SUBAMMA *v.* S. K. AZIZ AND SONS

[COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and Sir Joseph Stanton, JJ/A), January 6, 1959]

CIVIL APPEAL No. 7 OF 1958

(Appeal from H.M. Supreme Court of Fiji—Hammett, J.)

Bill of Sale—covenant to assign proceeds of sugar crop—assignment to be executed at future date—assignment—notice of assignment contained in covenant properly given—whether covenant is a valid assignment.

On the 7th March, 1955 a debtor gave the appellant a Bill of Sale to secure a sum owing. The instrument contained a covenant to assign, at a future date, certain moneys which would come due to the debtor from the sale of sugar cane. The appellant gave notice of the assignment relying on the covenant contained in the Bill of Sale. When the moneys concerned were in being, the respondent, having a judgment against the debtor, obtained a garnishee order on the moneys. The moneys were paid into Court and claimed by both the appellant and the respondent. The trial Judge ordered the payment out of the moneys to the respondent. The appellant appealed against the judgment containing that order.

Held : 1. The obligation to give the assignment was absolute and unqualified.

2. It is not open to any Court to read as conditional what is expressed unconditionally unless there is something in a document which, read as a whole, compels such a construction.

3. The contract to assign was given for valuable consideration in this particular case.

4. Where there is a definite agreement to pay moneys which might be recovered from a third party, the agreement creates an anticipatory equitable charge over the moneys.

5. The principle that " where nothing remains to be done in order to define the rights of the parties, the Court will protect those rights " applies in this case as the rights are clearly defined.

6. The respondent could not take more than the debtor could enjoy and as the moneys were already pledged, the debtor could not have called for them.

Appeal allowed.

Cases referred to:

Tancred v. *Delagoa Bay & E.A. Railway Coy.* (1889) 23 Q.B.D., 239; *Hughes* v. *Pump House Hotel Coy.* (1902) 2 K.B., 190; *McArdle* (1951) 1 All E.R., 905; *Antrobus* v. *Smith* (1806) 12 Ves., 39; *Holt* v. *Heatherfield Trust* (1942) 2 K.B., 1; *Glegg* v. *Bromley* (1913) 3 K.B., 474; *Riccard* v. *Pritchard* (1855) 1 K. & J., 277; *The Kent and Sussex Sawmills* (1947) Ch., 177; *Re Wait* (1927) 1 Ch., 606; *Holroyd* v. *Marshall* (1862) 10 H.L. Cas. 191; *Hanbury's Modern Equity ; Joseph* v. *Lyons* (1884) 15 Q.B.D., 280; *Tailby* v. *Official Receiver* 13 App. Cas., 523; *West and Wright* v. *Newing* (1900) L.J., 260; *Mankles* v. *Dixon* (1853) 3 H.L. Cas., 702.

K. A. Stuart for the appellant.

K. P. Mishra for the respondent.

(The following is the judgment of SIR GEORGE FINLAY, J/A. The other members of the Court wrote similar judgments.)

The relevant facts involved in this appeal are simple and undisputed. They may be stated chronologically as follows:—

1. On 7th March, 1955 one, Sheik Abdul (hereafter called " the debtor ") gave to the appellant a duly registered Bill of Sale to secure repayment of an advance of £500.

2. That Bill of Sale contained a covenant which reads as follows:—
" The mortgagor " (i.e. the debtor) " agreed [*sic*] and covenants with the mortgagee " (i.e. the appellant) " that he will give and execute to the mortgagee an assignment of the proceeds of his crops of sugar cane growing and to be grown by the mortgagor on the said farm No. 1108. Such assignment to be given and executed when the next payment is made by the Colonial Sugar Refining Coy. Ltd. for sugar cane harvested from the said farm and to be a collateral security with this Bill of Sale."

3. Claiming that the covenant constituted a valid assignment of the moneys to which it relates, notice of it was given in writing to the Colonial Sugar Refining Coy. Ltd. on behalf of the appellant on the 22nd August, 1956.

