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Present: Lascelles C.J. and De Sampayo A.J.

FONSEKA *et al.* *v.* NARAYANAN CHETTY.

67—D. C. Negombo, 8,256.

Evidence—Mortgage bond—Variation of terms of bond by subsequent non-notarial document.

In 1903 A executed a mortgage bond (hypothecating land) whereby he bound himself to pay B on demand the sum of Rs. 1,500 with interest.

In 1906 the parties came to a new agreement—which was embodied in writing, but not notarially attested—the purport of which was, not only to change the method of payment, but also to increase the burden of the debt, and thus to make the security to bear a larger debt.

Held, that the non-notarial agreement was inadmissible in evidence for proving the variation of the terms of the original bond.

The document (non-notarial) constitutes one entire promise, which is partly within and partly without section 2 of Ordinance No. 7 of 1840, and is therefore not enforceable in any respect.

Kiri Banda v. Ukku Banda,[1] and *Lushington v. Carolis*,[2] distinguished.

THE facts are set out in the following judgment of the District Judge (John Scott, Esq.,):—

Plaintiff and his wife in December, 1903, borrowed Rs. 1,500 on mortgage bond B (filed) from four Chetties, of whom defendant is one. In terms of the bond the principal was repayable without interest within four months; in failure thereof interest was payable at 13 per cent. per annum every four months; in failure thereof the principal with interest at 20 per cent. per annum from date of failure till date of payment on demand legally.

Plaintiff paid interest at 13 per cent. per annum every four months from date of bond up to April, 1906. From that date onwards he paid eighteen bi-monthly instalments of Rs. 90 up to June, 1909. By his own calculation on that date he owed only Rs. 250.38 on the bond. This sum he tendered formally to his creditors, but they refused to accept it. Plaintiff now brings this action to compel defendant to accept that sum in full satisfaction of the debt, and for the cancellation and return of the bond.

Defendant produces a writing A, which purports to be an agreement entered into by the plaintiff and two of the four Chetties above referred to. It is dated in October, 1907. It refers expressly to the bond B, and states that plaintiff agrees to settle the debt due on that bond by payment of twenty-five bi-monthly instalments of Rs. 90 starting from April, 1906. It is reckoned therein that such payments would by June,

[1] *(1911) 14 N. L. R. 181.*

[2] *(1911) 14 N. L. R. 489.*

1910, cover the principal Rs. 1,500 and interest thereon at 12 per cent. per annum, Rs. 750. In default of payment of these instalments, plaintiff agrees that the principal sum, with interest at 20 per cent. per annum as from April, 1906 (less the amount of any instalments already paid), shall be recovered from him by process of law. The writing purports to confirm a verbal agreement made in April, 1906. . . . .

I hold, then, on the second issue framed that plaintiff entered into and signed agreement A.

[The following is the agreement A:—

October 13, 1907.

The agreement entered into between me, M. M. Fonseka of Dummaladeniya, and Sena Ana Roona Seena Narayanan Chetty and Theyna Moona Ravenna Mana Ramanadan Chetty, both of Negombo, is as follows: With regard to the bond No. 9,144 dated December 7, 1903, attested by Mr. James, Notary Public, for the sum of 150 pounds, there was due on the said sum interest calculated on April 7, 1906, at the rate of 12 per cent. for fifty months from the above date up to June 6, 1910, Rs. 750, and principal Rs. 1,500, both aggregating the sum of Rs. 2,250, which was payable by twenty-five instalments of Rs. 90 each once in every two months. Out of these instalments, nine instalments, ending up to the 6th instant, amounting to Rs. 810, having been already paid, I agree to pay the residue sum of 144 pounds, equivalent to Rs. 1,440, by sixteen instalments of Rs. 90 each in manner aforesaid and obtain receipts therefor. After all the said twenty-five instalments shall have been fully paid and settled, I shall get back the said bond No. 9,144 for 150 pounds duly cancelled and discharged. Should I make default to pay in manner aforesaid, the balance amount that may be found to be due on calculation of the principal and interest thereon at the rate of 20 per cent. from April 7, 1906, on which the verbal agreement was made, after deducting the amount that shall have already been paid by me, shall be recovered from me by process of law.

