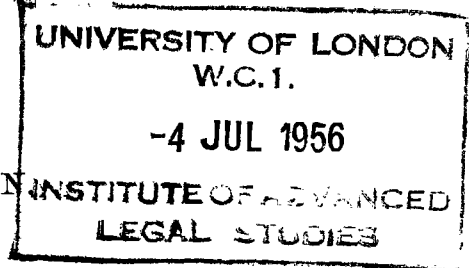


14, 1955

GLI.G.2

No. 39 of 1954.

In the Privy Council.



43543

**ON APPEAL**

FROM THE SUPREME COURT OF CEYLON

BETWEEN

T. A. K. DE SILVA (Plaintiff) . . . . . *Appellant*

AND

HIRDRAMANI LIMITED (Defendant) . . . . . *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

10 1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated 3rd March 1953, which reversed a Judgment and Decree, dated 3rd November 1950, of the District Court of Colombo in an action in which the Appellant was the Plaintiff and the Respondent the Defendant. pp. 42, 63.  
pp. 32, 38.

2. The issue which arises in this Appeal is whether the Respondent is liable to pay the sum of Rs.150/- per month to the Appellant under an Agreement dated 29th January, 1944, Exhibit P.1. The particular questions involved are as follows:—

20 (A) Whether or not the Respondent is estopped from denying its liability to the Appellant on the said agreement.

(B) Whether or not the said agreement ceased when one Wijeratne entered the service of the Respondent.

(C) Whether or not there is novation in this case.

(D) Whether or not the Appellant's rights under the agreement (Ex. P.1) became extinguished by the death of one Parmanand Tourmal. p. 10.

(E) Whether or not the assets and liabilities of the said Parmanand Tourmal were taken over by the Respondent.

30 (F) Whether or not there is *causa* to support the undertaking of the Respondent to make the monthly payments to the Appellant in terms of the said agreement.

3. The Agreement, Exhibit P.1, dated 29th January 1944, was entered into by the Appellant with Parmanand Tourmal, the proprietor of "Hirdramani," and C. P. Wijeratne, under which the said Parmanand Tourmal agreed to pay the Appellant Rs.150/- per month under the terms of the said agreement. p. 10.

4. The following were, *inter alia*, the terms of the said agreement :—

“(A) The said Silva shall retire as leading jewellery maker in the firm of Hirdramani as from the first day of February, 1944, and shall, in consideration of the sum of 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 from 1st February, 1944, serve under Parmanand Tourmal 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 Parmanand. 10

(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 1944 pay to Silva monthly at the end of each and every month a sum of Rs.150/- during the lifetime of Silva.

(D) Towards the payment of the aforesaid monthly sum of Rs.150/- by Mr. Parmanand he the said Wijeratne shall contribute a sum of Rs.75/- monthly from his remuneration. 20

(E) 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 Rs.150/- shall immediately cease anything herein contained to the contrary notwithstanding.”

The term “ Parmanand ” was used to mean and include his heirs, executors and administrators.

5. In 1946 the said Parmanand Tourmal ceased to carry on the business of “ Hirdramani ” in his own right when a private limited company, within his own family, known as Hirdramani Ltd., was formed. This Company was incorporated on 27th June, 1946 and took over the business. Parmanand Tourmal was the Managing Director of the Company till his death in March 1948. 30

6. After the formation of the limited liability Company as aforesaid in 1946, the Company continued the monthly payments of Rs.150/- to the Appellant until the death of Tourmal in March 1948.

7. After the death of Parmanand Tourmal the Company continued to make similar payments until May 1949, stating however that the payments were being made *ex gratia* and without any legal obligation on the part of the Company to make the same. 40

8. On the 14th September 1949 these proceedings were instituted by the Appellant in the District Court of Colombo by his plaint of that date. In paragraph 4 of the plaint the Appellant set out the terms of the

said agreement, and in paragraph 8 alleged that after the death of the said Parmanand Tourmal the Respondent wrongfully and unlawfully refused to continue the said payments to the Appellant in terms of the said agreement and the Appellant was entitled up to the date of the plaint to a total sum of Rs.2,250/-. In paragraph 6 the Appellant stated that the Respondent undertook the liability of Parmanand Tourmal to pay the said sum of Rs.150/- per month to the Appellant and continued to pay the Plaintiff the said sum monthly without default. In paragraph 10 the Appellant set out the damages claimed. By the prayer in the said plaint,  
 10 which is set out fully in the printed Record, the Appellant prayed for judgment against the Respondent in a sum of Rs.2,250/- with interest, and for further monthly payment of Rs.150/- from the month of September 1949 onwards in terms of the said agreement and for such other and further relief in the premises as to the Court seemed meet.

