INSOLVENCY JURISDICTION.

Before Ameer Ali J.

1931

Aug. 12, 17.

In re SUMERMULL SURANA.*

Insolvency—Trusts—Trust receipts—Reputed ownership—Rule that property held in trust by the insolvent does not vest in Official Assignee—The rule and its exceptions formulated—Presidency Towns Insolvency Act (III of 1909), ss. 52(1)(a), 52(2)(c).

Where, prior to insolvency, the goods were delivered by sellers to buyers, upon terms which purported to make them trustees for the sellers of the goods and of the proceeds until payment,

held that, on the bankruptcy of the buyers, the goods were in their reputed ownership and hence vested in the Official Assignee.

In re *Nripendra Kumar Bose* (1), *Kitchen* v. *Ibbetson* (2), *Hollinshead* v. *P. and H. Egan, Limited* (3), In re *David Allester, Limited* (4), *Joy* v. *Campbell* (5), Ex parte *Watkins.* In the matter of *Kidder* (6), In re *Fuwcus.* Ex parte *Buck* (7), Ex parte *Burbridge* (8), Ex parte *Bright.* In re *Smith* (9) and *Great Eastern Railway Company* v. *Turner* (10) referred to.

The facts will appear from the judgment.

Pugh for the petitioners. Under clause 34 of the contract, the firm of Sumermull Surana became trustees of the goods, which, on their insolvency, did not vest in the Official Assignee under section 52 (*1*) (*a*) of the Presidency Towns Insolvency Act.

S. C. Bose for the trustees under the deed of composition. The promissory note was taken by way of satisfaction of the price of the 12 cases delivered unconditionally to the purchasers and the buyers if they were trustees under the terms of the clause ceased to be so. Moreover, the manner of dealing with the

* Application in Insolvency Case No. 131 of 1930.

(1) (1929) I. L. R. 56 Calc. 1074.
(2) (1873) L. R. 17 Eq. 46.
(3) [1913] A. C. 564.
(4) [1922] 2 Ch. 211.
(5) (1804) 1 Sch. & Lef. 328.
(6) (1835) 2 Mont. & Ayr. 348.
(7) (1876) 3 Ch. D. 795.
(8) (1835) 1 Dea. 131.
(9) (1879) 10 Ch. D. 566.
(10) (1872) L.R. 8 Ch. 149.

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five cases shows that the conditions of the clause were waived and the goods were in the order and disposition of the buyers. *Kitchen* v. *Ibbetson* (1).

Secondly, according to the petitioners, the property in the goods did not pass to the buyers hence there can be no trust. In re *Nripendra Kumar Bose* (2).

AMEER ALI J. This is an application by the sellers to obtain possession from the trustee of a deed of composition of certain goods sold to the insolvents before their insolvency. The goods in question were found in the actual possession of the insolvents on adjudication, were taken by the Official Assignee and made over by him to the trustees of the deed of composition.

The goods were delivered to the buyers under terms, which purported to make the buyers trustees of the goods and of the proceeds until payment to the sellers.

The question at issue is whether, on the bankruptcy of the buyers, the goods vested in the Official Assignee.

The short facts are as follows :—

The goods, 12 cases, were sold by the applicants to the insolvents by a contract, dated the 7th August, 1929. On the 21st April, 1930, the goods were delivered to the insolvents by means of a delivery order a copy of which is annexed to the petition and against a *bâzâr* chit or promissory note of that date, which is also annexed. Five of the cases were taken by the buyers and sold and proceeds not applied in accordance with the terms of the contract.

On the 18th July, 1930, the insolvents were adjudicated.

Clause 34 of the contract reads as follows :—

> The delivery contemplated by this contract shall always at the option of the sellers be against a delivery order which shall be construed as trust receipt and shall always be deemed to include the following stipulations :—
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> (*a*) That in consideration of the sellers having handed over to the buyers the shipping documents for the goods or in consideration of the sellers

(1) (1873) L. R. 17 Eq. 46.

