

Code, the Court which has seisin of the appeal is competent to stay the carrying out of the order appealed against pending the hearing of the appeal. Now in the present case, we think it is impossible to say that this Court has, by virtue of the appeal preferred against the order refusing to set aside the *ex parte* decree, acquire any seisin either of the original suit or of the execution proceedings, as it would undoubtedly have done if an appeal had been preferred either against a preliminary decree in the suit or against an order made in the execution proceedings. In our opinion the proceedings based upon the application of the 2nd January 1904, made with a view to set aside the *ex parte* decree, are not proceedings in the suit which was terminated by the decree, nor can they be rightly regarded as proceedings in execution of that decree. We are constrained to hold, therefore, that it is not competent to this Court to stay proceedings in execution of a decree of a subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under section 108 of the Code of Civil Procedure. The view we take is in accordance with that taken by this Court in the case of *Mir Sarwar Jan v. Faizunnessa Khatun* (1), (Civil Rule No. 2093 of 1902). The Rule will accordingly be discharged. We make no order as to costs.

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*Rule discharged.*

31 C. 1084 (=9 C. W. N. 9.)

[1084] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Mitra.

BRIDGE v. MADDEN.\*

[5th August, 1904.]

*Trust property—Debts incurred by trustee—Trustee's Right of Indemnity—Creditor's right to stand in the place of the trustee.*

A, the owner of an hotel, on the occasion of her marriage with B, appointed B trustee by a deed of settlement. The trust deed gave the trustee power through managers and assistants to carry on the business of the hotel, and it was declared that the trustee should be at all times fully indemnified, out of the trust estate, in respect of all liabilities arising from the execution of the trusts. The plaintiffs brought a suit against B, the trustee, for goods supplied to the hotel and claimed B's right of indemnity:

*Held*, that the plaintiffs were entitled in equity to stand in the place of the trustee, if the trustee had not through his own default lost his right of indemnity.

*In the matter of M. A. Shard* (2) referred to.

[Ref. 85 Cal. 320=12 C. W. N. 256=8 M. L. T. 156.]

APPEAL by the defendant, Travers Edward Madden, from a judgment of Henderson, J.

This was a suit brought by the members of the firm of Messrs. G F. Kellner & Co. to recover the sum of Rs. 4,457-2 due for goods sold and delivered for use in the Adelphi Hotel in Calcutta.

This hotel was the property of one Mrs. Cook (now Mrs. Madden), and she on the occasion of her intended marriage with the first defendant, Captain T. E. Madden, on the 6th August 1894 assigned the hotel

\* Appeal from Original Civil, No. 50 of 1904, in Suit No. 301 of 1901.

(1) (1902) Unreported.

(2) (1901) I. L. R. 28 Cal. 574.

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and all her interest therein to one James Browne, in trust, to carry on the business of the hotel for her sole and separate benefit during her life-time and after her death for the other trusts declared by the settlement. By the trust deed it was declared that the trustee for the time being should be at all times fully indemnified out of the trust [1085] estate in respect of all liabilities arising from, occasioned by, or connected with, the execution of the trusts, and that he might reimburse himself out of the trust premises all expenses incurred in or about the execution of the trusts. After the execution of the settlement Mrs. Cook was married to the first defendant, Captain Madden. The trustee, James Browne, took upon himself the trust and carried on the business of the hotel until the 5th July 1897, when he retired from the trust and was succeeded as trustee by the defendant, Captain Madden, who, with the assistance of managers, carried on the business of the hotel in the ordinary way until the 12th February 1901, when he retired from the trust and the defendant, Mrs. Shard, was appointed the sole trustee in his place. Mrs. Shard continued to carry on the business until the 20th May 1903, when the defendant, Captain Madden, was re-appointed and is now the sole trustee.

The plaintiffs' case was that during the time of the successive trustees, they from time to time supplied wines and other goods for the use of the hotel. This continued up to the 3rd May 1898. The plaintiffs then appropriated all payments made from time to time to the various bills in order of date, and said that there was now a balance due of Rs. 4,457-2.

