

In Re: Ambrose Summers, an Insolvent

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Court : Kolkata

Decided On : Apr-14-1896

Reported in : (1896)ILR23Cal592

Judge : Sale, J.

Appellant : In Re: Ambrose Summers, an Insolvent

Judgement :

Sale, J.

1. This is an application by the Delhi and London Bank to be allowed to rank as a preferential creditor of the insolvent Ambrose Summers who was a trader and carried on business in Calcutta, Rangoon and Simla the object of the bank being to obtain payment in priority of a sum of Rs. 8,729-7-3 representing the sale proceeds of the stock-in-trade of the insolvent.

2. The insolvent filed his petition on the 22nd August 1895 Subsequently by arrangement the stock-in-trade of the insolvent was sold by the office by arrangement the stock in trade of the insolvent was sold by the Official Assignee; who now holds the sale proceeds subject to the order of this Court.

3. The claim of the bank consists of two sums, namely, Rs. 57,802-8-6 due or principal and interest on a promissory note executed by the insolvent in favour of the bank on the 31st December 1889, and Rs. 8,685-3- due on the insolvent's

overdrawn current account with the bank.

4. The claim of the bank to rank as a creditor in respect of the amount over drawn is not questioned; but the claim in respect of the amount due on the promissory note is resisted on the ground that the debt is barred by the law of limitation. - by law (sic)

5. It appears that on the 28th March 1892 the insolvent paid the bank a sum of Rs. 600 by cheque signed by himself in the name of his firm, Watson and Summers. The cheque was sent to the bank, accompanied by the -following letter signed by the insolvent in the name of his firm:

Calcutta, 28th March 1892. The Manager, Delhi and London Bank, Calcutta. Dear Sir, We beg to enclose a cheque for Rs. 600, which please place to the credit of our loan account, and grant us an acknowledgment and oblige. Yours faithfully, Watson and Summers.

6. On the 30th June 1894 a statement of the insolvent's loan account showing what was their claim was sent to him by the bank, and the correctness of that statement was acknowledged by the insolvent in the letter, dated the 25th October 1894, which is in the following terms:

25th October 1894. To The Manager, The Delhi and London Bank, Limited. Dear Sir, I am in receipt of your letter of June 30th with a statement of my loan account with the above bank made up to that date, showing a balance due by me of rupees thirty-three thousand, nine hundred and eighty-nine, annas thirteen and pies six only, which I hereby acknowledge to be correct. I am, Dear Sir, Yours faithfully, Watson and Summers.

7. The bank rely on the payment of the 28th March 1892 and the acknowledgment of the 25th October 1894 as operating to keep the debt alive, and this contention would appear to be correct, if under the circumstances the payment of the sum of Rs. 600 can be said to be part-payment of the principal, and if further the fact of such payment can be said to appear in the hand-writing of the insolvent within the meaning of Section 20 of the Limitation Act.

8. The evidence of the Manager of the bank shows that from the date of the payment of the sum of Rs. 600 interest was charged only on the principal sum less the Rs. 600; clearly therefore the payment of this sum was treated as a part-payment of principal, and as this was done in pursuance of the request of the insolvent that the amount should be placed to the credit of his loan account, it seems to me that the payment ought to be treated as operating in fact as a part-payment by the debtor of the principal of the debt. But then it is said that the fact of the payment does not appear in the hand-writing of the debtor within the meaning of Section 20 of the Limitation Act, because there is no writing of the insolvent to show that he asked or intended that the payment should be treated as a part-payment of the principal.

9. The proviso to Section 20, however, requires not that the part-payment of the principal as such should appear in the hand-writing of the person making the payment, but that the fact of payment should so appear. To adopt the construction suggested against the bank would seem to necessitate the introduction into the proviso of the words 'as such' after the words 'the fact of payment.' It is to be observed that the words as such have been expressly applied by the earlier part of the section to the case of a payment of interest, so that, if the fact of payment of interest due on a debt is relied on as keeping the debt alive, it must, appear that the interest has been paid as such. The omission of these words in the proviso relating to a part-payment of principal would seem to imply that, when a part-payment of principal is made, all that is required to be attested by the hand-writing of the person making the payment is the fact of payment.

