

(1868) 06 CAL CK 0010

Calcutta High Court

Case No: None

Sterling

APPELLANT

Vs

Cochrane

RESPONDENT

Date of Decision: June 17, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

It appears to me that the decree in this case dismissing the suit must be set aside. The cause was set down for the settlement of issues, and it was then contended on the part of the defendant that as the plaint did not disclose any cause of action, it was unnecessary to try any issues. The learned Judge adopted that view, and instead of settling the issues to be tried determined upon the facts appearing upon the plaint that the plaintiffs had no cause of action, and that the suit ought to be dismissed. The plaintiffs allege that they were the owners of certain goods, and that they sold the same to Messrs. Balfour and Co., of Calcutta, and Messrs. Small and Co., of London; and that they drew for the price of the goods upon Small and Co., who accepted their drafts, and that the goods were delivered to Messrs. Balfour and Co., in Calcutta. They then allege that it was distinctly agreed between the plaintiffs and the said Messrs. Small and Co. and Messrs. Balfour and Co., that the said acceptances should be met and paid out of the proceeds of the sale of the said goods which were thereupon specially appropriated to the payment of the bills. The plaintiffs do not profess to set out the contract in the very words of it (whether it was in writing or merely by words of mouth); and I, therefore, understand the allegation to mean that the proceeds of the goods were by the terms of the contract specially appropriated to the payment of the bills; and that the allegation was not meant (as contended in argument) to be a conclusion or inference of law to be drawn from the facts alleged.

2. I see nothing illegal in such a contract, and nothing to prevent it, if it was made from vesting in the plaintiffs an equitable right to have those proceeds applied to the payment of the bills. The facts of this case are not precisely the same as those in *Inman and Clare* (Johnson, 769), but I am of opinion that the principles laid down in that case apply to the

present, and show that the contract created an equitable charge upon the proceeds.

3. Up to this point I have been speaking only of the rights of the plaintiffs with regard to the proceeds, if Messrs. Balfour and Co. had not become insolvent. It is necessary to consider whether insolvency has affected the case; whether the plaintiffs notwithstanding the insolvency have a right to have those proceeds applied in payment of the bills; and whether they are entitled to maintain this suit in the form in which they have framed it, and against the parties who have been made defendants.

4. Two of the members of the firm of Messrs. Balfour and Co., who were out here, and who had the goods in their possession, took the benefit of the Insolvent Act in Calcutta, and their petition was dated the 7th February 1867. The plaintiffs allege that, previously to their presenting that petition, they had delivered twelve bales of the goods to Messrs. Jardine, Skinner and Co., and had endorsed and made over to the same firm the remainder of the goods. They say that this was done without consideration, and that Messrs. Jardine, Skinner and Co., had notice of the insolvent state of Messrs. Balfour and Co., and that they, the plaintiffs, are informed and believe that the proceeds arising from the sale of the goods have been handed over by Jardine, Skinner and Co. to John Cochrane, the Official Assignee, under the insolvency, and that he intends to apply the same in payment of the general body of creditors.

5. Now, there is no doubt, that, according to that statement, the money which forms the proceeds of the goods is here. Mr. Cochrane resides within the jurisdiction of this Court; and, therefore, if the plaintiffs have a right to have the proceeds applied to the payment of the bills, their cause of action as against Mr. Cochrane to compel him so to apply them arose within the jurisdiction of this Court, and is maintainable against Mr. Cochrane, who resides within that jurisdiction.

6. But the plaintiffs have also made the members of the firm of Small and Co., who do not reside in Calcutta, defendants in the suit; and they ask to have the rights of the parties to the suit declared. It is contended that they cannot do this as against the firm of Small and Co., inasmuch as they are not resident within the jurisdiction of this Court, and the Court has made no order that the cause of action against those gentlemen should be tried here. If the plaintiffs have a charge upon the proceeds, notwithstanding the insolvency of Messrs. Balfour and Co., one of the rights of the plaintiffs is to have it declared that the funds in the hands of Mr. Cochrane are liable to be applied in taking up the bills. That was the decree made in *Inman and Clare* (Johnson, 769), to which I have referred. They also ask that Mr. Cochrane should render an account, and should be directed to pay to them what upon the taking of that account should appear to be due to them. There is no allegation in the plaint that the plaintiffs have parted with are not the holders of the bills; and if not, they are entitled to have it declared that the money is liable to take up the bills, and that Mr. Cochrane should apply them accordingly; and even if they have parted with the bills, they may still have a right to have the proceeds applied to take them up. It is not because they may have asked too much that their suit should be dismissed altogether. It,

therefore, appears to me that the suit ought to go on for the purpose of trying what the plaintiffs' rights are as against Mr. Cochrane with regard to the monies in his hands. The plaintiffs also ask for an injunction against Mr. Cochrane, and they may be entitled to an injunction to restrain him from paying over the monies to the general body of creditors of Balfour and Co., and they have a right to have the suit tried with reference to their claim for injunction, when they ask that the rights of the parties may be declared. I do not understand them to ask for relief against Messrs. Small and Co., or that the rights should be declared as between Mr. Cochrane and Messrs. Small and Co., with regard to any surplus, if any, which may remain after the plaintiffs' rights have been satisfied. But even if they do, that would not prevent their suit from going on as against Mr. Cochrane in respect of the rights which the plaintiffs have against him. Messrs. Small and Co. are made defendants, in order that they may have an opportunity, if they please of coming in, and showing that by the terms of the arrangement the plaintiffs were not entitled to have the proceeds, which are in the hands of Mr. Cochrane within the jurisdiction of this Court, applied in satisfaction of the bills. The defendants who reside out of the jurisdiction may appear, if they think fit, and may be heard.

