

A

DAMODAR NARSEY AND OTHERS

v.

MATA PRASAD AND OTHERS

B

[COURT OF APPEAL, 1973 (Gould V.P., Henry J.A., Marsack J.A.), 4th, 19th July]

Civil Jurisdiction

C

Contract—novation—agreement by distributors to supply films to cinema—subsequent sale of cinema—written agreement between vendor and purchaser to which distributors not a party—whether purchaser liable to distributors for breach of original agreement—whether novation of the agreement by conduct of the parties.

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In 1964 the appellants who were distributors of films contracted with the first and second respondents to supply films to their cinema for a period of 10 years. In 1965 the first and second respondents entered into a written agreement with the third respondent to sell the cinema. The appellants were aware of the sale and in fact continued to supply the third respondent with films and accept payments from him although there was no fresh written contract drawn up. As a result of a dispute, the appellant sued the first, second and third respondents for damages for breach of the original contract.

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Held: That although the appellants supplied films to the third respondent and accepted payment, they did no more than this. The conduct of the appellants throughout showed that they considered and treated the first and second respondents as being still liable under the original contract and that therefore there was no novation. Consequently there was no basis for an action against the third respondent for breach of a contract to which he was in no sense a party.

Appeal from a judgment of the Supreme Court dismissing an action for damages.

D. N. Sahay for the appellants.

F

M.S. Sahu Khan for the first and second respondents.

G. P. Lala for the third respondent who did not take part in the appeal.

The following judgments were read:

HENRY J. A.: [19th July 1973]—

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In this appeal it is convenient to retain the terms plaintiffs, first and second defendants and third defendant. At all material times plaintiffs were distributors of films. On May 28, 1964 plaintiffs and first and second defendants entered into a written agreement whereby plaintiffs agreed to supply films to first and second defendants for exhibition in their theatre at Tavua. The term of this agreement was for a period of 10 years commencing on May 1, 1964. There were express provisions for earlier termination.

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The following provisions, setting out the obligations on the part of plaintiffs, are of importance. They are:—

1. The Distributor will:

(a) supply Indian Films to the Exhibitor for exhibition in the said place;
(Tavua)

- (b) not exhibit any Indian Film in the said place and not supply any Indian Film to any person except the Exhibitor for exhibition in the said place; **A**
- (c) arrange and pay for delivery of the Films to the said place and notify the Exhibitor when a Film has been or is about to be despatched;
- (d) decide which Films are to be supplied to the Exhibitor out of the Distributor's stocks of Films from time to time on hand or in circulation in Fiji provided however that the Exhibitor shall not be compelled to accept for re-exhibition any film which shall have been sent to the Exhibitor for re-exhibition on four previous occasions; **B**

The contract related to "Indian Films" only. This term was defined in the contract. First and second defendants agreed not to exhibit any Indian Films except those supplied by plaintiffs. Remuneration payable to plaintiffs was 50 per cent of the gross proceeds. There was a provision in the contract which reads:—

2. The Exhibitor will: **C**

- (i) not assign or otherwise deal with the exhibitor's interest under this contract or any part thereof without the prior written consent of the Distributor, who may require that the assignee or other person concerned in the dealing shall first enter into a new contract with the Distributor in the terms of this contract and for the unexpired period thereof.

By an agreement dated February 15, 1965 first and second defendants sold the said theatre business at Tavua to third defendant. This agreement contained the following provision:— **D**

- 4. The purchaser shall take over all existing contracts hereto existing between the Vendors and certain film distributors, PROVIDED that the Purchaser shall indemnify the Vendors against, all claims, if any, of all film distributors with whom the Vendors are contractually bound. **E**

On this topic one of plaintiffs deposed as follows:—

I was never asked to do any thing about Sale and Purchase Agreement.
I was not required to consent.

I just orally told them that it was all right. We orally consented.

I did not enter into a separate agreement with 3rd Defendant. **F**

At no time we entered into fresh contract with 3rd Defendant.

