

(1928) 07 CAL CK 0054
In the Calcutta High Court

Osman Jamal and Sons Ltd.

APPELLANT

Vs

Gopal Purshottam

RESPONDENT

Date of Decision : 19-07-1928

Acts Referred:

Citation : AIR 1929 Cal 208 : 118 Ind. Cas. 882

Hon'ble Judges : Warrington, J;Lort-Williams, J;Lord-Williams, J;Kennedy, J;Buckley, J

Bench : Full Bench

Judgement

Lort-Williams, J.—In this case the plaintiff company is in liquidation and is represented by the Official Liquidator. By a contract made in July 1925 it was agreed inter alia that the plaintiff company should act as commission agents for the defendant firm in the purchase and sale of hessian and gunnies and that the defendant firm would indemnify the plaintiff company against all losses in respect of such transactions. Pursuant thereto, on or about the 2nd December 1925, the plaintiff company purchased certain hessian from one Maliram Ramjidas, which the defendant firm failed to pay for or take delivery of, with the result that the goods were resold by the vendor at less than the contract price and he has claimed the balance from the plaintiff company. Consequently the plaintiffs now seek to recover this sum from the defendants under the aforesaid indemnity, in addition to a further sum for commission which otherwise they would have received. The defendants contend, firstly, that the plaintiffs have never become liable to the vendor, because they acted only as agents for disclosed principals, namely, the defendant firm, and therefore no right to indemnity has arisen. This argument seems to rest upon a misapprehension of fact. The plaintiffs purchased through a broker as principals and not as agents which becomes evident upon perusal of the bought and sold notes. Consequently they are liable to the vendor for breach of the contract of sale.

2. Secondly, the defendants contend that inasmuch as it is admitted that the plaintiffs have not actually made any payment to the vendor in respect of their

liability to him, they are not at present entitled to any sum on account of the aforesaid right of indemnity. In support of this contention their learned Counsel has referred to the case of *In re Richardson*. *In re Richardson*, *Ex parte the Governors of St. Thomas's Hospital* [1911] 2 K.B. 705 and especially to the observations therein of Fletcher Moulton, L.J. at p. 712 as follows:

Suppose A has a claim upon B, but in respect of that claim, B has a right of indemnity from C. B. goes bankrupt. Is B's trustee in bankruptcy in a position in which he can force to pay the amount of the claim to him and then can use the money so obtained for distribution amongst the creditors generally, whereas he only pays a dividend upon the claim which A has against the bankrupt?

If you seek guidance in the matter from common law, there is no doubt whatever that it went on this principle. It would not help a man to make a profit out of what was merely an indemnity. If, for instance, B was bound to pay a sum to A and C was bound to indemnify B, which is the case before us, then B could not sue C unless he could aver payment to A.

3. But the learned Lord Justice was there expounding the doctrine of the common law, which he recognized was different to the rule in equity. Moreover in that case the right of indemnity did not arise from contract but from a trust and the learned Judge goes on to say at p. 714:

It would not be right for a trustee to obtain money from this right to be indemnified against payments made to the head creditor when he not only has not made those payments but comes here to say that he does not intend so to do. Therefore I come to the conclusion that, as a general principle, an indemnity like this can be used by the trustee only for the purpose of bringing about payment to the head creditor of the claim against which he is indemnified.

4. These distinctions were drawn also by Cozens-Hardy, M.R. at p. 709, where he says:

In the first place this is not the case of a contractual right of indemnity. It is merely an equitable right which every trustee has to be indemnified by his cestui que trust. It is a right which the common law would not in any way have recognized. Equity has always taken a wider and more liberal view of these rights of indemnity than the old Common Law Courts did. It is settled at common law that, given a contract of indemnity, no action could be maintained until actual loss had been incurred. The common law view was first pay and then come to the Court under your agreement to indemnify. In equity that was not the view taken. Equity has always recognized the existence of a larger and wider right in the person entitled to indemnity. He was entitled, in a Court of Equity, if he was a surety whose liability to pay had become absolute to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety. Another way in which the indemnity was often worked out in the Court of Chancery was by ordering a fund to be set apart to meet the liability as and when it arose. So that in the view of the Court of Equity it was not

necessary for the person entitled to the indemnity to be ruined by having to pay the full amount in the first instance. He had full power to take proceedings under which that fate might be averted, and he might substantially protect himself and secure his position by coming to the Court.

5. Further, Buckley, L.J. says at p. 715:

Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay....

6. In *Richardsons case* [1911] 2 K.B. 705 it was held that the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified. The reason given for this by Buckley, L.J. was that if such sum were distributed among the creditors generally, the creditor whose claim the debtor was indemnified against would only get a dividend and would have the right to a further dividend if further assets came in; against this claim, the debtor would have no right of indemnity left, and, therefore, his indemnity against such creditor would not be complete, as it had been intended to be. And the Master of the Rolls at p. 711 says as follows:

The respondent-says: " This right to an indemnity which the bankrupt as trustee had against his cestui que trust is property which vests in me as his trustee in bankruptcy, and and I am bound to apply that like all other assets of the bankrupt for the benefit of all the creditors." But is that quite so ? I cannot think it is. If and when he pays the amount of the debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify, as part of the estate, but unless and until he pays I fail to see how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate.