9. On the 5th of December 1949 the Respondent filed an Answer. p. 12.  
 By paragraph 4 of the Answer the Respondent alleged that the said agreement ceased when C. P. Wijeratne entered the service of the Respondent in or about June 1946 but the Respondent continued to make payments to the Appellant until June 1948 without any legal obligation  
 20 on its part to do so and specially denied that it undertook the liability of Parmanand Tourmal to pay the Plaintiff Rs.150/- per month. In the sixth paragraph of the Answer the Respondent specially denied that the refusal of the Defendant to make any payments thereafter was wrongful or unlawful.

10. On 19th June 1950 the Appellant filed an amended plaint. In p. 13.  
 paragraph 8 (A) thereof, the Appellant specially pleaded that the Respondent was estopped in law from denying its liability to pay to the Plaintiff the said monthly sum of Rs.150/-.

11. On 29th June 1950 the Respondent filed an Amended Answer p. 16.  
 30 and by paragraph 7 (A) thereof denied that it was estopped in law from denying its liability to pay the Plaintiff the said monthly sum of Rs.150/-. The Respondent prayed that the Appellant's action be dismissed with costs and for such other and further relief in the premises as to the Court seemed meet.

12. On the 12th October 1950 the following Issues were framed pp. 19, 20.  
 and the answers given by the learned District Judge thereto are also set p. 37, ll. 26-36.  
 out :—

1. " On the facts admitted in paragraphs 2, 3, 5 and 6 of the amended answer is the Defendant-Company liable to the Plaintiff  
 40 in respect of the claims, if any, arising on the agreement dated 29th January, 1944, marked P.1 ? "

Answer : " No."

2. " Did the Defendant-Company undertake to pay the Plaintiff the sum of Rs.150/- per month mentioned in the said agreement ? "

Answer : " Yes."

3. (A) " Did the Defendant-Company continue unconditionally to pay the said sum of Rs.150/- per month to Plaintiff from date of its incorporation until the death of Mr. Parmanand Tourmal ? "

Answer : " Yes."

(B) " If so, is the Defendant-Company estopped from denying its liability to Plaintiff on the said agreement ? "

Answer : " Yes."

4. " If all the foregoing issues or any one of them is answered in the Plaintiff's favour what sum is due from the Defendant-Company to Plaintiff ? "

10

Answer : " Rs.2,250/-."

5. (A) " Did the rights and obligations of the parties under the agreement P.1 cease when Wijeratne entered the service of the Defendant-Company in or about June 1946 ? "

Answer : " No."

(B) " If issue 5 (A) is answered in the affirmative, did the agreement thereupon cease to be effective ? "

Answer : " No."

6. " Did the defendant make payments to the Plaintiff until June 1948, without any legal obligation on its part to do so ? "

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Answer : " No."

7. " If issue 6 is answered in the affirmative, was the Defendant entitled to withhold further payment at any time ? "

Answer : " Does not arise."

8. " Was Wijeratne employed by the Defendant-Company with the consent of Mr. Parmanand Tourmal ? "

Answer : " Yes."

9. " If so is the Defendant-Company liable on the agreement P.1 ? "

Answer : " Yes."

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pp. 20-25.

13. At the hearing of the Suit, which took place on 12th October 1950, oral evidence was adduced by the Appellant only. At the close of the addresses to Court Judgment was reserved.

pp. 32-38.

14. By his Judgment, dated 12th October 1950, the learned District Judge gave Judgment for the Appellant for the sum of Rs.2,250/-, together with legal interest from date of the plaint until payment, and costs, and declared the Respondent liable to pay the Appellant the monthly payment

of Rs.150/- from the month of September, 1949, onwards in terms of the said agreement together with legal interest on the total sum due up to the date of decree till payment in full.

