APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Mukerji J.

J. D. JONES & Co., LTD.,

v.

RANJIT ROY AND OTHERS.*

1926

Nov. 22.

Company—Liquidator—"Floating charge"—Indian Companies Act (VII of 1913), s 109.

A company, by a deed, created a charge on all the stock-in-trade, machinery etc., that did or would belong to them in connection with their business, in favour of another company, in consideration of certain drafts being met by the lender company. The deed *inter alia* provided that the lender company would be in possession but the borrower company would be entitled to sell the goods in usual course of business.

Held, on construction of the deed, that it was not a "floating charge" within the meaning of section 109 of the Indian Companies Act.

Re Yorkshire Woolcombers Association (1), *Tailby* v. *Official Receiver* (2), *The Government Stock and Other Securities Investment Co.* v. *The Manilla Railway Co.*, (3), *Evans* v. *Rival Granite Quarries Ltd.* (4) and *Bank of Baroda* v. *H. B. Shivdasani* (5), referred to.

APPEAL from an order of C. C. Ghose J.

On 9th September 1924, Eureka Belting Works, a limited company, created a charge in favour of Messrs. J. D. Jones & Co., the appellants, of all the machinery, plant, stock-in-trade, etc., that did or would belong to them in connection with their business, in consideration of the lender company meeting certain drafts. Portions of that deed important for this case appear fully in the judgment. Eureka Belting Works created two other subsequent charges, *viz.*, a mortgage, dated

*Appeal from Original Civil No. 114 of 1926.

(1) [1903] 2 Ch. 284.
(2) (1888) 13 App. Cas. 520.
(3) [1897] A. C. 81.
(4) [1910] 2 K. B. 979.
(5) (1926) I. L. R. 50 Bom. 547.

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the 21st February 1925, in favour of Messrs. McLawrie & Co. and another mortgage in favour of the Bengal National Bank. The last two mortgages were registered with the Registrar of Joint Stock Companies, but the charge in favour of Messrs. J. D. Jones & Co. was not registered. Subsequently Eureka Belting Works went into liquidation by an order of Court and Mr. Ranjit Roy was appointed the official liquidator. On 15th January 1926 the liquidator put up the machinery and plant for sale and Messrs. McLawrie & Co. were declared the purchasers. Thereafter Messrs. McLawrie & Co. took out a summons for an order that the said machinery and plant be delivered to them or their nominee —on their undertaking to pay the amount due to the Bengal National Bank—and the purchase money of such machinery, etc., less the amount payable to the Bank be set off against the claim of Messrs. McLawrie & Co. On that the order was made by Mr. Justice Gregory, with the consent of all parties, reserving the determination of Messrs. J. D. Jones & Co.'s rights, and making provisional arrangements in case they were successful. Subsequently the question of Messrs. J. D. Jones & Co.'s claim came before Mr. Justice C. C. Ghose and, on 12th July, 1926, was decided against them, the Court holding that the charge above-mentioned was a floating charge and was not valid against the liquidator without registration under section 109 of the Indian Companies Act.

On that Messrs. J. D. Jones & Co. filed this appeal.

Mr. W. W. K. Page, for the appellants.

Mr. J. C. Hazra, for the respondents McLawrie & Co.

Mr. A. K. Roy, for the other respondents.

RANKIN C. J. In my opinion this appeal must be allowed.

The question for decision is whether the security created by the deed, dated the 9th day of September, 1924, made between the Eureka Belting Works, Ltd., now in liquidation and the company called J. D. Jones & Co., Ltd., is a "floating charge" within the meaning of that expression which occurs in section 109 of the Indian Companies Act.

It may be as well to say at once that section 109 is a repetition of section 93 of the English Companies Act of 1908; but in repeating section 93 the Indian Legislature has omitted to enact any equivalent for sub-clause (*c*) of the English section, plainly enough for the reason that as there were no Bills of Sale Acts in India governing securities upon moveable properties given in the case of private individuals it was not possible to employ the same terms with reference to the Indian Companies Act. This is a matter of some importance as the omission of the clause which is found in the English Act may have considerable consequences as regards the purpose and the policy to be attributed to the Indian sections.