4. On the 29th October, 1956 the respondent recovered judgment against the debtor in the Supreme Court, Fiji for £651 11s. 10d. with £7 17s. 6d. for costs.

5. In February, 1958 (the precise date is difficult to determine from the record) the respondent obtained a garnishee order charging with its judgment debt moneys in the hands of the Sugar Company and payable to the debtor.

6. The Sugar Company paid into Court the sum of £555 1s. 10d. and was discharged from the proceedings.

7. The sum so paid into Court was claimed by both the appellant and the respondent and their respective claims were the subject of a judgment given on the 30th May last.

8. By his judgment, the learned Judge, for reasons which invite consideration, dismissed the claim of the appellant and directed (subject to any appeal proceedings) that the fund in Court be paid out to the respondent.

From that judgment this appeal was brought. The learned Judge seems to have taken the view that the covenant was not an assignment at all. He refers to it as having " assigned nothing " : that, I apprehend, because it was expressed as a covenant to give an assignment and not as a present assignment. Then he held that if it were an assignment it was a conditional assignment. In the first place, it was, he thought conditional upon the debtor failing to repay on due date the moneys advanced under the Bill of Sale, and interest. Then he thought it conditional because, as he phrased it, " The assignment would only be made when the next payment is made by the Colonial Sugar Refining Coy. Ltd. for sugar cane harvested from the said farm."

This latter view seems untenable. The provision as to the date when the assignment was to be given did no more than fix the date upon which the assignment was to be given. It is true it permitted " the next payment " after the execution of the Bill of Sale to go to the debtor: but that is, for present purposes, immaterial. To merely fix a date when a document is to be executed does not express any condition and, with great respect, I can see nothing in the suggestion that it does.

Nor does it seem to me that the first so-called condition is such in fact or in law. The assignment covenanted to be given was not expressed to be given if the debtor failed to pay. The obligation to give it was expressed in terms at once absolute and unqualified and it is not open to any Court to read as conditional what is expressed unconditionally—that is, unless there is something in the document, read as a whole, which compels such a construction. There is nothing in this document which warrants any such conclusion.

There is some little analogy here with the judgment in *Tancred* v. *Delegoa Bay & E.A. Railway Coy.* (1889) 23 Q.B.D., 239 at p. 242. I refer to p. 242 where the statement appears:—

> " Now the document in this case " (it was a mortgage of debts) " does not appear to us to purport to be ' by way of charge only ' either expressly or by necessary inference from its provision within the meaning of the section; it is an absolute assignment of the debt: a document given ' by way of charge ' is not one which absolutely transfers the property with a condition for re-conveyance, but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property."

See too, *Hughes* v. *Pump House Hotel Coy.* (1902) 2. KB., 190.

However, any such discussion is germane only to the question whether an assignment is a legal assignment under the statute. It does not touch the question whether an equitable assignment which is outside the statute is valid and enforceable or not. For the rest, the learned Judge expressed the view that an agreement to give an assignment would be treated in equity as an equitable assignment between the parties " to the extent that a decree for specific performance would be granted to compel the assignor to execute a formal assignment ". But he thought any such right would be dependent upon the fulfilment of the " conditions " he thought existed. He held, in consequence, that until the appellant had taken steps to secure or procure an assignment, the garnishee could not be held bound to pay anything under or by reason of the covenant.

This seems a little inapposite, for the question is what the present rights of the appellant are under the covenant, not what could be done to crystallise presently nonexistent rights. The Judge does, however, advert to a consideration which seems to me to be more material when he states that the Sugar Company, after notice of the covenant, would—before paying under it—be concerned to inquire if any debt existed under the Bill of Sale: this because the covenant was given in anticipation of the receipt of the moneys to be affected by the covenant, and there might be no debt existing under the Bill of Sale when the time for disbursement came.

There is, no doubt, a wide difference between a present assignment expressing, as it must, the present concurrence of the assignor in the payment of the moneys referred to in it and a claim under a covenant such as this, given long before in circumstances in which the debt might have been paid or materially reduced, so that the obligations for which the covenant was given might have been discharged or discharged to an extent which made only partial reliance on the covenant necessary.

