[1892] 2 Q.B. 633

[COURT OF APPEAL]

IN RE FRASER. EX PARTE CENTRAL BANK OF LONDON.

1892 Aug. 5.

LORD ESHER, M.R., BOWEN and KAY, L.JJ.

Bankruptcy - Receiving Order - Judgment Debt - Power of Court to go behind Judgment - Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g), s. 7 - Partnership - "Holding out" as partner - Liability of retiring Partner for Debts of Firm contracted after Dissolution of Partnership.

Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal.

A partnership having been dissolved by mutual consent, and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution.

APPEAL from the refusal to make a receiving order against John Fraser.

The bankruptcy petition was presented by the Central Bank of London, who were the holders for value of a bill of exchange for 500*l.*, due December 5, 1890, which was accepted in the name of bill on November 20, 1890. The firm had consisted of John Fraser and his brother William Fraser. On December 6, 1890, the bank issued a specially indorsed writ in an action in the Queen's Bench Division against W. & J. Fraser upon the bill, which had been dishonoured. On December 16 an appearance to the writ was entered for "William Fraser and John Fraser, sued as W. & J. Fraser, carrying on business as W. & J. Fraser." On the application of the bank, an order was, on December 23, made by the master, giving them leave to sign judgment under Order XIV. for the amount indorsed on the writ, with interest and costs. The defendants did not appear on the hearing of the summons. On December 24, judgment was signed for 501*l.* 6*s.*, and costs. The judgment debt was not paid. On March 16, 1892, John Fraser issued a summons in the action, asking that the judgment might be set aside as against him, on the ground that, prior to the date of the acceptance of the bill, the partnership between himself and his brother had been dissolved, the business being afterwards carried on by William Fraser alone, so that John Fraser was not liable upon the bill. The master dismissed the summons. John Fraser appealed to the judge in chambers. The judge referred the matter back to the master for further inquiry. The master, after hearing further evidence, adhered to his former decision, and the judge then dismissed the appeal. John Fraser appealed to the Divisional Court, and the appeal was dismissed. He then appealed to the Court of Appeal (Fry and Lopes, L.JJ.), who, on May 30, 1892, dismissed the appeal on the ground of delay, and also because they were not satisfied by the evidence that the partnership had been dissolved before the date of the acceptance, or that, if it had, the money was not raised for the purpose of discharging partnership liabilities.

On March 9, 1892, the bank had served a bankruptcy notice on John Fraser in respect of the judgment debt. An act of bankruptcy was committed by non-compliance with the notice, and the bank presented a bankruptcy petition. John Fraser resisted the making of a receiving order on the ground that at the date of the acceptance he was not a partner in the firm of the acceptors. Upon the evidence adduced to him the registrar came to the conclusion that this was the fact, and he, therefore, refused to make a receiving order, and dismissed the petition.

The bank appealed.

Hopkinson, Q.C., and **Vivian Morten**, for the bank. Though the Court of Bankruptcy does in some cases go behind a judgment for a debt, and inquire into the consideration for the debt, it ought not to do so in a case in which the debtor has, on the very same grounds which he now puts forward, endeavoured to set aside the judgment, and his application has been refused by every Court, including the Court of Appeal. The validity of the debt cannot now be disputed by the debtor, even in the Court of Bankruptcy. The matter is really res judicata: *Bowes v. The Hope Life Insurance Company*. (1)

[KAY, L.J., referred to *Ex parte Banner*. (2)

LORD ESHER, M.R., referred to *Ex parte Lennox*. (3)]

In that case the debtor had not taken any steps to set aside the judgment. Here he has done so without success.

Even if John Fraser was not a member of the firm at the time of the acceptance, he had held himself out as a partner by allowing his brother to carry on business under the name of the old firm. It is not necessary for the purpose of making him liable on this ground that the representation should have been made to the particular person who seeks to take advantage of it; it is sufficient if the representation comes to the knowledge of any such person casually.

F. H. Mellor, for John Fraser, was not heard.

LORD ESHER, M.R. This appeal must be dismissed. A judgment was obtained by the appellants against the alleged debtor. The judgment was against a partnership firm, and against him as one of the partners. The judgment had been obtained under Order XIV., and an application had been made by John Fraser to the Queen's Bench Division to set aside the judgment as against him, and to allow him, notwithstanding the judgment, to defend the action. This was a matter for the discretion of the Court, and in the exercise of that discretion the master, the judge in chambers, the Divisional Court, and ultimately the Court of Appeal, refused the application. They did so on the ground of delay, and on some other grounds. As a matter of law the judgment, therefore, stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy.

(1) H. L. C. 389.

(2) 17 Ch. D. 480.

(3) 16 Q.B.D. 315.

