1967

*May 1
June 1

KENT STEEL PRODUCTS LTD., MANITOBA ROLLING MILLS division of Dominion Bridge Co. Ltd., SUTHERLAND SUPPLY LTD., ACKLANDS LTD., MAURICE FIELDS, AUBREY J. HALTER and NAT FROOMKIN (*Plaintiffs*) .....APPELLANTS;

AND

ARLINGTON MANAGEMENT CONSULTANTS LTD. and PRAIRIE FOUNDRY LTD. (*Defendants*) .... RESPONDENTS.

MOTION TO QUASH

Appeals—Application to quash—Leave to appeal—Bankruptcy—Order granting creditor leave to take proceedings in own name—Appeal to Supreme Court of Canada—Whether s. 151 of the Bankruptcy Act, R.S.C. 1952, c. 14, applies—Rule 53 of the Bankruptcy Rules.

Having obtained leave to take proceedings in their own names under s. 16 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, the appellants, as creditors in a bankruptcy, instituted proceedings in the ordinary civil law courts to determine questions of priority and security. In due course, a notice of appeal to this Court from the judgment of the Court of Appeal was served by the plaintiffs, as appellants, without leave having been obtained under s. 151 of the *Bankruptcy Act*. The respondents applied to quash the appeal on the ground, *inter alia*, that the appeal was barred by s. 151 of the Act. An application for leave to appeal was made orally by the appellants during the hearing of the application to quash.

Held: The application to quash should be granted and the application for leave to appeal should be dismissed.

Section 151 of the *Bankruptcy Act* applies to this appeal, and the appeal to this Court could only be taken by leave of a judge of this Court.

Apart from the fact that no notice of an application for leave to appeal was served on the other party at least 14 days before the hearing, as required by rule 53 of the Bankruptcy Rules, the application for leave to appeal could not be granted as no "special reasons", as required by that rule, existed.

Appels—Requête pour rejet—Permission d'appeler—Faillite—Ordonnance permettant à un créancier d'intenter des procédures en son propre nom—Appel à la Cour Suprême du Canada—Application de l'art. 151 de la Loi sur la Faillite, S.R.C. 1952, c. 14—Règle 53 des Règles de la Faillite.

Ayant obtenu une ordonnance les autorisant à intenter des procédures en leur propre nom en vertu de l'art. 16 de la *Loi sur la Faillite*, S.R.C. 1952, c. 14, les appelants, comme créanciers de la faillite, ont

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

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intenté des procédures devant les cours civiles ordinaires pour faire déterminer des questions de priorité et de garantie. Éventuellement, un avis d'appel à cette Cour du jugement de la Cour d'Appel a été signifié par les demandeurs, comme appelants, sans avoir obtenu l'autorisation requise par l'art. 151 de la *Loi sur la Faillite*. Les intimés ont présenté une requête pour faire rejeter l'appel pour le motif, *inter alia*, que l'appel était prohibé par l'art. 151 de la Loi. Une requête pour permission d'appeler a été présentée oralement par les appelants durant l'audition de la requête pour rejet.

Arrêt: La requête en rejet d'appel doit être accordée et la requête pour permission d'appeler doit être rejetée.

L'article 151 de la *Loi sur la Faillite* s'applique à cet appel, et l'appel à cette Cour ne peut avoir lieu sans l'autorisation d'un juge de cette Cour.

Outre le fait qu'avis d'une requête pour permission d'appeler n'a pas été signifié à l'autre partie au moins 14 jours avant l'audition, tel que requis par la règle 53 des Règles de Faillite, la requête pour permission d'appeler ne peut pas être accordée parce qu'il n'existait aucune «raison spéciale», tel que requis par cette règle.

REQUÊTES en rejet d'appel[1] et pour obtenir permission d'appeler en matière de faillite. Requête en rejet d'appel accordée et requête pour permission d'appeler rejetée.

MOTIONS TO QUASH an appeal[1] and for leave to appeal in a bankruptcy matter. Motion to quash granted and motion for leave to appeal dismissed.

W. C. Newman, Q.C., for the plaintiffs, appellants.

R. Penner, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an application to quash the appeal, made by the respondents Arlington Management Consultants Ltd. and Prairie Foundry Ltd.