That characteristic would, no doubt, have defeated the appellant's claim had the contract to assign been voluntary. See *McArdle* (1951) 1 All E.R., 905 and particularly at p. 909 where the Master of the Rolls states the nature of the inquiries the garnishee in that case would be constrained to make. But this was a contract to assign given for valuable consideration and present rights may well be involved. In the circumstances, consideration was necessary. See *Antrobus* v. *Smith* (1806) 12 Ves., 39: this because, as was said in *Holt* v. *Heatherfield Trust* (1942) 2 K.B., 1, " an assignment of a future debt can operate only as a contract to assign. It remains a purely equitable assignment which will be enforced like any other contract only if given for value." This statement was founded upon the judgment of the Court of Appeal in *Glegg* v. *Bromley* (1913) 3 K.B., 474. Both relate, of course, to an assignment expressed as such and not to a mere contract to assign.

It may be that, as the intention to assign is clear, in the covenant and no form of words is necessary, though phrased in contractual terms, the covenant, taken alone, should be construed as a present assignment. It is, however, unnecessary to consider that question for there is clear authority that where there is a definite agreement that a debt owed by one man to another is to be paid out of moneys which the debtor might recover from a third party, the agreement creates an anticipatory equitable charge over the moneys. *Riccard* v. *Pritchard* (1855) 1 K. & J., 277. See too, *The Kent and Sussex Sawmills* (1947) Ch., 177; *Re Wait* (1927) 1 Ch., 606.

The principle is expressed in *Holroyd* v. *Marshall* (1862) 10 H.L. Cas., 191 and is phrased in *Hanbury's Modern Equity* thus:—

> " The House of Lords decided that if the future goods which were to form the subject of a future sale or mortgage were sufficiently earmarked at the time of the contract and if the contract were such that equity might decree specific performance of it, equity will then place the property in a state of anticipatory isolation so as to give the beneficial interest therein to the intended transferee or mortgagee directly the property comes into existence or falls into the hands of the intending transferor or mortgagor."

The principle enunciated in *Holroyd* v. *Marshall* (*supra*) was summarised in *Joseph* v. *Lyons* (1884) 15 Q.B.D., 280 by Cotton, L.J., when he said in language more expressly germane to this case:—

> " In *Holroyd* v. *Marshall* it was held . . . that when future acquired property is assigned pursuant to a contract capable of specific performance that property, when it has been sufficiently earmarked and identified, may pass to the assignee and become his property: it may be that there was not a valid assignment at law but where there was a valuable consideration the assignment might be valid in equity."

Lord Watson in *Tailby* v. *Official Receiver* 13 App. Cas., 523, in rejecting the test as to whether specific performance would be decreed, substituted another test by saying, in effect " where nothing remains to be done in order to define the rights of the parties but the Court is merely asked to protect rights completely defined as between the parties to the contract or to give effect to such rights " the Court will protect them. *West and Wright* v. *Newing* (1900) L.J., 260 is an example of the application of the doctrine. The principle is apt to cover this case for the rights are clearly defined in the covenant. It follows, in my view, that the funds affected by the covenant to assign were in a state of anticipatory isolation as soon as they were available for disbursement by the Sugar Company and that the beneficial interest in them as they became distributable was vested in the appellant as from that date. It follows that the appellant is, as against the respondent, entitled to the moneys now in Court.

There is another ground upon which I think the appellant is entitled to succeed. The respondent could not, under its garnishee order, take any more than its debtor could himself honestly enjoy. *Mankles* v. *Dixon* (1853) 3 H.L. Cas., 702 and *Holt* v. *Heatherfield Trust* (*supra*). The fund attached was already pledged to the appellant, effectively, as I think, but certainly pledged, and clearly the debtor could not himself have called for payment of the fund. Nor can the respondent.

I would set aside the judgment appealed from. As to costs, I concur in the order of the learned President.