(1868) 06 CAL CK 0014

Calcutta High Court

Case No: None

In Re: A. Stewart, an Attorney and Proctor of the High Court — APPELLANT

Vs

RESPONDENT

Date of Decision: June 2, 1868

Judgement

Lord Page Wood, J.

The appellant, in this case, seeks to reverse an order of the High Court of Judicature in Bengal, made on the 6th May 1867, whereby a rule nisi of the 18th April 1867, calling upon the appellant to show cause why his name should not be struck off the Roll of Attorneys and Proctors of the Court, was made absolute; and it was ordered hat his name should be struck off accordingly. The charge alleged against him by the rule nisi was that of misbehaviour in inserting in a deed a fake recital, as to the consideration, knowing the same to be false, and in attesting the execution of the deed with such false recital, and also in signing his name as a witness to the receipt of the consideration-money therein mentioned, knowing that no consideration had passed, or was intended to pass. The deed in question is dated the 16th February 1863, and purports to be an absolute conveyance by W.M. Stewart to J.A. Stewart, of a 4-anna or quarter share in an indigo factory, called Begum Serai, the property of W.M. Stewart, in consideration of 32,000 rupees. A receipt for that sum is endorsed on the deed, and by W.M. Stewart, and the stamp affixed, and the covenants for title and further assurance are the same as would be found if the transaction had been that which the deed represents. Its execution and the receipt of the money are both attested by the appellant. It is admitted by the appellant that the real transaction was of a different character and the circumstances of the case are stated by him and by the parties to the deed, to have been as follows. The parties to the deed and the appellant are brothers. W.M. Stewart was the owner of the factory, and is alleged to have been in good credit at the time of the transaction. His brother, the appellant was an attorney in partnership with Mr. Hatch, a share in that partnership had been purchased for him by his elder brother, W.M. Stewart. James had for some time

assisted William in managing the factory; he had. in 1860 been admitted an attorney, and about the time of the deed being executed, had been offered a partnership in the firm of Messrs. Barrow and Sen, attorneys at Calcutta. William was desirous of still retaining his brother''s services, and induced him to rive up the offer of Messrs. Barrow and Sen, by proposing to make over to him one-quarter of the Begum Serai Factory. The assent of James to William''s proposal formed the real consideration for the assignment made to him on the 16th February, no money-consideration whatever was paid by James.

2. Mr. Barrow, by evidence, confirms the statement of this offer of partnership having been made by him to James in July 1862, and of James declining it on the ground of "favorable arrangements having been made with his brother."

3. It does not appear that, at the date of the deed, there was any charge on the factory beyond a deposit of title deeds with Messrs. Thomas and Co., the agent to the factory, for the current outlay, and a balance was, in fact, then due to the factory on this account. The deed was registered immediately upon its execution, and within a day or two afterwards, William borrowed of Mr. Hatch, the farther sum of 14,000 rupees, of which 6,000 rupees seem to have formed the consideration for the appellant''s share in the partnership, bought for him by William, and a mortgage was executed, the draft of which is produced, by which William mortgaged his 12-anna or three, quarter shares only in the factory. The deed of conveyance of the 16th of February did not take any notice of the equitable mortgage to Thomas and Co., the mortgage to Hatch recites its existence.

4. After these transactions, William purchased another considerable Factory, and took shares in an Indigo Company, whither he went to reside; but James continued to superintend the Begum Serai factory. It is not shown that William was embarrassed till after the failure of the Agra Bank in June 1866, Thomas and Son also failed about that time, and towards the end of the same year, William presented his petition in the Insolvent Debtors'' Court. James, in the meantime, had continued to manage the factory, and to draw a salary of 300 rupees a month, but he drew no sum as profits, nor was any division of profits made, till after the insolvency of William, when James consigned his one-quarter share of produce to separate agents.

5. On the 25th of March 1867, the Official Assignee, under the insolvency of William, summoned the appellant, and James and Mr. Hatch, to be examined before the Insolvent Court as to the insolvent''s estate; and on the 13th of April 1867, they and the insolvent were examined before Mr. Justice Phear, and specially interrogated as to the above transaction.

6. On the 18th April 1867, the appellant was served with the rule nisi of the High Court, upon which the order now appealed from is based, which was obtained on the motion of the Advocate General. The rule purported to be drawn up upon

reading the affidavit of Mr. Davis, chief clerk of the Insolvent Debtors'' Court, and two exhibits, marked A. and B., and the examination of W.M. Stewart, Mr. Hatch, and the appellant, and the deed of conveyance of the 16th January 1863.

7. Mr. Davis''s affidavit merely Verified the proceedings before the Insolvent Debtors'' Court, and the Exhibits A. and B. A. appears to have been the deed of conveyance, B. the mortgage to Mr. Hatch.

8. On this rule having been served, the appellant appeared and filed affidavits in opposition to making the rule absolute.