On July 6, 1965 second and third defendants entered into an agreement relating to certain defaults made by third defendant in respect of the lease of the said theatre. The following recital in this agreement was relied on by plaintiffs. It reads:—

AND WHEREAS the party of the second part having communicated with certain Film Producing Companies to wit: Universal Pictures Ltd; Warner Brothers; International Pictures Ltd and Damodar Brothers with whom the party of the first part has had contracts for the supply and acceptance of Films either by Sale and Purchase or on rental basis in consequence of which the party of the first part considers that he may be made liable for breach or may in consequence of such negotiations suffer monetary losses by increase in prices paid to such Film Producers their agents or importers during the currency of the existing contracts whereby the party of the second part has given assurance agrees and undertakes to indemnify the party of the first part against any damages or loss that the party of the first part may suffer. **G**
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This recital was followed by an agreement which reads:—

- A** 3. That the party of the second part assures agrees and undertakes to indemnify the party of the first part against any loss or damages that may result to the party of the first part from any act deed default or miscarriage of the party of the second part in relation to the existing contracts with Universal Pictures Limited, Warner Brothers Limited, International Pictures Limited and Damodar Brothers for sale and purchase or hire of films
- B** PROVIDED HOWEVER this assurance shall not be deemed to extend to any renewals of such contracts after the expiry of the existing contracts in question.

C From the time when third defendant took over the said theatre business plaintiffs supplied Indian Films to third defendant who paid for such films. There were occasions when special terms were demanded in respect of, some Indian films with the result that the remuneration was, on these occasions, raised to 60 per cent. Disputes arose between plaintiffs and third defendant concerning the supply of Indian films. As a result the solicitors for third defendant wrote to plaintiffs on April 26, 1968 in the following terms:—

Re Marolia & Company (Paramount)
Theatre—Tavua

- D** “ Our clients have consulted us about an Agreement with you dated the 28th May 1964 whereby you were to distribute films to their theatre upon certain conditions.

We are instructed that you have broken the agreement in the following ways:

- E** (1) Contrary to Clause 1(d) you have supplied to the exhibitor films for re-exhibition on more than four occasions.
- F** (2) The practice has always been for the films distributed by you to pass from Suva to Nausori, then to Tavua and then to Ba. However, you have now changed this and you send the films from Nausori to Ba. The owner of the Theatre at Ba who was previously the owner of our client's theatre is now advertising in Tavua that your films can be seen in Ba first.
- G** (3) You undertook to supply the film ‘WAQT’ to our clients for showing on Wednesday the 24th April. About three weeks earlier you had sent the publicity material to our clients for distribution in the area advertising the showing of this film. On the afternoon of the 20th April, you informed our clients that this film ‘WAQT’ was going to be sent to Ba first and that all the advertising publicity should now be sent to Ba. You then sent to our clients on Tuesday, 23rd April, a film for showing on the 24th April although they had no chance to advertise.

H It is clear from the breach by you of the contract and the actions set out in paragraphs 2 and 3 above that you are assisting the owner of the Ba Theatre to the detriment of our clients, which is contrary to the spirit of the Agreement.

Accordingly, our clients are treating this Agreement as determined from the 30th April 1968 and in addition are considering whether action should be taken against you for damage to their business”.

Plaintiffs countered this letter by issuing the present action on May 15 1968. The statement of claim pleaded the contract of May 28, 1964 and referred to the obligations of first and second defendants thereunder. Plaintiffs further pleaded the

contract of February 15, 1965 made between first and second defendants on the one part and third defendant on the other part. The following paragraphs are important, namely:—

8. *THAT* in accordance with the said Sale and Purchase Agreement the third named defendant in place of the first and second named defendants received from the plaintiffs Indian films.

9. *THE* plaintiffs continued to supply Indian films in accordance with the said Agreement dated the 28th day of May 1964 and had all future dealings with the third named defendant.

Plaintiffs then proceeded to claim breaches 'of the said contract' (sic) by third defendant. The said contract was not better defined but it appears to refer to the contract made between plaintiffs and first and second defendants on May 28 1964. Plaintiffs claimed that they had suffered loss and claimed relief as follows:—

1. Specific performance of the said agreement.
2. An injunction to restrain the defendants, their servants and agent from exhibiting at Tavua, Fiji any Indian films except those supplied by the plaintiffs.
3. £2,000 damages for breach of contract and
4. Costs.