(2) (1929) I.L.R. 56 Calc. 1074.

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having delivered the goods to the buyers as the case may be the buyers shall undertake to land, store and/or hold until sale of the said goods as trustees for and on behalf of the sellers and in the event of the said goods or any portion thereof being sold by the buyers to receive the gross sale-proceeds thereof as trustees for sellers and forthwith after receipt thereof to pay the same in full to the sellers and at the same time to advise the sellers of the account in respect of which such payment is made and (*b*) they the buyers shall further undertake not to sell the said goods on credit except with the permission in writing of the sellers and whenever any goods covered by this contract or any part thereof shall be sold by the buyers on credit with the permission in writing of the sellers as aforesaid to obtain from the purchaser or purchasers thereof a promissory note or notes for the price of the said goods made in their own favour or order and payable on demand and to endorse the same in favour of the sellers forthwith if called upon to do so and further that all sums paid to the buyers in discharge or part discharge of the promissory notes or any of them shall be received by the buyers for and on behalf of the sellers and shall be the property of the sellers and that they the buyers shall hold all such payments while in their hands as trustees for the sellers and will pay the same to the sellers when and as received by them and that they the buyers shall advise the sellers of the account in respect of which such payment or payments is or are made and (*c*) the buyers shall undertake that they shall keep the goods fully insured against loss or damage by fire and to hold the policy or policies of insurance as trustees for the sellers and to hand over to the sellers forthwith the full amount recovered by them in respect of such insurance and (*d*) that the buyers shall get such delivery order duly stamped and (*e*) it being further expressly agreed that in the event of the breach of any item or conditions of the stipulations aforesaid or any part thereof the sellers may at their option either prosecute the buyers under section 405 of the Indian Penal Code or may proceed civilly against the buyers or may adopt both such proceedings.

An affidavit in reply has been filed by the applicants, in which they state "That the buyers, not "having paid for the said goods, we were never and "are not now the beneficial owners thereof. "Lachmandas Amarchand have all along been and are "still the owners of the said goods."

Mr. S. C. Bose, who appears for the trustees, argued two main points. First, that the buyers, if they were trustees under the terms of this clause in the contract, ceased to be so. He relies especially on the promissory note and the manner of dealing with the 5 cases. He refers to the case of *Kitchen* v. *Ibbetson* (1). Second, that the property, not having passed to the buyer (*vide* the applicant's own affidavit) there can be no trust, and he relies on the decision of the Hon'ble Mr. Justice Lort-Williams in In re *Nripendra Kumar Bose* (2). During the argument, I

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suggested a third point, namely, as to whether, from a technical point of view, clause 34 of the contract was capable of creating a trust at all.

With regard to Mr. S. C. Bose's first point, I am not prepared to find that either the manner of dealing with 5 cases or the taking of the promissory note necessarily excludes the existence of a trust with regard to the 7 cases.

Further, with regard to the third point, I propose to assume that clause 34 of the contract, so far as formalities and wording are concerned, is capable of creating a trust of the goods for the seller.

I could dispose of this matter on the second point by following the decision in *In re Nripendra Kumar Bose* (1), the decision in that case being, as I read it, based on the proposition that the property, not having passed (by the very terms of the document in question), there could be no legal ownership in the buyer and, therefore, no trust of which he could be trustee. There are, however, certain references in the judgment, which, as worded, may give rise to misconception but which when further examined, in the light of the authorities, afford, in my opinion, an additional and valid ground for the decision. I refer to the following passages: "The argument "was an ingenious attempt to defeat the provisions of "the Insolvency Act" and "They (that is the sellers) "tried to secure a preference for themselves over all "creditors." The wording of these passages suggests fraudulent preference. There was no question of fraudulent preference either in that case or in this.

