

**IN THE MATTER OF THE VOLUNTARY DISSOLUTION OF GEORGE,
O'FARRELL & CIE., INC. CHINA BANKING CORPORATION
AND LEOPOLDO KAHN, CLAIMANTS AND APPELLANTS, VS. M.
MICHELIN & CIE., CLAIM...**

G.R. No. 36930. June 30, 1933

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is a joint appeal of the China Banking Corporation and Leopoldo Kahn from the order of the Court of First Instance of Manila dated November 7, 1931, denying the appellant bank's motion for reconsideration of the order of the said court of November 8, 1930, allowing the claim of the appellee, M. Michelin & Cie., as a preferred claim against the corporation in dissolution, George, O'Farrell & Cie., Inc., to which reference will be made as the "corporation".

The appellant, China Banking Corporation, is a claimant against the corporation as the holder of a note for P8,500 signed jointly and severally by the corporation and the other appellant, Leopoldo Kahn, who has joined the appeal to protect his interest.

George, O'Farrell & Cie., Inc., is a domestic corporation organized in 1925 and registered in the same year in the mercantile register of the Bureau of Commerce and Industry, one of its purposes being that of acting as the agent and representative of foreign firms for the sale and distribution of their products in the Philippines.

For a number of years prior to its dissolution the corporation had been acting as the representative of the appellee, M. Michelin & Cie., in the Philippine Islands for the sale and distribution of the rubber tires for motor cars produced by the appellee and broadly known as "Michelin tires". These business relations between the appellee and the corporation lasted until the month of May, 1930, when the appellee decided to discontinue them, and upon settlement of accounts between both concerns it was found that the corporation failed to account for the sum of P23,268.83, the sale price of a number of rubber tires sold by the corporation. This amount according to appellee's claim and taking appellee's own words "was disposed of by the corporation for its own use and benefit and without the authority or consent" of the appellee. A few days later, however, the corporation, Gaston O'Farrell, personally, and one Rosario Sanchez, represented by Gaston O'Farrell as her attorney-in-fact, executed a mortgage in favor of the appellee of a house belonging to Gaston O'Farrell and of a number of shares of stock of the corporation owned by O'Farrell and Rosario Sanchez to guarantee payment of the said amount to the appellee in five monthly installments, the first one to be made on June 1, 1930, and prior to the filing of the petition for dissolution the corporation made a partial payment of P1,300 leaving an unpaid balance of P21,968.83, which is the amount claimed by the appellee and allowed by the court below as a preferred claim. (Record of Appeal, pages 16, 17, 18, 73-79.)

On July 9, 1930, the board of directors filed the petition for its dissolution and for the appointment of its president and general manager, Gaston O'Farrell, as receiver and liquidator to wind up the affairs of the corporation which,

according to the petition, had a balance of P57,601.24 over and above its just debts and liabilities, and upon publication of the notices required by law and hearing of the petition the trial court decreed the dissolution of the corporation on August 22, 1930, and appointed the said Gaston O'Farrell as receiver and liquidator to wind up the affairs of the corporation, pay all its liabilities, collect all debts and obligations and dispose of all the remaining assets and property of the corporation subject to the order of the court and as the law may permit and justice may require.

The appellee, M. Michelin & Cie., is a foreign "sociedad anonima" organized under the laws of France and domiciled in said country, and on November 4, 1930, filed its claim against the corporation for the aforesaid balance of P21,968.83 with a prayer that the claim be allowed as a preferred one against the corporation on the ground that the said amount represented the proceeds from the sale of a number of rubber tires which were on deposit with and sold by the corporation. The attorney for the corporation, Jesus O. Serrano, gave his conformity to the petition by signing at the foot thereof under the words "estoy conforme en que la presente reclamacion sea considerada como credito preferente." Notice setting the hearing of the claim for Saturday, November 8, 1930, was likewise served on said Jesus O. Serrano as attorney for the corporation. No notice appears to have been given to anybody else neither of the claim nor of the hearing thereof, and on the same date set for the hearing, that is, November 8, 1930, the court rendered a judgment allowing the claim as a preferred claim against the corporation and directing the receiver to pay the amount thereof out of any funds in his possession. Nobody except the claimant and the attorney for the receiver was notified of such order. Under date of November 26, 1930, the appellee filed an "ex parte petition", praying for an order directing the liquidator, Gaston O'Farrell, to pay appellee's claim within three days, and acting on said petition the court granted the same and directed the liquidator to pay the claim within three days with preference to all other claims. Again nobody was served with notice of this order, and pursuant thereto, the receiver paid the appellee on December 9, 1930, the sum of P5,000 on account which was¹ receipted for by appellee's attorney. (Record of Appeal, pages 16-21; Main Record, pages 233, 569, 576, 572, and 579.)

