(1864) 04 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 863 of 1861

Bhawani Charan Mitter		APPELLANT
	Vs	
D.H. Kearnes		RESPONDENT

Date of Decision: April 8, 1864

Judgement

Sir Barnes Peacock, Kt., C.J., Norman and Kemp, JJ.

The plaintiff sued for the recovery of rent due for lands, which had been occupied with and for the use of the factory. The lease under which the rent became due had expired before the date of the indenture of assignment, and the rent sued for had become due before that date. The rent was in fact a debt due on account of the factory, or, in technical language, one of the debts of the factory. The terms of the agreement, as recited in the deed, were general, to take over the dena powna account as it stood on the 30th of September 1856, and not any particular account as furnished by Macdonald. But it was contended that the true contract of the parties was that Kearnes should take over the debts, mentioned in a list or schedule, dated the 30th of September 1856, and signed by Macdonald, though this instrument is not expressly referred to in the deed, and that, as the debt in question was not entered in this list, Kearnes was not liable to pay it. The Judge says: "On looking into respondent Kearnes'' bill of sale, "dated 5th of March 1857, I find that he therein covenants to take over "the dena powna account of the factory of Barganti, 8 annas for himself "and 8 annas as attorney for Mr. Macdonald, as it stood on the 30th "of September 1856. Now, as above shown, the sum in dispute "was, "on the 30th of September 1856, a part of the dena powna account of "the above factory. But the respondent, Kearnes, pleads non-liability, "because, he says, the sum in question was not entered in the dena "account furnished to him by Macdonald, as by exhibit filed, dated the "30th of September 1856, under that person''s signature. But in the "first place, that exhibit did not form a part of the bill of sale transaction "of the 5th of March 1857. Then, secondly, although its accuracy was "denied, and its alleged executant, Macdonald, was made a party to the "suit by appellant, yet it was not attested, nor was its executant summoned by respondent

Kearnes to attest it; and lastly, supposing it "to be a bona fide paper, it only represented the dena of the factory "as Macdonald believed them to be, and not as respondent accepted these "dena, viz., in full and without reservation in the bill of sale of March 1857." It is clear that the Judge is mistaken in supposing that the bill of sale contains a covenant by Kearnes to take over the dena powna accounts. It contains a recital of an agreement between Kearnes and Macdonald on that subject, and upon that agreement the rights of the plaintiff in the present suit rest. There is nothing in the bill of sale to alter the terms of the original agreement, whatever it was, if that agreement was, in fact, an absolute undertaking on the part of Kearnes to take upon himself all the debts of the factory as they stood on the 30th of September 1856; and by the bill of sale all the property and assets of the factory were assigned to him for that purpose. We think that he must be taken to have incurred a liability to the creditors of that factory which such creditors could enforce by suit. The contract would be for the benefit of creditors, and would create a trust or obligation to them, which, we think, they could adopt and enforce. It would be very hard upon them if they could not do so. The bill of sale conveys to Kearnes Macdonald''s share of the factory, and of the debts due to the factory to which the creditors of the factory had a right to look for satisfaction of their debts. That assignment being made honestly, and upon a valuable consideration, viz., the contract of Kearnes to pay the creditors of the factory, could not in this country be impeached by the creditors. In England, an assignment of all the stock-in-trade and effects of a trade under such circumstances, might be defeated by the creditors as being an act of bankruptcy and void as against them. Here, however, unless we were to hold that the creditors could sue the assignee, the whole of the assets of the debtor to which they have a right to look for satisfaction of their debts might be removed beyond their reach by assignment, and they would be left without remedy. By the law of this country, the right of action to recover a debt is capable of being legally assigned, so as to give the assignee a remedy by action at law, and there would seem to be no sound reason why the liability of the debtor should not also be assignable. It seems that, by the common understanding and custom of the country, the purchaser of an indigo factory who takes it with the dena powna, is liable to be sued by the creditors of the concern. We, therefore, think that it may be laid down as a rule that, if a trader or, other person in this country assigns his stock-in-trade and effects to another, and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favor such contract is made, which they may enforce by suit. By so holding, we think that we are only giving effect to that which, we find from several of the cases reported amongst the decisions of the late Sudder Court, Frith and Sandes v. Chunder Monee Debea S.D.A. Rep., 1857, 1720, Syed Mahomed Bakur v. Blanchard, Spence, and others S.D.A. Rep., 1848, 186, Meares v. De Brandy S.D.A. Rep., 1852, 716, has evidently been treated as the law and usage of this country with respect to the assignment of indigo concerns, though the principles upon which such liability must

