

(1915) 04 AHC CK 0025
In the Allahabad High Court

The Bank of Upper India Limited

APPELLANT

Vs

Robert William Anderson

RESPONDENT

Date of Decision : 06-04-1915

Acts Referred:

Citation : (1915) ILR (All) 390

Hon'ble Judges : Henry Richards, C.J.; Pramad Charan Banarji, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Henry Richards, C.J. and Pramad Charan Banarji, J.—This appeal arises out of a suit brought by the Bank of Upper India claiming that they might be put into possession of the chattels, goods, stock-in-trade, book-debts, securities and moneys and the business belonging to a firm of merchants carrying on business under the style of Burton & Co., at Bareilly, or in the alternative that the Bank should have a decree for the sum of Rs. 18,839-5-6 against the defendants jointly and severally and that in default of payment, the business should be sold for the realization of their debt.

2. The court below has given the plaintiff, Bank, a decree directing the defendants to pay the sum of Rs. 18,839-5-6 together with interest and costs, and further that in the event of the amount in the hands of the receiver (who had already been appointed) not being sufficient to pay the plaintiff's decree, the receiver should call for tenders and sell the business of Messrs, Burton & Co., with the "good-will" &c. as a going concern.

3. We are informed that in execution of this decree the business has been sold as a going concern.

4. The defendant Robert William Anderson has appealed. The Bank's claim is based on a deed, dated the 11th August, 1911, executed by the defendant, Graham, in favour of the Bank of Upper India. The document commences by reciting that the said Graham was indebted to the Bank and other persons and

required a loan of Rs. 11,000. Then follows a covenant to repay the sum of Rs. 11,000 by installments. There is a clause which provides if for the preservation of the security hereby created it be necessary for the said Bank to make any advance or to incur any other charge such advance or charge shall form part of this loan and be subject to the same stipulation about interest." The document then proceeds as follows : "and this indenture further witness that for the due repayment of the money due under these presents and other charges as above specified and interest or both as above stated and agreed upon, the said mortgagor doth hereby mortgage unto the said Bank its executors and administrators and assigns all and singular the several chattels, goods, stock-in-trade and things specially described in the schedule hereto annexed by way of security for the repayment of the loan and interest, and charges thereon as stipulated above. Further he the mortgagor as beneficial owner doth hereby mortgage unto the said Bank its executors, administrators or assigns all the beneficial interest of the said business of Messrs. Burton & Co., with the fixtures appertaining thereto and also all the book-debts and other debts now due and owing to the said Percy Hubert Graham or Messrs. Burton & Co. upon account or in respect of the said trade or business and. all securities for the same, to hold the same unto the said Bank, its executors, administrators or assigns for securing payment of the loan and interest thereon as stipulated." There, is a further clause authorizing the Bank in the event of default to take over the property mortgaged. (This power was admittedly never exercised). There was a further clause mortgaging or charging a certain policy of insurance of the life of the said Percy Hubert Graham and finally a. Clause (hopelessly inconsistent; with the entire object of the deed) that the mortgagor would not alienate any of the property mortgaged during the continuance of the security. Attached to this deed is a schedule of the goods which formed the stock-in-trade of Graham's business at the time of the mortgage.

5. The appellant Anderson, who was connected by marriage with Graham, got a deed from the latter on the 31st August, 1912. This document recites that Graham was indebted to Anderson in the sum of Rs. 22,854. The sum was made up of Rs. 15,000 advanced at the time in cash, Rs. 3,750 promissory notes executed in favour of Anderson by Graham, Rs. 1,654 a decree against Graham by a creditor, and Rs. 2,450 a debt due by Graham to another firm. This document provided for interest on the Rs. 15,000 at seven per cent. It gave Anderson power to take possession of all the stock-in-trade in the business. It provided that the stock-in-trade should be kept fully replenished and all new stock which was brought in should be regarded and treated as being pawned to secure the debt. This document was followed by another document, dated the 31st August, 1912, which provided for the carrying on of the business by Graham as a manager at a salary of Rs. 200 per month, and a man of the name of Norton (who also was connected with both Anderson and; Graham by marriage) should be an assistant at a salary. The Ts deed finally provided that as soon as all debts and incumbrances had been discharged the business should belong to

Graham, Anderson and to Norton in certain specified shares.