It appears, though not clearly, from the materials before us that the respondents the Eureka Belting Works, Ltd., manufactured and sold belting for machinery. Messrs. J. D. Jones & Co., Ltd., carried on business of some sort no doubt but the nature of their business does not really appear. They were, however, going to accept certain bills or drafts on behalf of the Eureka Belting Works, Ltd., and the document in question was granted by way of security to Messrs. J. D. Jones & Co., Ltd., in respect of that transaction. The operative words of the assignment contained in the Indenture are these:

"The Borrower Company doth hereby charge to and "in favour of the Lender Company All that the "machinery plant implements utensils furniture and

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"articles manufactured or in course of manufacture "stock-in-trade raw materials stores and other "moveable effects and things now or at any time "hereafter during the continuance of this security "belonging to or used in connection with the said "business in or upon the said premises of the Bor- "rower Company at 17, Ezra Street Calcutta and 96, "Grand Trunk Road Howrah aforesaid." The word "premises" occurs in the subsequent clauses but it is not contended that this deed was intended as a mortgage upon immoveable property at either place.

The scheme of the document is this that the borrower company were to repay the loan by equal monthly instalments of Rs. 1,250 on the first day of every month. They were to pay also monthly interest at the rate of 12 per cent. per annum with monthly rests and they were to pay all costs which might be incurred by the lender company. The document contains two important clauses: Clause (2) is that "the said properties and premises shall be in the "Lender Company's possession and under its control in "such manner that such possession and control may "be apparent and indisputable and the same shall be "a security for the repayment of the moneys due by the "Borrower Company to the Lender Company here- "under"; and clause (3) is that the said properties and "premises shall be under the care of a Babu of the "Lender Company and the wages of the said Babu "shall be paid by the Borrower Company".

Clause (4) gives the lender company a right to have the properties valued from time to time.

Clause (5) requires the borrower company to furnish a weekly statement of all stocks and raw materials and finished articles and full particulars of all accounts sent out for payment and moneys received by the borrower company.

Clause (*6*) says that the borrower company is to keep the subject matter insured and clauses (*7*) and (*8*) are so important that they must be referred to specifically.

Clause (*7*) says: "The Borrower Company shall "not sell, alienate or alter the said properties, "machinery, raw materials, stocks, stores and pre- "mises without the permission in writing of the "Lender Company except in the usual course of "trade or business and when such sale, alienation "and alteration of such articles shall be rendered "necessary by the same being worn out and injured "and in such case shall replace such article by "another of at least of equal value. Provided "always that the liberty hereby given to the "Borrower Company to sell, alienate or remove any "of the said articles in the ordinary course of business "shall not authorise or enable the Borrower Company "to create any mortgage or charge thereon ranking "in priority to or *pari passu* with these presents."

It will be observed with reference to this clause that the first question to be answered is whether it requires upon a sale by the company of the stock-in-trade in the usual course of business that other articles of equal value should be at once procured and substituted by the borrower company. Speaking for myself, I do not think that it does. It is clear enough that the probable meaning of the clause is that the reference to articles being worn out and injured as distinct from the articles sold in the usual course of business is a reference to plant, machinery or implements as distinct from the stock-in-trade; and it seems to me to be the probable or right construction that there is no provision here on the part of the company to keep the stock-in-trade at any particular value.

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As regards clause (*8*), the only thing which deserves to be noticed in this that in stating what the lender company's rights shall be the only default upon which the clause proceeds is default in payment of any sum of money due by the borrower to the lender company. Substantially speaking, therefore, the rights given by clause (*8*) would be exercised only upon the failure of the borrower company to make the monthly repayments which they had promised. It is to be observed also that that clause (*8*) consistently with clauses (*2*) and (*3*) does not say that upon such default the lender company shall be entitled to take possession of the articles but it says, assuming that the lender company has possession or will have possession that it shall be entitled to sell them itself, if necessary.

