REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 2688 OF 1975

MACKENZIE (KENYA) LTD…….. PLAINTIFF

VERSUS

PHARMICO LTD……RESPONDENT

JUDGMENT

The plaintiff obtained a decree against the defendant in this suit for Shs 224,111/65. He applied for and obtained warrants of attachment and sale of the judgment debtor's goods lying in its premises at Latema Road, Nairobi. These were addressed to a court broker, J M Mukuruma, who levied attachment on 16th March 1976. Habib Bank Ltd claims a legal, or alternatively an equitable, interest in the whole of the judgment debtor's property by virtue of a debenture over all the judgment debtor's moveable property to secure credit facilities and financial accommodation to the extent of Shs 250,000. The value of the property attached is Shs 150,000 approximately. The debenture was issued on 26th April 1975. A receiver was appointed on 3rd April 1976.

The bank ("the objector") filed a notice of objection to the attachment by the decree-holder under the Civil Procedure Rules, order XXI, rule 53. Under rule 56 the decree-holder intimated that he intended to proceed with the attachment. The objector thereupon filed this chamber summons to establish its claim.

A certificate of registration of the debenture was issued under section 99 of the Companies Act. This certifies that the debenture dated 26th April 1975 was registered on 26th June 1975, pursuant to section 96 of the Companies Act.

Under section 96, a charge is void unless received by the registrar for registration within forty-two days after the date of its creation. This debenture was therefore registered nineteen days after the date of its creation. This debenture was therefore registered nineteen days out of time. Section 99, however, provides:

The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of and within any period allowed under this part, stating the amount thereby secured; and the certificate shall be conclusive evidence that the requirements of this part as to registration have been compiled with.

Mr Fraser, for the decree-holder, argued that since the certificate was defective on the face of it and had

been wrongly issued it could not be conclusive. He admitted that he had been unable to find any authority to support his argument. In *Re CL Nye Ltd* [1970] 3 All ER 1061 an application for registration of a charge misstated the date of creation of the charge and the charge was in consequence registered out of time. It was held by the Court of Appeal in England that by virtue of section 98(2) of the companies Act 1948 (the English equivalent of our section 99) the certificate of the registrar was conclusive and the charge valid and effective. Harman LJ (at page 1068) quoted with approval a passage from the judgment of Scrutton L J in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 447 in which he referred to the possibility of mistakes being made by the company in delivering particulars of the charge or by the registrar in his certificate and since, he said, the grantees had no control over the action of these persons great hardship could be caused to them unless the registrar's certificate was conclusive.

He took the view that the giving of the certificate by the registrar is conclusive that the document creating the charge was properly registered, even if in fact it was not properly registered.

In the present case the certificate should not have been issued by the registrar. He should have noticed that the delivery to him of the particulars of the debenture was out of time. Nevertheless it was issued and, despite the evidence on the face of it that it was not registered within the period allowed, it must I think be accepted as conclusive evidence that the requirements as to registration have been complied with. The debenture therefore is not void.

Mr D N Khanna, appearing with Mr Rommel da Gama Rose for the objector, submitted that there was no attachment of the property of the judgment debtor because there was no effective seizure; and that, if there was an attachment, mere attachment without completion of the execution by sale before the charge crystalised by the appointment of the receiver gave no priority to the execution creditor.

It will be convenient at this stage to consider the objector's application for the striking out of an affidavit by Mr SV Vadgama filed on 30th September 1976. Mr Khanna, I think, conceded that paragraph 7 of the affidavit was the only paragraph which did not repeat information obtainable from the record and Mr Fraser for his part conceded that paragraph 7 was hearsay and inadmissible, unless these proceedings are interlocutory. This application will determine the rights of the parties to the property of the judgment debtor and is not in my view interlocutory. Paragraph 7 of the affidavit must be struck out. Without this paragraph Mr Khanna submitted there was no evidence of attachment.

It is, however, clear from the record and the affidavit filed by the objector on 16th July 1976, that the court broker placed locks on the door of the judgment debtor's shop premises and that the receiver after his appointment also placed a lock on these premises. Order XXI, rule 38, provides that attachment shall be made by actual seizure. For the objector, it was contended that seizure implies effective control in such a way that the broker can obtain access to the goods of the judgment debtor and dispose of them. The goods were never effectively seized since the broker had no right to break open the door and was therefore powerless to gain access.