Further and alternatively the plaintiffs claim:

1. £10,000 damages for breach of contract; and
2. Costs.

When the action came on for trial the claims for specific performance and injunction were abandoned and the sole issue was one of damages. These were clearly claimed from all three defendants. At the conclusion of the case for plaintiffs, counsel for first and second defendants submitted that there was no case for his clients to answer. His final submission was that the application was premature because it was then too early 'to decide on the principle of novation'. This is the first claim made that a new contract by way of novation might have arisen. This submission of counsel for plaintiffs clearly implied that he was still claiming that first and second defendants might be liable. So far no plea has been made in the alternative. The learned trial judge accepted the submission of counsel for first and second defendants and dismissed them from the action. No appeal has been brought against this finding so it must stand.

At this stage, if plaintiffs were to succeed, they could do so only on proof of a contract between themselves on the one part and third defendant on the other. This, of necessity, must be after the date of the original contract and must discharge all obligations on the part of first and second defendants as from its date. It must also be supported by deed or by valuable consideration. No such contract has been pleaded and no amendment has been sought in respect of any such new contract. However, the case proceeded against third defendant alone on the original statement of claim. The learned trial judge held that plaintiffs were in breach of clauses 1(c) and 1(d) of the original contract and that third defendant was entitled to terminate the said contract. The case for Plaintiffs accordingly failed.

In the Court below the learned judge held that Appellants were in breach of their contract in two respects, namely:—

- (1) that they were in breach of clause 1(c) in that appellants sent the film 'WAQT' to Ba first, and,
- (2) that they were in breach of clause 1(d) in that they sent films for re-exhibition on more than four occasions.

A Clause 1(c) does not prohibit the sending of films to Ba first, and, clause 1(d) does not prohibit the sending of films for re-exhibition on more than four occasions. The latter clause gives only a right of rejection in such event. Plaintiffs, as appellants must therefore succeed in their appeal so far as the findings in the Court below rested on any such alleged breaches of contract. But counsel for plaintiffs urged this Court to find that a breach of contract between plaintiffs and third defendant had been proved. If this Court should find that such a breach has been proved then it is agreed that the case should be remitted for the findings of damages.

B It is clear that plaintiffs could not recover damages from first and second defendants on the one hand and recover the same damages from third defendant on the other hand. Unless plaintiffs can prove that, with proper consideration to support the same, there was a contract between plaintiffs and third defendant, their claim must fail. It is of no moment that the Court has determined that first and second defendants are not liable. That does not make third defendant liable. The liability of third defendant can arise only on proper proof of a breach of a contract (supported by sufficient consideration) between plaintiffs and third defendant.

D In my judgment the effect of the agreement entered into between first and second defendants and third defendant on February 15, 1965 and the agreement entered into between second defendant and third defendant on July 6, 1965, was to enable the contract to be vicariously performed by third defendant. These documents make it clear that liability to perform the original contract with plaintiffs still remained upon first and second defendants. This is for two reasons. First, each contains an indemnity against that liability, and, secondly, plaintiffs were never a party to either document. To the extent, if at all, that this was a breach of clause 2(i) of the original agreement, it was waived by reason of the evidence of plaintiffs earlier cited. The conduct of the parties also supports waiver.

E Consent of all parties is essential before a new contract is substituted for the old. It is true that such consent may be inferred from conduct but valuable consideration is necessary. When third defendant entered into the picture any one of three situations may have evolved. First, that the contract of May 28, 1964 remained in force between plaintiffs and first and second defendants but that, with the acquiescence of plaintiffs, performance was carried out with third defendant who then owned the relevant theatre, or, secondly, that a new contract was made in which all three defendants became parties and the original contract was discharged, or, thirdly, that a new contract was entered into between plaintiffs and third defendant whereby the original contract was discharged.