But, when it is sought to obtain a receiving order against him in respect of the judgment debt, the Court of Bankruptcy has to exercise its discretion, and for the exercise of that discretion one rule of conduct is to be found in s. 7 of the Bankruptcy Act, 1883, which provides, by sub-s. 3, that, "if the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." The question is, whether the registrar had not a discretion under s. 7, and whether he has rightly exercised that discretion. The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter. Upon the words of s. 4 of the Bankruptcy Act alone it might be said that the existence of a judgment determined the matter; but s. 7 shews that the Court of Bankruptcy, though the judgment cannot be set aside, may inquire, even at the instance of the debtor, whether there is any ground for making a receiving order. That this is so was determined by this Court in *Ex parte Lennox* (1), which shews that, though there is a judgment, which the judgment debtor cannot set aside, he may nevertheless ask the Court of Bankruptcy to inquire whether the debt on which the judgment was founded was a good debt, and that, if the Court is satisfied that it was not, it may refuse to make a receiving order in respect of the debt. The decision is based upon the highest ground - viz., that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt primâ facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor. The question is, whether the registrar has in the present case rightly exercised this power - whether, in fact, there is a good petitioning creditor's debt. The facts of the case had to be dealt with by the registrar. He was entitled to hold that the partnership had been dissolved before the acceptance was signed, and, if so, the fact was proved that the acceptance was not John Fraser's acceptance.

But it is said that John Fraser is liable on the bill because he held himself out as a partner in the firm. The doctrine of "holding out" is a branch of the doctrine of estoppel. If a man holds himself out as a partner in a firm, and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or by words; but the estoppel can be relied upon only by the person to whom the representation has been made in either way, and who has acted upon the faith of it. There is no evidence in the present case of any such holding out by John Fraser to the petitioning creditor'. If they had dealt with the old firm and had had no notice of the dissolution of partnership, the case would be entirely different.

Then it is said that the question of the validity of the debt is already res judicata by the refusal of this Court to set aside the judgment. But that decision was an adjudication upon the question whether the judgment could be set aside at the instance of the judgment debtor himself; the present question is whether, the judgment standing as a good judgment, the debt can in the Court of Bankruptcy constitute a good petitioning creditor's debt. In my opinion it cannot.

BOWEN, L.J. I am of the same opinion.

KAY, L.J. I agree. It is old law in bankruptcy that, neither upon an attempt to prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a judgment against him for the debt conclusive.

In *Ex parte Bryant* (1), Lord Eldon said: "Proof upon a judgment will not stand merely upon that, if there is not a debt due in '*truth and reality*,' for which the consideration must be looked to." Can this judgment be treated as conclusive in bankruptcy because the debtor has unsuccessfully attempted to set it aside? I think not, and I cannot see how the matter is any more res judicata because there has been an unsuccessful appeal to this Court. I agree in all that the Master of the Rolls has said on this point.

As regards the question of "holding out," I think it is clearly proved that at the time when the acceptance was given John Fraser was not a partner in the firm. He had been a partner, but the partnership had been dissolved, and the business was, with the consent of John Fraser, being carried on by William Fraser under the old firm name. The bank, who claim to be creditors of John Fraser in respect of the acceptance, had had no dealings with the old firm. Does the fact that John Fraser permitted his brother to carry on the business under the old firm name amount to a representation by him to the bank that he, John Fraser, was a partner in the firm? I think that *Newsome v. Coles* (1) shews that it does not. In that case Thomas Coles and his three sons, William, George, and Charles, had carried on business in partnership under the firm of "Thos. Coles & Sons." The father died in 1805, and the three sons continued to carry on business under the same firm till the year 1808. George and Charles then withdrew and established a new business under a new firm. Notice of the dissolution of partnership was published in the *London Gazette*, and was sent round to the correspondents of the house. William Coles continued the old business by himself, under the old firm, and in March, 1810, he accepted in that name a bill of exchange drawn upon Thomas Coles & Sons. The plaintiff, the holder of the bill, had not had any dealings with the partnership of Thomas Coles & Sons when composed of the three brothers, and when he took the bill he did not know that that partnership had been dissolved. He sued the three brothers upon the acceptance, and it was held by Lord Ellen-borough that the brothers George and Charles were not liable. They had done all that they could to notify the dissolution of the old partnership. In the present case the evidence shews that, when the dissolution of partnership took place, the partners notified it to their bankers and to their principal creditors. The appellants say that before they discounted the bill they inquired of those bankers who were the partners in the firm of W. & J. Fraser, and that the manager told them John Fraser was a partner. But the manager was not called, and there is really no evidence of such a statement. I think the facts bring the case within the principle of *Newsome v. Coles* (1), and that there is no estoppel as against John Fraser. In my opinion the registrar's decision was right.

(1) 2 Camp. 617.

Appeal dismissed.

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W. L. C.