The defendant, Captain Madden, in his written statement objected to the appropriation of the payments which had been made by the plaintiffs, and asserted that he was not liable for any goods supplied during the time of the previous trustee. He further objected to a number of bills on the ground that if the goods covered by them were in fact delivered, they were delivered under orders from managers appointed during his absence from India and without his authority. Mrs. Madden was allowed to appear for and conduct the defence on behalf of the first defendant, Captain Madden, under section 465 of the Civil Procedure Code.

On the suit coming up for trial, his Lordship Mr. Justice Henderson, on the 13th April 1904, found that the defendant, Captain Madden, as trustee was personally liable, and gave judgment for the plaintiffs for the sum of Rs. 4,457-2.

The decree of the Court below was in the following terms :—

“ Suit to recover rupees four thousand four hundred and fifty-seven and two annas for goods sold and delivered with interest, for a declaration that the plaintiffs are entitled to have the full benefit of all indemnities to [1086] which the defendants or either of them are or is entitled against the immoveable and moveable property and other assets subject to the trusts of an Indenture of Settlement ; for payment of the claim in suit out of sale-proceeds of the said property and assets ; for the appointment, if necessary, of a Receiver, &c.

“ This cause coming on on the twenty-fifth and twenty-sixth days of February last, the eleventh day of April instant, and on this day for final disposal before the Honourable Gilbert Stewart Henderson, one of the Judges of this Court, in the presence of Counsel for the plaintiffs and in the presence of Mrs. Laura Elizabeth Madden as the constituted attorney of the defendant Travers Edward Madden (the defendant M. A. S. Shard not appearing either in person or by Counsel). It is ordered and decreed that this suit be and the same is hereby dismissed as against the said defendant M. A. S. Shard. And it is further ordered and decreed that the plaintiffs do pay to the said defendant M. A. S. Shard her costs of this suit (to be taxed by the

Taxing Officer of this Court under the heading 'Class 2—Ordinary Causes') with interest thereon at the rate of six per cent. per annum from the date of taxation until realization. And it is further ordered and decreed that the defendant Travers Edward Madden do personally pay to the plaintiffs the sum of rupees four thousand four hundred and fifty-seven and two annas with interest thereon at the rate of six per cent. per annum from the date hereof until realization, and also pay to the plaintiffs their costs of this suit (to be taxed by the said Taxing Officer on the scale aforesaid) with interest thereon at the rate aforesaid from the date of taxation until realization, and it is declared that the plaintiffs are entitled to the benefit of any right of indemnity against the trust estate comprised in the Indenture of Settlement of the sixth day of August one thousand eight hundred and ninety-four in the plaint in the suit mentioned which the said defendant, Travers Edward Madden as trustee of such settlement may possess, and the parties are to be at liberty to apply to this Court with regard to the Receiver appointed in this suit, and generally from time to time as they may be advised. Dated this thirteenth day of April in the year of our Lord one thousand nine hundred and four."

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After the decree was made against the defendant, T. E. Madden, the plaintiffs, on the 29th June 1904, applied to the Court below, on notice to the Receiver appointed to the estate, to the defendant and the beneficiaries, for a declaration that the defendant, T. E. Madden, had a right of indemnity against the trust estate, and that in default of his paying the amount of the decree, the plaintiffs might be at liberty to proceed with the execution against the trust estate. In reply Mrs. Madden, under a power of attorney, for herself and her husband filed, on 30th June 1904, an affidavit the paragraphs 10, 20 and 28 of which were in the following terms:—

" 10. That, with regard to the 9th paragraph, I admit that, in the event of the business being wound up at my request, the said settlement provided [1087] for the payment of all debts and liabilities of the said business, but I do not admit that payment of such debts and liabilities as may not appear to have been incurred in a legitimate and *bona fide* manner is provided for in the said settlement, and that under the settlement now before the Court, debts have occurred solely through the recklessness, dishonesty, and intemperance of the managers and servants of the respective trustees consequent on the inability or negligence of the said trustees who were responsible for the acts and defaults of their servants.