7. In my opinion, however, a sounder reason appears in the next paragraph, viz:

The trustee cannot be allowed to say: " I will take the money recovered under my right of indemnity against the claim of St, Thomas's Hospital and will apply it, not towards satisfying the claim of the hospital in the way which the indemnity implies, but as part of the general assets, and I will give no effect whatever to the indemnity except so far as the hospital come in and prove for their claim in the bankruptcy. " To allow that would be to allow a trustee to make a profit out of his position as trustee.

8. This case of *Richardson* [1911] 2 K.B. 705 and especially the observations of Fletcher Moulton, L.J. were adversely criticized by Scrutton, J. in the *Liverpool Mortgage Insurance Co's case* [1914] 2 Ch. 617 which I will deal with hereafter.

9. In *Lacey v. Hill* [1874] 18 Eq. 182 Sir George Jessel M.R. said:

Last of all it is said this is a liability as distinguished from an actual payment, and

that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him.

10. And in *British Union and National Insurance Co. v. Rawson* [1916] 2 Ch. 476 Pickford, L.J. says:

It has been stated in several cases that at common law an indemnity is confined to protecting the indemnified against actual loss and not against liability, for example, *In re Perkins* [1898] 2 Ch. 182 though this was doubted by Scrutton, J. in *In re Law Guarantee Trust and Accident Society (2)* on the authority of *Ashdoun v. Ingamells* [1880] 5 Ex. D. 280. However this may be, the indemnity is not so confined in equity (see *Lacey v. Hill* [1974] 18 Eq. 182 and the two cases above mentioned), and in equity the indemnified may call upon the indemnifier to pay the debt either to him or to the principal creditor before having paid himself, and if paid to him the indemnifier has no concern with what he does with the money.

11. And Warrington, L.J. at p. 486 says:

Moreover, I think this decision follows logically on the manner in which Courts of Equity had given effect to contracts of indemnity. In many cases they had ordered the indemnifier to pay the debt against which the indemnity had been given though nothing had been paid by the person indemnified. *Cruse v. Paine* [1869] 4 Ch. 441 is an example. Money has even been ordered to be paid by the indemnifier to the indemnified himself in respect of moneys for which he was liable but which he had not paid. *Evans v. Wood* [1868] 5 Eq. 9 is an example and shows that Sir George Jessel, M. R. was not mistaken in saying, as he did in *Lacey v. Hill* [1974] 18 Eq. 182 that if the creditor is not a party, "I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him." The more recent cases of *In re Richardson* [1911] 2 K.B. 705 and *In re, Law Guarantee Trust and Accident Society* [1914] 2 Ch. 617 are in accordance with this view.

12. In *In re Law Guarantee Trust and Accident Society, Ltd. Liverpool Mortgage Insurance Co.'s. case* [1914] 2 Ch. 617 Buckley, L.J. says:

The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20s. in the pound, and, having got it, to deal

with it as he thinks proper. The case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays. This was the case in *In re, Richardson* [1911] 2 K.B. 705. The wife who was bound to indemnify was there concerned in seeing that the money which she paid went to the lessor so as to relieve the property of which she was beneficial owner from the consequences of nonpayment of rent and damages for breach of covenant. In *Cruse v. Paine* [1869] 4 Ch. 441 the stock jobbers were interested in seeing that the amount which they provided was applied in discharging the calls upon the shares. In *In re Perkins* [1898] 2 Ch. 182 the executors of assignee No. 2 were interested in the application of that which they had to pay in discharging the obligations under the lease. But here the company are not interested in the question whether the amount which they pay does or does not go to the debenture-holders. The case is that which is put in *Carr v. Roberts* [1833] 5B Ad. 78 where both Littledale, J. and Patteson, J., at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it.

13. And Kennedy, L.J., says at p. 638:

There appears to me to be authority for holding that, in the view of a Court of Equity to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given. See Wright, J., in *Wolmershausen v. Gullick* [1893] 2 Ch. 514 citing Lord Lindley's work on Partnership, 5th Edition, pp. 374, 375. As Neville, J., points out in the course of his judgment in this case *Liverpool Mortgage Insurance Co's. case* [1913] 2 Ch. 612 if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance.

14. And again, at p. 639:

This being that which may be called the normal position, is it altered by the fact of the insolvency and liquidation of the society? It is contended on behalf of the company that it is; that, inasmuch as the debenture-holders will not be able to enforce against the society payment in full of the amount due to them from the society, but only payment of a dividend upon their proof in the liquidation for that amount, the company, so far as the indebtedness to the debenture-holders as distinct from costs and expenses is concerned, will satisfy its contractual obligation to the society if it pays only the amount of that dividend. This question might have arisen on the facts stated in the report of that case in *In re, Eddystone Marine Insurance Co.* [1892] 2 Ch. 423 but it does not appear to have been argued by counsel or dealt with by the learned Judge. I do not think that the contention of the respondents is sound. How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special

considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him.

