

Skippers and Co. Vs. E.V. David and ors.

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Court : Allahabad

Decided On : Jun-18-1926

Reported in : AIR1927All132

Appellant : Skippers and Co.

Respondent : E.V. David and ors.

Judgement :

Ashworth, J.

1. These cross-appeals arise out of a suit brought by Skippers Company Limited, Calcutta (now in liquidation) through the liquidator, William Duchatel Woellworth, against Mr. E.V. David, Official Receiver, Cawnpore, Mr. Frank Skippers and one Jairam Das. Up to July 1922, Skippers & Co., Ltd., a Calcutta firm, owned a business in Calcutta with a branch at Cawnpore. The Cawnpore branch was managed by Mr. Frank Skippers, Defendant No. 2. ON the 6th July 1922 a sale-deed was drawn up whereby Skippers & Co., Ltd., sold the assets of the firm at Cawnpore to Mr. Frank Skippers. John Skippers and M. Skippers were made parties to the sale-deed as vendors, but this fact has not been considered of any importance in the present litigation. The sale-deed purported to convey the business at Cawnpore of Skippers & Co., Ltd., Calcutta, and was to include not only the branch known as the Civil Lines branch, but also a branch known as the Cawnpore Motor Company situated on the Mall, Cawnpore. The sale was to cover

not only immovable property and lessee rights but also

the goodwill and interest and book debts and the benefits of all contracts and engagements owing to or entered into by the said Company's business at Cawnpore, and the movable plant, furniture, trade, machinery, stocks, cars and all other accessories and all other goods of any kind whatsoever now lying or to be found at the Company's business premises at Cawnpore except any goods sent on consignment sale account from Goodrich Tyre Agency, Calcutta.

2. There was a provision that the vendor Company

shall have a lien and charge on all the immovable and movable property sold as aforesaid for securing payment of the balance of the said purchase money or any moneys that may remain unpaid or become due to the Company hereunder or otherwise, which lien and charge shall be subject only to a charge about to be created thereon in favour of the Imperial Bank of India or some other Bank, Company or person to secure an advance to the purchaser to the extent of rupees two lakhs and fifty thousand and the purchaser covenants further with the Company to execute and register a legal mortgage of the said property as and when required by the Company with full powers of sale and realisation and also not to create or allow any security or incumbrance (except as aforesaid) to rank in priority to or *pari passu* with the Company's rights hereunder.

3. The price fixed was Rs. 4,39,800 of which Rs. 2,50,000 were paid down and the balance was to be paid a year hence, on the 6th July 1923. The deed was registered at the Sub-Registrar's office, Cawnpore, on the 30th October 1922, and receipt of Rs. 2,50,000 acknowledged. There is an endorsement showing that the sale-deed was to be handed at the request of Mr. Frank Skippers, vendee, to an officer of what was then known as the Tata Industrial Bank and is now known as the Central Bank of India Ltd. It is common ground that Mr. Frank Skippers, in order to pay the Rs. 2,50,000 which were paid at the time of registration, borrowed two lakhs of rupees from this bank. He had raised Rs. 50,000 in some other way with which we are not concerned. It is also common ground that on the 30th July Frank Skippers applied to be made insolvent, and that Mr. E.V. David, Defendant No. 1, the Official Receiver, was made *ad interim* Receiver of his property. The

balance under the sale-deed became payable on the 6th July 1923.

4. The present suit is brought against the Official Receiver, Mr. Frank Skippers and one Jairam Das who is said to have given a surety bond for the payment of the balance of the purchase price, and it asks for a decree for Rs. 1,90,673-9-0 with costs and interest by enforcement of the charge on the property. It also asks for a sale of all the property in the possession of the Official Receiver or Frank Skippers.

5. The suit, was resisted by Mr, E.V. David, Official Receiver, mainly on the ground that he should have had notice under Section 80 of the Civil P.C., and that the charge could not be enforced against the movables in the possession of the firm at the date of the suit, and that the Central Bank which advanced Rs. 2,00,000 to Mr. Frank Skippers had a prior charge under the sale-deed against any property sold. Jairam Das, Defendant No. 3, admitted that he was liable, but only for such balance as might be due after proceeding against the movables, etc., under the charge set up by the plaintiff, which charge this defendant admitted as claimed.

6. The Subordinate Judge of Cawnpore decided as a preliminary point the question of notice. He held that the Official Receiver was a Government servant, but that no notice was required in a case of this kind, as the Official Receiver was only impleaded as being in possession of the assets, and not for any act done by him in his official capacity. He then decided that the charge only extended to movables which formed a part of the property sold by the plaintiff firm on the 6th July 1922 and did not extend to subsequently acquired movables. He rejected the claim of the Central Bank of India, Ltd., to any prior charge on the assets of Mr. Frank Skippers. Accordingly he gave a decree against the immovable property in the hands of Defendant No. 1, Defendant No. 2 and against such movables in their hands as were in existence on the business premises at the date of the sale by the plaintiff firm. He directed that a commission would issue to determine what these movables were, and directed that the list of such movables as found by the Commissioner will be deemed to be a part of the decree. A Commissioner was appointed; but, as might be expected, he was never able to ascertain what were the movables on the premises when the sale took place, and what were the

movables on the premises at the date of his holding his inquiry that had been subsequently added. The successor of the Subordinate Judge not being in a position to carry out his predecessor's direction for the addition to the decree of list of a movable property against which the decree was to take effect, inserted in the decree a direction that no movable property would be proceeded against unless and until the plaintiff in the course of the execution proceedings showed that the movable property against which he asked for execution had been in existence at the date of the sale.