With reference to the second and third clauses it is necessary to state that it appears to be clear that at the time this security came into effect, namely, at the time of the execution of the Indenture the lender company did appoint a durwan who went into the premises by way of taking of possession of the moveable effects comprised in the security.

It will be observed that there is no assignment here of book-debts. Although book-debts are one of the things that the weekly statement has to disclose there is no way of making out that the document itself warrants a charge upon the book debts.

The question before the Court is whether or not this document not having been registered is void as a security altogether and the only ground which is put forward is that it is a floating charge on the property of the company. It is not disputed that if it is a floating charge on some of the properties of the company it requires registration. It appears to

be the intention of the instrument that a Babu or a durwan should be in possession on behalf of the lender of the stock-in-trade, machinery, plant, furniture and all the rest of the subject matters of the deed. One might suppose, having regard to the language used in English cases, that anything of that sort would necessarily put an end to all possibility of the company carrying on its business in any reasonable way at all. If one looks to the terms of this security one finds that there is very little to show that under clause (7) the power of the borrower company over the stock-in-trade was in any effective manner to be restricted. It is quite possible, of course, that with a durwan in possession on behalf of the lender company the borrower company would go on selling without any control being exercised over them, without their being in any way hampered by the durwan's presence There is no stipulation as to a durwan or a Babu being there for the purpose of refusing to let the borrower company have the stock-in-trade until he is satisfied that the value of the remainder is up to a certain amount. It hardly appears that a durwan on Rs. 17 a month could be intended to exercise any effective check upon the management either of the manufacturing part of the business or of the sales.

The term "floating charge" is not a term of art. It is a term which has been much discussed and it has to be regarded as applying to a commercial document; one has undoubtedly in this case to look at the substance of the matter. At the same time if there are two ways of doing very much the same thing and a particular mortgagee has not chosen a way which the statute forbids, the Court cannot upset the security on the ground that it is in effect very much the same as something else. In this case

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one has to remember that although the restriction put upon the borrower company in disposing of their stock-in-trade in the ordinary way of business was not very great to all appearances, the articles comprised in the security were not entirely the stock-in-trade. There were plant, machinery, implements, utensils, furniture and so forth. The lender company was to continue in possession but the lender company's representative would not prevent the business being carried on in the ordinary way. The security is designed to interfere as little as possible with the carrying on of the borrower company's business but at the same time to make it impossible to say that the security floats at all. If one has regard to what Lord Justice Vaughan Williams said in *Re Yorkshire Woolcombers Association* (1), one would have to say that this did not satisfy his notion of a specific security. On the other hand, if one has regard to the definition of "floating charge" given in the numerous cases it does seem to be clear that this security cannot in the proper sense of the word be said to float. Thus in the case of *Tailby* v. *Official Receiver* (2), which was a pure case as to assignment of future book-debts, Lord Macnaghten intending to describe a "floating charge" said: "It is a floating "security reaching over all the trade assets of the "mortgagor for the time being, and intended to "fasten upon and bind the assets in existence at the "time when the mortgagee intervenes. In other "words, the mortgagor makes himself trustee of his "business for the purpose of the security. But the "trust is to remain dormant until the mortgagee calls "it into operation." He was not dealing with a case in which there was any element of possession and

(1) [1903] 2 Ch. 284. (2) (1888) 13 App. Cas. 523, 523, 541.