G The first situation will not support any action against the third defendant. There is simply no evidence at all to support the second situation. Thus, so it seems to me, the plaintiffs must prove the third situation if they are to succeed. No such contract was specifically pleaded. All acts done between the parties were consistent with the continuance of responsibility on the part of first and second defendants but with acceptance of performance by third defendant. Plaintiffs gave no consideration for any new contract although, if proved, the rescission of the original contract would be sufficient: Halsbury's Laws of England, Third Edition, Volume 8, page 264, paragraph 462. Counsel for plaintiffs relied heavily on the letter of April 26, 1968 (Supra). This letter refers to the obligations of plaintiffs under the original contract. Third defendant had an interest to take steps to have that contract carried out by reason of the rights third defendant acquired under the agreement with first and second defendants of February 15, 1965.

H

This was sufficient to support all statements made in that letter and it is not, in my opinion, the recognition of a new contract. Moreover, plaintiffs did not accept the letter as establishing any such new contract because their next step was to sue first and second defendants, albeit that they added third defendant. No question of estoppel can arise because plaintiffs did not act upon such letter to their detriment.

To succeed in the present claim, plaintiffs must allege and prove the contract which they claim was breached by third defendant. The present form of the pleadings does not specify any such contract. It is no more than a recital of the two contracts namely those of May 28, 1964 and February 15, 1965. Third defendant is a party to the second contract but is not a party to the first contract. It is the first contract, or some later contract incorporating its terms and binding third defendant, which alone can support the claim now made by plaintiffs. Counsel for plaintiffs has not made it clear just how or when third defendant became contractually bound to plaintiffs to observe the terms and conditions of the contract of May 28, 1964. Nor has he asked for any amendment which would make this clear. I turn again to the evidence to see whether or not it is possible to spell out any contract between plaintiffs and third defendant.

Third defendant was not a party to the first contract. The second contract between first and second defendants and third defendant dated February 15, 1965 conferred no rights on plaintiffs. They were not parties to it. It is true that third defendant agreed 'to take over all existing contracts'. Also that this term included the contract of May 28, 1964 but this did not create any contractual relationship between plaintiffs and third defendant which would make third defendant liable to plaintiffs for the performance of that contract. It is correct that first and second defendants transferred to third defendant their liability to perform the said contract and to indemnify them from any breach, but this does not bind the third party directly to plaintiffs to perform the said contract. Nor is the position any different merely because plaintiffs accept such performance. They could have refused their consent if the document of February 15, 1965 amounted to an assignment but they acquiesced in accepting performance by third defendant as sufficient performance by first and second defendants. Such acquiescence does not create any such contractual relationship as will bind third defendant to plaintiffs. Plaintiffs and first and second defendants still remain bound by their original contract.

Unless novation can be called in aid so as to make third defendant a party to a contract with plaintiffs in terms of the contract of May 28, 1964 then plaintiffs cannot claim for the breaches of contract alleged. It is impossible to suggest, because there is not a scintilla of evidence to support it, that there is a new contract in which first, second and third defendants all became bound by the terms of the contract of May 28, 1964. The only possibility is that, by conduct, a new contract arose which discharged the original contract and created a new contract *mutatis mutandis* in terms of the original contract and which bound third defendant and plaintiffs to such terms for the balance of the period for which such contract would run.

It is convenient to cite from Halsbury's Laws of England, Third Edition at page 262 where the following passage appears:—

'Meaning of Novation. Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged

- A from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction, and thus affords a defence to any action upon the old contract.'

Again at page 263 it is stated as follows in paragraph 461:—

'*Consent Essential.* Since novation is a new contract, it is essential that the consent of all parties shall be obtained, and in this necessity for consent lies the essential difference between novation and assignment.'

- B Lastly, consideration is essential and it is apposite to make one further citation from page 264, paragraph 462 where it is said:—

'*Valuable Consideration Necessary.* In addition to the consent of all parties being obtained, it is necessary that the new contract should comply with all other requirements of an original contract. There must, for example, be valuable consideration; but as a general rule the rescission of the former agreement of itself constitutes sufficient valuable consideration.'