D. Smith & Sons Ltd. were the subject of a Receiving Order in Bankruptcy on January 29, 1965. The appellants and others as creditors requested the trustee in bankruptcy to take proceedings to determine what amount, if any, was due to the Industrial Development Bank or its assignee on account of a certain property mortgage given by the bankrupt to the bank and to take proceedings to determine the

[1] (1967), 59 W.W.R. 382, 62 D.L.R. (2d) 502.

force and effect, if any, of an assignment in writing by the bankrupt to Lipman Holdings Ltd. of which the respondents in this appeal are the successors. The trustee, under the direction of the inspectors, refused by reason of lack of funds in the bankrupt estate to take such proceedings. The said creditors therefore applied to the Court in Bankruptcy for an order under s. 16 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, and on March 13, 1965, Smith J., as a judge in Bankruptcy, made an order permitting the applicants to commence and prosecute proceedings in their own name and at their own expense and risk for the said purpose.

Proceedings were commenced in the Court of Queen's Bench for the Province of Manitoba by statement of claim dated November 19, 1965. The proceedings purported to be those authorized by the said order although the statement of claim was very much broader in scope than that authorized by the order of Smith J.

After consultation by counsel it was agreed that certain questions of law should be stated in the form of a special case for the opinion of the court, *i.e.*, the Court of Queen's Bench. By reasons for judgment dated October 17, 1966, Hall J. answered those questions. An appeal therefrom was taken to the Court of Appeal of Manitoba[1], and by the judgment of that Court pronounced on February 21, 1967, such appeal was dismissed. The plaintiffs as appellants served notice of appeal to this Court. No application for leave to take the said appeal to this Court was made by the appellants and no order was made granting such leave. Under these circumstances, the respondents applied to quash the appeal on the ground, inter alia, that the same is barred by s. 151 of the *Bankruptcy Act*. Other grounds for the application were urged but they need not be considered in these reasons.

It is the position taken by the appellants that s. 151 of the *Bankruptcy Act* has no application to this appeal as the proceedings were carried on in the ordinary courts of the Province of Manitoba.

Section 151 of the *Bankruptcy Act* provides:

> 151. The decision of the Court of Appeal upon any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that Court.

[1] (1967), 59 W.W.R. 382, 62 D.L.R. (2d) 502.

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The issues raised by the appellants in the appeal are as follows:

1. Whether or not the title of the trustee in bankruptcy by virtue of the receiving order made on January 20, 1965 against D. Smith & Sons Ltd. takes priority over an assignment of choses in action by the bankrupt made on June 4, 1963.

2. Whether or not the respondent Arlington Management Consultants Ltd. loses its right to claim both as a secured creditor and as an unsecured creditor against the assets and estate of D. Smith & Sons Ltd. because it requested a deferment of the valuation of one of the securities held by it and therefore is barred from dividend by the provisions of s. 92 of the *Bankruptcy Act*.

It is to be noted that these proceedings could not have been commenced by the creditors without the leave as granted by Smith J. under the provisions of s. 16 of the *Bankruptcy Act*. Counsel for the appellants has agreed with this proposition. It is true that the proceedings were commenced in the ordinary civil law courts after authorization given by the Judge in Bankruptcy. Counsel for the appellants therefore submits that when the trustee did not assert any claim the provision of the *Bankruptcy Act* had no application, and that under such circumstances the procedure in the Bankruptcy Court was not available to the plaintiffs. It is difficult to understand how that submission can be valid in view of rule 86 of the Rules in Bankruptcy which provides for "a trustee or any other person" applying to the court to set aside or void any settlement. The "court" in that rule is that defined in s. 2(*g*) as "the court having jurisdiction in bankruptcy or a judge thereof. . ."