10. The case of *Jada Ankamma v. Nadimpalle Rama Sastrula* I.L.R. 6 Mad. 281, is an authority for this construction of the section. In my opinion the letter of the insolvent of the 28th March 1892 satisfies the requirements of the proviso to Section 20. It is unnecessary therefore to decide whether the cheque alone would be sufficient for the purpose. It follows that no portion of the bank's claim is barred by the law of limitation.

11. The question remains whether the bank is entitled to preferential payment.

12. The claim to priority is based on a letter signed by the insolvent and dated the 31st December 1889, which was intended to operate as a collateral security for the debt then due under the promissory note and for any future advance which the bank might make to the insolvent. The letter is as follows:

3-1, Wellesley Place, Calcutta, 31st December 1889. The Manager, Delhi and London Bank, Limited, Calcutta. Dear Sir, As collateral security for the advance of Rs. 30,000 (rupees thirty thousand only) which you have made on our on demand promissory note and for any future advances which you may make to us, we hereby give you a lien over our stock-in-trade, outstandings, fittings, etc., in connection with our business, which is carried on in, Calcutta, Simla and Rangoon, and we further undertake, whenever called upon by you to do so, to execute any assignment of our business to you with such conditions, as you may require. Our business is free from all liens and encumbrances, save and except this that we are now making and we undertake to keep it so. Yours faithfully, Watson and Summers.

13. The insolvent's overdrawn current account shows that the bank did as a fact make advances to the insolvent after the date of this letter; and no doubt these advances were made on the faith of the security furnished by the letter.

14. In July 1895 the bank called on the insolvent to execute an assignment of his business, stock-in-trade and outstandings in accordance with his undertaking contained in his letter of the 31st December 1889, but, as it appeared that the bank proposed to sell the business, unless its claim was satisfied within the period of three months, the insolvent declined to execute any such assignment.

15. This was followed by an attempt on the part of the bank to take actual possession of the insolvent's business. This attempt was resisted by the insolvent, and the result was that the bank placed durwans in charge at the entrance of the insolvent's business premises in Calcutta, who remained there until the Official Assignee was let into actual possession on the following day. Similar attempts to obtain possession were made at the business premises of the insolvent at Simla and Rangoon. It appears therefore that at no time was the bank in possession of the business or stock-in-trade of the insolvent; although I think enough was done

to show that the business or stock-in-trade of the insolvent was not in the order and disposition of the insolvent at the date of his insolvency with the consent of the bank.

16. The question is whether, under the circumstances and by operation of the letter of the 31st December 1889, any equity has arisen which the bank is entitled to as against the Official Assignee. The lien expressed to be given by the letter as collateral security for the bank's debt and for any future advance is in respect of the stock-in-trade, outstandings, fittings, &c., of the business carried on in Calcutta, Simla and Rangoon. This lien must, I think, be taken to affect only the then existing assets of the business.

17. Where a security of moveable property is concerned a clear intention must be expressed or implied to affect after-acquired property. See Fisher on Mortgage, 4th Edition, page 20.

18. In the letter there are no words to show that future assets were intended to be affected by the lien expressed to be given. It is otherwise as regards the clause dealing with the assignment which the insolvent undertook to give, because the assignment is to be of the 'business,' which must mean the assets of the business existing at the date of the assignment inclusive of assets acquired after the date of the letter.

19. In my opinion, therefore, the letter must be regarded in the first place as a letter of hypothecation, whereby the insolvent pledged to the bank the then existing assets of his business as collateral security for the debt then due to the bank and for any future advance the bank might make to the insolvent. Accordingly on the authority of *ex-parte North-Western Bank, In re Slee* (L.R. 15 Eq., 69) the letter created a good equitable charge on such assets in favour of the bank. In the next place what is the effect to be given to the undertaking by the insolvent to assign his business to the bank as further security for the debt and future advances.