7. Against this decree the plaintiff has appealed on the ground that the charge covered all movable property and stock-in-trade that might be found on the premises at any date up to the satisfaction of the decree. The Official Receiver has filed a cross appeal which raises certain points. One is that the lower, Court was wrong in refusing, on the ground that the Central Bank, Ltd., was no party to the suit, to declare the existence of a prior charge in favour of the Bank. Another is that, as the plaintiff failed to show the movables to which the charge extended, the decree should have excluded any relief against the movables. A third is that the suit was premature owing to want of notice to him as official receiver under Section 80 of the Civil P.C. There are other points raised in the petition of appeal, but they have not been pressed.

8. As to the plaintiff's appeal we are of opinion that the language of the sale-deed clearly confined the charge against the immovable and movable property to such property as was sold by the plaintiff firm. There was no provision as to property subsequently acquired by the vendee. It has been argued for the plaintiff firm that notwithstanding the use of the words 'all the immovable and movable property sold' in para. 6 of the said-deed, the circumstances of the case along with certain omissions in the sale deed clearly indicated that it was the intention of the parties to the sale-deed that the charge should operate against all movables whether in existence on the premises at the date of sale, or whether subsequently acquired before the date of enforcements the charge. It is pointed out that no list of the movables sold was attached to the sale-deed, and that the sale-deed did not contain any condition prohibiting disposal of a property pending completion of the purchase price. Again it is pointed out that what was being sold was a retail

business as a going concern, and that the parties must have been aware that the stock-in-trade would change from day to day, so that it would be absurd to suppose that the charge was to be confined to the stock in existence at the date of sale, inasmuch as the charge would not come into effect until a year later. There is some force in these contentions; but, at the most, they only amount to saying that the plaintiff vendor would have been well advised to require a charge different from the one actually imposed by the sale-deed. We do not consider that any circumstance can override the express language of the deed which clearly is not sufficient to include property not on the premises at the time the deed was executed.

9. A case precisely on all fours with this case is *Tapfield v. Hillman* 34 E.R. 884. This case was relied upon in a previous decision of this Court, *Robert William Anderson v. The Bank of Upper India, Limited* [1915] 37 All. 390. It is true that in *Tapfield v. Hillman* 34 E.R. 884 what was being sold was an inn with its furniture and stock-in-trade. The furniture of an inn might not be so liable to displacement and substitution as the movables of a motor shop, but wines, spirit and beer are as subject to renewal as motor spares, etc. In *Tapfield v. Hillman* 34 E.R. 884 Justice Colman remarked that it was not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to replace that which was disposed of and consumed by the plaintiff in the course of his business. But he added that they could only look to the language of the deed which clearly was not sufficient to include property not on the premises. In that case the deed spoke of 'the furniture scattered in about, upon belonging to the inn.' These words are less decisive as restricting the charge to property existing at the date of the instrument than the words in the present sale-deed are, which speak of the charge operating only on property sold. At the same time we think that under the circumstances of this case the lower Court should have held the property actually found on the premises at the time of the Commissioner's inquiry to be the property actually sold, in the absence of proof to the contrary by the Defendants 1 and 2. The vendee, Frank Skippers, had been manager of the vendors' firm. Accordingly, both before and after the sale, he was the person responsible for the books of the business at Cawnpore. The burden of proving what property was in existence at the date of

the sale, and what was subsequently added, was on him. It might be taken as extremely probable that he added very little, if anything to the stock after the sale. He was hard pressed to raise the balance of the sale money, and it is clear that he would only order any new stock when it was urgently needed. We have little doubt that the stock found on the premises by the receiver was the balance of the stock sold. In the circumstances of the case we consider that the lower Court should have given the plaintiff a decree against all the assets in the hands of the receiver. The receiver was allowed to convert these assets. The decree should therefore have been against the assets whether in the form of stocks or cash realized.