- C Counsel for plaintiff relied heavily in this regard upon the letter of April 26, 1968. In my judgment this letter is equivocal because it is equally, if not more, consistent with the acceptance of performance by third defendant—a situation to which reference has been made earlier. Be that as it may plaintiffs did not act upon or accept that letter. They sought to recover damages not only from third defendant but also from first and second defendants. Their conduct throughout clearly shows they considered and treated first and second defendants as being still liable under the original contract. In my judgment there was no novation and nothing in the shape of consideration to support novation. All plaintiffs did was continue to supply films to the Tavua Theatre and to accept payment under the original contract from third defendant as a sufficient performance of the obligations between themselves and first and second defendants under that contract. They were doing no more than they were bound to do albeit that they accepted performance by third defendant as sufficient performance by first and second defendants.
- D

- E In my judgment plaintiffs' claim must fail but for different reasons from those stated by the learned judge in the Court below. I would dismiss the appeal with costs.

GOULD V.P.

- F I have had the opportunity of reading the very clear judgment of Henry J.A. in this case and agree with his reasoning and conclusions.

- G I was at one time in some doubt about the matter, in considering the question whether the conduct of the parties and their attitude towards each other as shown by the evidence was not sufficient to support the finding of the learned trial judge that there was a novation and that the third defendant agreed with the plaintiffs that the terms of the written contract dated the 28th May 1964, should be binding on him and them. I need say only a few words on this question.

- H It is quite clear that as from the taking over by the third defendant of the theatre at Tavua the first and second defendants dropped completely out of the picture. All dealings as to films and payments were entirely between the plaintiffs and the third defendant which is of course consistent with the third defendant having operated the contract on behalf of the first and second defendants, but is also consistent with a new arrangement bringing the third defendant and the plaintiffs into direct contractual relations.

The fact that the plaintiffs sued all three defendants is, to my mind, immaterial. The statement of claim is both inconsistent and ambiguous. Inconsistent in that it alleges breach of contract only against the third defendant while seeking to hold

the first and second defendants liable. Ambiguous in that without putting forward alternative causes of action, it fails to specify how the breach of contract alleged on the part of the third defendant is to be imputed to the first and second defendants and, if on a basis of agency, why the third defendant was alleged to be personally liable. The object of the pleading, appears to me to have been to include everyone who might possibly be liable and its form provides no indication of the minds of the plaintiffs before the dispute developed.

As to the evidence, when the plaintiff Jekishan Ambaram said

"At no time we entered into fresh contract with first defendant", he had just been shown paragraph 2(i) of the agreement of the 28th May 1964, which gives the plaintiffs the right to require that any assignee of the exhibitor should enter into a new contract with the distributor in the terms of that agreement. But, particularly when that is taken with the witness's earlier answer that,

"I just orally told them that it was alright. We orally consented",

would not the trial judge be justified in constructing the whole as meaning that no specific written contract was entered into with the third defendant. These passages could be taken with earlier answers by the same witness. They read—

"After February 1968 I supplied film to 3rd Defendant and I knew it.

I knew that the 1st and 2nd defendants had relinquished their rights and interests and ties in the Paramount Theatre at Tavua.

I know that 1st and 2nd defendants have nothing more to do with it. For all intents and purposes from 15th February 1965 I had all the dealings with the 3rd Defendant.

I did not give any notice to 1st and 2nd Defendants of my problems with 3rd Defendant.

I knew that 1st and 2nd Defendant would not have to comply with Ex. 3 from 15th February, 1965.

From that time 3rd Defendant took over the arrangements. Contracted relationship with 1st and 2nd Defendants were abandoned from the 15th February 1965. I released them from all liabilities under the contract.

There was a separate contract with 1st and 2nd Defendant for Metro Theatre at Ba.

I was quite happy about the transfer of the Paramount Theatre to 3rd Defendant."

There is a strong inference from that evidence that the plaintiffs regarded the matter as being upon a completely new footing after the sale of the theatre. What was in the mind of the plaintiffs may be said not to determine their legal rights and obligations but the question could arise whether it was not proper material to assist the trial judge in deciding what actually was agreed. In the light of the subsequent conduct of the parties might he not construe the oral consent as embracing the whole transaction and the substitution of the new owner of the Paramount Theatre not only as exhibitor but as party to the contract to exhibit. The witness was "happy" about the transfer of the theatre to the third defendant and gave no notice to the first and second defendant when trouble arose with the third at a later date. As to consideration, if such a substitution took place; as between the plaintiffs and the third defendant there is consideration in their mutual promises, on the one hand to continue to supply films and on the other to exhibit and pay for them.

