Privy Council Appeal No. 127 *of* 1919.

The Kin Tye Loong - - - - - - - *Appellants*

v.

John Hennessey Seth and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD ATKINSON.]

The facts of this case are somewhat complicated. It is, however, unnecessary to state them in detail further than is needed to make the question for decision on this appeal clear and intelligible.

The three respondents, the two last-named of whom are Chinese, were, by an order of Court dated the 30th October, 1913, appointed joint trustees in bankruptcy of a firm styled Wing Hang Hong which by the same order was adjudicated bankrupt. This order, which was made with the assent of the two Chinese trustees, directed that they should forthwith furnish security in the sum of $100,000 for the due performances of their own duties and those of their co-trustee, and for the due payment within one month from the 30th August, 1913, of a dividend of 26 per cent to all the creditors of the bankrupt firm. The time for payment thus fixed was subsequently extended, but nothing turns upon this fact.

It is obvious that under this order the trustees had no jurisdiction, power or authority whatsoever to pay away in the shape

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of a dividend money part of the assets of the bankrupt firm to any person who had not proved in the bankruptcy proceedings that the debt upon which the dividend was paid was owed to him by the firm. To do so would amount to a violation of their trust—a malversation of the trust fund, the assets of the bankrupt firm. By two contracts in writing dated the 6th and 7th May, 1913, respectively, the appellants sold to the firm which subsequently became bankrupt 2,108 bags of rice at a stipulated price. Of these bags, 2,098 were, in performance of these contracts, subsequently delivered by the vendors to the purchasers. They were accepted by the latter as goods delivered under these contracts, but were not paid for. It is not disputed that the contract price of the goods actually delivered would amount to $16,279, the dividend on which at the stipulated percentage would amount to $4,232·54. The title of the appellants to be paid this sum of $16,279 was necessarily based on the assumption that these two contracts of sale were valid and binding both on them and on the purchasers. The time fixed by the abovementioned order was subsequently extended by order of Court in the bankruptcy proceedings. On the 27th October, 1913, within the extended time the following proof of debt was filed :—

" *Re* THE WING HANG HONG Debtors
" *Ex parte* THE KIN TYE LOONG. Creditors.

" I, Chan Yuen Hon Assistant Manager of the Kin Tye Loong firm of No. 27 Bonham Strand West Victoria in the Colony of Hongkong do solemnly, sincerely and truly declare and say

" The said Wing Hang Hong was at the date of the receiving order and still is justly and truly indebted to the Kin Tye Loong in the sum of $16,279·00 for goods sold and delivered for which said sum or any part thereof I say that my said firm hath not nor hath any person to my knowledge or belief to their use had or received any manner of satisfaction or security whatsoever save and except the following *viz* :—

" An alternative claim now pending against the said Wing Hang Hong and Others in the Supreme Court of Hongkong, Original Jurisdiction Action No 89 of 1913 The Kin Tye Loong *versus* The Wing Hang Hong and Others.

" Declared at the Supreme Court House, Victoria in the Colony of Hongkong, this 27th day of October, 1913, the same having first been duly interpreted to the Declarant in the Chinese language by

(Sd.) CHAN YUEN HON
(in Chinese).

" (Sd.) WONG KIN WO,
Sworn Interpreter.

" Before me,
" (Sd.) J. D. LLOYD,
" *A Commissioner, &c.*"

The matters to which the last paragraph of this claim refer will be subsequently dealt with, but it will be observed that the claim in the pending action is not treated as a contingent liability alternative to the debt sworn positively to be actually due, but

as a security for that very debt itself. In the due administration, apparently, of the estate of the bankrupt firm J. Hennessey Seth, one of the Trustees, served upon the appellants a notice which runs as follows :—

"Percy Smith, Seth and Fleming,
"5, Queen's Road Central,
"Kong Kong.
"19*th November*, 1913.

"Notice is hereby given that a First and Final dividend of 26 per cent. has been declared in this matter, and that the same may be received at the above office on the 21st day of November, 1913, or on any subsequent date during the hours of 10 a.m. and 12 noon.

"Upon applying for payment this notice must be produced entire, together with any bill of exchange, promissory note, or other security held by you. If you do not attend personally you must fill up and sign the subjoined form of receipt and authority when a cheque payable to your order will be delivered to your nominee.

"(Sd.) J. Hennessey Seth,
"Co-Trustee.

"To Messrs. Kin Tye Loong,
"c/o Hastings and Hastings."

