and *Hawkins and another v. Ducho*[2]. These were cases which considered the effect of section 8 (1) of the Registration of Business Names Act of 1916 on an innocent assignee from a person in default.

Sub-section 8 (1) corresponds to section 9 of our Ordinance and is in exactly similar terms except that the words "at any time" which come after the word "enforceable" in our Ordinance appear after the word "first" in the English Act.

[1] *(1918) 2 K. B. 228.* [2] *(1921) 3 K. B. 226.*

In my opinion this variation does not make any difference in the effect of the two sections, and the English cases cited to us are authorities on which we are entitled to rely in deciding whether an assignee is effected by any failure to comply with the provisions of the Registration of Business Names Ordinance on the part of his assignor.

In the first case the Court of Appeal expressed the opinion that section 8, sub-section (1), is limited to prohibiting the enforcement of contracts coming within its scope as between the immediate parties thereto. No doubt the opinion was *obiter* to the question at issue in the case.

In the latter case, the plaintiff was the trustee in bankruptcy of one Mayer Taper (or Tapor) and sued the defendants to recover damages for breach of contract made between the defendants and M. and B. Taper.

The facts of the contract are not material and need not be stated. One of the defences to the action was that the M. and B. Taper with whom the contract was made was one person Meyer who had neglected to register his business name as required by section 1 of the Registration of Business Names Act of 1916, and that as he was in default the plaintiff was precluded by section 8 (1) of that Act from enforcing Meyer Taper's rights under the contract by action.

The plaintiff applied for relief under sub-section E of the Act but it was refused. In appeal it was held that the relief should have been granted. The question whether the disability applied to the trustees in bankruptcy need not have been decided, but McCardie J. before whom the action was tried decided the question as the point was fully argued and as it was of practical importance. After referring to *Daniel v. Rogers* (*supra*) McCardie J. said that he respectfully agreed with the dicta in that case as representing the true interpretation of the Act of 1916 and added: "unless the dicta I have cited be good law the most serious consequence would follow. Innocent holders for value of negotiable instruments might under section 8 be unable to enforce the rights of a defaulter. The position of innocent assignees of a defaulter's book debts would be equally imperilled. Even purchasers of goods from a trader who was in default under the Act of 1916 might (if the goods were warehoused or held by third parties) be met by a plea of the Act if action was begun against those persons for detention".

I am of opinion that the reasons given by the learned Judge for holding that the disability imposed by section 8 is limited to the defaulter and does not pass to his trustee in bankruptcy or other assignees are equally applicable to section 9 of the Registration of Business Names Ordinance, No. 6 of 1918, and I respectfully adopt them.

There is no evidence in this case that the added plaintiff was not an innocent assignee for value. One of the circumstances mentioned by McCardie J. as necessary in determining whether the disability should or should not attach to the assignee was that he should be an innocent third party. That being so, the added plaintiff is entitled to plead that he is not affected by the disability imposed by section 9 and his plea must be upheld.

It was however argued that the deed of assignment relied on by the added plaintiff did not pass to him the benefit of the agreement sued on. This argument cannot be upheld. The deed P 3 is expressed in most

comprehensive terms; by it W. D. Fernando assigned to the added plaintiff all the business conducted by him under the name of the Ceylon Auto-Carriers Company together with the goods, effects, and assets including the book and other debts and for the purpose of enabling the added plaintiff to recover the book and other debts W. D. Fernando appointed the added plaintiff his attorney.

I am of opinion that by the deed P 3 the claim sued on was assigned to the added plaintiff.

Another argument addressed to us in support of the decree was that to District Judge was wrong in deciding issue 4 against the defendants. Issue 4 is as follows:—(a) Does the agreement pleaded contain the terms set out in 4 (*d*) of the plaint of 1931 ? (*b*) if not, can the action be maintained ?

4 (*d*) of the plaint avers that by the agreement P 1 it was agreed that in the event of the defendants failing to pay any of the agreed instalments the plaintiff should be at liberty forthwith to institute an action for the recovery of the sum of Rs. 7,385 that may be due on such agreement after allowing for payments made on account prior to such failure on the part of the defendant.

Plaintiff's counsel admitted that the averment cannot be justified by any clause of the agreement. But I do not see that the error in pleading in any way affects the claim.

The plaint of 1931 was filed by the added plaintiff, who pleads the agreement P 1, which was filed by the plaintiff with his plaint, which contains the same averment also numbered 4, and it is clear from the other averments that the plaintiff and the added plaintiff were seeking to recover the unpaid rent.

The absence of such an agreement as is averred in paragraph 4 of the plaint in no way affects the right of the plaintiffs to recover the amount due, and I am of opinion that the 4 (*b*) issue was rightly decided against the defendants.