A Upon full consideration, however, I have come to the conclusion, for one compelling reason, that this approach is not tenable. The evidence of Jekishan Ambaram which I have quoted above relates to the time of the transfer of the theatre from the first and second to the third defendants. That took place by agreement dated the 15th February 1965, and if a novation took place it must have taken place at that time. Yet about six months later, on the 6th July 1965, there was an agreement to settle difficulties between the second defendant on the one hand and the third defendant on the other (the first defendant was not a party) in which doubts are expressed as to whether the second defendant may be liable to the plaintiffs for breach of the contract to supply films and whereby the third defendant agreed to indemnify the second against any damages or loss that he might suffer. I do not think that in face of this document it is legitimate to draw the inference I have suggested from the evidence of Jekishan Ambaram even in the light of the subsequent conduct of the parties. Had the oral consent to the transfer of the theatre given by him been understood by all parties to include the substitution of the third defendant in the film contract, there would have been no need for the doubts or for the indemnity referred to in the agreement of the 6th July. On the other hand the agreement of the 6th July 1965 is fully consistent with the third defendant having carried on the contract on behalf of the first and second defendants with the consent or acquiescence of the plaintiffs, which is the view taken by Henry J.A. in his judgment.

D All members of the Court being of the same opinion the appeal is dismissed with costs.

MARSACK J.A.

E I have had the advantage of reading the carefully reasoned judgment of Sir Trevor Henry and find myself in full agreement both with the judgment and with the reasons given in support of it.

F Put shortly, the position appears to me to be this. The action taken by the appellants must necessarily be based on breach of contract, that is to say a contract mutually binding the appellants and the 3rd respondent. There is no such contract. The only contract affecting the matter in issue was that made between the appellants and the 1st and 2nd respondents. The appellants were not a party to the agreement subsequently made between the 1st and 2nd respondents on the one hand and the 3rd respondent on the other. The only way in which the 3rd respondent could be made to be directly responsible to the appellants would be that found by the learned trial Judge, namely that there was a novation. With the greatest respect I find myself unable to agree with the trial Judge's finding on this point.

G As there is nothing in writing which would bind the 3rd respondent to the appellants, then any novation must have been effected by the conduct of the parties; and must necessarily have resulted in the 3rd respondent standing in the shoes of the 1st and 2nd respondents under the original contract with the appellants. In my view the conduct of the parties was totally ineffective to bring about this result. The evidence of Ambaram, one of the appellants, on the point is as follows:

H "I was never asked to do anything about Sale and Purchase Agreement. I was not required to consent. I just orally told them that it was all right. We orally consented. I did not enter into a separate agreement with 3rd Defendant."

This really amounts to saying that the appellants had no objection to the agreement entered into by the respondents; but there is no indication that they would thereafter look to the 3rd respondent to carry out the agreement in place of the original parties. Moreover the fact that the appellants sued the 1st and 2nd respondents in these proceedings clearly shows that in their understanding those respondents were still bound by the original contract.

When the conduct of the 1st and 2nd respondents is examined it is clear that they also regarded themselves as still bound by their original contract with the appellants. This is shown by the insertion of a clause in the agreement with the 3rd respondent to the effect that the 3rd respondent would indemnify them against all claims made against them by the appellants, if the 3rd respondent failed to do what they had bound themselves to do under the original contract. Certainly the solicitors for the 2nd and 3rd respondents wrote to the appellants, some three years after the date of the second agreement, complaining of alleged breaches of the original contract by the appellants. But in my view this *ex post facto* action cannot be effective to bring about a novation of the original contract, where the actions of the parties at the time of the making of the second agreement did not inevitably lead to that conclusion.

It is true that the appellants when sending the films to the same cinema theatre were fully aware that the theatre was under new management. But that in itself, as pointed out in the judgment of Sir Trevor Henry, is insufficient to show that there now existed a contract between appellants and 3rd respondent only.

To summarise: in my view there can be no basis for an action against the 3rd respondent for breach of a contract to which the 3rd respondent was in no sense a party.

For these reasons, as I have said, I am in full agreement with the judgment of my learned brother Henry.

Appeal dismissed.