IN RE TRANSPACIFIC LINES, INC., Formerly Styled: IN RE DAVID M. SABLAN, Receiver of TransPacific Lines, Inc., Petitioner

Civil Appeal No. 137

Appellate Division of the High Court

Mariana Islands District

September 16, 1977

Corporation was granted, ex parte and with no notice to persons interested in its assets, receivership upon its own request. Lower court's denial of motion to vacate appointment, made by persons interested in the assets, was appealed. The Appellate Division of the High Court, per curiam, held that the appointment was not an abuse of discretion or in violation of appellants' due process rights where there was immediate danger of loss of assets and the corporation could not function, and where appellants were granted adequate hearing upon their motion to vacate.

1. **Receivership—Appeals—Refusal To Vacate Appointment**

   Generally, in absence of statutory authority, an order refusing to discharge, or vacate the appointment of, a receiver is not appealable, even in jurisdictions where an order appointing a receiver is appealable; but an appellant not given an opportunity to be heard prior to the original appointment may make such an appeal, for when an appointment is ex parte, the order confirming it is treated as an order appointing the receiver and it stands as if no other order had preceded it.

2. **Receivership—Power To Appoint Receiver—Main Action or Desired Relief Necessary**

   With certain exceptions, a receivership must be ancillary to some other main relief sought; there is no such thing as a pure receivership action.

3. **Receivership—Power To Appoint Receiver—Request of Financially Troubled Party**

   Jurisdiction to appoint a receiver may not be conferred by consent of the party whose assets are sought to be conserved.

4. **Receivership—Power To Appoint Receiver—Request of Financially Troubled Party**

   Though receivership is not generally granted solely upon the request of the financially troubled party, where those controlling and running the business are no longer capable of preserving or protecting the corporate assets, which is the purpose of a receivership, grant of receivership upon their request may be appropriate.

5. **Receivership—Power To Appoint Receiver—Notice**

   Appointment of a receiver without notice is entirely a matter of judicial discretion and will not be disturbed on appeal in absence of a clear abuse of that discretion.

6. **Receivership—Power To Appoint Receiver—Notice**

   Appointment of a receiver without notice may be granted upon the request of the financially troubled party in possession of the assets if such party has a definite interest in property which is in grave and immediate danger of dissipation and it is only through the appointment that immediate or substantial injury can be prevented and complete justice done.

7. **Receivership—Power To Appoint Receiver—Request of Financially Troubled Party**

   Ex parte appointment of a receiver at request of financially troubled corporation, without notice to appellants, who were creditors, holders of default, shareholders, plaintiffs in a shareholders' derivative action, and certain members of management and employees, was not an abuse of discretion where necessary requirement that there be danger of immediate loss of assets which could only be remedied by the appointment was provided by facts that corporation could not pay its debts and was insolvent for all practical purposes, a quorum for a meeting of the executive committee or the board of directors was unattainable and the corporation thus could not function, and substantial goods would be lost if corporation could not function.

8. **Receivership—Power To Appoint Receiver—Notice**

   It is error for a court to appoint a receiver without notice and fix no time for a prompt notice and hearing.

9. **Receivership—Power To Appoint Receiver—Notice**

   While an ex parte appointment of a receiver without notice may be erroneous under a given set of circumstances it is not necessarily void and the error may be cured if followed closely by a hearing on the merits.

10. **Receivership—Power To Appoint Receiver—Notice**

    Where corporation was granted appointment of receiver upon its own request, without notice to appellants, persons interested in corporation's assets, and appellants were given an extensive hearing upon their motion to vacate the appointment, appellants were not deprived of due process.

11. **Attorney and Client—Adequacy of Representation—Grounds for Nonpayment**

    Attorney who, on appeal, twice requested and was granted extension of time to file brief, the time being extended some two months, and who filed three months after deadline, and whose brief was stricken and oral argument denied, was not entitled to any payment for services related to the appeal.

