APPELLATE CIVIL.

Before Mr. Justice Mackney.

REV. BROTHER PATRICK

v.

LYAN HONG & Co.*

1938

Feb. 3.

Receiver—Making of a lease by receiver—Personal liability of receiver on his contract—Receiver not the agent of Court or estate for contract—Lessee's rights against receiver only—Civil Procedure Code, O. 40, r. 1.

A receiver appointed by the Court is not an agent to contract, either of the Court appointing him or of anybody else, but he is a principal. He is personally liable for contracts entered into by him, unless the express terms of the contract exclude any personal liability. Where the receiver is liable on his contract with the lessee of the property leased by him, the lessee can only sue the receiver and not the owner of the property although the receiver may be entitled to an indemnity from the property. Under the provisions of O. 40, r. 1 of the Civil Procedure Code a receiver has no power to bind the estate by a lease.

In re British Power Traction & Lighting Co., Ltd., (1910) 2 Ch.D. 470 ; *Burt* v. *Bull*, (1895) 1 Q.B. 276 ; *Dinshaw* v. *Amrit Lal & Co.*, I.L.R. 10 Pat. 379 ; *Evans* v. *Mathias*, (1858) Q.B. Rep. El. & Bl. 590 ; *In re Johnson*, 15 Ch.D. 548 ; *In re London United Breweries Ltd.*, (1907) 2 Ch.D. 511 ; *Mahanth Singh* v. *U Aye*, I.L.R. 14 Ran. 336 ; *Moss Steamship Co., Ltd.* v. *Whinney*, (1912) A.C. 254 ; *Parsons* v. *Sovereign Bank of Canda*, (1913) A.C. 160 ; *Ramnarayan* v. *Carey*, I.L.R. 58 Cal. 174, referred to.

Mohari Bibi v. *Shyama Bibi*, I.L.R. 30 Cal. 937, dissented from.

Foucar for the appellant.

Kyaw Din for the respondent.

MACKNEY, J.—This appeal arises out of a suit brought by the plaintiffs-respondent Lyan Hong & Company for the recovery of a sum of money as damages for breach of contract of a lease of a certain rice mill. This rice mill belonged to the estate of one U Po Kha. In Civil Regular Suit No. 5 of 1935 in the District Court of Insein a decree was passed for the administration of this estate, and one U Zeya was appointed receiver. The decree is dated the 23rd May 1936. U Zeya was

* Civil Second Appeal No. 292 of 1937 from the judgment of the District Court of Insein in Civil Appeal No. 18 of 1937.

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appointed receiver to wind up the estate and partition it among the parties. He was empowered to sell any part of the moveable property of the deceased if he found it necessary to carry out the objects of the suit. He was also empowered to sell the immoveable property with the prior sanction of the Court. In addition to these powers it was declared that the receiver should have power to rent out any immoveable property of the estate for a period not exceeding six months if he found it necessary to do so to carry out the objects of this suit. In conformity with this power U Zeya leased the mill to the plaintiff company on the 16th October 1936 but no document of lease was executed. One Chit Po was the former lessee. U Zeya appears to have turned him out. The plaintiff company went into possession on the 17th October 1936. On the 12th November 1936 they were ousted by an order of the Headquarters Magistrate at Insein and one Ma Hman, said to be a sub-lessee of Maung Chit Po, was put into possession and remained in possession until the 31st March 1937.

On the 2nd November 1936 the appellant, the Reverend Brother Patrick, having become the sole owner of the estate the Court discharged the receiver and directed him to give possession of the property, which was in his possession to the Reverend Brother Patrick. On the 3rd November the receiver was requested by letter to hand over the mill to the Reverend Brother Patrick. To this letter U Zeya replied on the 18th November stating that he had leased the rice mill to Lyan Hong & Company for six months and that the mill was in their possession. On the 23rd November a reply was made on behalf of the Reverend Brother Patrick indicating his surprise at receiving the information contained in the letter of the 18th November and pointing out that there seemed to be some trouble at the mill as a result of U Zeya's action as one Ma Hman,

as the sub-lessee of Maung Chit Po, claimed to be in possession.

The plaintiff company joined U Zeya, the Reverend Brother Patrick and one Maung E as defendants in their claim for damages. We are not now concerned with the case of Maung E. The Subdivisional Court granted the plaintiff company a decree against all the defendants for Rs. 3,240-10-0. All the parties appealed against this decree to the District Court. The learned District Judge dismissed the appeals of the defendants, modified the decree of the Subdivisional Court by granting a decree for Rs. 4,405-4-9, and directed that the decree be against the Reverend Brother Patrick and Maung E in their capacity as representatives of the estate of U Po Kha, and against U Zeya in his personal capacity. The Reverend Brother Patrick has appealed against the decree of the District Court dismissing his appeal.