" 20. That, with regard to the 11th paragraph of the said petition, I state that the said defendant has incurred personal liability as a result of placing confidence in managers and servants who have proved untrustworthy and who have defrauded him to a large extent, and inasmuch as the said defendant did not exercise more strict control over the said managers and servants he admits his liability for their defaults. That with further regard to the said 11th paragraph, I am informed and believed that it was the intention of the plaintiffs to charge that the said defendant had incurred personal liability, but for some reason or other the plaintiffs have found it advisable to alter their intention.

" 28. That unless the said Receiver be discharged and some other order be made by this Court in respect to the amount of the petitioners' advances used by the said Receiver for the upkeep of the business, the said business practically becomes vested in the petitioners for their sole and whole benefit and for the benefit of the Receiver's Office for several years hence inasmuch as the petitioners' investment is a sound one, and they will otherwise reap benefits from the carrying on the said business while continuing to deprive the beneficiaries of all or any small benefit or allowance whatsoever so long as it suits the petitioners to carry on the business sufficiently well to cover their own and Receiver's expenses under the order obtained by them."

The Court below granted the plaintiffs' application, making the declaration as prayed for.

The defendant appealed.

Mrs. *Madden*, the constituted attorney of her husband, T. E. Madden, for herself and the appellant. The judgment in the lower Court was obtained only through my admissions. The plaintiffs were unable to prove the debt and I was not allowed to call a witness.

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[HARINGTON, J. The only question is as to the validity of the form of the decree.]

I submit, the defendant trustee has not proved his right to an indemnity: *In the matter of M. A. Shard* (1).

Mr. S. P. Sinha and Mr. J. E. Bagrum, for the respondents. The only question is whether the creditors can be placed in the [1088] position of the trustee and take over the benefit of his indemnity. It has never been made out in this case that the trustee is a defaulter to the estate in the sense that he has not accounted for any moneys.

[MACLEAN, C. J. But that is not the only way a trustee loses his right of indemnity.]

No, but he has to pay any debts incurred by the trust estate, and it is for the defendant to show that he is a defaulter and has forfeited his right to an indemnity. That has not been shown anywhere in this case. Further the trustee has a right of indemnity under the terms of the trust deed dated the 6th August 1894, and it hardly lies in the mouth of the beneficiaries to say that the trustee was absent from the management of the trust, when the beneficiaries knew that as a military officer he would be absent a greater part of the time and still appoint him. The point raised that owing to the business not having shewn a profit, there was nothing against which the trustee could claim an indemnity, is a mistaken view of the authorities. The case of *In re Johnson, Shearman v. Robinson* (2) decided that a trustee was not entitled to an indemnity where he was shewn to be a defaulter to the extent of about £800. The case of *Ex-parte Garland* (3) clearly shows the position. See further *Strickland v. Symons* (4), *Dowse v. Gorton* (5), and *In re Raybould* (6).

Mrs. Madden, in reply. The trust estate really yielded a large profit which is not accounted for. If trustees can keep the profits to themselves and satisfy creditors out of the trust estate, the beneficiaries can receive neither protection nor benefit from the appointment of a trustee.

MACLEAN, C. J. The question we have to decide upon this appeal is whether or not the plaintiffs, who are wine merchants carrying on a large business at Calcutta, and who have obtained a judgment for Rs. 4,457 against Mr. Madden, who is an officer in the Army, are entitled to execute that judgment against the trust estate which is comprised in an Indenture of Settlement [1089] dated 6th August 1894, of which settlement Mr. Madden was the sole trustee at the time the debt was incurred to the plaintiffs for goods supplied by them. The subject-matter of the settlement was an hotel known as the Adelphi Hotel in Calcutta. It apparently belonged to Mrs. Cook (now Mrs. Madden, the wife of Mr. Madden). The deed was executed upon the occasion of her marriage with Mr. Madden, the trusts being to empower the trustee through managers and assistants to carry on the business, the net profits of which were settled on Mrs. Madden for life, with a reversion to her son, who is now of age and who has been served with these proceedings, but has not appeared.

It is contended by Mrs. Madden, who has appeared before us to-day both for herself and her husband, that the plaintiffs are only entitled to

(1) (1901) I. L. R. 28 Cal. 574.  
(2) (1880) 15 Ch. D. 548.  
(3) (1804) 10 Ves. 110.