This was signed by me after the same having been read and understood by me.

(Signed on a 5-cent postage stamp) M. M. FONSEKA.

(Signed) S. A. R. S. PALANJAPPA CHETTY, by his attorney S. A. R. NARAYANAN CHETTY.

(Signed) T. M. R. M. MUTTURAMEN CHETTY, by his attorney T. M. R. M. RAMANADAN CHETTY.]

It is now necessary to decide what is the effect of that document. It is non-notarial, whereas the bond B is notarial. But on this point the case quoted in *14 N. L. R. 181* seems to be quite clear, namely, that a notarial document can be varied or modified by a subsequent non-notarial document, provided that the latter does not itself require to be notarially executed under Ordinance No. 7 of 1840. Now, the notarial document B is a mortgage bond, but the non-notarial document A refers purely to money payments connected with the money debt part of the mortgage bond. Documents dealing purely with payments of money are not required by Ordinance No. 7 of 1840 to be notarially executed. Therefore, the agreement A is clearly capable of modifying a notarial document. As to whether it is capable of modifying a mortgage bond the case quoted in *14 N. L. R. 489* seems to be in point, where the divisibility of the promise involved in a mortgage bond is

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clearly indicated, viz., first, the promise to repay money lent; and secondly, the giving of security for the repayment. A non-notarial writing can have no effect on the second part of the promise, but it can certainly affect the first part of the promise. Thus, the agreement A can modify that part of the bond B which refers purely to the repayment of the loan made by defendant to plaintiff, and plaintiff must be held to be bound by the terms of that agreement which he has himself voluntarily entered into and signed. As to the equity or inequity of the terms of that agreement I am not called upon to express an opinion. Plaintiff is a man who is accustomed to deal with Chetties, and is presumably thoroughly conversant with their methods of business. He has entered into this agreement with open eyes, and must take the consequence of his action.

On the first issue framed, then, I hold that the sum due to defendant by plaintiff after the payment of the last instalment in June, 1909, was not Rs. 250.38 as calculated by plaintiff on the basis of the terms of the bond B, but was a sum of Rs. 630 payable in seven bi-monthly instalments of Rs. 90 according to the terms of agreement A. Further, since plaintiff has made default in payment of those instalments, he is bound by the same agreement to pay to defendant the principal sum, with interest at 20 per cent. per annum as from April 7, 1906, to date of payment, less the amount already paid in instalments by plaintiff. That amount is calculated to be Rs. 1,177.50 up to date of defendant's claim in reconvention (August 3, 1910).

I dismiss plaintiff's action with costs, and give judgment for defendant for Rs. 1,177.50, with interest thereon at 9 per cent. per annum from August 3, 1910, till date of payment. Defendant cannot have a mortgage decree.

The plaintiff appealed.

Bawa, *K.C.* (with him *Morgan*), for appellant.

H. A. Jayewardene (with him *Samarawickreme*), for respondent.

Cur. adv. vult.

May 22, 1912. DE SAMPAYO A.J.—

On December 7, 1903, the plaintiff and his wife executed a mortgage bond, whereby they bound themselves jointly and severally to pay to the defendant and three other Chetties, or to one or more of them, on demand a sum of Rs. 1,500, with interest thereon at 13 per cent. every four months, and in default thereof to pay interest at the rate of 20 per cent.; and as security for such payment they mortgaged certain immovable property. The plaintiff from time to time made certain payments in liquidation of the debt, and he says that at the date of this action there was due on the bond only a sum of Rs. 285, which was tendered to defendant, but was not accepted. He accordingly brought this sum of money into Court, and prayed that the mortgage bond be cancelled and returned to him. The defendant pleaded that by a subsequent written agreement the terms of payment were varied, and that on

the footing of that agreement the balance due on the bond was Rs. 1,177.50, and he accordingly claimed this sum in reconvention and prayed for a mortgage decree and for sale of the mortgaged property.

