Nippon Kinyu Sha Ltd. (Re)

In Re Nippon Kinyu Sha Limited
Ex Parte Fujino

[1923] B.C.J. No. 9

[1923] 1 D.L.R. 1156

British Columbia Supreme Court

Murphy J.
(In Chambers)

Heard: January 5, 1923.
Judgment: January 11, 1923.

Counsel:

Hossie, for the trustee.
Wilson, K.C., and Griffin, for the creditors.

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1 MURPHY J.:-- In my opinion, the decision of the trustee is correct and distribution should take place in accordance with Exhibit D, called Exhibit 2 at the hearing. I have already held on the authority of Sinclair v. Brougham, (1914), 83 L.J., Ch. 465 that no debt could be created by deposit of money in the bankrupt concern after April 15th, 1920. If that is correct then this application seems determined by the decision in Wright v. Laing (1824), 3 B. & C. 165. It is there laid down that where a person has two demands one recognized by law the other arising on a matter forbidden by law and an unappropriated payment is made to him the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. There is no qualification of this principle as I read the decision in The Mecca (1897), 66 L.J., P. 86.

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ANNOTATED

Alphabetically Arranged Table of Annotations

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[1923]

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and its claim must be denied. *Re Pearsons' Estate* (1896), 45 Pac. Rep. 849.

One other point argued was in respect to children not actually under a claimant's roof but living with a parent or some other person and actually maintained and sustained by the institution. I think such children are children *under the care* of the institution within the meaning of the bequest.

If counsel cannot agree as to the actual number of children, for the purposes of distribution, there will be a reference to the registrar to ascertain such numbers in accordance with the above findings.

Costs of all parties out of the estate.

Judgment accordingly.

Re NIPPON KINYU SHA Ltd., Ex p. TOTARO FUJINO.

British Columbia Supreme Court, McDonald, J. January 5, 1923.

BANKRUPTCY IV—*Distribution—Creation of debt.*]—Application to determine the correct distribution of a bankrupt's estate. [See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

D. N. Hossie, for trustee.
C. Wilson, K.C., and *W. M. Griffin*, for creditors.

MCDONALD, J.:—In my opinion the decision of the trustee is correct and distribution should take place in accordance with ex. D. called ex. 2 at the hearing.

I have already held on the authority of *Sinclair* v. *Brougham*, [1914] A.C. 398, that no debt could be created by deposit of money in the bankrupt concern after April 15, 1920. If that is correct, then this application seems determined by the decision in *Wright* v. *Laing* (1824), 3 B. & C. 165, 107 E.R. 695. It is there laid down that where a person has two demands one recognised by law the other arising on a matter forbidden by law and an unappropriated payment is made to him the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. There is no qualification of this principle as I read the decision in *The Mecca; Cory Bros.* v. *Owners of S. S. Mecca*, [1897] A.C. 286.

Judgment accordingly.

WINTERBURN v. ANDERNACH.

B.C.
S.C.
1922.

British Columbia Supreme Court, Murphy, J. October 9, 1922.

REPLEVIN II A—*Bond—Refusal of sheriff to assign until certain costs paid—Order of Court directing sheriff to assign bond—Jurisdiction of Court to make order.*]—Action on a bond assigned to plaintiff.

W. C. Moresby, for plaintiff.
H. A. Maclean, K.C., for defendant.

MURPHY, J.:—It is objected the Court had no jurisdiction to make the order directing the sheriff to assign the bond. I cannot see why. The sheriff is an officer of the Court. He declined to assign the bond because he claimed certain costs were payable to him. The Court found against him and thereupon made the order. If I am wrong in this, the order stands until set aside by a Court of competent jurisdiction. *Brigman* v. *McKenzie* (1897), 6 B.C.R. 56. Then it is said the bond is invalid because the plaintiff was never put in possession by the sheriff of the replevied property. But I find nothing in the Replevin Act, R.S.B.C. 1911, ch. 201, to justify this contention. The position is the plaintiff sues on a bond duly assigned to him. He has proved that the conditions which would have avoided the bond have not been fulfilled.

It is urged that the sheriff never replevied the boat, that he, therefore, could not sue on the bond, and that plaintiff being his assignee is in no better position. To this, I think, there are two answers: 1st the sheriff did replevy the boat. He took it out of the possession of plaintiff and held it so that it was available if the claimant succeeded at the trial. True, he did not hand it over to claimant, but it does not appear that the claimant ever asked for delivery. In connection with this point, I hold the contention that the plaintiff, or his solicitor, refused to accept the bond not proven. I have here two officers of the Court contradicting one another on a question of fact. I see no reason to disbelieve either and, therefore, hold the one who propounds the affirmative to have failed to prove his assertion. Such unfortunate issues would not arise if officers of the Court would transact all official business in writing. I accept the evidence of the plaintiff that he never personally refused to accept the bond.

Next, the bond is, I think, given in replevin actions not primarily for the possession of the article replevied by the plaintiff but to ensure that the property on its value will be available when judgment is given in the proceedings that it may