In the course of the argument regarding paragraph 4 (*d*) it was submitted that the contract was one of sale and that in any event the plaintiff could not keep the bus of which they had recovered possession and also recover the rent which represented the value of the bus. I do not think either submission to be well founded. P 1 is clearly an agreement in the nature of a hire purchase contract, in terms very similar to the agreement held to be a hire purchase contract in the case of *Mather and Son v. de Silva et al.*[1]

The bus was seized on March 11, 1929, when the rent sued for had already become due and the plaintiffs were entitled to take possession of the bus and sue for the arrears of rent under clause F of the agreement which provides that should the hirer fail to pay the rent or hire instalment on the due date . . . . the owner may (without prejudice to his rights to recover arrears of rent and damages for breach of the agreement) terminate the hiring and retake possession of the bus.

I am accordingly of opinion that the claim of the plaintiffs should not have been dismissed.

[1] *(1933) 12 Ccy. Law Recorder p. 211.*

The plaintiff has also appealed from the decree of the District Court declaring the second defendant entitled to recover from the added plaintiff in reconvention a sum of Rs. 2,800, the damages he alleges he sustained by reason of the plaintiff's agent, James Jayasinghe, failing to insure the bus in breach of his undertaking to do so after receipt of the amount due to pay the premium.

The appeal was argued on the footing that the decree on the claim in reconvention had been entered against both the plaintiff and added plaintiff, but it has been entered against the added plaintiff only, as the judgment does not specify the plaintiff against whom the judgment was entered in reconvention it is possible that the decree is not in accordance with the judgment.

In view of the conclusion I have come to that the order cannot be sustained, it is not necessary to determine whether the District Judge intended to cast both plaintiffs or only the added plaintiff in damages.

The learned District Judge has found that James Jayasinghe was plaintiff's (W. D. Fernando's) agent in Hatton and that, although the agreement cast the duty of insuring the bus on the hirer, the Company had arranged to insure it and James Jayasinghe received the cheque 2 d 7 for Rs. 205 in payment of the premium on June 13, 1926, which he endorsed in the course of business. This cheque appears to have been endorsed and cashed by one M. B. Simon who was said to have been an employee of the Auto-Carriers Company.

The evidence of James Jayasinghe and the second defendant has been accepted by the learned Judge in spite of the fact that it is open to a great deal of suspicion. James Jayasinghe is a brother of the first defendant and when giving evidence was the second defendant's father-in-law, and there is no evidence that the second defendant at any time made any inquiries regarding the policy of insurance, nor is there any evidence that the sum of Rs. 205 was received by the Auto-Carriers Company.

I would, but for the strong finding, have been for these reasons inclined to reject the evidence of James Jayasinghe and the second defendant.

The bus according to the second defendant's evidence was taken out by an unauthorized person on February 21, 1927, and went over a precipice on the Ramboda Pass near Nuwara Eliya and was smashed to pieces and the driver killed. It cost him Rs. 350 to raise the bus to the road and Rs. 2,800 to have it repaired. In another place he said the sum of Rs. 2,800 included the sum of Rs. 350.

The second defendant's evidence of what he paid to have the bus repaired is most unsatisfactory. He said in the course of his evidence "in regard to this Rs. 2,800 I have paid it in two part for the body Rs. 750 and the balance for repairing the chassis, and so on. I paid it to Davit Singho of Talawakele and for the body to the Talawakele blacksmith. I got no receipt from him".

Later on he said "I have no account to show that I spent Rs. 2,400 on repairs. I only have got my statement that I spent Rs. 2,400. I got the repairs done by Davit Singho".

A third version was "I paid this Rs. 2,400 to several persons. I have receipts from some. I do not know where Davit Singho lives. That sum that I paid him was Rs. 800 for repairing the bus and Rs. 750 for

the body to another man. His name is Charles. To Rowlands I paid Rs. 250 for towing the bus, I paid Rs. 60 to a driver from Nuwara Eliya. Rs. 60 I paid for three watchers for three days. For the radiator I paid Rs. 125, and four tyres and tubes Rs. 423, and Rs. 108 licence". The last item is unintelligible.

Lastly he says "The name of the man who repaired the bus for me is Davit Singho. I say he is too ill to come and give evidence".

The bus I have little doubt did meet with an accident and had to be repaired but the second defendant has failed to prove what he spent on repairs. In view of his claim for damages it is most surprising that he did not obtain receipts and keep an account of the sums expended by him in having the bus repaired.

The only definite evidence is the receipt from Rowlands Garage for Rs. 350, but the second defendant is not entitled to recover that sum as his evidence leaves me in doubt whether it is included in the sum of Rs. 2,800 or not.

I accordingly hold that the second defendant has not established his claim to the sum of Rs. 2,800 made in reconvention.

It is therefore unnecessary to discuss the various legal objections taken to the claim by appellant's counsel.

I allow the appeal and enter judgment for the added plaintiff for the sum of Rs. 3,239.36 with interest as prayed for and costs against both defendants.

The second defendant's claim in reconvention is dismissed without costs as it does not appear that his claim involved the plaintiffs in extra costs.

The plaintiffs will also be entitled to their costs of appeal. But the plaintiffs will not be entitled to more than one set of costs either in appeal or in the District Court.

The dismissal of plaintiff's claim for goods sold and delivered is affirmed.

Appeal allowed.