On September 30, 1931, the appellant, China Banking Corporation, filed a motion praying that the orders of November 8 and November 26, 1930, be set aside as null and void, that appellee's claim be allowed as an ordinary claim and that the sum of P5,000 paid by the receiver to the appellee on account of the latter's claim be refunded to the funds of the corporation in liquidation for the benefit of the rest of the creditors. In support of said motion and with the permission of the court the appellant, Leopoldo Kahn, submitted a memorandum, arguing on the nullity of the said orders on the ground of want of notice and on the proposition that under the provisions of the Insolvency Law appellee's claim could not and should not have been allowed as a preferred claim under the allegations contained therein. Upon consideration of the motion, the memorandum, appellee's opposition and the arguments of counsel, the trial court denied the motion under order of November 7, 1931, as far as it referred to the order of November 8, 1930, on the ground that said order, "whether erroneous or not", had become final and unappealable and ordered that the order of November 26, 1930, be given no effect as being manifestly contrary to law. (Record of Appeal, pages 27-32; page 1266 of the second "Pieza" of the main record.)

The assignment of error made by the appellants contends that the lower court erred in not finding that the order of November 8, 1930, is null and void ab initio for lack of jurisdiction on the part of the court when the said order was issued and in not finding the said order just as contrary to law as the court found the order of November 26, 1930, to be, and arguing on this point, they raise the question as to whether appellee's claim can legally be allowed on its face as a preferred claim.

The appellee, on the other hand, argues at length on the theory that the appellants have had sufficient constructive notice of the claim and of its allowance by the court and that under the provisions of section 113 of the Code of

Civil Procedure appellants' motion for reconsideration is untenable.

In so far as the service of notice is concerned, we adhere to the rule laid down in *Whalen vs. Pasig Iron Works* (13 Phil., 417), where this court held that " * * * claims against a corporation in the hands of a receiver should not be approved and paid without some formal and regular proceeding whereby their justice and correctness may be inquired into after a reasonable opportunity has been given to all the parties in interest to present objections and submit evidence in support of such objections." The said case is a parallel of the case at bar in that the receiver in that case, together with the claimant, appeared in open court and without previous notice to any of the other parties in interest, the claim was submitted upon the favorable recommendation of the receiver and allowed by the court, and upon appeal to this court it was held that the trial court erred in rendering judgment in such a summary manner.

After a careful consideration of the arguments of the attorney for the appellee to show that under the provisions of section 113 of the Code of Civil Procedure appellants' motion for reconsideration cannot be favorably considered and upon due consideration having been given also to the peculiar circumstances surrounding this case, we have reached the conclusion that the issue should be governed by the provisions of the Corporation Law or Act No. 1459.

A close examination of the record in this case fails to disclose the reasons which led the corporation to resort to the court for a decree of voluntary dissolution. If the corporation was under such a financial condition as alleged in its petition for dissolution and did not desire to continue doing business because of failing conditions or of any other reason, we are unable to understand the necessity of its seeking judicial intervention in the winding up of its affairs coupled with the appointment for a receiver to deal with its creditors as though they were the creditors of an insolvent corporation.

Section 176 of the Code of Civil Procedure dealing with the appointment of receiver upon decree of dissolution of a corporation provides that the court "may * * * appoint a receiver to take charge" of the estate and effects of the corporation, "and to pay the outstanding debts thereof, and to divide the money and other properties that shall remain over among the stockholders or members", and consistent with said provision section 66 of the Corporation Law provides with respect to decrees of dissolution rendered upon voluntary application that the court "may appoint receivers to collect and take charge of the assets of the corporation." Such language found in both statutes on the subject is permissive rather than mandatory and tends to recognize that in cases of voluntary dissolution there is no occasion for the appointment of a receiver except under special circumstances and upon proper showing. There can be no doubt that when enacting the Corporation Law the Legislature intended to let the shareholders have the control of the assets of the corporation upon dissolution in winding up its affairs. The normal method of procedure is for the directors and executive officers to have charge of the winding up operations, though there is the alternative method of assigning the property of the corporation to trustees for the benefit of its creditors and shareholders.

Sections 77 and 78 of the Corporation Law make the general purpose of the law manifest. Section 77 provides that every corporation whose charter expires by its own limitation or whose corporate existence terminates in "any other manner", shall nevertheless be continued as a body corporate for three years "after the time when it would have been so dissolved" for winding up operations; and section 78 provides that "said corporations at any time during the three years term may convey its property to trustees for the benefit of creditors, stockholders and others concerned".

