

(1904) 08 CAL CK 0008

In the Calcutta High Court

Case No : Appeal From Original Civil No. 50 of 1904

T.E. Madden

APPELLANT

Vs

Alfred John Bridge and others

RESPONDENT

Date of Decision : 05-08-1904

Acts Referred:

Citation : (1904) 08 CAL CK 0008

Final Decision : Dismissed

Judgement

Maclean, C.J.—The question we have to decide upon this appeal is whether or not the Plaintiffs, who are wine merchants, carrying on a large business at Calcutta, and who have obtained a judgment for Rs. 4,457 against Mr. Madden, who is an officer in the army, are entitled to execute that judgment against the trust estate which is comprised in an Indenture of Settlement, dated 6th August 1894, of which settlement Mr. Madden was the sole trustee at the time the debt was incurred to the Plaintiffs, for goods supplied by them. The subject matter of the settlement was a Hotel known as the Adelphi Hotel in Calcutta. It apparently belonged to Mrs. Cook (now Mrs. Madden, the wife of Mr. Madden). The deed was executed upon the occasion of her marriage with Mr. Madden, the trusts being to empower the trustee through managers and assistants to carry on the business, the net profits of which were settled on Mrs. Madden for life, with a reversion to her son, who is now of age, and who has been served with these proceedings, but has not appeared.

2. It is contended by Mrs. Madden, who has appeared before us to-day, both for herself and her husband, that the Plaintiffs are only entitled to execute this judgment against their judgment-debtor Mr. Madden, and that they have no claim against the trust property of which he was a trustee. It is clear and has not been disputed that the debt was incurred for the benefit of the trust, and with the object of carrying on the business of the Hotel and the Plaintiffs say that, inasmuch as Mr. Madden was a trustee of this property and incurred the debt as a trustee for the purpose of carrying on the business of the Hotel, he is entitled

to be indemnified out of the trust estate, and the Plaintiffs in equity are untitled to stand in his shoes. That is the Plaintiffs' case, and as a general proposition of law, that position cannot be disputed.

3. The law upon this point has been laid down by Mr. Justice Sale in the matter of *M.A. Shard* ILR 28 Cal. 574 (1901), which was also a case concerning this Hotel. In that case, the learned Judge reviewed the English authorities upon the subject which lay down the equitable principle to which I have referred. But the proposition I have stated is subject to the important qualification that, if the trustee, through his own default, has lost his right of (sic) indemnity, such right cannot pass to the creditor, for the creditor cannot have the benefit of that which does not exist. We have, therefore, to consider in this case whether the present Appellant has substantiated that Mr. Madden, by his own default, has lost his right to indemnity. The indemnity clause in the settlement is couched in very wide terms, and the only case of default which is suggested against the trustee is that suggested in paragraphs 10 and 20 of Mrs. Madden's affidavit of the 30th June of this year. In that affidavit the only suggestion is that the loss has occurred "consequent to the inability or negligence of the said trustees who were responsible for the acts and defaults of their servants."

4. When Mr. Madden was appointed trustee, he was an officer in the army liable to be called away any moment from Calcutta, and; as a matter of fact, he has been obliged to be away on his military duties for a long time. He could not personally attend to the business of the Hotel nor could he be expected personally to carry on the management. The settlement gives the trustee very wide powers to appoint managers and assistants. Having regard to the language of the indemnity clause this vague charge of negligence cannot be regarded as fixing the trustee with default so as to deprive him of his right to indemnity. When we pass to para. 20 of the affidavit, we find that the charge there is still more substantial, the default alleged is that Mr. Madden did not exercise more strict control "over the managers and servants." His absence from Calcutta on military duty would prevent him from exercising a strict control and this was anticipated. This alleged default is amply met by the terms of the indemnity clause. If then the case of alleged default breaks down, and I think it does, Mr. Madden is entitled to indemnity out of the trust estate and the Plaintiffs are entitled to stand in his shoes. The judgment therefore of the Court below must be affirmed and this appeal dismissed with costs.

5. I may add that the Plaintiffs have acted with forbearance; the debt was incurred for goods supplied from October 1897 to May 1898 and the suit was not instituted until April 1901. Possibly the parties may be able to come to some arrangement, so as to avoid wrecking the Hotel business, if it be worth carrying on, but into this we cannot enter.

Harington, J.

6. I agree. By the terms of the trust deed, the trustee is not to be accountable

for any involuntary loss, however incurred, and is not to be under any liability in respect of any acts done bond fide, in the course of, or in connection with, the management of the business. Now the affidavit which has been made by the Appellant does not allege that any act which was done by the trustee in connection with the management of the business was done mala fide, nor does it state that any of the losses incurred were incurred otherwise than involuntarily so far as the trustee is concerned. On the contrary, in the 20th paragraph of the affidavit, the allegation is that the trustee was defrauded and, in effect, it alleges that the loss which has been suffered was suffered involuntarily. That being so, the affidavit fails to show that the trustee is deprived of the indemnity which is given by the express terms of the deed of settlement and, that being so, the Appellant fails to support the case which she has maintained. I agree, therefore, that this appeal must be dismissed.

Mitra, J.

I agree with the learned Chief Justice