It appears that on April 7, 1906, the plaintiff and the Chetties came to a new agreement as to the payment of the amount of the debt. They made a calculation of the interest that would be due on the principal sum of Rs. 1,500 from that date till June 6, 1910, at 12 per cent., and adding the same to the principal they arrived at the total sum of Rs. 2,250. It was then agreed that this sum should be paid by twenty-five instalments of Rs. 90 each payable bi-monthly; that after all the instalments have been fully paid the mortgage bond should be cancelled and discharged; and that in default of payment of the instalments as agreed, interest should be payable on any unpaid balance at the rate of 20 per cent. as from April 7, 1906. This agreement was subsequently embodied in a writing dated October 13, 1907.

The point for consideration is whether the writing, which is non-notarial, is admissible in evidence, and is available for the purpose of defendant's claim in reconvention. It will be noticed that the document itself is not depended upon as an independent agreement, but is sought to be engrafted on the original mortgage bond, and that the defendant's claim is on the mortgage bond as so modified. The District Judge has admitted the document in evidence on the authority of *Kiri Banda v. Ukku Banda*.[1] That case decided that since the enactment of the Evidence Ordinance a notarial agreement might be varied by a subsequent non-notarial writing, provided that the latter writing was not itself of such a nature as to require notarial execution under Ordinance No. 7 of 1840. The document in that case was a receipt for interest, which also contained an agreement that no further interest should be payable on the mortgage bond, and was held to be admissible so as to relieve the debtor from its date of his obligation to pay interest. The reason for its admissibility, notwithstanding the Ordinance No. 7 of 1840, was thus put by Lascelles C.J.: "It was not given for establishing any security, interest, or incumbrance affecting land"; and Middleton J. said: "It does not modify the original agreement in any respect as regards its effect on land or immovable property." Herein lies, to my mind, the distinction between that case and this. The writing in question not only changes the mode of payment of the debt, but increases its burden, with the result that now the plaintiff owes Rs. 1,177.50 instead of a smaller sum. The further effect of this is to make the security bear a larger debt, and consequently, I think, the agreement does affect the lands or immovable property mortgaged by plaintiff. The defendant himself understood the agreement in this sense, because, as I said before, he

[1] (1911) 14 *N. L. R.* 181.

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declared upon the mortgage bond as modified by the subsequent writing and not on the writing itself, and I think myself this is the effect of the writing, which stipulated that the plaintiff was not to be entitled to redeem the mortgage until he had paid all the instalments under the agreement. The District Judge himself felt this difficulty, since he refused to give defendant a mortgage decree. If the case of *Kiri Banda v. Ukku Banda*[1] relied on applied, I do not see why the defendant should not have a mortgage decree as well. In dealing with the difficulty, the District Judge referred to the case of *Lushington v. Carolis*,[2] which was relied on before us also, and held that in the writing the promise to pay the money on the terms agreed was separable from the agreement relating to the mortgage, and that therefore the writing could, and did, modify the personal obligation on the bond, though not the mortgage security. Now, the above case is quite different from this. There the action was on a non-notarial bond, which was of itself a single and complete document, and was not one modifying any prior notarial mortgage bond. This Court, held, and if I may say so, rightly held, that the document could be sued on so far only as the personal obligation was concerned. Moreover, I do not think that the present writing can be split up in the same way. It constitutes one entire promise, which is partly within and partly without section 2 of Ordinance No. 7 of 1840, and, therefore, according to that very decision, is not enforceable in any respect.

In my opinion the judgment appealed against cannot be sustained. I think it should be set aside, and the case sent back for ascertainment of the amount now due from the plaintiff on the basis of the original bond. It is desirable that the parties should, if possible, agree as to the amount, but otherwise the District Judge will ascertain the amount by further inquiry, and on payment by plaintiff of the amount so agreed or ascertained judgment should be entered for plaintiff in terms of the second prayer of the plaint. The plaintiff will have the costs of this appeal. But as regards the costs of the District Court, the plaintiff's denial of the execution of the writing necessitated a long trial on the issue of fact, and I think each party should bear his own costs in the District Court. The costs of the further proceedings, if any, will be at the discretion of the District Judge.

LASCELLES C.J.—I entirely agree.

Sent back.

[1] *(1911) 14 N. L. R. 181.*

[2] *(1911) 14 N. L. R. 489.*