rest do not appear to have been very clearly stated or defined. We desire, however, to add that nothing which takes place between the assignor and assignee, under such circumstances, can, in any way, affect the right of the creditors as against the original debtor, unless the creditor has agreed to discharge him.

2. We think that the case must be remanded to the lower Court to try what was the real agreement between Kearnes and Macdonald with reference to the debt in question. The recital in the deed, which is only evidence of the agreement, and not itself the agreement, refers to the state of things on the 30th September 1856, and the question will be whether the list under that date, and signed by Macdonald, was a mere estimate, or an essential part of the contract as an actual schedule of the debts which, and which alone, Kearnes, as between himself and Macdonald, undertook to pay.

3. We think that the plaintiff could not compel Kearnes to pay any debt which, as between Kearnes and Macdonald, he was not bound to pay, for although it is urged that the deed was registered, and the exhibit was not registered, the registry was not for the purpose of giving notice to the creditors of the factory of the contracts which Kearnes and Macdonald had not entered into, but to prevent a subsequent registered purchaser of the factory from obtaining a priority over Kearnes, if Macdonald should sell it to another person. But this is a special appeal, and we think that the finding on record is not sufficient to show that the exhibit in question contained a list of all the debts which Kearnes contracted to pay, or that it contained any fraudulent misrepresentation on the part of Macdonald, in order to induce Kearnes to enter into the contract in general terms to take over the dena account of the factory.

4. In the above view of the law, we think that the creditor is not bound to elect between his original debtor and the assignee of the factory, but that be may look to the assignee for payment, and also have recourse to his original debtor in the same manner as the grantor of a lease may sue an assignee of the lessee for rent, and may also hold the original lessee responsible under his covenant. And as we are not fettered by any strict technical rule which might prevent the joinder of parties as co-defendants, whose liability is not strictly joint, we think that the assignee may be sued as a co-defendant with the original debtor.

5. We desire to add some observations as to several grounds on which the judgment of the Court below is rested, and as to certain cases on the subject of the liability of the assignees of indigo concerns.

6. The Judge says that, by the bill of sale, Kearnes covenanted to pay the dena of the factory in full and without reservation, and, therefore, that he was liable, notwithstanding that the rent in question was not mentioned in the list drawn up in September 1856. Now, there is no express covenant by Kearnes to pay those debts. The indenture recites the existence of such an agreement, but, under the

circumstances of the case, there is no sufficient reason for treating the recital as a covenant. To construe it as a covenant, we must alter the language, and though, in order to carry into effect the evident intention of the parties, that may sometimes be done, that rule of construction does not apply, where, as in the present case, the application of it would alter the position of the parties to the prejudice of one of them. Even if it were expressed in the language of a covenant, Kearnes would still be at liberty to obtain relief, if he could show that it was a mistake, and that the actual contract was that he was to be liable to pay only the debts in the schedule which were meant to be described, when the parties in the deed spoke of the liabilities as they stood on the 30th of September 1856.