Counsel for the appellants, as respondents on this motion to quash, cites *Princeton Tailors Ltd. ex parte the Dominion Bank*[1]. In that case the bank applied for a declaration that it had at the date of the bankruptcy of the debtor a claim upon the goods of the bankrupt superior to that of the landlord's claim for rent as against the same goods. Sedgwick J. held that he was bound by the judgment of the court in *Canadian Carpet and Comforter Mfg. Co.*,

[1] (1931), 12 C.B.R. 208, 39 O.W.N. 531.

ex parte A.G. of Canada[1] and must hold that the Bankruptcy Court had no jurisdiction in the bankruptcy proceedings to hear and determine the rights of the bank and landlord as between themselves. That situation is not the one presented in this application. Here the creditors take their action as creditors of the estate of the bankrupt, and any fruits of the litigation would flow to them as such creditors. Moreover, if the said fruits of the litigation exceeded their claims and their necessary costs, by the provisions of s. 16(2) of the *Bankruptcy Act* such excess, if any, goes to the estate of the bankrupt. It should be noted that in *Garage Causapscal Ltée., Traders Finance Corpn. v. Levesque*[2], when a trustee in bankruptcy had refused to take proceedings to void a fraudulent preference an order was made under s. 16 enabling an individual creditor to take such proceedings at its own risk. The creditor then proceeded by means of a petition to the Superior Court sitting in Bankruptcy. The decision of the Superior Court was appealed to the Court of Queen's Bench (Appeal Side) in the Province of Quebec and further, upon leave granted, to this Court.

In view of these circumstances, I am of the opinion that s. 151 of the *Bankruptcy Act* applies to this appeal and that as a bankruptcy proceeding, both by virtue of the order made by Smith J. and because of the character of the issues in the appeal, an appeal to this Court may only be taken by leave of a judge of this Court. As I have said, no such leave was applied for until the hearing of this application to quash when the appellants, opposing this application to quash, in the alternative, asked leave to appeal. That application was made on May 1, 1967.

Rule 53 of the Bankruptcy Rules, as amended by P.C. 1962-371, provides:

> 53. An application for special leave to appeal from a decision of a Court of Appeal and to fix the security for costs, if any, may be made to a judge of the Supreme Court of Canada within sixty days after the date of the decision appealed from, or within such extended time as a judge of the Supreme Court of Canada may for special reasons allow, either during or after the said period of sixty days, and notice of the application for leave to appeal or to extend the time in which to apply for such leave shall be served on the other party at least fourteen days before the hearing thereof.

[1] (1924), 4 C.B.R. 423, 25 O.W.N. 514, 1 D.L.R. 639; affirmed, (1924), 5 C.B.R. 54, 26 O.W.N. 345, 4 D.L.R. 1307.

[2] [1961] S.C.R. 83, 2 C.B.R. (N.S.) 52, 26 D.L.R. (2d) 384.

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It is to be noted that such rule now permits the application for special leave to appeal to be made to a judge of this Court after the expiration of sixty days from the date of the judgment of the Court of Appeal if such extended time is allowed for special reasons by a judge of this Court and thereby confers upon the judge of this Court the jurisdiction which Fauteux J. held in *Ferland v. Desjardins et al.*[1] we lacked. However, notice of such application for special leave to appeal must be served on the other party at least fourteen days before the hearing thereof. No such notice was of course served in the present case, the application was simply made orally during the argument.

In *Re Hudson Fashion Shoppe Ltd.*[2], Anglin C.J.C. found there was no power in a judge of the Court to abridge such fourteen-day period and the amendment to rule 53 does not appear to have conferred such jurisdiction.

Even apart from such lack of notice, I am of the opinion that special leave to appeal should not be granted in this case. The judgment of the Court of Appeal of Manitoba was pronounced on February 21, 1967, and on March 20, 1967, the solicitors for the appellants were notified as follows:

> Insofar as your appeal to the Supreme Court is concerned, we respectfully suggest also that it is precluded by Section 151 of The Bankruptcy Act. In the event that leave is required we propose to oppose leave being given.

In view of such clear notification, it is difficult to understand how the "special reasons" required by Bankruptcy Rule 53 in order to confer jurisdiction to extend time for application for special leave could exist.

For these reasons, I am of the opinion that the application to quash the appeal must be granted with costs, and that the appellants' application for leave to appeal must be refused without costs.

Application to quash granted; application for leave to appeal dismissed.

Solicitors for the plaintiffs, appellants: Zuken & Penner, Winnipeg.

Solicitors for the defendants, respondents: Newman, MacLean & Associates, Winnipeg.

[1] [1961] S.C.R. 306, 2 C.B.R. (N.S.) 121, 27 D.L.R. (2d) 482.
[2] [1926] S.C.R. 26, 10 C.B.R. 173.