Reference was made to section 45 of the Civil Procedure Act, but that specifically refers to dwelling-houses only. This is the position also in England (see *16 Halsbury's Laws of England* (3rd Edn) 41, 42). The outer door in the present case is the door of shop premises and there was nothing to prevent the court broker from breaking in. He therefore did have effective control of the goods within the premises. The judgment debtor's goods in its shop premises were in my opinion attached before the appointment of the receiver but does that give the execution creditor priority"

The *Supreme Court Practice* 1976, page 248, paragraph 17/1/10, contains the following statement of the

law:

A debenture usually creates a floating charge on a company's assets, and only where the charge has been crystallised – eg by appointment of a receiver – before the completion of an execution by seizure and sale do the rights of the debenture holder have priority over those of the execution creditor.

Following this note, a number of cases are cited. None was referred to by either counsel and Mr Fraser contended that the statement was too wide and should be treated with caution. A slightly different statement appearing in *Palmer's company Law* (21st Edn) 404 reads:

A floating charge is valid as against execution creditors, save that if the execution creditor takes property in execution, eg by seizure and sale by the sheriff, or obtains a garnishee order absolute (but not a garnishee order *nisi*) before the charge crystallizes he obtains priority.

In *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, the debenture had not been crystallised by the appointment of a receiver and a garnishee order nisi was made absolute by the Court. In *Robinson v Burnell's Vienna Bakers Co Ltd* [1904] 2 K B 624 the goods of the judgment debtor were seized, in consequence of which payments were made to the sheriff to avoid a sale. No receiver having been appointed, the execution creditors were entitled to cash. Channel J said, at page 626:

The debenture-holders were the holders of a floating security over the assets of the company, and no doubt when the company's goods were taken in execution by the sheriff they were only seized subject to the equities attached them, and the title of the debenture-holders would have prevailed had it been perfected in time.

The decision in the foregoing case was approved and applied in *Heaton & Dugard Ltd v Cutting Bros Ltd* [1925] 1 KB 655. In this case, the latest of the cases cited in the *Supreme Court Practice* 1976, and *Palmers' Company Law* (21st Edn), the sheriff went into possession under a writ of *fieri facias* and in order to avoid a sale the defendant company's managing director paid the judgment debt and costs. Before the sheriff paid this to the execution creditors, debenture-holders in the defendant company appointed a receiver who claimed to be entitled to the money in the hands of the sheriff. It was held that this money was a debt owing by the defendant company to the execution creditors who were therefore entitled to retain it as against the receiver. Salter J said at page 657:

It was said that where at the time the floating charge is made effective the sheriff is in possession of the chattels of the judgment debtor, but has not yet sold them, those chattels are in the custody of the law, and in those circumstances the receiver for the debenture-holders has priority over the execution creditors.

This is exactly the case in point; and unfortunately Salter J considered it unnecessary to express an opinion on it.

The cases cited, however, I think support the statements which I have quoted from the *Supreme Court Practice and Palmer's Company Law.* The law applicable in the instant case, as I understand it, may be stated as follows. When a debenture has created a floating charge over the whole moveable property of a company which is a going concern, it attaches to that property as it varies from time to time If any of the company's property is subsequently attached in execution that property, although in the custody of the court broker, remains the property of the company and therefore subject to the floating charge. On the appointment of a receiver the charge crystallises; that is, it becomes a fixed charge over the moveable property of the company as at that date including any attached property which has not yet

been sold. Any such property already sold, however, has ceased to be the property of the company and is thus no longer subject to the charge created by the debenture. The rights of execution creditors accordingly have priority over those of the debenture-holders only where execution has been completed by sale of the attached property before the charge crystallises.

The objector in my opinion has a legal or equitable interest in the whole of the property lying in the shop or business premises of the judgment debtor at Latema Road, Nairobi, and the decree-holder is not entitled to proceed with its application for execution.

The objector is entitled to the costs of this application, and the application to strike out part of SV Vadgama's affidavit. I am not prepared to order costs to be taxed on the basis of a civil action. Since I leave this question to the taxing officer and, if necessary, full argument on appeal from him, I prefer to make no further comment on Mr Khanna's request. I think the objector is entitled to any storage charges and incidental expenses incurred by it after the filing of the notice of objection.

Order accordingly

Costs (certified for two counsel) to the objector.

Dated at Nairobi this 9th Day of November 1976.

A.H. SIMPSON

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JUDGE