The point taken is that the receiver U Zeya is personally liable for the contract entered into by him, and the other party cannot sue the estate or the owners of the estate for damages for breach of contract but can have recourse only against the receiver. Consequently no decree should be passed against the Reverend Brother Patrick. The receiver can claim to be indemnified from the estate if it is found that his action in leasing the property was correct.

The learned District Judge has considered this point in his judgment and he held, on the authority of *Mohari Bibi* v. *Shyama Bibi* (1), that although the receiver was personally liable a creditor could have recourse also against the estate, the principle to be applied being that the estate cannot enjoy the benefit of the receiver's acts without being held responsible for the obligations arising out of them.

(1) (1904) I.L.R. 30 Cal. 1937.

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In *Mahanth Singh* v. *U Aye and others* (1) it was pointed out that—

"As regards the liability of the contracting parties, there is normally no difference between a contract to which A is a party in his capacity as 'a trustee' and one to which A is a party in his personal capacity. In either case the opposite contracting party contracts with A and with no one else; and, in the absence of an express or clearly implied term of the contract itself that the personal liability of the contracting trustee is to be excluded, no limitation upon A's personal liability arises by virtue only of his being in fact, and by his being described as, a trustee. In either case the trustee is the contracting person . . . . . If a creditor obtains a decree against a trustee or an executor with whom he has contracted and such trustee or executor has a right of indemnity against the estate that right of indemnity becomes one of the assets of the trustee or executor accessible to the creditor, whether by subrogation or otherwise. But the personal liability of the trustee or the executor must first be recognized and only then can any right of indemnity arise upon which the doctrine of subrogation can operate."

In this judgment a number of English authorities are cited, but as the learned Judge observes in this matter the law applicable in this country does not differ. I have no doubt that the same principles are to be applied in the case of a contract with a receiver. For this there is ample authority.

I would first refer to *In re British Power Traction and Lighting Company, Limited. Halifax Joint Stock Banking Company, Limited* v. *British Power Traction and Lighting Company Limited* (2), in which a reference is made to the case of *In re Johnson* (3), which is referred to by Mr. Justice Braund at page 345 of the Rangoon Reports. In *In re Johnson* (3) Jessel M.R. said:

"If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves so to speak, in the place of a

(1) (1936) I.L.R. 14 Ran. 336. (2) (1910) 2 Ch.D. 470, 476.
(3) 15 Ch.D. 548, 555.

trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms, to make good a loss to the trust estate, the creditors cannot have a better right. Reading 'receiver and manager' in lieu of 'trustee' the passage is exactly in point."

The claim of the creditors was against the receiver and in this case (a debenture-holder's action) they were allowed to claim against the estate only to the extent of the net amount of the receiver's indemnity, *i.e.*, £500 which was less by £400, than the total liability incurred by the receiver, because the receiver's cash account was deficient by £400 which he was unable to pay. Swinfen Eady J. said :

"The right of the trade creditors was to sue Watkins (receiver), to whom they gave credit. He would have had no answer to their claim. But can they through him claim against the estate of which they are not creditors ? The answer is that they can only claim through him to the extent of his right of indemnity against the estate . . . . . The trade creditors have no higher right than Watkins against the estate. If Watkins paid them the whole £900 he could only come against the estate for difference between the £900 and the £400 in his hands, *i.e.*, £500."

In *Moss Steamship Company, Limited* v. *Whinney* (1), it is clearly shown that where the contract is made by the receiver and manager he is personally liable, the receiver and manager looking for indemnity to the assets of the company of which he is receiver and manager. Earl Halsbury observed (at page 261) :

"Once a receiver and manager is appointed things are changed, and every man of business would know, or ought to know, that the only person with whom he could safely contract would be the manager appointed by the Court."

In *Dinshaw* v. *Amrit Lal & Co.* (2), the decision in *Parsons* v. *Sovereign Bank of Canada* (3) is quoted

(1) (1912) A.C. (H.L.) 254. (2) (1930) I.L.R. 10 Pat. 379.
(3) (1913) Ap. Cas. 160.

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in which this case is referred to and it is observed (at page 387) by Lord Haldane L.C.