9. The affidavits were:--1st, an affidavit by Mr. Macleod, an owner of factories in the Tirhoot district, who deposed to his having known for some years past that James was the owner of a quarter share in the factory, and to his having always believed that it had been given to him by his brother, William; 2nd, an affidavit of Mr. Barrow, verifying his offer of a share in his business to J. Stewart, who had assigned as a reason for declining it that he had an offer of a favorable arrangement with his brother; 3, 4 and 5, affidavits of the three brothers. Certain accounts of Thomas and Sons were produced, showing a balance of 24,544 rupees, 6 annas, 2 pie, due to the factory in February 1863, over and above a sum exceeding 2,000 rupees paid to W.M. Stewart''s credit at his bankers. An exhibit B. was also produced, being the draft of the mortgage to Hatch, originally prepared as a mortgage by the two brothers, William and James, of the whole factory, and afterwards altered to a mortgage of the 12-anna, or three-quarter, share of William only. The'' appellant states in his affidavit that the form in which the deed was drawn was suggested by W.M. Stewart, who alleged as his sole motive for desiring it to be drawn as a sale for a money-consideration, his wish to put a value on the factory, the same being then a new one. The appellant states, that he was not aware of any other object; that he believed, and believes, it to be a fair estimate; that his brother William was not indebted beyond 20,000 rupees, and had, at the date of the deed, property of a value far above the amount of his debts as to which he states some particulars. He states the immediate registering of the deed, the mortgage to Hatch, and says that, in preparing and attesting the execution of the deed, and attesting the endorsed receipt, he had no fraudulent or dishonest intention of any kind whatever; and that nothing, either directly or indirectly, passed between hint and his. brother William to lead him to suppose that William contemplated, and he does not believe that he contemplated, any fraud directly or indirectly. James, in his affidavit, says, that he was not aware of the form of the deed till after its execution. In his examination before the Insolvent Court, he had said he wrote a letter about it, and that he thought it would have been better if the consideration had appeared; that letter cannot be found. In his affidavit, he. denies all intention of fraud, and says, he is bond fide owner of the property, William also, in his affidavit, denies all fraud, and makes a statement as to his estate, which, if true, would show him, at the date of the deed, to have possessed considerable property, and both agree in stating that

the real consideration to have been the consent of James to give up the offer of Mr. Barrow, and to attend to the management of the factory. No evidence, whatever, was given impugning the statements contained in these affidavits. No evidence has been given of any person having been defrauded by any of the brothers, nor of any improper use of the deed having been attempted. Nor does the Assignee in Insolvency make any complaint, or impugn the actual ownership of the property, to the extent of one-quarter, by James, The deed was registered. Macleod speaks of the notoriety of the claim, at least, of ownership, by James and Hatch took a mortgage of three-fourths on the footing of James being'' the owner of the other one-fourth, within a day or two of the execution of the deed of conveyance. Under these circumstances, the Chief Justice and Mr. Justice Phear have thought that the appellant ought to be struck off the List of Attorneys and Proctors of the Court. The Chief Justice, in the reasons which he assigned for this conclusion, states, "that the insertion of the recital and statement admitted to be false, and known by all parties to be false, and which might be used for the purpose of misleading others, was a very grave offence on the part of the attorney. The offence is greatly aggravated if it is proved that the recital was inserted dishonestly, or in order that it might be used for a fraudulent or dishonest purpose, if necessity should ever arise." And at a later part of his reasons, the Chief Justice says, "I do not believe that Mr. A. Stewart acted honestly or innocently in inserting in the deed the false statements which are contained in it, and in attesting the execution of the deed, when he knew the statements were false, together with the false receipt for the 32,000 rupee." The Chief Justice cites also Section 423 of the Indian Penal Code, which punishes with fine or imprisonment, or both, any one "who dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or change property, and which contains any false statements relating to the consideration for snob transfer or change, or relating to the person for whose use it is really intended to operate."

10. Mr. Justice Phear in his reasons states, "that the intentional statement of a falsehood in a solemn deed taken by itself without explanation must be considered as a badge of fraud;" adding, "that it is of course possible to conceive cases in which the act should be unconnected with any fraudulent intention, but that if the person who has made such a statement relies on its having been done innocently, it is for him to prove it. That it betokens fraud until the contrary is shown." And in a later passage he says, "that it is incumbent upon the officer of the Court, who has done such acts as the appellant admits he has done, is show not merely that it is not certain after all that the act was not an innocent one rather than a fraud; but that he is bound to go further, and show convincingly that he was in fact acting innocently in the matter, and with no fraudulent motive or motives of misconduct." The learned Judge concludes by observing, "that the powers of the High Court could, ft they thought it reasonable (even though such a case might not, according to the reports of cases in England, have seemed as yet to have been judicially recognised by the

Superior Courts of Westminster as a cause of punishment), remove or suspend from practice an attorney of the Court." Mr. Justice Norman concurred with the other learned Judges in thinking that the appellant had been guilty of a very great and serious irregularity and impropriety, which, whatever views were taken of the motives which, Actuated him, would justify the Court in visiting him with severe penalties.