7. Secondly, he says:-- "The respondent Kearnes was liable by the "general custom of indigo planters. Sums due on account of current "rents are not to be considered as the personal debts of the pro tempore "proprietors, but as running with the land, and, therefore, as a lien on the "factory to which the land was attached." The deed of transfer does not specially charge this rent upon the factory, or declare the factory liable for the debt, so as to bring the case within the terms of the rule stated in Frith and Sandes v. Chunder Monee Debea S.D.A. Rep., 1857, 1720. Looking to general principle, as well as to the authorities in the late Sudder Court, and particularly E.D. De Sarun v. Woma Churn Sett S.D.A. Rep., 1858, 1814, there seems no ground whatever for saying that the hack rents of a firm, the lease of which had expired before the sale of the factory, can be considered as a lien on the factory and other property belonging thereto in the hands of a purchaser. In Young v. Tiery S.D.A. Rep., 1856, 199, it was held that the purchaser of a lease is not liable for arrears of rent due by the previous owner. If the purchaser of the land out of which the rent issues is not, without express contract, liable for back rents, still less it would seem, can a purchaser of land, out of which the rent did not issue, be held so liable. Meares v. De Brandy S.D.A. Rep., 1852, 716 was a suit for arrears of salary by a servant of a factory. The Court below held that the employer was discharged by the sale of the factory to the purchasers. The decision was reversed by the Sudder Court on the ground that the claim did not attach as a lien on the factory. But whether it did so attach or not, it would be a monstrous doctrine to hold that one who has dealt with a person whom he knows or believes to be solvent, should be deprived of his remedy against the person with whom he dealt by any act of the debtor without his own consent. In Syed Mahomed Bakur v. Blanchard, Spence, and others S.D.A. Rep., 1848, 186, Mr. Tucker, in admitting the appeal, said:-- "The universal practice I believe to be, if nothing be said to the contrary, that a person purchasing an indigo factory is responsible for the debts due by the factory." In delivering judgment, the Court says:-- "It is the general practice that, if money be borrowed for a factory by a party competent to borrow, the factory is responsible for it, notwithstanding transfer by purchase, as the transfer carries with it all the liabilities of the factory."

8. We have already seen that if, as in the present case, the purchaser by the contract of sale takes over the assets of the factory, and agrees to pay the debts, the

creditors may adopt and avail themselves of the contract in their favor. It is hardly suggested that there is any local or special custom which carries the liability of the purchaser further than this. Indeed any such custom would be certainly at variance with the general law applying to the case of in-coming and out-going partners. The rule applying to such cases is stated in Lindley on Partnership, Volume I, page 314: "A person, who is admitted as a partner into an existing firm, does not, by his entry, become liable to the creditors of the firm for anything done before he became a partner." The same rule holds as to a purchaser.

9. The Court, in Syed Mahomed Bakur v. Blanchard S.D.A. Rep., 1848, 186, further say: "The factory must be considered as chargeable with the debt." Land may be charged with a debt in the hands of a purchaser where any lien or equitable mortgage on the land is credited at the time of the creation of the debt, or in cases of ryots receiving advances under Regulation VI of 1823, section 2; but ordinary debts do not imply liens on the property of the debtor. And in cases where a lien exists upon particular property, it must be enforced by suit to declare such property liable, and to obtain payment by the sale or out of the proceeds of it, not by an ordinary suit for debt against the person who has taken the land subject to the charge. If it were otherwise, the whole property of such person, and not merely the property charged with the debt, would be liable. In Motee Lall Seal v. Mudden Thakoor S.D.A. Rep., 1856, 10, the substantial point was whether, according to the conditions of a bill of sale from the Sheriff, the plaintiff who purchased the interest of one Oman in a factory at the Sheriff''s sale, took it subject to the liabilities which attached to it in Oman''s hands. The question whether the plaintiff could maintain the suit was not raised. The case is very shortly reported, and not satisfactorily; and, so far as it states the debt not to be merely a personal one against Oman, appears not consistent with the latter case, in the Sudder Court, of E.D. De Sarun v. Woma Churn Sett S.D.A. Rep., 1858, 1814.
Steer, J.

10. I never entertained any doubt that, according to the well-understood meaning of the words dena powna, and the everyday practice of owners of indigo concerns, the purchaser of a factory who takes upon himself the dena powna of it, or in other words, the assets and liabilities, and publishes it to all the world in the most public and effectual way, viz., by registration of the deed of purchase, and the terms of it, in the office of the Registrar of Deeds, was liable to the creditors for debts contracted by the factory. But still creditors are not restricted in their action against the purchaser individually, but they may sue both him and the late owner, and the Judge, who so held in the Court below, took, therefore, a right view of the matter.

11. The Chief Justice, Mr. Justice Norman, and Mr. Justice Kemp, while upholding this view of the Judge, still considered that the case should be remanded that the Judge may inquire for what particular debts the purchaser, Mr. Kearnes, agreed to hold himself liable.