20. The assignment referred to in the letter of hypothecation was agreed to be given in contemplation of possible future advances, but then it was to include all

future properties or assets of the business. The effect of such an assignment would be to enable the bank at any moment to stop the insolvent's business and take over the whole of his trade-property, and apply it exclusively in satisfaction of its own debt in contravention of the policy of the insolvency law. But an assignment of that character would amount to an act of insolvency within the meaning of Section 9 of the Insolvent Act. That has been so held by the late Supreme Court in the case of *Agra Bank v. Cochrane* 3 Tay and Bell 63. One of the questions expressly considered and determined in that case was whether an assignment by a trader of his stock-in-trade covering future assets would, if made after the date of the Indian Insolvent Act, amount to an act of insolvency; although such assignment was made in part for a new consideration and to secure a new advance as well as the antecedent debt. Upon this question the Court at page 68 make the following observation:

We need hardly say it is a question widely differing from that of the invalidity of a conveyance under the Statute of Elizabeth. It involves the policy of the bankrupt law and the incapacity of the trader to bring about a distribution of his assets other than that ordained by these laws. Accordingly the general rule is that an assignment of the trader's whole estate or of the whole with merely a colourable exception, is an act of bankruptcy. Upon that the law has engrafted certain exceptions, viz., whereas in *Baxter v. Pritchard* Ad. & E. 456 a sale is made bond fide so far as the purchaser is concerned for a fair value, or where as suggested in *Silbert v. Spooner* 1 M. & W. 714 an equivalent in some shape or other is given, and merely the nature and form of the trader's property are changed, or where, as is thrown out by Lord Kenyon in *Whitwell v. Thompson* 1 Rsp. 68 and admitted as a principle of exception by Tindal, C.J., *Lindon v. Sharp* 6 Man. and Cr. 895 there is a stipulation for further advances. But the peculiarity of this deed is that,, although it is undoubtedly made in part for a new consideration and to secure a new advance as well as the antecedent' debt, the object of its provisions is to make not only the then but the future assets of the traders the subject of the assignment; to give the favoured creditor the power of taking, whenever he pleases, the whole of the trader's property and applying it to the payment of both the old and the new debt in preference of the other creditors; of stopping, whenever he pleases, the business and insuring a distribution of the assets

different from that contemplated by the bankrupt laws. I confess, therefore,, that, if the case had been untouched by authority, I should have thought this attempt to effect all the future as well as all the present property of the debtors would have supplied an answer to the reasons assigned for making the case of a new advance or consideration one of exception to the general rule, and would have rendered such an assignment as this, notwithstanding the new consideration, an act of insolvency. Even though the after-acquired property may not pass at law without a subsequent appropriation, still the question is partly one of intent, and the assignee must be presumed to intend to do that which is necessary to perfect his assignment; particularly when, as in this case, he has expressly covenanted so to do. The case of *Graham v. Chapman* 12 C.B. 85 is an authority in point.

21. If therefore any such assignment as is contemplated by the letter of hypothecation would amount to an act of insolvency and be void and inoperative as against the general body of creditors, it seems to follow that no equity available as against the Official Assignee can arise in respect of the undertaking, given by the insolvent in respect thereof; although the insolvent previous to his insolvency was called on to perform his undertaking and refused to do so.

22. It is clearly an agreement or undertaking, which could not be enforced in equity, and for which, in the event of a breach, there would be no remedy at law.

23. In the result I hold the bank is entitled to preferential payment of so much of the fund as can be shown to represent assets of the insolvent's business, which were in existence at the date of the letter of hypothecation, and that, as regards the balance of the debt, the bank must rank only as a general creditor of the estate.

24. The bank may add the costs of this application to its claim.

25. The costs of the Official Assignee will come out of the estate; and I will allow the costs of both parties to be taxed as in an ordinary bearing on scale 2.