15. The learned District Judge in accepting the Plaintiff's statement that Parmanand as Managing Director of the Defendant-Company undertook to make the payments due to the Plaintiff under the Agreement, Ex. P.1, observed :—

10 "The Defendant-Company has not adduced any evidence to contradict the Plaintiff's testimony on this point. But the Counsel for the Defendant submits that the Plaintiff's evidence on this point is not true. If Parmanand did in fact give any such undertaking, it is argued that the Plaintiff would have referred to it in his letter P.6. If any such reference was made in that letter it certainly would have strengthened the Plaintiff's evidence on this point. But, on the other hand, it cannot be said that if the Plaintiff in fact questioned Parmanand about his position under the Company, that it is strange conduct on his part. It is in evidence that the Plaintiff was in the habit of going to the Defendant's shop even after he retired from the firm of Hirdramani. What is more natural than that on one of those occasions he should inquire from the Managing Director as to what his position would be under the new dispensation? The fact that payments were continued after the formation of the Company supports the Plaintiff's story that Parmanand as Managing Director gave him an undertaking that the payment to him would be continued by the Company. If no such undertaking was given at any time, why did the Company pay? The Company's account books and minute books would show the nature of these payments. But those books have not been produced. Is it not unfair to presume that they are not forthcoming because those books would not support the Defendant's present position that the payments were made without any legal obligation to do so? If these payments were made *ex gratia*, why didn't the Company inform the Plaintiff accordingly before Parmanand died? That position was taken up after Parmanand's death probably because Parmanand would not have supported it. It is true that the firm of 'Hirdramani' is different from 'Hirdramani Ltd.' according to law. But in reality it is the same business. That was probably the reason why the Defendant-Company undertook the liability of Parmanand to pay the Plaintiff. Such liability the Defendant-Company was entitled to take over in terms of Article 3 (J) of the Memorandum of Association (P.8)." p. 35, ll. 1-34.

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The learned District Judge, who was of opinion that there was a novation of the original contract by a substitution of the Respondent as the new debtor in place of Parmanand Tourmal, the original debtor, went on to say :—

"Such an undertaking would in effect amount to a novation of the original contract by the substitution of the Defendant-Company as the new debtor in place of Parmanand the original debtor. The fact that in the plaint a novation is not pleaded in

so many words does not affect the legal position. But it is necessary to consider whether the other party to the agreement P.1 namely, Wijeratne, was a consenting party to the novation. According to the agreement itself, Wijeratne too had to contribute Rs.75/- to Parmanand to enable the latter to pay Rs.150/- to Plaintiff. The payment to the Plaintiff, as I observed earlier, was regularly made. It is not suggested that Wijeratne at any time refused to give his contribution . . . Therefore it is legitimate to presume that Wijeratne too agreed to the novation. Once the novation took place Parmanand ceased to be the debtor.”

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p. 36, ll. 3-5.

p. 36, ll. 14-33.

16. On the question whether the Appellant's rights under the agreement Ex. P.1, became extinguished with the death of Parmanand, the learned District Judge held that the said agreement was to continue even after the death of Parmanand according to the interpretation of the said agreement.

17. On the point of estoppel the learned District Judge held in favour of the Appellant. He observed :—

p. 36, ll. 34-39.

“ It is also argued that the Defendant-Company is estopped from denying its liability to pay the Plaintiff by reason of the fact that the Defendant-Company continued to make the payments even after Parmanand's business was formed into a Company. By reason of those payments it is suggested that the Plaintiff was lulled into a false sense of security . . . In this case, if before the death of Parmanand the Defendant-Company ceased to make the payments, the Plaintiff had every opportunity of arriving at a satisfactory adjustment of the matter with Parmanand. But the Defendant continued to make the payments and almost immediately after the death of the one and only person with whom the Plaintiff could have arrived at a settlement he is told that he has no legal right to claim those payments. That was far too late from the point of view of the Plaintiff. It cannot be said that the representation made by the Defendant by reason of those continued payments was uncertain. Those payments have no reference to anything other than the claim of the Plaintiff under the agreement P.1. Therefore I hold in favour of the Plaintiff on the plea of estoppel.”

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p. 37, ll. 11-23.

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p. 38.

18. A Decree in accordance with the Judgment of the learned District Judge was entered on 3rd November 1950, and against the said judgment and decree the Respondent appealed to the Supreme Court of Ceylon. The main grounds of appeal were that there was no novation of the contract in the circumstances of this case ; that the payments made to the Appellant by the Respondent after the formation of the Company did not amount to a representation sufficient in law to create an estoppel and that the learned District Judge erred in acting on the evidence of the Appellant as to what the late Parmanand Tourmal told him because it is not supported by any other evidence and was in fact inconsistent with document Exhibit P.6.

p. 41.

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p. 85.

pp. 42-46.