is a little difficult to say how at a time when there is by agreement between the parties possession given to the mortgagee the trust can be said to be remaining dormant at all. In the same way if one looks to what was said in *The Government Stock and Other Securities Investment Company, Limited* v. *The Manilla Railway Company, Limited* (1), which was a case of an ordinary debenture where after default the right of the debenture-holders was suspended for a time, one finds Lord Macnaghten saying this: "A "floating security is an equitable charge on the assets "for the time being of a going concern. It attaches "to the subject charged in the varying condition in "which it happens to be from time to time. It is "of the essence of such a charge that it remains "dormant until the undertaking charged ceases to be "a going concern, or until the person in whose favour "the charge is created intervenes". It is quite true that in several cases, for instance in the case already referred to, *i.e.*, the case of the *Yorkshire Woolcombers Association, Limited* (2), it has been pointed out that "a charge on all book-debts which may now be, "or at any time hereafter become charged or assigned, "leaving the mortgagor or assignor free to deal with "them as he pleases until the mortgagee or assignee "intervenes, is not a specific charge, and cannot be. "The very essence of a specific charge is that the "assignee takes possession, and is the person entitled "to receive the book-debts at once. So long as he "licenses the mortgagor to go on receiving the book "debts and carry on the business, it is within the "exact definition of a floating security".

It is quite true, therefore, that an ordinary carrying on of business has been held in many cases to be a conclusive reason for regarding a security as

(1) [1897] A. C. 81, 86. (2) [1903] 2 Ch. 284

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intended to be of a floating character but I cannot find that in any of those cases there was any element of possession and when one comes to the case of *Evans* v. *Rival Granite Quarries, Limited* (1) one finds it expressly laid down by Lord Justice Buckley that "a floating security is not a specific mort-"gage of the assets, *plus* a license to the mortgagor "to dispose of them in the course of his business, "but is a floating mortgage applying to every item "comprised in the security, but not specifically "affecting any item until some event occurs or some "act on the part of the mortgagee is done which "causes it to crystallize into a fixed security".

The result is, therefore, that although in this case the security may not be in the fullest sense a specific security, it is also not entitled to be described as coming within the proper definition of a floating security. It is possible to hold that anything may be regarded as a floating security until the full rights of the mortgagee settle or fasten on or bind the subject matter finally; but it seems to me that in a case of this character the element of possession which is contemplated by this deed and which according to the evidence was actually given at the time prevents our holding that we have before us a purely equitable charge of a character coming fairly within the description of a floating charge. The case of the *Bank of Baroda, Limited* v. *B. B. Shivdasani* (2), was, I think, a stronger case in favour of the mortgagee than the present case is on the facts. It will be seen that the security in that case was taken to put a real restriction upon the business of the mortgagors. The present application was brought by the present respondents not upon any allegation that the document according to its true construction was one thing

(1) [1910] 2 K. B 979, 999. (2) (1926) I. L. R. 50 Bom. 547.

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and the real intention of the parties was another but merely on the footing that the document itself disclosed an intention to grant a floating charge. In my judgment, the case before us is not an equitable charge in so far as the assets have been handed over to the possession of the mortgagee. It is quite true that future moveables can only be assigned in equity but here no charge attached to any articles until they were brought upon the premises and put into possession of the mortgagee. Prior to that there was a mere promise or covenant to charge which could no doubt in a proper case have been specifically enforced.

It does not seem to me, therefore, that this is an equitable charge and it does not seem to me that the charge was intended in the proper sense of the word to float, that is to say, to have no immediate effect upon any particular item comprised in it until the mortgagees should become entitled to intervene and should, in fact, intervene. In a case of this character we are administering and must administer somewhat strictly the provisions of the law which avoids a charge altogether unless it is registered.

For these reasons, I think, this appeal should be allowed and the summons taken out by the present respondents should be dismissed with costs to the appellants against Mr. Hazra's clients. We do not disturb the terms of the consent order made by Mr. Justice Gregory.

MUKERJI J. I agree.

Attorneys for the appellant: *Orr Dignam & Co.*

Attorney for the respondent McLawrie & Co.: *K. B. Ghose.*

Attorneys for the other respondents: *Dutt & Sen.*

N. G.