

In Re: Bengal Textiles Association (In Liquidation)

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Court : Kolkata

Decided On : Apr-19-1962

Reported in : AIR1963Cal122

Judge : S.P. Mitra, J.

Acts : [Provincial Insolvency Act, 1920](#) - Section 28 and 28A

Appeal No. : Matter No. 124 of 1956

Appellant : In Re: Bengal Textiles Association (In Liquidation)

Advocate for Pet/Ap. : Sankar Ghosh, Adv.;B.N. Sen, Adv.

Disposition : Petition allowed

Judgement :
ORDER

S.P. Mitra, J.

1. This is an application for an order that the Official Liquidator of the Bengal Textiles Association (In Liquidation) be directed to pay the sums of Rs. 2,591/12/6 and Rs. 6,287/10/6 or the dividends already declared on two shares and may in future be declared thereon to the petitioners under scrip No. 0143/4. In 1948, an order for winding up of the Bengal Textiles Association was made by this Court. A partnership firm known as 'Shyamlal Srinivas' was the holder of four shares in the

Association under scrip No. 0143/4. Srinivas Ladia and Rangla! Ladia were the partners of the firm. Srinivas owed a sum of Rs. 2591/12/6 to the petitioner Mohanlal Thalia and a sum of Rs. 6,287/10/6 to the petitioner Dhaliram Thalia. On January 14, 1954 Srinivas executed a document in favour of the petitioners Clause (c) whereof runs thus:

'The first party (i.e. Srinivas) further agrees that he will give due information to the second party (i.e. Mohanlal Thalia) and the third party (i.e. Dhaliram Thalia) whenever any money will be payable by the Bengal Textiles Association in respect of and under the said scrip No. 0143/4 so that the second and third parties shall receive the sum or sums which shall be payable in respect of two shares hereby pledged till their respective debts together with interest debts are discharged.'

2. On the 3rd December, 1954, a petition for adjudication of Srinivas Ladia as an insolvent was presented. The adjudication order being Order No. 25 of 1954 was made on the 29th March, 1955. Under this Order Srinivas and his family became insolvent. Apparently certain dividends on the shares held by Srinivas and Ranglal were declared by the Official Liquidator and Ranglal received those dividends. On the 15th April, 1957 the petitioners wrote to the Official Liquidator that Ranglal had not paid any portions of these dividends to them. There was further correspondence between the Official Liquidator and the petitioners and at one stage the Liquidator told the petitioners to collect moneys from the Official Assignee. The present application was¹ made on the 24th June, 1961.

3. Mr. Sankar Ghose, learned counsel for the petitioners contends that by virtue of Clause (c) of the document dated the 14th January, 1954 an equitable assignment of the moneys payable on the shares was created by Srinivas in favour of the petitioners. An appropriation of a debt, fund or goods, may amount to an equitable assignment so as to entitle the assignee on the insolvency of the assignor, to have his claim satisfied out of the subject-matter of the assignment. A person may assign his beneficial or equitable interest in a property owned by him. The assignment of such an interest is called an equitable assignment, and the assignor is deemed to be a trustee for the assignee. An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund or out of specific

goods will operate as an equitable assignment of the fund or goods. Thus where a person indebted to a bank agrees with the Bank Manager to assign to the bank his interest in certain goods, then deposited with a third party for sale, there is a complete equitable assignment of the goods to the bank: vide Mulla on the Law of Insolvency, 2nd Edition, Article 492, page 453 and 454. Property held by an insolvent on trust for others does not pass to the Official Assignee or Receiver and is not divisible among his creditors. This Rule applies not only to property held by the insolvent as a trustee in the strict sense of the term, but also to property held by him in any fiduciary capacity; Mulla's Law of Insolvency, Second Edition, page 449, Articles 487 and 448.

4. Mr. Ghose has urged that Srinivas after the execution of the document dated the 14th January, 1954 was the trustee of the moneys payable to him under scrip No. 0143/4 and upon his adjudication his rights in respect thereof . did not pass to the Official Assignee. The petitioners are, therefore, in the present circumstances, entitled to claim the sums aforesaid from the Official liquidator of the Bengal Textiles Association.

5. Mr. B. N. Sen, learned counsel for the Official Assignee, has argued that the document of the 14th January, 1954 must be read as a whole. In Clause (A) it is stated that the first party pledges and hypothecates with the second and third parties his two shares in the Bengal Textiles Association covered by scrip No. 0143/4.-Clause (B) provides that the first party being unable to hand over scrip No. 0143/4 covering the two shares pledged has given information of this pledge to Ranglal Ladia and then comes Clause (c) providing that the first party will give due information to the second and third parties whenever any money will be payable, by the Bengal Textiles Association in respect of and under the scrip so that the second and third parties shall receive the sum or sums which shall be payable until the debts and interests are discharged. Obviously there was no pledge of the shares as delivery was not given: vide Sections 172 and 148, Indian Contract Act. This is therefore a document of hypothecation of shares and does not constitute an equitable assignment of the moneys payable thereunder at all. A pledge of shares made after the commencement of winding up is void unless the court otherwise orders: See Section 536(2) of the Companies Act, 1956 corresponding

to Section 227(2) of the Indian Companies Act, 1913; In re Union Indian Sugar Mills Co, Ltd. : AIR1933 All607 and Birchand v. John Brothers : AIR1934 All161 . Similarly a hypothecation of shares would be void on the same principle.