19. The appeal was argued on 23rd February 1953 and on 3rd March 1953 Gratiaen J. delivered judgment (Gunasekera J. agreeing) setting

aside the judgment and decree of the District Court and ordering judgment to be entered in favour of the Respondent and dismissing the Appellant's action with costs in both Courts.

20. After setting out the material facts, the learned Judge, Gratiaen J., dealt with the question of novation on the incorrect assumption, it is submitted, that the particular obligation was no longer subsisting after the death of Parmanand. He said: "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  
10 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 Ltd. as its leading jeweller. No such contract has been pleaded or proved by the Plaintiff." p. 45, ll. 30-37.

It is respectfully submitted that the Supreme Court of Ceylon erred on this point and that there was a novation of the contract after the incorporation of the Respondent Company, and the uncontradicted evidence of the Appellant supports this view.

21. The evidence relating to the correspondence between the  
20 Appellant and the Respondent after the death of Parmanand repudiating the legal rights of the Appellant and offering to continue payments on an *ex gratia* basis does not, it is respectfully submitted, affect the question of novation. pp. 21, 84-86.

The payments made to the Appellant after the formation of the Company support the plea of estoppel. It is respectfully submitted that those payments can have no reference to anything other than the claim of the Appellant under the agreement, Exhibit P.1.

22. It is respectfully submitted that the learned Judge Gratiaen J., who agreed that the principle of estoppel by representation enunciated in  
30 Hailsham, Vol. I, p. 479, para. 547, was correct, was wrong in stating that this principle could not be applied to the facts of this case. It is respectfully submitted that the evidence proved that the Plaintiff was led into the belief that the Company would continue payments throughout his lifetime, and was lulled into a sense of security. The Respondent waited till the Appellant lost the opportunity of clarifying his position and adjusting matters to his advantage and then when it was too late for the Appellant to take any steps to fight out his position with Parmanand the Respondent repudiated its liability to make the payments. The letter  
40 of the Respondent dated 29th June 1948, Exhibit P.7, only indicates that the Respondent had taken a different view after the death of Parmanand, which view it could not legally take because it was estopped from denying its liability on account of its previous conduct. p. 86.

23. From the Judgment and Decree of the Supreme Court dated  
9th March 1953 the Appellant was granted Conditional Leave to appeal pp. 42-46, 47.  
to the Privy Council on 14th September 1953, the leave being made Final pp. 54-64, 65.  
on the 27th October 1953. p. 68.

24. The Appellant humbly submits that the Judgment and Decree of the Supreme Court in this case was wrong and ought to be set aside and that the Judgment and Decree of the District Court ought to be restored for the following among other

### REASONS.

- (1) BECAUSE there was evidence on which the Supreme Court could and should have come to the conclusion that there was a novation of the contract, Exhibit P.1.
- (2) BECAUSE there was evidence on which the Supreme Court could and should have come to the conclusion 10 that the plea of estoppel must succeed in favour of the Appellant.
- (3) BECAUSE the learned District Judge was right and the Supreme Court was wrong in its application of the law relating to novation and estoppel to the facts of this case.
- (4) BECAUSE the Respondent had taken over the liability of Parmanand Tourmal.
- (5) BECAUSE the payments made by the Company could be referred only to the contract.
- (6) BECAUSE the business of Hirdramani continued to be 20 the same notwithstanding the formation of the Company.
- (7) BECAUSE the evidence of the Appellant as to the conversation he had with Parmanand Tourmal stands uncontradicted and was accepted by the learned District Judge.
- (8) BECAUSE the Supreme Court was not justified in interfering with the findings of the learned District Judge on questions of fact.
- (9) BECAUSE the question whether or not there was a novation is a question of fact deducible from the 30 evidence led.
- (10) BECAUSE there is *causa* to support the undertaking by the Respondent to continue the payments in terms of the agreement, the Respondent being therefore in any event liable to continue making the said payments.
- (11) BECAUSE the Judgment of the Supreme Court is wrong and ought to be set aside.
- (12) BECAUSE the Judgment of the District Court was right and ought to be restored.

L. G. WEERAMANTRY. 40

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No. 39 of 1954.

In the Privy Council.

ON APPEAL FROM THE SUPREME  
COURT OF CEYLON.

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BETWEEN

T. A. K. DE SILVA (Plaintiff) *Appellant*

AND

HIRDRAMANI LIMITED  
(Defendant) . . . *Respondent.*

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CASE FOR THE APPELLANT.

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