

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Khoo Kwat Siew and others v. Wooi Taik
Hwat and others, from the Court of the
Recorder of Rangoon; delivered November 13th,
1891.*

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MORRIS.

SIR RICHARD COUCH.

MR. SHAND (LORD SHAND).

[*Delivered by Lord Hobhouse.*]

THE only question in this case is whether the mortgage deed of the 11th March 1889, either originally, or as modified in May 1889, is valid against the assignee in insolvency of the mortgagors. It is better not to use the term "fraudulent" in such a case, though that term has, by rather an unhappy use of language, been applied by courts of equity to transactions which are not at all dishonest in their nature, but are only such as the law will not allow. In this case there is no suggestion from beginning to end of there being anything dishonest in the transaction. The sole question is as to its legal validity.

The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance something is left to carry on the business.

Prior to the mortgage of the 11th March 1889 the mortgagees had assisted the mortgagors, either by payments or by incurring liabilities on promissory notes for them, to the extent of Rs. 30,000. At the time of the mortgage more assistance was given. Their Lordships take it to be clear beyond dispute, though it has been argued to the contrary at the bar, that simultaneously with the mortgage the Defendants' firm did receive, in the form of a joint promissory note signed by themselves, and by the Plaintiffs, further assistance to the extent of Rs. 25,000. They also received an undertaking for further accommodation, amounting in the whole to a lakh of rupees. This promissory note, like at least one, if not more, of the former ones, was payable on demand, but there seems to have been some understanding—it does not appear exactly what—that it should not be presented until some later date. It was in fact presented in the month of September 1889. It was not taken up by the mortgagors, and it was taken up by the mortgagees. There was therefore substantially an advance of Rs. 25,000 simultaneously with the mortgage. The further accommodation to the extent of a lakh of rupees was not made, on account of a subsequent agreement which will be noticed presently.

That being so, their Lordships consider that this deed must be held to be valid. They are not aware of any case in which, a simultaneous advance of a large amount being made, and future support being promised of a large amount, the validity of such a deed has been seriously called in question. In this case the simultaneous advance was nearly as much as the pre-existing debt, and the undertaking to give future advances was considerably more.

It has been argued for the assignee that the proper test is, whether it was the intention of the

parties that the trader giving such a security should carry on his business. Their Lordships conceive that that question hardly arises except in those cases where the amount of additional assistance given at the time of the mortgage is so small as to create a doubt whether it is substantial; and then comes in the inquiry into the motives of the parties, whether they did really intend that the business should be carried on or not. It is impossible to raise such a question here, where the amount of simultaneous and future advance is very large. Even if their Lordships did enter into that question, which is one of honesty, the receiver's accounts show that the firm was, as late as the 31st August 1889—in fact till the large amounts due on promissory notes were called for—a solvent firm. Striking out from the liabilities the debts due to the partners themselves, which of course cannot be taken into account for this purpose, and the sum of Rs. 40,000 which was due to or was to be supplied by the mortgagees, it seems that at that date the firm would have had a surplus of something like Rs. 74,000. It was a solvent firm, and we have it in evidence that it was doing a large business, and it must have been the interest, and doubtless was the motive, of all the parties to keep on its legs a firm that was doing a business bringing in profit.

Their Lordships have no doubt whatever about the validity of the mortgage deed of the 11th March 1889. That would, at all events, cover such assets of the then firm as were in existence at the time of the insolvency; and the receiver's accounts again show that those assets were something substantial.

But then it is argued that as regards the partners who came into the firm on the 29th May 1889, and as regards the new stock-in-trade which was brought into the business after that

time, the mortgage deed cannot operate. First, it was said that there was no arrangement that it should operate on the future stock. But their Lordships consider it to be well established by the evidence that the arrangements made were of the nature which has been succinctly stated by witnesses on both sides. The principal Plaintiff says, at page 62 of the record: "I said that if an agreement was made"—that is the agreement for incoming partners—"they would have to pay Rs. 15,000,"—that was paid down—"and Rs. 40,000 on due date." Then he says: "It was secured by the document." What was secured? The sum of Rs. 40,000 was secured. But this sum certainly would not have been secured if the goods of the old firm, which were being exhausted week by week, had been the only security for it, and the goods substituted for them were not to form part of that security. The same witness afterwards says: "When the incoming partners came into the firm it was understood that I should continue to guarantee the Rs. 40,000 until Bugwan Doss and the Chetty's notes became due." On page 69 of the record one of the outgoing partners says, speaking of the incoming partners: "They undertook to pay all debts contracted by the firm"—that is the old firm—"as well as what was due under the mortgage. The security of the mortgage was to continue but no further advances were to be made. * * * * It was also said that the amount due on Exhibit A was to be reduced to Rs. 40,000, and that there was to be no more accommodation and the Rs. 40,000 was to be paid on due date or on demand. The stock was to continue as security."