6. That there has been a hypothecation and not a pledge of shares is conceded by learned counsel for the petitioners. Mr. Ghose has, however, argued that 'pledge' and 'hypothecation' do not stand on the same footing. The Indian Contract Act does not state that the whole of the Law of Contract is comprised in the Act. As it appears from the preamble it only contains a portion of the Law of Contract and there is nothing to prevent a person from hypothecating his goods to another person for security, The ordinary principles of equity apply in such cases, viz: the question becomes whether there was an intention to create a security and, if there was an intention to create a security, equity gives effect to it : Haripada V. Anath Nath 22 Cal W. N. 758 : (AIR 1918 Cal 165).

7. To my mind it is unnecessary in this application to go into the question whether a hypothecation of shares after the commencement of winding up is void unless the court otherwise orders. It seems to me that under Clause (C) of the document dated the 14th January 1954 Srinivas Ladia had created the equitable assignment of his rights to receive moneys payable in respect of an underscrip No. 0143/4 by the Bengal Textiles Association in favour of the petitioners. He undertook to give due information to the petitioners wherever any money would be payable

'So that the second and third parties shall receive the sum or sums which shall be payable in respect of two shares till their respective debts together with interest debts are discharged'.

8. What then are the rights of the petitioners by virtue of this assignment? Admittedly when the assignment was effected no money was immediately payable by the Bengal Textiles Association. That was also the position when the adjudication order was made. Where future debts are assigned, if the debts are due at the date of the bankruptcy but are not payable until a future time, they belong to the assignee and not to the trustee in bankruptcy, but if a debt is one that will only become due if certain conditions are fulfilled in future on behalf of the Bankrupt, then the assignee has no right to the debt. If before bankruptcy a

bankrupt has executed a valid assignment of after-acquired property (such as an interest under a will or intestacy), then, whether the property falls into possession before or after the bankruptcy, the assignee's title is good as against the trustee in bankruptcy. Where there is an actual assignment, that assignment operates immediately the property comes into existence without any further act on the part of the bankrupt, but if the document only amounts to licence to seize or creates a mere right in contract, then the assignee has no right to the property: vide Halsbury, Laws of England, 3rd Edition, vol. 2 Article 619 at page 324.

9. It is also useful to quote Article 521 in Mulla's Law of Insolvency, 2nd Edition, at page 489, which is as follows :

'..... if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency, the assignee has no right to it. On the other hand, debts due at the date of the assignment, but payable at a future time, may be validly assigned, and if they become payable after insolvency, they belong to the assignee. We shall give an instance of each class.

A common instance of the former class arises where a trader makes an equitable assignment of the future receipts of his business. Such an assignment even if made for value, is, as regards receipts accruing after the commencement of his subsequent insolvency, inoperative as against the Official Assignee because the debts fall due after insolvency. An instance of latter class arises where a person who has transferred goods under a Hire Purchase Agreement assigns his interest under the agreement to another, who has lent him money, as security for the advance. In such a case the assignment of the instalments which accrued due under the hiring agreement after the commencement of the insolvency of the assignor is valid against the Official Assignee, the reason being that the debt assigned was due at the date of the assignment although it is not payable until a future time. The principle applicable to these two classes of cases has thus been stated by Rigby, L. J. in *Wilmot v. Altont* (1897) 1 Q. B. 17 at p. 22; where a person who has entered into contracts in the course of his business ceases to carry on business on account of bankruptcy, there is an important distinction, for the present purpose, between cases in which the consideration for the contract

having been wholly executed by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contract in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration of such performance when it becomes due'.

Upon consideration of the authorities, it seems to me that, where future debts are assigned and the assignor becomes an insolvent after the assignment the Official Assignee's rights may or may not be subject to the assignment. His rights are subject to the assignment if the debts are due at the date of the bankruptcy but are not payable until a future time. The assignee loses his rights upon insolvency if the debt is one that will only become due if certain conditions are fulfilled in future on behalf of the insolvent. In the instant case the order for winding up the Bengal Textiles Association was made in 1948 : the assignment took place on the 14th January 1954. The moneys that were payable on the shares the subject matter of the assignment by way of distribution of the assets were not payable until a future time. But no act or effort on the part or on behalf of the assignor was required or necessary in order that they became payable. No conditions were to be fulfilled in future on behalf of the insolvent. The assignor would have been entitled to these moneys by virtue of his being only one of the holders of the shares under scrip No. 0143/4. In these circumstances it appears that the Official Assignee has no claim on these moneys at all.

10. Originally this application was made without notice to Srinivas Ladia and Ranglal Ladia. I felt it would not be proper to make any order on this application without ascertaining their views. I then directed that notices should be served on them; and those directions have been complied with. They are not opposing this implication.

11. In the premises the Official Liquidator of the Bengal Textiles Association is directed to pay to the petitioners the sums of Rs. 2,591-12-6 and Rs. 6,287-10-6 as prayed for in Clause (a) of the summons. Each party will bear and pay its own costs of the application. The Official Liquidator will retain his costs out of the assets as between attorney and client. Certified for Counsel.

12. The Official Assignee is to retain his costs out of the assets in his hands as between attorney and client.

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