Privy Council Appeal No. 4 of 1918.

S. D. Krishna Ayyangar - - - - - - *Appellant*

v.

S. V. Nallaperumal Pillai and others - - - - *Respondents.*

(*Four Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH DECEMBER, 1919.

Present at the Hearing:

VISCOUNT FINLAY.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* VISCOUNT FINLAY.]

The question in the present case is whether a charge given to the Secretary of a Limited Company upon unpaid calls can be enforced by him although not registered as required by section 68 of the Act of 1882 (the Indian Companies Act). The difficulty in the case is occasioned by the Explanation appended to the section, which otherwise is on the same lines as the corresponding section in the English Act. It was held by the High Court of Madras that the terms of the Explanation rendered the charge not enforceable. Apart from the effect which the Explanation in the Indian Act may have in the case of a mortgage or charge to an officer of the Company, it is clear that a mere failure to register does not under either the English or the Indian Act render a mortgage or charge on the property of the Company unenforceable.

Section 68 of the Indian Act requires registration of all mortgages and charges specifically affecting property of the Company, and imposes a penalty upon any official of the Company who knowingly and wilfully authorises or permits the omission of such

entry on the register. The performance of the duty to enter the mortgage or charge on the register may be compelled by order of the High Court. There is appended to this section in the Indian Act an Explanation in the following terms :—

> " *Explanation.*—Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered."

The appellant contends that the judgment of the High Court is erroneous, and that the question of construction has been conclusively settled in his favour by an order of the District Judge in 1912 which stands unreversed.

The appellant was the secretary of the Swadeshi Steam Navigation Company, Limited. On the 27th June, 1910, a Resolution creating the charge in question was passed by the managing directors in the following terms :—

> " *Resolution III.*—Resolved that, in consideration of the fact that the Honorary Secretary Krishna Ayyangar has worked for the Company without any salary, foregoing his own source of income, and of the fact that he has borrowed and advanced moneys to meet the urgent needs of the Company, the unpaid calls due to the Company from the share-holders are mortgaged for the amount advanced by the aforesaid person to the Company and for interest thereon, and for the money advanced to the Company by the late Manager Kandasami Pillai and for the deposit money due from the Company to the late cash-keeper Gopalakrishna Pillai ; that the Secretary be authorised to collect the unpaid calls through Court if necessary under the power already given to him, and that out of the amounts collected the deposit money due to Gopalakrishna Pillai be paid first, and that the Secretary Krishna Ayyangar and the said Kandasami Pillai Avergal shall appropriate the balance amount in the proportion of the amounts due to each of them."

This charge was never registered.

An order was made on the 4th July, 1911, that the Company should be wound up by the Court, and in the course of the winding up a petition was presented by the appellant to the District Judge, Mr. Oldfield, asking for an order recognising the validity of the charge. The liquidator relied on section 68, and contended that the charge not having been registered was not enforceable by the appellant, as he was an officer of the Company when it was taken. The District Judge rejected this contention on the ground that the Explanation refers to the contingency of the officers of the Company desiring to avail themselves as such of a charge, and that it was not as secretary but as an individual that the appellant sought to avail himself of this charge, and made an order on the 27th April, 1912, allowing the claim for the reasons set out in his judgment on pages 8–10 of the Record. The liquidator further attacked the charge before the District Judge as a fraudulent preference, but the District Judge by the same order decided in favour of the appellant on this point also. No appeal was ever presented against this order. On the 25th September, 1913, the appellant applied to the District Court for an order directing the official liquidator to