12. I cannot assent to an order of remand on these terms. In the deed of sale, all the debts of the factory (that is, of course, all debts for which the factory could be legally held liable) were, without any specification, all taken over, the whole dena powna, whatever they were at the time. That deed alone was registered, but some days afterwards, as it is alleged, but not proved, Macdonald, the old proprietor, and Kearnes the purchaser, privately drew up a schedule purporting to show the debts due by the factory, in which schedule the rents due to the plaintiff in this case do not appear. That schedule was not registered, nor was anything done to give it the least publicity, or to apprize the creditors of the factory that by this private arrangement, which was so greatly in modification of the published deed of sale, the whole dena powna outstanding at the date of sale was not transferred to the purchaser. To hold that there should be an inquiry as to what particular debts Kearnes agreed to take over, which inquiry may possibly end in its being found that the debt due to the plaintiff was not one of the debts transferred to Kearnes, may, and probably will, be productive of the greatest hardship to the plaintiff; for Macdonald having sold the factory with its liabilities generally, may be in Europe, or he may be dead leaving no assets, and there may be no way of recovering the debts from him. Thus Kearnes may possibly evade a debt which, by his own public act, he acknowledged himself to be liable for, and which by the terms of his registered contract he is liable for, by a device which any one may hereafter adopt. He and Macdonald say to the public, we have agreed that the factory changes hands, and we have agreed that Kearnes recovers all the debts due to the factory, and that he pays the factory debts; in private they make another agreement, the effect of which may be that Kearnes is liable for no debt whatever, while Macdonald, by hood-winking the creditors, has succeeded in getting out of the country, and out of reach of any legal proceedings.

13. By the terms of their published deed, Kearnes is liable for all the debts of the factory generally, and as from him alone there is any hope of recovering anything, I cannot agree to a remand which may possibly end in Mr. Kearnes being able to show that, whereas he in the most public manner held out to all the creditors that he was the party to look to, he had, by another and a private arrangement between himself and Macdonald, of which the creditors had no knowledge, settled that he was to be liable, not for all, but only for some of the debts.

14. I would, therefore, with every deference to the opinion held by the Chief Justice, and his other two learned colleagues, uphold the judgment of the lower Court, and dismiss the appeal with costs,

Seton-Karr, J.

15. This case involves a very important principle affecting the interest of all persons in the interior of the country who have to do with indigo factories and their lands, whether such persons be Europeans or Natives; whether they be managers, superintendents, or owners of factories on the one hand, or Natives who have dealings with the factories on the other, on account of lands, rents, &c., &c. I have

thought it necessary to go into all the decisions of the late Sudder Court in this important matter, and they are as follows: Syed Mahomed Bakur v. Blanchard, Spence, and others S.D.A. Rep., 1848, 186; Meares v. De Brandy S.D.A. Rep., 1852, 715; Mottea Lall Seal v. Muddun Thakoor S.D.A. Rep., 1856, 10; Young v. Tiery Ibid, 199; Frith and Sandes v. Chunder Moonee Debea S.D.A. Rep., 1857, 1720; E.D. De Sarun v. Woma Churn Sett S.D.A. Rep., 1858, 1814; Latafut Hossein v. R. Savi S.D.A. Rep., 1860, 55.

16. In the first case, three Judges of great experience in the customs under which land and factories are held and transferred in the interior, were decidedly of opinion that "it is the general practice that, if money "be borrowed for a factory by a party competent to borrow, the factory "is responsible for it, notwithstanding transfer by purchase, as the transfer carries with it all the liabilities of the factory;" and "with reference to the usual practice in such cases, and to what the justice of the "case demanded," the Court proceeded to charge the factory generally for a debt contracted by a partner who had an 8-anna share therein, but contracted for the general good of the whole factory.

