ORIGINAL CIVIL.

Before Ameer Ali J.

1940

April 24.

SYED ABBAS ALI

v.

ABID JEHAN BEGUM.*

Receiver—*Administration suit—Creditor's suit against receiver—Leave to defend—Notice to creditor—Renewal of application for directions—Forum—Materials for giving directions—Opinion of independent counsel—Cost of obtaining opinion—Practice.*

A creditor of an estate instituted a suit for money against the receiver appointed in a suit for administration of the estate. The receiver obtained leave to defend the money claim of the creditor and made a further application to the Court trying the administration suit, for directions regarding his future conduct in the suit for money.

Held: (1) that in the application for leave to defend, liberty should be retained to renew the application and directions may be asked for, from time to time;

(2) that notice of the application need not be given to the creditor;

(3) that directions should properly be asked for in the suit in which the receiver is appointed;

(4) that before asking for directions, if any matter of complexity is involved, opinion of independent counsel should be obtained and placed before the Court;

(5) that costs of and incidental to obtaining opinion of counsel should be paid by the receiver who would be indemnified out of the estate.

English practice discussed and compared.

APPLICATION by receiver for directions.

Relevant facts of the case are sufficiently set out in the judgment.

AMEER ALI J. On April 8, I dealt in this suit, which I will call Suit "A", with an application by the receiver appointed in Suit "A", who is defendant in Suit No. 1950 of 1937, which I shall call Suit "B", a

*Application in Original Suit No. 1013 of 1933.

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suit on a money-claim by one Kedar Nath. I declined on that occasion to make an order such as I thought, perhaps erroneously, was required of me, *i.e.*, an order in the nature of one revoking or recalling leave to defend.

I indicated or recommended in my judgment, as will appear from the third paragraph from the end, that the receiver should regulate his future action upon the advice of counsel. After signing the judgment I did what I should have done before, namely, consult the English practice in these matters, and, having done so, I thought it desirable, for reasons which I have to make apparent, to convert the recommendation into a direction to be incorporated in the order. This I did on the 16th in Court and in the presence, at any rate, of counsel for the defendant, and the added direction was minuted; but it was not listed and I gave no reasons, and it has, perhaps on this account, been suggested that there is something not quite respectable about the added direction.

Since it is undesirable that any suspicion should attach to this little direction, and I have not the faintest desire to do anything in a clandestine or equivocal manner, I have had the application restored on notice to the parties in the suit, and, although in my opinion it is not necessary, on notice to the plaintiff in Suit "B". Notice has not gone to the parties in Suit "A", resident in Lucknow, some of whom are in fact minors, but some of the plaintiffs and some of the defendants are present in Court. The plaintiff in Suit No. 1950 of 1937 does not appear on the application.

Further, this being a public trust the matter is more than usually one in which the responsibility is shared between the receiver and the Court. This having been done, the circumstances indicate the propriety of my taking the opportunity first to explain the principle and practice upon which my

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direction is based, and secondly to state the precise direction to be incorporated in the order.

My original reason for looking into the English practice was to ascertain whether there existed anything to support the view to the effect that leave to defend should have been granted only on notice to the plaintiff in Suit "B" and after taking evidence. I found nothing, and, in that respect, therefore, I am unable to depart from the view expressed on this point in my previous judgment, but what I did find, and should possibly have found earlier, are certain indications of a practice or usage, features of which might usefully be adopted by this Court and which to my mind point to the proper course to be followed in this matter.

I shall now state in outline how I understand that practice and how it compares with ours. In England, the original application is usually made by one of the parties on notice to the other parties to the suit in which the receiver is appointed. In England, in any matter of complexity, the Judge will probably require to have placed before him an opinion of counsel. In England, in the order granting leave to defend there is incorporated a provision for indemnity in the matter of costs and expenses to be incurred by the receiver in defending the suit. In England, it is also usual or common to insert in the order liberty to renew the application at different stages or any critical stage of the suit. It is further the usage for the Judge to require on such renewed application in any matter of complexity a further opinion of counsel. In our practice, so far as I am familiar with it, it is almost invariably the receiver who applies, nor do I think it necessary to depart from that system.

Rarely, if ever, is notice given even to the parties in the suit. That, in certain circumstances, might, however, be desirable. In our practice, the application is, as a rule, when made in Chamber, treated as

a formality. Although on certain occasions the Court may have required an opinion of counsel, generally speaking it is not demanded.

Further, we have not yet, at any rate, adopted the system of making the application renewable when the receiver wishes for further directions. So far as I know, it has usually been done by a fresh application.

Having considered this practice, I do not feel myself to blame, excepting in one respect. I gave to the matters of leave to defend more attention than is usual in an application of this kind, but now that I have seen what is done in England, I think that, since this was an important matter involving difficult questions of equity, I should have required the opinion of counsel to be put before me rather than to proceed on such knowledge of that branch of law as I myself possess. That is the course I shall take in future. Secondly, that being the nature of the matter involved in the suit, I might usefully have made the application renewable as in the English practice.