"It is no doubt true that *prima facie* any new contracts they (*i.e.*, the receivers & managers) made would ordinarily be made by them personally in reliance on their right of indemnity out of the assets as happened in the recent case before the House of Lords of *Moss Steamship Company, Limited* v. *Whinney* (1) where a new contract made by the receiver was held, as a matter of construction, to have been entered into by him personally."

The Patna High Court applied the principle in the case before it. Again, in *Ramnarayan Satyapal* v. *Carey & Daniel* (2), reference was made to English cases and it was pointed out that

"receivers appointed by the Court are not agents to contract, either of the Court appointing them or of anybody else, but they are principals. They are personally liable for contracts entered into by them, unless the express terms of the contract exclude any personal liability."

If it be true that the receiver in the present case is personally liable on the lease contract entered into by the plaintiff company, and if the plaintiff company can only enforce its claim against the estate through the receiver on its being able to establish that the receiver is entitled to indemnity in respect thereof from the estate, then it is obvious that the Reverend Brother Patrick, as the owner of the estate, is not a proper party to this suit.

I have examined the case of *Mohari Bibi* v. *Shyama Bibi* (3) on which the learned District Judge relies but I am bound to say with the greatest respect that I do not understand the reasoning employed in this judgment. This was a suit for the recovery of a sum of money due

(1) (1912) A.C. (H.L.) 254. (2) (1930) I.L.R. 58 Cal. 174.
(3) (1904) I.L.R. 30 Cal. 937.

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to the plaintiff's firm on account of their dealings with the receiver of the estate of one Pokhiram, for the administration of which Shyama Bibi had obtained letters of administration, the receiver being discharged. It was contended that the plaintiff's proper remedy was against the receiver alone, but the learned Judge dismissed this contention saying that the creditor is entitled to proceed against the representative of the estate for recovery of debts incurred by the receiver during the management of the estate by him. The learned Judge thought that the right to maintain such a suit against the representative of the estate was founded on the just and equitable principle that as the acts of a receiver, acting within his authority, were the acts of the Court, the estate could not be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. The observations of Rigby L.J. in *Burt, Boulton and Hayward* v. *Bull* (1) are quoted as justifying this conclusion. No doubt it is true that the receiver is entitled to be indemnified by the estate, but this proposition does not justify the conclusion that the creditor is entitled in a suit to recover his dues to proceed against the representatives of an estate instead of the receiver, or conjointly with the receiver; and with the greatest respect I cannot see that the quotation from the judgment of Rigby L.J. justifies such an inference. The quotation is:

> "The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment."

In point of fact, this observation has been taken right out of its proper context and, when considered with its

(1) (1895) 1 Q.B. 276.

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context, appears to bear a meaning quite opposite to that which the learned Judge who decided *Mohari Bibi* v. *Shyama Bibi* (1), has put upon it. Rigby L.J. says :

"The intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available ; and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament. I do not say that it would be the duty of a receiver and manager to incur liabilities of an exceptionally heavy nature, but I think he must be understood to take on himself the ordinary liabilities that would fall on a person carrying on such a business as that to which his appointment relates. I do not say that, if the fund to which he was looking for indemnity failed, he might not come to the Court and ask to be relieved from responsibility ; but I do not think he can get rid of responsibility on a contract merely by stating in the contract that he is a receiver. As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally, and he must look for indemnity from the liability so incurred to the assets . . . . . I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is, not that he is to be in the position of an agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into *e.g.*, executors or trustees, who, by the terms of the instrument appointing them, are directed to carry on a business for the benefit of others. The rule has always been that such persons are *prima facie* themselves personally liable, and they cannot get rid of liability on the contracts made by them

(1) (1904) I.L.R. 30 Cal. 937.

merely by describing themselves in the contract as executors or trustees . . . . . ."

and then comes the sentence which has been quoted in the Calcutta decision. In the Calcutta case, Sale J. avers that

"a right to maintain such a suit (*i.e.*, by creditors of the receiver against the representative of an estate), is, in my opinion, founded on the just and equitable principle that as the acts of a Receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held responsible for the obligations arising out of them."

But, with the greatest respect, I do not think that it is correct to hold, even if the acts of a receiver are in this sense the acts of the Court that the creditors of the receiver have any direct claim against the estate.