17. In the next case, Meares v. De Brandy S.D.A. Rep., 1852, 715, the Court held that the Judge below had wrongly made the new proprietors liable for the salary of an assistant employed in the factory, on the supposition of a general practice applicable to such case, whereof there was no evidence on the record; and the Court relieved the new proprietors from the claim, as one which would not lie, without some reference to any contract which might have been made between the vendor and vendee, regarding the payment of outstanding claims and debts. In the case now before us, I must remark that there is direct evidence of what was the contract as to dena powna between the old and the new purchasers. One of the Judges, who admitted the special appeal in the above case just reviewed, remarked pertinently on the hardship to which petty factory servants would be subjected, if they were not considered to have a lien for wages on the factory for and in which they worked.

18. In the next case, Mudden Thakoor v. Motee Lall Seal S.D.A. Rep., 1856, 10, two Judges, Mr. J. Torreus and Mr. C. Trevor, held that, as the bill of sale was express as to the liability of the purchaser for the debts or dena, the new owner was liable for hack rents; and the third Judge, Mr. Sconce, concurring in opinion with his colleagues, further stated that whatever private arrangements had been made by the debtor appealing against liability for rents, the interest of the plaintiff, zamindar, could not be sunk thereby, and that the transfer of the land carried with it the liability for rent.

19. In the next case, young v. Tiery Ibid, 199, the Court released a lessee from the liability for rents accruing previous to his purchase and entry, but did so expressly on the ground that it was not said "that he was "not bound by the terms of his purchase to liquidate past balances, or "that the assignment of the lease to him had, in any way, lessened the "plaintiff"s power of recovering the old arrear from the first

tenants." In this last case, it seems to me pretty clear that no plea of a purchase with express liability for the dena powna had ever been raised. The point was that a lessee generally could not be made liable, unless so stipulated.

20. The next case is a well known one, Frith and Sandes v. Chunder Monee Debea S.D.A. Rep., 1857, 1720. The case turned on a bond for money borrowed for the expenses of the factory, and the Court ruled that the deed in question was "drawn up in the terms of an ordinary bond, without "any reference whatever to the factory for which allowedly the sum "in litigation was borrowed; "and with regard to a plea of general practice, whereby the liabilities of a factory attached, as it was urged, to the factory, the Court was "not satisfied of the existence" of any such general custom, but added that such a general custom, if established, might govern the decisions of the Court, while the use of the words dena powna in documents drawn up in the Bengali language "would render argument superfluous," as under these terms are clearly included both the liabilities of the vendor and also the debts due to him, while in English conveyances, the Court would have to look to the express terms used. On the whole, the Court, referring to two of the cases cited above, viz., those of 1848 and 1852, ruled that the correct principle was that the liability of a new purchaser for the personal debts of a vendor depended, first, on the express contract between them; and if there were no written contract, then on the general or particular custom, or on other circumstances of the case. The conclusion drawn by the Court in this case, while releasing the new purchasers, was that parties lending money to a factory should take care to have the loan made a lien on the factory by express terms, and if they did not, that they could only have their remedy against the original borrowers.

21. In the next case, E.D. De Sarun v. Woma Churn Sett S.D.A. Rep., 1858, 1814, the Court, in conformity with the decision just reviewed, said that the presumption was not that the new purchaser took the factory with its liabilities, but that the parties claiming rents were bound to prove, by special engagement or otherwise, that the debts were not personal, and that the factory was liable. In this view the Court held plaintiffs entitled to rents from the new owners only from the date of the purchase. But, in this case, the bill of sale, which might have shown the real state of the case, was repeatedly called for, but had never been produced in the first Court.

22. The last case quoted, Latafut Hossein v. R. Savi S.D.A. Rep., 1860, 55, merely turns on a question of costs, and throws but little light on the present question.

23. From the above review, I draw the following conclusions. The existence of a well-understood custom, whereby the new purchaser, on taking the dena powna, is empowered to collect all outstanding balances, and is liable for all bona fide debts incurred for and on account of the factory, has been openly recognized in some decisions of the Sudder Court by Judges of great experience. The existence of such a custom has never been positively denied by other Judges, even when in a particular case, from the facts before them, they have refused to hold the new purchasers

liable. The utmost that these latter Judges have done is to rule that there was no evidence of such a custom in the case before them. In the case now before our Full Bench, the principle was directly contended for by the plaintiff himself as one recognized by all indigo concerns, and the Judge of the Court below has acted on and recognized the same principle. Its existence and a general and wide-spread belief in its existence were admitted by Mr. Allan, who, however, argued the case for the non-liability of the new purchaser before us on special grounds.

