(1871) 08 CAL CK 0003

Calcutta High Court

Case No: None

In Re: Shibchandra Mullick — APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 21, 1871

Judgement

Phear, J.

The first question which I have to determine in this case is, whether or not the bills of lading which the bank holds by way of security represent property belonging solely to the bankrupt; for if they do so, if the property covered by them belongs solely to the bankrupt, it is a well established rule that the creditor must give them up to the Official Assignee, or make the most of them, before he can prove against the bankrupt"s estate. I am not yet quite free from difficulty with regard to the facts intended to be disclosed in the affidavits; but I gather from them that Charles Nephew and Co. were consignees of the goods or indorses of the bills of lading, and themselves indorsed these bills of lading to the bank; and besides indicia of ownership of this sort, I think enough does appear in the affidavits, to show that there were relations between the insolvent and Charles Nephew and Co. in respect of these goods, which would prevent me from saying that the property covered by the bills of lading was solely the property of the insolvent. At any rate, the matter is not put beyond doubt, and for the purpose of this application, I think I must infer that Charles Nephew and Co. were to some extent interested in the goods, as well as the insolvent. That being so, the bank was not obliged to give up the security in question before proving its claim. In other words the bank was entitled both to retain the security and to prove for the whole amount of the debt secured. This brings me to the second question. What is this debt? Is it the full sum for which the bills of exchange were originally drawn, or is it that sum reduced by such an amount as has in fact been realized from the security?

2. Mr. Marindin argued that the sum for which the bank was entitled to prove, was the full amount of the acceptances without deduction of the price realized by the sale of the goods. He argued that, inasmuch as, if nothing had been realized at all under the bills of lading, the creditor would be entitled to prove for the whole amount of the acceptances,

the fact that he had realized ought not to put him in any worse position. Mr. Marindin also argued that whatever was realized by sale of the goods was in effect pro tanto payment by the drawer of the bills of exchange, and that this payment did not discharge the acceptor of the bills. I think both these arguments are disposed of by the cases of Ex parte Tayler, In re Houghton I DeGex & Jones, 302; S.C., 3 Jur. N.S. 53, and Cook v. Lister 9 Jar. N.S., 823. In the case of Ex parte Tayler I DeGex & Jones, 302; S.C., 3 Jur. N.S. 53, Lord Justice Turner said that it was not necessary for him to express an opinion as to whether, under the circumstances of that case, the appellant could recover the full amount of the bill at law, because "the argument for the appellants, if followed to its legitimate consequences, would amount to this, that proof must be made for what was due from the bankrupt, and not for what was due to the creditors proving; but if that had been the practice and rule of the Court of Bankruptcy there would have been no occasion for the statutory provisions as to the rights of sureties. I therefore cannot consent to disturb the general and settled rule of bankruptcy on any of the grounds which have been urged on this occasion." The settled rule of bankruptcy to which Lord Justice Turner refers is that the creditor must prove for the amount due to him, and not for the amount due from the bankrupt. The Court of Bankruptcy does not understand his proving in his own name for one sum, for a part of it on his own account, and for the remainder as quasi trustee for some one else. If there is a person other than the proving creditor to whom a portion of the money due from the bank ought to go, proof for that portion can and ought to be made in that person"s own name, or specifically on his behalf. Then the case of Cook v. Lister 9 Jur. N.S., 823, as I think, entirely displaces the argument which Mr. Marindin raised on the case of Jones v. Broadhurst 9 C.B., 173. Erle, C.J., seems to have gone so far as to say of Jones v. Broadhurst 9 C.B., 173, that more had been laid down in that case than was relevant to the decision given. He entirely repudiates the doctrine that the holder of a bill of exchange is under all circumstances entitled in a Court of Law to recover the whole amount expressed in the bill, notwithstanding that he had received payment, or part-payment from the drawer. With regard to the particular case before him the Chief Justice said: "It seems to me, however, that it would be monstrous and irrational that the law should allow the plaintiffs to interfere between the defendant and Cheesborough and Son, and between the defendant and Yewdall and Son, and that the plaintiffs should recover from the defendant money which they are to hold as trustees for those parties." And he further said, "considering that Courts of Justice are instituted for the purpose of enabling a creditor to recover his debt, and not a great deal more than his debt, that case (Jones v. Broadhurst) 9 C.B., 173 went a very long way. It does not warrant the pro-position for which it is now cited,--namely, that in every case except that of a strict accommodation bill, the holder is entitled to sue the acceptor for the whole amount due on the bill, notwithstanding that he has received payment or part-payment from the drawer." And Mr. Justice Willes in the same case expressed the like views with equal emphasis. I think therefore that these cases, taken together with those of In re Barned"s Banking Company, Coupland"s Claim 5 L.R., Ch. App., 167, and Leech"s Claim 6 Id., 388, make it very clear that the Lank is only entitled to prove for so much as is due to themselves on the bills of exchange after deducting the amount realized by the sale of

the iron. The affidavits leave it uncertain whether this amount was realized after or before the insolvency, but I think that is here immaterial. No doubt, as was held by Lord Justice Page Wood in Kellock"s case 3 L.R., Ch. App., 769, the Court is only concerned for the moment with the amount which was due at the time of the making of the claim upon which the Court is adjudicating. But in our insolvency proceedings the schedule is from time to time amended after it is filed, according to change of circumstances, so that it may correctly represent the debts at the time when the Official Assignee declares a dividend.