Statutes authorizing voluntary dissolutions are generally held to apply only to a dissolution brought about by the stockholders themselves, and, while the appointment of a receiver rests within the sound judicial discretion of the

court, such discretion must, however, always be exercised with caution and governed by legal and equitable principles, the violation of which will amount to its abuse, and in making such appointment the court should take into consideration all the facts and weigh the relative advantages and disadvantages of appointing a receiver to wind up the corporate business. The court should only act on facts which have been proved by competent legal evidence. (8 Thompson on Corp. [2d ed.], pages 693, 701, 727, and 738.)

The appointment of a receiver by the court to wind up the affairs of the corporation upon petition of voluntary dissolution does not empower the court to hear and pass on the claims of the creditors of the corporation at first hand. In such cases the receiver does not act as a receiver of an insolvent corporation. Since "liquidation" as applied to the settlement of the affairs of a corporation consists of adjusting the debts and claims, that is, of collecting all that is due the corporation, the settlement and adjustment of claims against it and the payment of its just debts, all claims must be presented for allowance to the receiver or trustee or other proper persons during the winding up proceedings which in this jurisdiction would be within the three years provided by sections 77 and 78 of the Corporation Law as the term for the corporate existence of the corporation, and if a claim is disputed or unliquidated so that the receiver cannot safely allow the same, it should be transferred to the proper court for trial and allowance, and the amount so allowed then presented to the receiver or trustee for payment. The rulings of the receiver on the validity of claims submitted are subject to review by the court appointing such receiver though no appeal is taken to the latter's ruling (8 Thompson on Corp., 718), and during the winding up proceedings after dissolution, no creditor will be permitted by legal process or otherwise to acquire priority, or to enforce his claim against the property held for distribution as against the rights of other creditors. (5 Thompson on Corp. [2d ed.], pages 1389, 1391, 1402, and 1403.)

The decree of dissolution in the case at bar having been entered on August 22, 1930, and the motion of the appellant, China Banking Corporation, appearing to have been filed on September 30, 1931, or about thirteen months later, it follows that the motion was filed on time to have the appellee's claim reviewed by the court under the provisions of the said sections of the Corporation Law, and the trial court, therefore, erred in finding that the order of November 8, 1930, allowing appellee's claim was final and unappealable under the provisions of section 113 of the Code of Civil Procedure.

The record in this case shows that Gaston O'Farrell, the receiver herein, besides being the principal promoter of the corporation and the holder of the largest number of shares was elected president and general manager and that he held the said offices ever since the organization of the corporation and his conduct in executing a mortgage on his own house and giving a pledge on his shares of stock and on those of Rosario Sanchez represented by him as attorney in fact, in favor of the appellee to guarantee the latter's claim, lends itself to a serious suspicion. The facts appearing of record leave no room for doubt that his administration of the business of the corporation left much to be desired and that he alone ought to be blamed for the shortage claimed by the appellee, but to save himself from personal liability he made the corporation shoulder the burden of the obligation in exchange for a simulated conveyance of his house to the corporation. No sooner had the corporation become delinquent in the payment of the obligation under the terms of the written agreement than he resorted to a judicial proceeding of voluntary dissolution in an attempt to settle appellee's claim and to free himself from all harm, but fearing that the alleged preference of appellee's claim might be defeated, in collusion with the appellee they had the claim allowed summarily as a preferred claim ignoring the rest of the world.

Appellants' contention that appellee's claim cannot be allowed as a preferred claim is well taken for even admitting for the sake of argument that the merchandise which sale price is the subject of appellee's claim was shipped to the corporation under a commission agreement or any other agreement carrying the obligation to return either the goods or its price, the fact is that the merchandise in the case at bar was no longer in the corporation's

possession nor could the appellee trace the proceeds from its sale, and this is made manifest by the very fact of the written agreement entered into between the appellee and the corporation whereby the appellee accepted payment of the obligation by installments duly secured with a mortgage of property to guarantee its payment. But such is not the case, however, for the very agreement of May 31, 1930, mentioned in paragraph 5 of appellee's claim, shows that the rubber tires consigned to the corporation were to be sold by the latter "por orden, cuenta y riesgo de los Sres. M. Michelin & Cie." and that the customers' accounts were opened "por orden, cuenta y riesgo de M. Michelin & Cie.", and so much is this true that the uncollected accounts were turned over to and received by the appellee, M. Michelin & Cie. Under such circumstances the amount of appellee's claim appears to be in the nature of a balance of a current account between the two firms more than anything else. (Record of Appeal, page 68, together with the 4th and 5th paragraphs of the agreement.)

The order appealed from is reversed, and the appellee's claim is hereby declared to be an ordinary claim. The appellee, is ordered to refund to the corporation the sum of P5,000 erroneously paid by the receiver, with costs against the appellee. So ordered.

Avanceña, C. J., Street, Malcolm, Villa-Real, Abad Santos, and Imperial, JJ., concur.

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