The exigencies of trade apparently require that buyers should be given possession and control of goods for the purpose of sale before payment. This has led to the adoption by sellers of various devices designed to maintain some connection with or control over the goods; some invisible machinery by which the sellers can prevent goods being dealt with or passing from their buyer to the sellers' detriment. Two kinds of

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situations arise, one as between sellers and buyer simply, and the other as between sellers, bank and buyer. In the latter case, common when the goods have been imported from abroad, the bank, having discounted foreign bills for the price of the goods, is, until payment, a pledgee of the goods *vis-a-vis* the buyer or the seller according to whether property has or has not passed under the contract of sale. The bank, in many cases, notwithstanding the pledge, delivers the goods to the buyer, so that the latter can deal with them against documents called "trust "receipts."

The situation to be considered here is between buyer and seller simply, but, in my opinion, the same principles apply to the situation as between bank and buyer.

As between the seller and buyer, the seller has 3 classes of difficulties to face.

(1) *Vis-a-vis* the buyer, (2) *vis-a-vis* transferees, or (3) *vis-a-vis* the Official Assignee.

(1) As against the buyer, whether the property passes or not, whether or not the seller has lost his lien, he yet has, whatever form of document he takes from the buyer, a valid contract and the buyer is bound by that contract, and in proper proceedings the seller can enforce his rights, possibly by injunction, possibly by receiver, but, in any event, he has a remedy. The real difficulty is against third parties and the Official Assignee.

(2) As regards transferees, the situation is controlled by the old sections of the Contract Act, sections 101, 108, and 178 and now by the Sale of Goods Act of 1930.

(3) As regards the Official Assignee, the position has so far remained to a large extent uncontrolled by authority, but, in my opinion, the principles applicable are analogous to those which relate to transfers by the buyer.

As between seller and the Official Assignee, *i.e.*, in order to meet the danger of the goods on bankruptcy vesting in the latter for the benefit of all the creditors, sellers have, in practice, adopted 3 classes of device.

First of all, delivery plus a mere contract, *i.e.*, delivery to the buyer plus a contract that the buyer will use them in a certain way.

Secondly, delivery plus a security, either a hypothecation (a document purporting to create a pledge but without possession) or in England a mortgage by way of a bill of sale or in India a mortgage without a bill of sale.

Thirdly, delivery plus a document or device purporting to create fiduciary ownership on the part of the buyer, *i.e.*, trust.

With regard to the first, a mere contract, that is clearly ineffectual for the purpose intended.

With regard to the second, questions have arisen, but in my opinion, that again is ineffectual [see *Hollinshead* v. *P. and H. Egan, Limited* (1)]. That is to say, where goods are given to the buyer and they remain in his possession subject to a mortgage created by the buyer over those goods in favour of the seller, the goods on the insolvency of the buyer pass to the Official Assignee as being in the reputed ownership of the buyer.

There remains the question of trust. As already indicated I propose to assume that the clause here (clause 34) is equivalent to a trust receipt. Now, it is clear that trust receipts may be considered something more than mere contract [see *In re David Allester, Limited* (2)].

Sellers resorted to the device of trust for the reason that, as a general rule, trust property does not vest in the Official Assignee and is excluded from the scope of reputed ownership. That general rule is based upon the theory of law that the trustee is the

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owner. Therefore, there is no other owner who can give his consent to reputed ownership, by the buyer [*Joy* v. *Campbell* (1)].

In India the rule is stated in sections 52 (*a*) and 52 (*2*) (*c*) of the Presidency Towns Insolvency Act. These two sub-sections read as if trust property could in no event be affected by the doctrine of reputed ownership. But, in my opinion, the rule is subject to certain qualifications. It may be put alternatively as follows:—either some trusts may fall within the reputed ownership clause or such trusts when investigated will not be regarded by the court as trusts in the full legal sense.

I now propose to try to formulate the general rule and its exceptions as these appear from the authorities.

The rule is that chattels in possession of a trustee of a *bonâ fide* trust are in his possession as legal owner and, therefore, no consent of the *Cestui que trust* can be inferred [*Joy* v. *Campbell* (1)]. This includes trusts to be implied from the situation of the parties or other circumstances, *e.g.*, chattels held for a specific purpose.