(4) (1884) 26 Ch. D. 245.  
(5) (1891) A. C. 190.  
(6) (1900) 1 Ch. 199.

execute this judgment against their judgment-debtor, Mr. Madden, and that they have no claim against the trust property of which he was a trustee. It is clear, and has not been disputed, that the debt was incurred for the benefit of the trust, and with the object of carrying on the business of the hotel, and the plaintiffs say that inasmuch as Mr. Madden was a trustee of this property and incurred the debt as a trustee for the purpose of carrying on the business of the hotel, he is entitled to be indemnified out of the trust estate, and the plaintiffs in equity are entitled to stand in his shoes. That is the plaintiff's case, and as a general proposition of law that position cannot be disputed.

The law upon this point has been laid down by Mr. Justice Sale *In the matter of M. A. Shard* (1) which was also a case concerning this hotel. In that case the learned Judge reviewed the English authorities upon the subject which lay down the equitable principle to which I have referred. But the proposition I have stated is subject to the important qualification that if the trustee, through his own default, has lost his right of indemnity, such right cannot pass to the creditor, for the creditor cannot have the benefit of that which does not exist. We have, therefore, to consider in this case whether the present appellant has substantiated that Mr. Madden, by his own default, has lost his right to indemnity. The indemnity clause in the settlement is couched in very wide terms, and the only case of default which [1090] is suggested against the trustee is that suggested in paragraphs 10 and 20 of Mrs. Madden's affidavit of the 30th June of this year. In that affidavit the only suggestion is that the loss has occurred, "consequent on the inability or negligence of the said trustees who were responsible for the acts and defaults of their servants."

When Mr. Madden was appointed trustee, he was an officer in the Army, liable to be called away any moment from Calcutta, and, as a matter of fact, he has been obliged to be away on his military duties for a long time. He could not personally attend to the business of the hotel nor could he be expected personally to carry on the management. The settlement gives the trustee very wide powers to appoint managers and assistants. Having regard to the language of the Indemnity Clause, this vague charge of negligence cannot be regarded as fixing the trustee with default, so as to deprive him of his right to indemnity. When we pass to para. 20 of the affidavit, we find the charge there is still more unsubstantial, the default alleged is that Mr. Madden "did not exercise more strict control over the managers and servants." His absence from Calcutta on military duty would prevent him from exercising a strict control and this was anticipated. This alleged default is amply met by the terms of the Indemnity Clause. If then the case of alleged default breaks down, and I think it does, Mr. Madden is entitled to indemnity out of the trust estate, and the plaintiffs are entitled to stand in his shoes. The judgment therefore of the Court below must be affirmed and this appeal dismissed with costs.

I may add that the plaintiffs have acted with forbearance; the debt was incurred for goods supplied from October 1897 to May 1898, and the suit was not instituted until April 1901. Possibly the parties may be able to come to some arrangement, so as to avoid wrecking the hotel business, if it be worth carrying on, but into this we cannot enter.

(1) (1901) I. L. R. 28 Cal. 574.

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HARINGTON, J. I agree. By the terms of the trust deed, the trustee is not to be accountable for any involuntary loss, however incurred, and is not to be under any liability in respect of any acts done *bona fide* in the course of, or in connection with, the [1091] management of the business. Now the affidavit which has been made by the appellant does not allege that any act which was done by the trustee in connection with the management of the business was done *bona fide* nor does it state that any of the losses incurred were incurred otherwise than involuntarily so far as the trustee is concerned. On the contrary, in the 28th paragraph of the affidavit the allegation is that the trustee was defrauded and, in effect, it alleges that the loss which has been suffered was suffered involuntarily. That being so, the affidavit fails to show that the trustee is deprived of the indemnity which is given by the express terms of the deed of settlement, and that being so the appellant fails to support the case which she has maintained. I agree, therefore, that this appeal must be dismissed.

MITRA, J. I agree with the learned Chief Justice.

*Appeal dismissed.*

Attorneys for the respondents : *Sanderson & Co.*