The learned District Judge referred to a passage in Kerr's "The Law and Practice as to Receivers," Tenth Edition, page 172, but omitted to specify what was the particular passage on which he relied. On referring to the Text Book in question, the only passage I can find, which, possibly, might have been the one the learned District Judge had in mind, is this:

"The acts of a receiver are for the benefit of all parties according to their titles: . . . . . Conversely, if a loss arises from the action of a receiver the estate must bear it as between the parties to the action."

Reference is then made to two cases of which the one which I have before me is *In re London United Breweries, Limited. Smith* v. *London United Breweries, Limited* (1). This was a debenture-holders' action, so that presumably the word "action" where it is used for the second time in the quotation must have referred to

(1) (1907) 2 Ch.D. 511.

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such an action. In that particular case the receiver and manager who had been appointed became bankrupt. There were assets in the hands of the Court and the Court had to decide how these assets were to be dealt with. The trustee in bankruptcy of the receiver put in a claim as well as the debenture-holders. It seems that the receiver had become entitled to certain payments out of the assets of the company but as he had become bankrupt the Court thought fit to make the payments direct to the creditors who could prove that the debts in which they were interested had been properly incurred by the receiver in the course of his duties, the reason being that "this is what would happen ultimately." Neville J. observes :

> "It seems to me that in directing an inquiry with a view to payment to the creditors of the receiver, after the discharge of the costs of realization, I shall be putting those creditors in precisely the same position that they would have been in had the receiver paid them and then come for his indemnity against the estate."

The decision deals with a very special case and does not lay down any principle on which the plaintiff-respondent in this case can rely in impleading the Reverend Brother Patrick, the present owner of the estate. Even here it is shown that the claim of the creditors is through the receiver.

Whilst conceding that the principle of law herein set out is correctly laid down, the learned counsel for the respondent contends that the case of a lease is different from that of a contract, that the receiver by leasing the property binds the estate and that the lease created an interest in the estate. I do not think that this is a sound proposition. It does not appear to me to be correct to say that a receiver can bind the estate by a lease.

In *George David Evans* v. *William Mathias and John Lewis* (1), I find the following observation by Lord Campbell C.J. :

"The counsel for the respondents laid down the proposition that an attornment to a receiver appointed by the Court of Chancery enures to the benefit of the person who shall ultimately be found to have in him the legal estate. The Court of Chancery certainly does not assume to itself any title or power of conveying, directing its decrees only in personam, and requiring the parties in whom the legal or equitable interest may be to convey for the benefit of those found to be beneficially interested. But no authority was adduced to show that an attornment to a receiver appointed by the Court of Chancery hypothetically creates a tenancy under another person."

In that case it may be said that Evans was a tenant who had attorned to the receiver. Ultimately the estate passed to the defendant Mathias. It was observed :

"We must, therefore, hold that Evans never became tenant to Lewis," (who assigned to Mathias) "either by the attornment or by the subsequent payment of rent to the receiver ; and that the relation of landlord and tenant, upon which the avowry is framed, was not constituted by the subsequent assignment of the term to Mathias."

It would seem, therefore, that no relationship of landlord and tenant has been created between the plaintiff-company and the Reverend Brother Patrick.

In Kerr on Receivers at page 238 it is observed :

"If a receiver himself grants a lease without sanction, the lease will be binding as between him and the person who takes the lease by estoppel. As between the lessee, however, and the owner of the legal estate, the lease has, in the absence of special circumstances, no binding force, even though it may have been made with the sanction of the Judge. The powers of the receiver are limited to receiving proposals and making arrangements as to the leasing of the property over which he has been appointed receiver.

(1) (1858) Q.B. Ref. El. Bl. 590, 601.

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He has no power by a lease made in his own name to transfer the legal estate in the property, nor can such a power be given to him by the Judge. Leases should be granted in the name of the estate owner."

In the present case the receiver appointed by the Court can have such powers as can in law be conferred on such receivers. Order 40 rule 1 of the Code of Civil Procedure sets out the powers which may be conferred upon a receiver: none of them include the power to bind the estate by a lease.

I am of the opinion, therefore, that the proper remedy of the plaintiffs-respondent is against the receiver, U Zeya; and that they have no right of suit against the owner of the estate, the Reverend Brother Patrick, in respect of a breach of contract of the lease. It may be that U Zeya will be able to establish his right to indemnity against the estate and that through him the plaintiff company will be able to resort to the estate to satisfy its dues, but these are matters which cannot arise for decision in such a suit as the present one. This appeal is allowed and the plaintiffs' suit against the appellant the Reverend Brother Patrick is dismissed with costs in all Courts.