15. Again at p. 640:

I desire only, in conclusion, to refer to the case *In re Richardson* [1911] 2 K.B. 705 which my brother Neville seems to treat as an authority for the view which he has taken of the present case. It appears to me that we can decide the present question in favour of the society without differing from the decision of the Court of appeal, in that case. The circumstances were peculiar. The husband's right of indemnity, upon which the wife was sued in an action in which the trustee in bankruptcy of her husband's estate and the husband's landlord were joint plaintiffs was not a contractual right, but an equitable obligation arising from the relation of *cestuique* trust and trustee which existed between wife and husband ; and it was held by the Court of appeal that the husband's trustee in bankruptcy could avail himself of the husband's right of indemnity only for the purpose of passing on the money, which his wife paid by way of compromise in the action, to the landlord, his co-plaintiff, who was the principal (or ultimate) creditor. To hold otherwise, said the Master of the Rolls, would be to allow a trustee to make a profit out of his position as trustee. In the present case the right to payment upon which the society is insisting depends upon an express contract, whether of insurance or re-insurance, for the payment in a certain event of a sum of money. The debenture-holders are not parties to these proceedings. There is no bond of connexion between the company and the debenture-holders. The company has no sort of interest in seeing how the money due from the company to the society is applied by the society.

16. And Lord Justice Scrutton at p. 650 says:

Neville, J., thought himself bound by the decision in *In re Richardson* [1911] 2 K.B. 705 to hold that the society could not recover from the insurance company more than they had actually paid, but could call upon the insurance company to pay off the debenture-holders. The latter point, however, he said was not before him; and it was not in the original summons. The facts in *In re Richardson* [1911] 2 K.B. 705 were remarkable and peculiar. Richardson, the husband, was twice bankrupt. He was also lessee of some properties from St. Thomas's Hospital and held them as trustee for his wife under circumstances explained in *Governors of St. Thomas's Hospital v. Richardson* [1911] 2 K.B. 705. Between his first and second bankruptcy the landlords got judgment against him for arrears of rent, damages for non-repair, and costs, and he then went into bankruptcy. The Court of bankruptcy gave leave to the landlords to join with the trustee in an action against the wife as *cestui que* trust. I understand how the husband and his trustee could ask to be indemnified by the wife. I do not understand and how the landlords had any direct claim against the wife to the sum claimed. However, the action never came to trial, for the wife paid ? 520 to the two plaintiffs in compromise of a claim for ? 711. Then the question arose who was to have the ?520, the trustee for the general body of creditors, or the

landlords, against whose claim the husband was to be indemnified, and the Court of appeal gave the money to the landlords. But the Master of the Rolls stated that it was not the case of a contractual right of indemnity" but of the "equitable right which every trustee has to be indemnified by his cestui que trust." The case did not decide that the trustee could not recover till he paid, and only what he paid. He had in fact paid nothing and got ? 520 by consent. The authorities on insurance were not cited to the Court, which was not dealing with any questions of re-insurance, and while Fletcher Moulton, L.J., made some very general statements as to the common law right of indemnity, they were not, as I read the decision, necessary for it" and if I understand the decision of the Court of appeal in *Ashdown v. Ingamells* [1880] 5 Ex. D 280 were contrary to the common law rules therein laid down. In *Ashdown v. Ingamells* [1880] 5 Ex. D 280 A agreed for valuable consideration to pay the trade debts of B ; he did not do so, and B was freed into liquidation by his trade creditors, whose proof for ? 1750 was admitted, The trustee of B sued A for damages, and it was replied that as B's estate would only have to pay a nominal dividend there were no damages. Huddleston B agreed with this contention, but the Court of appeal reversed him. They held that the insolvent if solvent, would have recovered the full amount, whether it was a contract to indemnify or pay was immaterial, and that the trustee could recover what the bankrupt could, if solvent, have recovered, without regard to whether the estate had paid or not. I do not understand how this supports the view of Neville J., or justifies the general observations of Fletcher Moulton, L.J.

17. Now the present case seems to me to fall in the category of those in which the party giving the indemnity is concerned with the application of the money which he pays. The defendants may be liable as undisclosed principals, and it would be a most unjust result if after paying the full amount claimed in this case, of which sum the vendor would receive only a dividend, they were called upon to pay a further sum to the vendor, to make up the balance due on the contract made by their agent on their behalf.

18. Therefore there will be a decree in favour of the plaintiff company for two sums of Rs. 7,175-8-6 and Rs. 224-4-0 and costs with a direction that the sum of Rs. 7,175-8-6 be paid by the Official Liquidator to Maliram Ramjidas in settlement of his claim.