Messrs. Hastings and Hastings were the solicitors of the appellants. They had a managing clerk named Crew. This notice is followed by a letter from the appellants addressed to the three trustees in the following words : "Please deliver to Hastings and Hastings the cheque (or amount) for the dividends payable to us in this matter." In compliance with this request the money was remitted, and a receipt in the following terms was sent by Messrs. Hastings and Hastings to the trustee Seth.

"Receipt.
"November, 1913.

"RECEIVED from the Co-Trustees the sum of Dollars Four thousand two hundred and thirty two and cents fifty-four being the amount payable to us in respect of the First and Final dividend of $26 per cent. on our claim against this estate.

"(Sd.) Hastings and Hastings.
"27*th November*, 1913.

"$4,232.54 Receipt stamp,
"5 cents."

If these facts and documents had stood alone, the legitimate, indeed, the only possible conclusion to be drawn from them would be, that the appellants had unequivocally elected to take their stand upon the two agreements of the 6th and 7th May, 1913, to treat them as valid and binding on the parties to them, and by reason thereof to make the estate of the bankrupt firm a debtor to the appellants to the amount of $16,279, upon which the firm were entitled to receive and retain for their own purposes, a dividend at the stipulated rate.

These facts and documents do not, however, stand alone. Before this proof of debt had been filed an interview took place between Mr. Crew, acting on behalf of his employers, and Mr. Seth, one of the trustees. Some conversation then took place between them touching the terms upon which the proof of debt should be filed by the appellants, and the dividend upon the debt when

proved should be applied for and obtained. This conversation (though it is admitted no agreement enforceable at law was arrived at) makes it, the appellants contend, altogether illegitimate to draw any conclusion such as this since it would, they allege, defeat the express intention both of this trustee and of the appellants. The question for the decision of the Board is, in effect, whether this contention is sound or not. The condition of things at the time this interview took place was, so far as is material, this :—

On the 10th May, 1913, the appellants had instituted an action against the firm of Wing Hang Hong to recover the sum of $16,380·58, the price of the 2,098 bags of rice sold and delivered by them to this firm. These bags of rice had got into the possession of a firm of warehousemen named Hang Cheong by whom 1,354 of them were pledged to the Russo-Asiatic Bank. The remaining 744 were, in certain legal proceedings, sold, and the purchase money (less charges) which amounted to $4,447·14 was paid into a bank. On the 6th June, 1913, the writ of summons was, under an order of Court, amended, first by adding the Hang Cheong firm as defendants, and second by adding a claim for the return of the 2,098 bags of rice on the ground that they had been obtained from the appellants by the bankrupt firm's fraud.

On the 16th July, 1913, a statement of claim was filed in the action. As soon as the trustees in bankruptcy were appointed they were, by order of the Court, added as defendants. This statement of claim was, under an order of the Court, amended on the 25th November, 1913, and again, under another similar order, further amended on the 30th August, 1916. The relief claimed by it after this last amendment is (1) a return from the warehousing firm of 1,354 bags of rice or their value, $10,409·12, and (2) as against the bankrupt firm a return of the 2,098 or their value, $16,279, or in the alternative a return of the 744 bags or their value, amounting to $5,869·88. There is no claim to recover the price of goods sold and delivered, for the obvious reason that that claim was being enforced in the bankruptcy proceedings.

Both Mr. Crew and Mr. Seth were examined on the trial of the issue framed in the form mentioned. The learned Chief Justice who tried the case finds that they were substantially agreed as to what took place at their interview upon the subject of the appellants claiming in bankruptcy; and he summarizes their evidence. In this summary he sets forth that Mr. Crew informed Mr. Seth that if the appellants were unsuccessful in their action for fraud, they would be entitled to the dividend, and suggested that Seth should allow him on their behalf to file a proof in bankruptcy, and should also pay over to him on their behalf the dividends; that Mr. Crew stated that the whole discussion proceeded on the assumption that the action for fraud was going on; that the appellants could not recover both in this action and hold the dividend; that if successful in the action the appellants would receive the proceeds of the sale of the goods which would be the fruit of the action, and would give credit for the dividend paid, or, apparently, hold it on account of their costs in the action.

The learned Chief Justice sets forth that Mr. Crew stated that Mr. Seth raised no objection to the payment of the dividend, that Seth admitted that Crew told him that the action was going on, though a proof in bankruptcy was going to be filed, that he, Crew, made it clear that the taking of the dividend did not mean the abandoning of the action, that he, Crew, took up the position that he was at least entitled to a sum of money equal to 26 per cent., the amount of the dividend, and that he would get that money in any case.