11. He conceived, however, that on a question of striking an attorney off the Bolls "the clearest distinction exists between cases where an attorney misconducts himself for fraudulent purposes, and those where such misconduct or irregularity, however grave, is not committed with the intent of defrauding his client or injuring others.'"' He further says, "I should require the fraud or the crime to be as distinctly proved against him as if he stood upon his trial at the Bar of a Criminal Court for the offence." He finally came to the conclusion that the false statement was, in fact, not made with intent to injure or defraud any one, and with still more confidence, that on the evidence no such intent had been proved, and he accordingly suggested suspension as an adequate punishment.

12. Their Lordships feel bound, on the consideration of the whole evidence before them, to come to the conclusion that the order complained of ought to be discharged.

13. They are of opinion that the preparation of the deed of conveyance containing an untrue statement of the transaction, and the attesting of the deed and a receipt for consideration-money which was never paid, would be circumstances of great, perhaps overpowering weight, as evidence of guilty contrivance against a solicitor, cognizant of the actual facts, in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud. They are further of opinion that any solicitor may very properly be called upon by the Court before, whom such a deed shall have been produced, to explain the circumstances attending its preparation and execution. But, if this explanation be given, if it he supported by evidence, if no counter-evidence be offered, if no fraudulent use of the instrument complained of has never been made or attempted, and no person complained of any injury directly or indirectly caused by it--we think that, however objectionable the practice may be of permitting, for any reason whatever a deliberate mis-statement of facts upon the face of a deed, yet such practice, unfortunately, by no means unfrequent, cannot be considered sufficient in itself to warrant the striking of the practitioner off the Rolls.

14. Even assuming the correctness of the view taken by Mr. Justice Phear of the solicitor''s duty, namely, that of showing convincingly the absence of fraudulent motive, yet when fraudulent motive has not been alleged by any complainant, such a rule can scarcely be applied if the explanation offered be not simply incredible.

15. Deeds are constantly prepared which, on the face of them, deal with the parties as interested, who are, in effect, only trustees for others; and the knowledge of such a practice probably influenced the framers of the Code in preparing the enactment referred to by the Chief Justice, for they confined its penal provisions to "fraudulent and dishonest" participation in such an instrument.

16. It appears to their Lordships, on the evidence in the present case, that James was intended to become, and did become, the bond fide owner of the quarter share. Mr. Barrow confirms the statements as to the circumstances under which he became such owner. Publicity as to the ownership was immediately given, there was no reason for representing him to be such owner with a view to protect William against his creditors. The deed was acted upon at the time of the mortgage to Hatch, as if William had parted with a one-quarter share. James was (as is stated by Macleod) in possession not only as manager, but as the recognized owner of a share, and no one, up to the present hour disputes the validity of that ownership. It does not seem, therefore, that any suspicion in such a state of circumstances can arise to displace the reality of the transfer made.

17. The reasons assigned for the false statements, though unsatisfactory, had any fraud whatever followed upon the transaction, are not inconsistent with the possibility of honest motives. Though James gave a consideration for his share in the shape of services only, yet if the share were really worth 32,000 rupees (and no evidence to the contrary was offered), it exceeded probably the value of his services, and his brother might be desirous to mark the fact of his bounty. Besides this, the condition requiring James to offer his share to his brother, before parting with it to a stranger, would afford some ground for stating an estimated value. It is said that the deed contained no covenant by James to continue his management, but if the property were, as it seems to have been. flourishing, such a circumstance alone would afford an adequate motive for his continuing as owner, and the condition as to offering the share to his brother would prevent an immediate sale.

18. The absence of any mention of the deposit with Thomas and Sons to secure the floating debt due to them as agents on the purchase-deed as contrasted with the mention of it in the mortgage, is consistent with honesty. It was necessary to inform the mortgage of all charges, but it was not necessary to inform the person purchasing the business of that which was really a security usual in the ordinary course of business.

19. The fact that James received no profits, whilst he had a monthly salary as manager, seems to their Lordships to throw no doubt on the transaction.

20. Their Lordships are not aware of such special authority, as appears to be referred to by Mr. Justice Phear, as would authorize the striking of the appellant off the Bolls of the High Court, where such a step would not be sanctioned by the practice of the Courts in England. They desire expressly to state that they do not, in

recommending to Her Majesty the discharge of this order, in any way sanction the propriety of deeds being prepared, which on the face of them are inconsistent with fact, and wish simply to express the opinion that upon the evidence, the irregularity was wholly unconnected with any intention to defraud, and does not therefore justify the penalty inflicted.