10. As to the cross-appeal: it has been strenuously contended by the counsel for the defendant-respondent that para. 6 of the sale-deed should be construed as effecting a prior charge in favour of the bank notwithstanding that no subsequent formal document was executed between Frank Skippers and the bank creating a charge in favour of the bank. The equitable principle is invoked that what ought to have been done by Frank Skippers should be regarded as having been done, and that the mere omission or mistake of the bank to get a contract of charge from Frank Skippers may be ignored, as the plaintiff vendor clearly contemplated such a charge being created. In support of the argument it was urged that the sale-deed was shown to have been delivered by the Sub Registrar after registration to the bank, and this is said to indicate the intention not only of Frank Skippers, but also of the plaintiff vendor who was present, that a prior charge should exist in favour of the bank. Again we are referred to an application by Mr. Frank Skippers to the bank for the advance of the two lakhs of rupees in which he offered as security not only a joint promissory note by himself and a rich Indian gentleman, Pandit Balbhadar Prasad Tewari, but also offered a lien on all buildings, stock and outstanding at the mills store and motor department. There are thus three pieces of evidence to be considered in respect of this plea. As to para. 6 of the sale-deed, it is only evidence that the parties to the sale-deed contemplated a prior charge being offered to the bank as security for two lakhs to be advanced by the bank. As regards the application to the Tata Bank for the loan, this is no evidence that the bank accepted the offer of a charge over the property. As regards the endorsement on the registered sale-deed that it was to be handed over at the Request of Mr. Frank Skippers to the bank, this endorsement loses all force as

evidence owing to the fact that the sale-deed was not produced by the bank but by the plaintiff. Whatever therefore happened on the day of registration, it is clear that the plaintiff obtained the sale-deed from the bank. The bank is not likely to have handed over the sale-deed to the plaintiff firm if it really understood that a prior charge had been created in its favour. We are unable to hold that this is a case where the charge merely fails by some inadvertent act on the part of the persons concerned, which equity might regard as being fulfilled. The probability is that the bank did not accept the offer of a charge on the movables in view of the fact that it had got a promissory note by so substantial a person as Pandit Balbhadar Prasad Tewari.

11. As to the objection that no reference should have been made in the decree to the movables as the plaintiff had failed to show on what movables the charge operated, the objection ceases to be tenable by reason of our decision that it must be held that all movables on the premises at the date of the preparation of an inventory by the receiver and entered in his list were movables sold by the plaintiff firm and subject to the charge.

12. As regards the objection based on the language of Section 80 of the Civil P.C., we are of the opinion that it is a valid objection. There had been much difference of opinion shown by the High Courts of India as to the object of Section 80. The Bombay High Court seems generally to have taken the view that Section 80 applies only to suits based on tort. Reference may be made to *Rajmal Manikchand Marwadi v. Hanmant Anayalia* [1896] 20 Bom. 697 and *Cecil Gray v. The Cantonment Committee of Poona* [1910] 34 Bom. 583 and *Damodar Jagjivan v. Govindji Jivabhai* A.I.R. 1923 Bom. 392. On the other hand, the Calcutta High Court has extended the section to actions arising out of a breach of contract; see *Ratanchand Dharamchand v. Secretary of State* [1914] 18 C.W.N. 1340. Taking the language of the section as it stands along with the definition of act in the General Clauses Act where an act will include illegal omission, that is to say, an omission which gives rise to a civil action, it is difficult to place any restriction on the section which would appear to require notice in all suits against any person for anything done or omitted by him in his official capacity. There is a decision of this Court to which one of us was a party which has points of similarity with the present

case *Murari v. E.Y. David* : AIR1925 All241 . It was held that no suit can be instituted against an official receiver in respect of any act done by him in his capacity as such a public officer without a previous notice prescribed by the Civil P.C. The relief asked in that suit was one for a declaration of title by the plaintiff in some property which the official receiver had advertised for sale in the interests of the unsecured creditors.

13. The peculiarity of the present case is that the cause of action stated in the plaint is said to be the failure of the defendants, that is to say, the official receiver, the insolvent and the surety in respect of the debt due to the plaintiff firm to pay the plaintiff firm the balance of the purchase money of the business in question. Now the suit is really one of establishing and realising a charge over property movable and immovable. The official receiver did not deny the right of the plaintiff to maintain a charge. He was directed by the District Judge to resist the suit for the purpose of settling certain matters. It does not appear that any act or omission can be predicated on the part of the official receiver as one in respect of which the suit is being brought. Section 28(6) of the Provincial Insolvency Act (5 of 1920) says:

14. The making of an order of adjudication shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

15. From this it would appear that the plaintiff was not bound to make the official receiver a party and that he is not alleging any act or omission on the part of the official receiver as one in respect of which he is suing. It would appear that the plaintiff must have recourse to the Court to get the property sold, and that nothing that the official receiver had done up to the date of suit has stood in his way of doing this. The official receiver is joined as a party in whom the property vests for the time being and not as the party who made a contract or was guilty of any breach of it. For the above reasons we think it would be unsafe in this case to hold that notice under Section 80 was required.

16. Accordingly we dismiss Appeal No. 18 of 1925 with costs. We allow appeal No. 496 of 1924 and direct that the charge shall be enforceable against the

movable property entered in the inventory prepared by the official receiver or the sale proceeds thereof in his hands on the date of the decree of the Court below in addition to the immovable property specified in the decree, The appellant in Appeal No. 496 of 1924 will get his costs in this Court from the contesting defendant-respondent.

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