Exception 1. Even in the case of a *bonâ fide* trust, "reputed ownership" can be applied where the *Cestui que trust* consents to the property being dealt with by the trustee in a manner inconsistent with the trust [*Kitchen* v. *Ibbetson* (2)]. The circumstances may show that the trustee has really ceased to be a trustee.

Exception 2. The second exception is this, and it is a very important one to the commercial public. Property held for a specific purpose is held upon an implied trust (as for instance property held for sale by a factor), but, unless there is notoriety, unless it is known that the holder is a factor, reputed ownership will apply. [In re *Fawcus.* Ex parte *Buck* (3), Ex parte *Bright.* In re *Smith* (4), and Baldwin on Bankruptcy, 303 and 400]. That is to say, if goods

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(2) (1873) L. R. 17 Eq. 46.
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are left in the hands of another person and there is an undisclosed relation of master and factor, then the goods vest in the Official Assignee. If the situation is such that the public knows that the holder is a factor, then those goods held on an implied trust will not pass to the Official Assignee.

Exception 3. The third exception is the one which claims our attention in this case. Where the parties carry out the forms of a trust for a purpose not directly connected with the creation of the trust itself, but, for an ulterior object, then again the property will fall within the reputed ownership clause. That is to say, if a trust is created to conceal the real ownership of the property or, as in this case, to try and maintain in the sellers a control with which he has already parted. The cases are *Ex parte Burbridge* (1). *Ex parte Watkins. In the matter of Kidder* (2).

These cases deal as a matter of fact with shares, *e.g.*, shares being taken in the name of A with a trust in favour of B, because the Articles of Association or the rules of the company do not allow B to hold more than a certain number, but I consider the principle to be of general application. It is expressed as follows in *Great Eastern Railway Company* v. *Turner* (3): "There are undoubtedly cases in which an apparent "exception is made to the general rule, that where "there is a *bonâ fide* trust the trustee does not hold "the property in his order and disposition with the "consent of the true owner, or with such a reputation "of ownership as to cause the property to be treated "as his own in case of bankruptcy. But the principle "of the exceptions in those instances, which I will "assume for the present purpose to have been correctly "made upon the facts of those particular cases, "is this, that there being no *bonâ fide* reason for the "creation of any trust, the forms of a trust were gone "through in order to conceal the true ownership of the "property."

See Baldwin on Bankruptcy, page 400.

(1) (1835) 1 Dea. 131. (2) (1835) 2 Mont. & Ayr. 348.
(3) (1872) L. R. 8 Ch. 149, 153-4.

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I consider that that principle applies to a case of this nature, where sellers of goods (or as I have said pledgees of goods) desire to put the goods in the hands of their buyer in order to allow the buyer to deal with them freely and yet desire to maintain an invisible control over those goods.

If the views above expressed are correct, the conclusions to be drawn as regards trust receipts and analogous documents are as follows :—

First, that which appears on the document to be a trust may fall within reputed ownership, either because reputed ownership does apply in cases where a trust is of a secret or fictitious nature or because the court refuses to recognise such transactions as trusts at any rate as against outsiders. I add the qualification because it may be that the incidents of the trust would be enforced as between the two immediate parties.

Secondly, trust receipts taken by a trader seller from a trader buyer so far as they purport to create an agency for sale do not preserve the property from reputed ownership unless the relationship of the parties is known to the public.

The commonsense of the matter is this, that no special words or legal formula can preserve a control where actual control has been abandoned nor maintain a connection with the goods when the connection has been in fact severed or save for the seller, property which a seller hands over to a buyer with capacity to deal with it either as against transferees for value or against the Official Assignee. If the exigencies of trade require that the goods must be handed over for sale the seller takes the risk, he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner.

On those grounds, I dismiss the application with costs. Certified for counsel.

G. K. D.