pay to the petitioner the amount collected or to be collected for unpaid calls. This was opposed by debenture-holders and by the liquidator on the grounds (*a*) that the charge was void as a fraudulent preference; (*b*) that it had not been registered; and (*c*) that it was not entitled to priority over debentures previously issued. The District Judge, Mr. Waller, refused to entertain grounds (*a*) and (*b*) as they had been decided by the order of the 27th April, 1912, but heard argument on ground (*c*), and on the 22nd December, 1913, decided that the appellant was entitled to priority over the debenture-holders. On appeal against this decision to the High Court at Madras the judgment now under appeal was delivered on the 30th April, 1915. The judgment deals with two points. The first was as to the claim of the debenture-holders to priority over the charge. On this the High Court decided in favour of the present appellant and against the debenture-holders. The second point was that of non-registration, which the Court allowed the debenture-holders to raise on this appeal. The Chief Justice, in delivering judgment, referred to the conflict on the interpretation of section 43 of the English Act which had arisen between Sir George Jessel and James, L.J., as to mortgages and charges to officers of the Company, and said that the Explanation appeared to be intended to reproduce the ruling of James, L.J., in *Ex parte Valpy* (1872, Law Reports, 7 Ch. App. 289). He then proceeded as follows :—

> "The words 'as such' present some difficulty. If they mean 'as officers of the Company,' it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the Legislature was anxious to reproduce not only the substance, but as far as possible the very language of the decisions, and that this must be accepted as the meaning of the Explanation."

It is undoubtedly true that the very point which has now been argued before their Lordships was argued before the District Judge in 1912 and then decided in the appellant's favour, and there has been no appeal against that decision. Ought this, as the appellant contends, to make an end of the matter? The point is of considerable importance as a matter of practice. The order of the 27th April, 1912, which was made after argument on behalf of the appellant and the official liquidator, decided that the want of registration did not prevent the enforcement of the mortgage. Their Lordships think that the official liquidator must be regarded as having represented on that application the debenture-holders and creditors as well as the Company, and that so long as the decision stands it is conclusive in the winding up on all parties so represented. The official liquidator did not appeal. If any debenture-holder or other person interested desired to attack the decision, it was open to him to ask that he should be made a party and should have leave to appeal. No such application was made. But when the appellant applied on the 28th September, 1913, for enforcement of the order made on the

27th April, 1912, the debenture-holders, on their appeal from the order of the 22nd December, 1913, were allowed by the High Court to raise the point of non-registration which had been decided against them in 1912. (See the judgment now under appeal, Record, pp. 96 & 97.) The proper course to have taken in order to raise this point would have been to get leave, notwithstanding the lapse of time, to appeal from the judgment of the 27th April, 1912. But the matter is merely one of practice. The High Court could have regularised the proceedings by extending the time, and giving leave to appeal from the 1912 decision, and they considered the point without going through this process. Their Lordships are not prepared to reverse the decision of the High Court merely because the proper course in point of practice was not taken, and they propose to deal with this appeal on the footing that the respondents were entitled to raise in the High Court their objections under section 68. Whether leave should have been given to appeal would have been a matter of discretion, but the High Court appear to have had no doubt that they should allow the point to be raised. Their Lordships have, therefore, dealt with the case on this basis, and now proceed to consider the appeal on its merits.

The question of the effect of non-registration in cases where the charge was taken by an officer of the Company must be decided upon the terms of the Explanation to section 68, but in order to make the judgment of the Chief Justice intelligible it is necessary to refer shortly to the English decisions which he quotes in his judgment.

The English section—section 43 of the Companies Act of 1862—corresponds to section 68 of the Indian Act *minus* the Explanation. In 1872, in *Valpy's* case (*supra*), James, L.J., held that, as the unregistered charge had been taken by a person acting as solicitor to the Company, he could not avail himself of it, and in 1876 in *Re the Native Iron Ore Company* (2nd Ch. Div. 345) a mortgage in favour of directors of the Company was held not enforceable as the registration was defective, there being no description of the property. These decisions proceeded on the supposed principle that, as it is the duty of officers of the Company to see to registration of mortgages, if they fail to do so in the case of mortgages to themselves they cannot be permitted to enforce them. But in 1878 in the *Globe* case (48 L.J. Ch. 295) Sir George Jessel expressed his dissent in the strongest terms from these two decisions, and in 1879 in the *South Durham* case (11 Ch. Div. 579) Sir George Jessel and Bramwell, L.J. (*dissentiente* Baggallay, L.J.), adhered to the view that these two cases had been improperly decided. The whole Court, however, held that they were binding authorities, but distinguishable on the facts of the case then before the Court.