6. There was considerable controversy in the court below as to whether Anderson had notice of the Bank's mortgage when he made the further advance of Rs. 15,000 and got the documents of the 31st August, 1912, executed in his favour. The court below has found that he had notice but having regard to the view we take of the case, it is quite unnecessary for us to come to any decision on the question of notice. It is contended on behalf of the appellant that all that was mortgaged by the Bank's mortgage of the 11th August, 1911, were first, the articles which are specified and set forth in the schedule to the deed; second, the good-will and thirdly the book-debts actually due at the time, that at the time of the mortgage and certainly at the time the receiver took possession of the property, all the goods which were mentioned in the schedule had long before been sold in the ordinary course of business and that the plaintiff's security did not attach to any goods that might have been subsequently purchased. (The appellant makes no claim to the policy of insurance.) The appellant contends that under the terms of his indenture" he was entitled to enter into possession of the business and to carry it on, that all profits made during that time, or subsequently by the receiver, belong to him and that the proceeds of the sale which is said to have taken place in execution of the decree also belonged to him. He finally contends that in no event ought there to have been a personal decree against him.

7. On behalf of the respondents, it is contended that on the true construction of the indenture of the 11th August, 1911, any stock-in-trade which was purchased to replace the articles specified in the schedule must be regarded as part of the Bank's security, and that accordingly they are entitled to all profits in the hands of the receiver as well as to the entire proceeds of the sale.

8. In our opinion it is absolutely clear that the goods and chattels described in the schedule alone were mortgaged. We think that the good-will of the business was also mortgaged. Mr. O'Connor on behalf of the respondents has cited the case of *Coltman v. Chamberlain* (1890) 25 Q.B.D. 328. That was a case of a mortgage of "a ship and her boats, guns, ammunitions, small arms and appurtenances." The question arose as to whether sundry articles of ship's furniture purchased after the date of the mortgage were included in the security. It was held on the construction of the mortgage in that case that all these articles passed under the mortgage of the "ship" or as "appurtenant" thereto.

9. A case much more like the present is the case of *Tapfield v. Hillman* (1843) 6 M&G 245. In that case there was a mortgage of an inn together with "the furniture, stock-in-trade in, about, upon, belonging to the inn," with a power on non-payment to the mortgagee to enter into possession of the inn and "to take, possess, hold and enjoy all the goods, chattels, effects and premises." The question arose as to whether or not stock-in-trade and goods acquired after the date of the mortgage were covered by the deed. Pattison, J., at the trial held that on the true construction of the deed only the stock-in-trade existing at the date

of the mortgage, was pledged. Tindal, C.J., Coltman, J., Maule, J., and Cresswell, J., all concurred in holding that the after-acquired stock-in-trade was not subject to the mortgage. Coltman, J., says : "It is not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to replace that which was disposed of and consumed by the plaintiff in the course of his business. We can, however, only look to the language of the deed which clearly is not sufficient to include property not on the premises at the time the deed was executed."

10. If then the plaintiff's mortgage in the present case did not attach to the subsequently acquired stock, the Bank had no right to bring anything but the "good-will" to sale, and the question whether or not Anderson had notice of their mortgage became quite immaterial. In our opinion the plaintiff Bank are not entitled to the profits in the hands of the receiver, nor are they entitled to any portion of the proceeds of the sale, save so far as the same are attributable to or represent the "good-will" of the business. In our opinion also the Bank are not entitled to a personal decree against the appellant.

11. It is unnecessary to decide the question of the amount to realize which the Bank were entitled to bring the mortgaged property to sale. It seems to us more than doubtful that they were entitled to add to their debt any sum that was not strictly paid or advanced for the purpose of preserving their security, e.g., premium paid to keep up the policy of insurance.

12. Before passing a final order in the case we think it desirable to refer an issue to the court below, namely "what portion, if any, of the proceeds of the sale represents the value of the good-will."