7. The learned Judge has stated that the plaintiffs have not asserted any right to stop the goods in transit. But that I apprehend is no answer to his claim, if he has the right to have the proceeds of these goods which have reached their destination and been sold, and of which the proceeds are now in the hands of Mr. Cochrane, applied in discharge of the bills. The learned Judge does not, as I understand his judgment, expressly decide that the plaintiffs have not the right to have the money so applied by virtue of the contract, although he seems to think that the non-application of the proceeds in that manner would merely amount to a breach of contract on the part of Messrs. Balfour and Co.; and that it did not confer on the plaintiff such an equitable interest in the proceeds as would entitle them to have them so specifically applied. He says: "I will" suppose, for the purpose of this case, that the allegation that the sale proceeds "were thereupon specially appropriated thereto may be taken to mean that "there was by the contract such an appropriation of the future sale proceeds, "that if after selling the goods and receiving payment for the same, Balfour and Co. failed to place the money in the hands of Small and Co., to enable him to take-up the acceptances, it would have amounted to a breach of trust on their part. "However that may have been as between Balfour and Co. and Small and Co., "the joint owners of the goods, I entertain very great doubts whether as between Balfour and Co. and the plaintiffs such failure to apply the proceeds would" have been any thing more than a breach of contract. I need not, however, "discuss this point, because it has not been argued before me."

8. The plaintiffs' case is that these bills, which had been accepted by Small and Co., were, by virtue of a contract with them, to be paid out of the proceeds of the goods; and that they did not look merely to the personal responsibility of the acceptors of the bills, but also to the security of the proceeds of the goods which they sold upon the faith of having the proceeds applied in discharge of the bills. The learned Judge after adverting to this

part of the case, finally as I understand, disposed of the case upon the ground that at the time of their petition Messrs. Balfour and Co. had these goods in their order and disposition, as reputed owners, with the consent and permission of the plaintiffs, or that they had taken upon themselves the sale, alteration, or disposition thereof as the owners.

9. It is clear that, according to the plaintiffs' statement, Messrs. Balfour and Co. had, before the petition to the Insolvent Court, transferred to Messrs. Jardine, Skinner and Co., a portion of the goods and the bills of lading of the residue. The goods were not the plaintiffs' goods. They had been sold upon the terms that the sale proceeds should be applied in discharge of the bills given in payment of the purchase-money. Messrs. Small and Co., the acceptors, have stopped payment. The plaintiffs do not claim that the goods were their goods, and, therefore, as to the goods themselves, the question of order and disposition does not arise. The plaintiffs' claim is merely to a charge on the proceeds of the goods when sold, for payment of the bills; and the question is whether those proceeds were in the order and disposition of Balfour and Co. at the time they presented their petition. The learned Judge seems to have thought that because the plaintiffs alleged in their plaint that Balfour and Co. voluntarily transferred the goods to Jardine, Skinner and Co., such transfer was fraudulent and void under the 24th Section of the Insolvent Act; and that being void, the goods were in the order and disposition of the insolvents at the time of their insolvency, and the plaintiffs thereby lost their equitable charge upon the proceeds as against the insolvents. It appears to me that the effect of the 24th Section cannot be brought to bear upon the 23rd Section, with reference to the question of reputed ownership. Suppose Balfour and Co., at the time when they handed over the goods to Jardine, Skinner and Co., informed them of the real state of facts, or that the plaintiffs had stipulated that the proceeds should be applied in discharge of the bills, would the goods or the proceeds have then been in the order and disposition of the insolvents at the time of their petitioning? Or would Jardine, Skinner and Co. have been justified under these circumstances in paying the proceeds to Balfour and Co., or to their assignee. I put this merely to show that, upon the face of the plaintiffs' own plaint, they do not, by the allegation that the goods were handed over to Jardine, Skinner and Co., admit that the goods or the proceeds were in the order and disposition of Balfour and Co. at the time when they presented their petition. It appears to me, therefore, the plaintiffs' suit ought not to be dismissed upon the ground that, upon their own showing, they had lost the right to have the proceeds of the goods applied for the purpose of taking up the bills, by reason of their having admitted that the goods were in the order and disposition of Balfour and Co. The plaintiffs have a right to have it tried whether they have an equitable charge upon the proceeds for the purpose of paying the bills, and the defendants have a right to have it tried whether the goods or the proceeds were in the order and disposition of Messrs. Balfour and Co. It is unnecessary for us to determine those questions now; and, in fact, we have not the means of doing so until the facts of the case have been investigated. All that we can do is to reverse the decree, and to remand the case for the purpose of having the proper issues settled, and the case tried upon the merits.

10. All the costs arising out of this appeal must be paid to the plaintiffs, appellants, according to Scale No. 2. The costs of the suit, in the first Court, must be refunded to plaintiffs, if, as alleged, they have paid them.

Markby, J.

I only wish to add a few words. It seems to me on the first ground of appeal that the plaint does sufficiently disclose a cause of action, although it does not state all the facts. On the second ground, as to the jurisdiction of the Court, I concur in the opinion of the Chief Justice. On the third ground, as to whether the plaintiffs are entitled to have the proceeds of the sale of the goods applied to the payment of the bills, or whether the goods were in the order and disposition of Balfour and Co. at the time they presented their petition of insolvency, these are questions of fact to be tried in the cause, and on them I reserve my judgment.