This was the state of the authorities when the Indian Companies Act became law. The High Court in the present case took the view that the Explanation was intended to reproduce the ruling of James, L.J., and must be construed accordingly.

The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. The controversy was terminated, so far as the English Courts are concerned, by the decision of the House of Lords in 1887 in *Horton* v. *Wright* (12 A.C. 371), which is an express and final decision that Sir George Jessel's view was right. Of course this decision can have no effect upon the present case. If the effect of the Explanation in the Indian Act of 1882 was to adopt as law in India the view of James, L.J., there is an end of the matter in the absence of further legislation. If the Explanation has this effect it must be carried out, and the fact that the enactment was passed in consequence of what the subsequent decision of the House of Lords showed to be a misconception of the English law would be quite irrelevant. The question is, What does the Explanation mean? No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The question really narrows itself to this: What effect should be given to the words " as such " in the Explanation?

The appellant contended that the words " as such " relate to the words " the officers of the Company," and that the effect is to enact that the officers cannot avail themselves as such officers of unregistered mortgages or charges taken by them in their capacity of officers of the Company. This is the most natural meaning of the words; it was adopted by Mr. Oldfield, the District Judge, in his decision of the 27th April, 1912, and in his judgment (Record, p. 9) he suggested circumstances in which he thought the words so read would take effect. The contingency referred to by Mr. Oldfield was the retention by the Company of redeemed debentures or charges in the name of an officer. Such a contingency, however, is remote even if possible and it appears to their Lordships that it would be a mistake to read the words as directed to it.

The respondents contended that the words " as such " refer entirely to the following words " of a mortgage or charge," and that their effect is that the officers of the Company cannot avail themselves of a mortgage or charge as such unless it has been registered. It was suggested that the words were introduced in order that it might be open to the officer of the Company to avail himself of the instrument as evidence of a debt or for some other purpose of that kind.

Their Lordships are unable to accept this construction. It seems to them to be at variance with the language of the Explanation. The structure of the sentence is such that the words must be read as referring to what precedes and not to what follows them. To hold otherwise would be to put an unjustifiable strain upon the clause, which must be read according to the ordinary usages of the English language. Indeed, the intervention of the word " of " between the words " as such " and the words " a mortgage or charge " appears fatal to this theory.

Yet another construction has been put forward, *viz.*, that " as such " means " while such," and prevents the enforcement of the security by an officer of the Company while he remains such officer. If this view be correct, the appeal would succeed, as, owing to the winding up of the Company, the appellant had ceased to be an officer of the Company before the claim was put forward. Their Lordships do not see their way to construing the words in this sense as relating merely to time.

There is a fourth possible construction of these much debated words and it is that which after much consideration their Lordships adopt. It is this. The words " as such " should not be read as denoting the capacity in which the officers take the mortgages or charges. They are introduced simply as giving the reason for the inability to take advantage of the securities. The reason underlying the judgments, which the Explanation appears to have been intended to crystallise into the form of an enactment, was that officers entrusted with a duty as to registration could not take advantage of a security to them as to which this duty had been neglected by them. The words " as such " relate simply to the prohibition under which they are as officers. The officers are forbidden as such because they are officers and were therefore bound to see to registration, to avail themselves of unregistered securities. The words in this sense are unnecessary but not insensible. The drafting is bad, but having regard to the extreme improbability that it was intended to meet such a contingency as that put by Mr. Oldfield in his decision of the 27th April, 1912, and to the fact that the construction now suggested would, as the Chief Justice in the Court below points out, embody the effect of the judgments of the Court of Appeal, which were in 1882 when this clause was enacted recognised as of binding authority, their Lordships think that this last construction should be adopted. The language of the Explanation is to some extent taken from these judgments, as the Chief Justice remarks, and this strengthens the probability that it was intended by the language used to reproduce their effect.

Their Lordships therefore are of opinion that the judgment of the High Court of Madras is right and will accordingly humbly advise His Majesty that these appeals should be dismissed with costs.

In the Privy Council.

S. D. KRISHNA AYYANGAR

v.

S. V. NALLAPERUMAL PILLAI AND OTHERS.

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DELIVERED BY VISCOUNT FINLAY.

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