On those passages it was argued that that merely meant that the mortgage of the 11th March 1889 was to continue according to its

legal operation as it was made, that is, its operation on the assets of the old firm. But such an interpretation would be making the parties enter into a nonsensical agreement. It is impossible to suppose that the incoming partners, who were to take all the benefit and the profits of the existing stock, the mortgagees not enforcing their security against it which they could enforce, were not agreeing under these expressions, if those were the expressions used, or that the witnesses did not intend to state that they were agreeing, that the stock for the time being of the firm then constituted was to be the security to the mortgagees. An incoming partner, and one of the Defendants, Khoo Cheng Choon, says: "I said" to Khoo Kwat Siew, "I would pay Rs. 15,000,"—that was done—"and for the balance Rs. 40,000 you " must stand guarantee. He agreed. If he " hadn't done so I wouldn't have entered into the " firm." Therefore it seems that the incoming partner entered into the firm on the promise of the Plaintiff Khoo Kwat Siew to guarantee these Rs. 40,000 which actually were paid. This statement of Khoo Cheng Choon leads to the same inference in the minds of their Lordships that they have drawn from the preceding evidence. In his cross-examination Khoo Cheng Choon says: "When Taik Hwat,"—the senior partner,— "went out it was arranged that the security should continue." Their Lordships interpret the meaning of this to be that the security should continue with respect to the new firm, and the new stock, exactly as it stood with respect to the old firm and the old stock.

Then it is argued by Mr. Mayne that if this new arrangement had been the first arrangement, and if we take the facts as they stood at the time when the new arrangement was made, all the debts then secured were past debts or existing

liabilities, and so the security, the mortgage, would fall within the rule which makes void assignments of all a trader's property. It is an ingenious argument, but their Lordships, cannot accede to it. In the first place it is impossible to take the case as if the original arrangement did not exist. We find a valid mortgage existing over the assets of the firm, immediately before the arrangement of May 1889. New partners then come in, and the mortgagees' assent has to be obtained, because they could seriously embarrass, probably could break up the firm at any moment. The new partners then have the benefit of the going concern, and they make the reasonable arrangement that the going new concern shall be under the same liabilities to the secured creditors as the going old concern. It is impossible to say that such an arrangement as that would invalidate the prior valid security, because it amounts to a mere substitution of persons and goods at the time of the change. But further, it is not true that substantial consideration in payment did not pass to the incoming partners. It is true that Rs. 15,000 of the debt was then paid off, and that the obligation of the mortgagees to provide accommodation up to a lakh of rupees was then remitted, but there still remained their obligation to provide the Rs. 40,000, which was actually provided in the succeeding month of September.

This obligation did not exist as between the mortgagees and the incoming partners till the arrangement of May 1889 was made. Then the incoming partners got the benefit of the suretyship into which the mortgagees had entered for the former partnership.

Their Lordships therefore hold that, even if this had been the original arrangement, it would have been supported by the passing of

a substantial consideration to the incoming partners at the time of the arrangement.

The result will be that the decree of the Recorder of Rangoon should be reversed, and that the Plaintiffs should have a decree substantially in accordance with the plaint. Probably the property has undergone change during the progress of the suit, in a way to vary the precise mode of relief. It will be right to declare that the indenture of the 11th March 1889 is a lawful and valid instrument, and that by virtue thereof the Plaintiffs were, at the date of the insolvency of Pinthong and Friends, mortgagees of all the stock-in-trade, fixtures, utensils, and effects then upon or in or appertaining to their premises in Merchant Street, and of the good will of their business, with all book debts and trade outstandings then payable to, or recoverable by the said firm.

There is some further care required in framing the decree, because the suit was originally brought, and this appeal is brought against all of the seven persons who, between the 11th March 1889, and the date of suit, viz., the 11th September 1889, were partners in the firm of Pinthong and Friends. None of those persons have appeared here, and their Lordships must act in their absence. Three of these persons, Khoo Bean Poot, Khoo Hock Chie, and Khoo Jinn Inn, do not appear to have made any defence, or to have caused or incurred any costs. The effect of the arrangement of May 1889, was to transfer the liability created by the mortgage of March from the then outgoing partners to the incoming ones. The outgoing partners are the three Defendants in question. Against them there should be no costs. The other four, Wooi Taik Hwat, Khoo Cheng Choon, Saw Pang Lim, and Khoo Cheng Wah, put in a written statement denying the validity of the

mortgage. In March 1890 the Official Assignee under the insolvency was added as a Defendant, and though the individual has been changed, the Official Assignee is a party to this appeal, and has appeared to maintain the Recorder's decree. Whether a decree against the insolvents will be of any value to the Plaintiffs their Lordships cannot tell, but they think that the Plaintiffs are entitled to it. All the remedies that the mortgage deed is calculated to give them, they are entitled to against the persons who undertook the obligations, and against the Official Assignee on whom the mortgage property has devolved. The four Defendants last mentioned, and the present Official Assignee should be ordered to pay the costs of the suit and of this appeal.

Their Lordships will humbly advise Her Majesty accordingly.