These were the suggestions of Mr. Crew. What his object and intention were is plain. He wanted to secure for the appellants the chance of, at the same time, blowing hot and cold, approbating and reprobating the same transaction, affirming (1) that the two contracts of May, 1913, were valid and binding and obtaining a dividend on the debt arising from them, and (2) that these same contracts were fraudulent and void, that the goods which purported to be sold under them were never sold at all, and had never ceased to be the appellants' property. The appellants have never repudiated Mr. Crew's action, or declined to be bound by it. On the contrary, they have adopted it and acted upon it. Of the two inconsistent and mutually destructive claims they enforced one successfully in bankruptcy and obtained a final dividend, on the debt they proved to be due as for the price of the goods sold under these two contracts. They hold that dividend, and are notwithstanding proceeding with the action to have these same contracts declared null and void. It is necessary to scrutinize somewhat closely the evidence of Mr. Seth as given in the Chief Justice's summary in order to ascertain whether that witness clearly understood the true nature and legal effect of the proposals made to him, whether he approved of them, and definitely and unequivocally consented to act upon them. Mr. Crew is stated to have said that he, Seth, did not object to them. That is admittedly true, but that is a very different thing from approving of them and consenting to act in conformity with them. According to the summary, Mr. Seth further admitted that Mr. Crew told him that the action was going on, although the proof of debt was going to be filed, and the dividend thereon to be handed over to him, and that the taking of this dividend did not mean that the action was to be abandoned; that Mr. Crew took up the position that the appellants were entitled to the dividend and could get it in any case. Mr. Seth said that he made no objection to these proposals, for the strange reason that it was not his business, and further that at the date of the interview he knew nothing about law but did not mean to waive any legal rights. He further stated that he never told his co-trustees, the Chinamen, of his conversation with Mr. Crew.

But these two Chinese trustees were the guarantors of the 26 per cent. final dividend on the debts to be proved in bankruptcy, which, being final, would, if accepted, satisfy these debts. If the Chinese trustees paid this dividend they would be entitled

to look to the assets of the bankrupt firm to recoup themselves, and as the dividend only amounted to about one-fourth of the price of the goods, they might be prejudiced by having goods presumably worth four times the dividend withdrawn from the assets of the firm available for administration in bankruptcy. There is not a particle of evidence that these trustees ever authorised their co-trustee, Seth, to enter into any arrangement whatever with Crew, or ever knew or approved of or consented to act upon the proposals actually made by Crew. The interview took place behind their back and without their knowledge. The fact that Seth, to whom the proposals were made, said it was no business of his would go to show that he did not understand their nature, or the legal result to which they would lead. The fair construction of his evidence would appear to their Lordships to be that he treated the proposals as matters with which he had no concern; while the statement that he did not mean to waive any legal rights indicates clearly that he did not intend to deprive the trustees of the power to insist on any legal right which the payment of the dividend would give them.

The methods by which Mr. Crew, on behalf of his principals, endeavoured to carry out his proposals, are as follows: His firm procured, or permitted, the assistant manager of the appellants to make the solemn declaration already set out, to the effect that "the defendant firm were justly and truly indebted to the appellants in the sum of $16,279·00 for goods sold and delivered." That statement was true, and could only be true if these two agreements of May, 1913, were valid and binding as against the appellants. It was absolutely false if these agreements were fraudulent and void, as the appellants had by instituting their action, elected so to treat them.

The trustees had already on the 6th October, 1913, applied for and obtained liberty to defend this action for fraud. They did defend it. The statement in the proof of debt that this action was a security for the payment of the debt proved was too preposterous. Messrs. Hastings and Hastings resolved to mend their hands. On the 20th November, 1913, they wrote to Mr. Seth a letter in the following terms:—

"Re Wing Hang Hong and Kin Tye Loong.

November, 20, 1913.

"Enclosed we send you dividend warrant No. 49 for $4,232·54 in favour of our clients the Kin Tye Loong being a dividend of 26 per cent. on their claim for $16,279. Our clients have signed the receipt and authority to pay the dividend to us and we shall be glad to receive your cheque accordingly.

"The money is of course received on account only of our clients claim in Original Action No. 89 of 1913 reference to which is made in the proof filed by our clients and the receipt which we enclose does not in any way waive their claim in that action as against either the Trustees of the Wing Hang Hong or the Hung Cheong Firm.

"Yours faithfully,

(signed) "Hastings & Hastings.

"J. H. Seth, Esq."