24. From the above it follows, that I concur in a great deal of what has been laid down by the Chief Justice and my other colleagues, Mr. Justice Norman and Mr. Justice Kemp, in their judgment. The ruling that the purchaser of a factory in this country, who takes it with the dena powna, is liable to be sued by the creditors of the concern, seems to me a sound ruling, and one in accordance with several earlier decisions of the late Sudder Court, as well as in conformity with the common understanding and custom of the country, and the necessities and contingencies under which trade must be carried on, and concerns must change hands, in the interior of this country, where the sudden departure of owners and managers is, for obvious reasons, inevitable. In the case now before us, the terms dena powna were used, and I have no doubt, used advisedly and with a full knowledge of their meaning and interpretation by the English firm in Calcutta which drew up the transfer from Macdonald to Kearnes, of March 1857, in the phraseology common to English legal documents of that kind.

25. I also concur in that part of the judgment which rules that the creditor is not bound to elect between its original debtor (Macdonald) and the assignee of the factory (Kearnes), but that he may look to the assignee and the original debtor, either or both, as he thinks fit. For though, under the custom of the country so well understood by European gentlemen and natives of all classes, I believe that the creditor will ordinarily consider the purchaser to stand exactly in the shoes of the original proprietor or assignor, and will look to that purchaser to sue and be sued, and though I hold that factories do change hands constantly on this understanding, the new purchasers discharging the liabilities, and collecting the dues, without having recourse to law suits, still there may be cases where he ought not to lose his remedy against the original debtor, but should be allowed to proceed against him for the recovery of his claim.

26. But I am unable to concur in that part of the judgment which would remand the case for the reasons given. I think that the reasons given by the Judge for holding Kearnes liable, as well as Macdonald, in this instance, are full and sufficient.

27. The Judge finds as a fact, and on full and satisfactory evidence, that the sum claimed as rent was due for lands taken for the use of, and attached to, the factory, and was not denied by Kearnes to be due on the date from which Kearnes took over the concern, i.e., on the 30th of September 1856, or the last day of the indigo year.

28. He also finds that the alleged separate paper, the existence of which was only known to Kearnes and Macdonald, was not proved, as it ought to and might have been; and it seems to me a hard doctrine when applied to these cases, that creditors are to be admitted to sue assignees or purchasers of such concerns who take them roundly with their dena powna or assets and liabilities, and yet are liable to have their claims defeated by separate and secret agreements, of which they could have no possible knowledge whatever from the terms of the conveyance between the principals. It appears to me on this, that the only notice which the creditors could have of the transfer was the registered conveyance, and that this deed was notice to all concerned of the person to whom they were in future to look as capable of suing and being sued. Of course, in being desirous of upholding the decision of the Judge on this point, I did not intend to rule that all debts must, in all cases, be discharged by the new purchaser. Each debt must be judged of by the circumstances under which it was incurred. There may be debts which, on investigation, may not be found to attach to the factory, but to be personal liabilities of the late proprietor. In this case, however, the Judge finds, on good evidence, that the debt runs with and is admitted to run with the land, and that the new proprietor accepted the transfer by a public deed without any reservation. To give Macdonald and Kearnes an opportunity of now proving the nature of any separate and secret agreement between them, would be, as I read the transaction, to imperil the just claims of the creditors. The separate schedule ought to have been filed and registered with the bill of sale of March 1857. If Kearnes should now establish the bona fides of his separate agreement with Macdonald, and should show that this special debt was, by mutual agreement, excluded from the general liability, to what remedy would the creditor be left? Macdonald, as Mr. Justice Campbell, in referring the case, particularly observes in his reasoning on this part of the subject, with which I wholly concur, "may he at the other end of the earth." For the above reasons, while entirely concurring in the general opinion, which the judgment delivered by the Chief Justice clearly set forth, I am compelled to dissent from the order of remand for further evidence. I would uphold the decision of the Judge, including both Macdonald and Kearnes in the decree, and would dismiss this appeal with costs.