The application of the receiver made before me on April 8, last came to be made under somewhat unusual circumstances, but nevertheless it is in fact and in substance the equivalent of a renewed application under the English practice. I regarded it at the time as premature, no compromise having been suggested by the party and no judgment having been given. For that reason, I did not say more than I did about counsel's opinion and sanction. But, having considered the English practice, I think I should first of all have adjourned the application or made the application renewable as soon as occasions should arise, and this I propose to do. Secondly, I should have indicated in the form of a direction the materials to be placed before the Court on such adjourned or renewed application. That I intended to do by the added direction. Those materials I considered to be counsel's opinion, and in this case

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I have directed, and propose to direct, the receiver to take the written opinion of counsel of the highest standing not engaged in the case. This is no reflection on counsel engaged, but it is human nature that counsel engaged in a case may think more of his client's prospects of success than counsel not engaged in a case, and further in certain circumstances it is desirable that the whole matter should be analysed by a fresh mind.

Finally comes the question of forum. I had originally intended to say nothing as to the Court or Judge before whom the application for sanction should be renewed or made, but I have come to appreciate or have been caused to appreciate that the matter is one of principle, and it is not right or proper that my opinion for what it is worth on this question of principle should remain ambiguous.

I refer to the administration suit as Suit "A", and the suit upon claim of money out of the estate as Suit "B". The Judge trying Suit "A", whom I may call A. J., has given leave to defend. B. J. tries the suit "B". Both suits happen to be on the Original Side of the same Court, but this, except where I shall indicate, makes no difference to the question of principle. Suit "B" might as well be in Alipore or in Bombay. At the end of Suit "B" certain things happen. Let us suppose, although this has not happened, that the plaintiff put forward an offer of compromise. Let us suppose that B. J. informs the receiver that he should pay the plaintiff's claim, being an officer of the Court. The parties to Suit "A" do not wish the receiver to pay. Apart from the parties, he has the advice of his counsel. He is no doubt an officer of the Court, but he is also a quasi-trustee and a defendant. He feels that it is an unusually critical situation, or let us assume that there are indications that while judgment has been reserved without date it will ultimately be in favour of the plaintiff; a less unusual situation but still, from the receiver's point

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of view, critical. He wishes to know how to decide and what to do.

In my view, according to the English practice and according to our practice, the receiver is entitled to the guidance of the Court. Now that guidance, in my opinion, will not be sought in Suit "B". It will be sought in Suit "A", and normally he will come back to A. J. for guidance. A. J. will probably, and in this case certainly, require counsel's opinion to be placed before him before he presumes to give that guidance. In this case, A. J. has gone further and requires advice in a special form and from a special source. I do not mean to suggest that the application *must* be renewed before A. J. or made before A. J. It may no doubt be made in Chambers before any of of the Judges on the Original Side, A. J. or B. J. or C. J., but, normally, and according to our usage and according to convenience, both under Indian and English practice, the application will be renewed or made before A. J., the Judge who has control of, and is supposed to be familiar with the administration. If A. J. should for any reason feel indisposed to hear the application, it is no doubt open to him to request any of his colleagues to do him the favour of hearing it. In this matter A. J. was originally so indisposed, but having, as I say, now appreciated how much the matter is one of principle—and that personal predilections should not enter the matter—A. J. is unable to say that with proper materials, such as I have indicated, placed before him he will be unable to give a correct direction to the receiver.

I hope that what I have said will demonstrate that the course taken by me was not intended as an interference and is not an interference with the jurisdiction of the learned Judge trying Suit 1950 over the parties in that suit and that it is in accordance with the English practice and with commonsense. It is, at any rate, the practice which I propose to follow until and unless it is criticised by a competent authority, and for that reason it may be reported.

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I will now state the precise direction which I propose to have incorporated in the order:—

(1) The application may be made renewable on notice by letter to the plaintiffs and defendants in Suit No. 1013 of 1933 in Calcutta and to such other parties as the Court may require.

(2) In the absence of judgment in Suit No. 1950 of 1937 the receiver, if pressed to pay the claim of the plaintiff, will take the written opinion of leading counsel not briefed in the case and will renew the application together with the opinion for directions.

(3) In the event of judgment in favour of the defendant, the receiver will wait before taking opinion or further opinion until notice of appeal has been given by the plaintiff.

(4) In the event of judgment against the defendant, the receiver will obtain the written opinion of counsel not briefed in the case or supplementary opinion and will renew the application for direction, attaching that opinion.

(5) In respect of the costs of and incidental to obtaining the opinion, the receiver will be indemnified out of the estate.

(6) The receiver on the renewed application will further be at liberty to ask for a direction as regards costs which may be incurred in any further proceedings which the Court may allow him to prosecute or defend.

The costs of this application and the restored application he will be entitled to take out of the estate as between attorney and client.

Directions given.

G. K. D.