There is something grotesque in the notion of a creditor whose debt, based on the validity of two contracts, has been

proved by him in the bankruptcy of his debtor, receiving a dividend upon that debt on account of that creditor's claim in an action to have those very contracts declared void, and thereby proving that the debt on which the dividend was paid never had any existence. Absurd as the claim embodied in the second paragraph of this letter was, it would, perhaps, have been more prudent on the part of the trustees, to have written in reply protesting against their attempting to treat the payment of the dividend in the way proposed, and requiring them to refund it unless they were ready to receive it in the only character in which it could be legally paid, namely, as a final dividend on the debt proved in bankruptcy, satisfying that debt. Unfortunately, they did not do so. But Messrs. Hastings and Hastings must have known quite well that the Chinese trustees supplied the money for the payment of this dividend, as they were bound to do under their guarantee, and that trustees in bankruptcy have no legal power or authority to pay to a creditor a dividend on a debt, unless it be proved by or on behalf of that creditor to be legally due to him, and that it would be a breach of trust, a malversation of funds, on their part so to do. Well if that be the law, whether known to Messrs. Hastings or not, as, in their Lordships' view, it is, then when trustees in bankruptcy purport to pay a sum of money to a creditor as a dividend upon a debt they must, in the absence of proof to the contrary, be taken by the creditor to have done so upon the only basis upon which the law enables them to do it, namely this, that the debt upon which it purports to be paid is an existing legal debt duly proved.

If the creditor does not wish to take the dividend on that basis he should refuse it. If he takes it, he must be held to have taken it in the character it can legally bear, and not in one which it cannot legally bear. Though the trustees have not replied to the letter from Messrs. Hastings and Hastings in the manner suggested, still the office they held, the powers they had, the trusts they were bound to discharge, the steps they had actually taken in the bankruptcy proceedings, told the appellants as emphatically as any language could that they only could legally pay, and only would pay, the sum of money they styled as dividend, on the basis that the debt upon which they purported to pay it was as against the appellants proved to be an existing legal debt.

The case, therefore, in their Lordships' view is covered by the principle of the decision in the case of *Croft* v. *Lumley*, 6 H.L.C. 672. There the lessor, insisting that a forfeiture of the lease had occurred, received a sum of money offered to be paid to him by the tenant as rent which had accrued due after the cause of forfeiture had arisen. The tenant insisted that he would pay the money as rent and only as rent. The landlord's agent as obstinately insisted that he would not accept it as rent, but he took the money, and it was held that what the agent did, not what he said, was the decisive matter; that he must be held to have taken the money in the character in which the tenant, the payer of the money, paid it, and that the forfeiture was therefore

waived. So here the money was paid by the trustees in the only character in which they could legally pay it, namely, as a dividend on a debt proved to be an existing debt due to the appellants. The appellants, knowing the law, must be deemed presumably to have accepted it in that character and in none other, but if so, that acceptance necessarily involves the affirmance of the validity of the contract creating the debt. Whatever arrangements the appellants' solicitors may have made with one of the trustees the appellants can have no right to require the three trustees to commit a breach of trust, namely, to treat a debt as an existing debt validly due, and pay a dividend upon it, and at the same time consent that those very persons, the appellants, should endeavour to prove that this debt never existed.

Mr. Maugham, in his forcible and ingenious argument, insisted that an election to affirm a contract depends entirely upon the intention of the person entitled to affirm it. Well, that depends very much upon what the nature of the intention is. The intention of the owner of goods, however resolutely entertained, to recover as a debt from a purchaser of those goods the price for which they were sold, and when his debt has been paid or satisfied to recover back the goods, or their value, in an action of trover will not avail him in any way, however truly he may intend at the same time to approbate and reprobate the contract of sale. The law will not permit him to carry out that intention.

That is very much what occurred in the present case.

The case of *ex parte Adamson* (8 C.D. 807) is on the facts entirely distinguishable from this. Their Lordships are of opinion that on the issue raised in the case, and which subsequently went to trial, the appellants must be held to have elected to affirm the contracts of sale of the 6th and 7th May, 1913, respectively; that the judgments of Chief Justice Rees-Davies and that of Mr. Justice Gompertz were right, and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise his Majesty accordingly. The appellants must pay the costs of this appeal and of the proceedings in the Courts below, so far as not otherwise provided by the order of the 8th February, 1918, directing the issue to be tried.

In the Privy Council.

THE KIN TYE LOONG

v.

JOHN HENNESSEY SETH AND OTHERS.

DELIVERED BY LORD ATKINSON.

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