HEFNER, *Associate Justice*, WILLIAMS, *Associate Justice* and BENSON, *Designated Judge*

PER CURIAM

On February 15, 1974, the former counsel for TransPacific Lines, Inc. (hereinafter "TransPacific") filed an application for receivership in the High Court. An additional petition was filed the next day by David M. Sablan, who had purportedly been appointed receiver for TransPacific by the High Commissioner in Executive Order No. 110.

The affidavits and application before Chief Justice Burnett recited in essence the following state of affairs as of February 16, 1974, which Appellants do not contest:

1. TransPacific was indebted in excess of $2 million.

2. TransPacific was unable to pay its current debts, and thus the corporation was for all practical purposes insolvent.

3. The annual shareholders meeting had been enjoined by a court order due to a lawsuit filed by a minority shareholder.

4. No quorum for a meeting of the Executive Committee or the Board of Directors was attainable, and thus the corporation was incapable of functioning.

5. A substantial amount of cargo destined for the Trust Territory was on Guam, and if TransPacific failed to function the cargo would spoil or be lost.

6. The owner of one of the vessels TransPacific had under charter was threatening to divert from the Trust Territory and sell the ship's cargo—which was destined for the Trust Territory—for the charter fee.

7. If the business were stopped due to the execution of judgments by its creditors, there would be a further loss of the corporations's assets.

Based on this state of affairs, Chief Justice Burnett issued an ex parte order on February 16, 1974 establishing a receivership for TransPacific, and appointing David M. Sablan as receiver. The order provided:

> [A]ll creditors and/or persons [are restrained] . . . from instituting any litigation in reference to TransPacific Lines, Inc. unless so ordered to the contrary by the Court and . . . any judgments against TransPacific Lines, Inc. are not to be executed on and no execution of judgment is to be rendered, except through further order of this Court.

Appellants are "various of the real parties in interest involved in placing TransPacific Lines, Inc. into receivership"[1] and specifically "creditors, holders of default, shareholders and plaintiffs in a shareholders' derivative action against TransPacific Lines, Inc. and certain of its Management and employees of said TransPacific Lines, Inc."[2]

On March 20, 1974, Appellants filed a motion to vacate the order appointing the receiver. After an extensive hearing involving detailed evidence pertaining to the emergency state of affairs, the court below denied the motion in an order dated February 25, 1975. Appellants have appealed from that order.

[1] Of initial concern to this Court was the question whether an appeal may properly be taken from an order denying a motion to vacate the appointment of a receiver. The general rule is that "[i]n the absence of statutory authority, an order refusing to discharge, or to vacate the appointment of, a receiver is ordinarily not the basis for a direct appeal, even in jurisdictions in which an order appointing a receiver is appealable." 4 Am.Jur.2d Appeal

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[1] Memorandum of Points and Authorities filed by Appellants on March 20, 1974.

[2] Motion to Vacate filed by Appellants on March 20, 1974.

and Error § 155, at 699 (1962) (footnotes omitted). See *Milwaukee & M. R. Co. v. Soutter*, 154 U.S. 540, 540 (1864) ("The removal or appointment of a receiver, which, in effect was the object of the motions, rests in the sound discretion of the [district] court, and the decision is not revisable here"). But see *Carlton v. Bos*, 281 S.W.2d 131 (Tex. Civ. App. 1955); Annot., 72 A.L.R.2d 1075, §§ 11–13 (1960).

However, we are convinced that Appellants have correctly stated the law on this issue, in support of their contention that this appeal is properly taken. Where the appellant was not given an opportunity to be heard prior to the original appointment, an order denying a motion to vacate is appealable. See *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 495 (1932). The reason for this departure from the general rule is that where the appointment is ex parte, "the order confirming the appointment of the receiver upon the [motion to vacate] hearing [is treated as] an order appointing the receiver. It stands as if no other order had preceded it." *Pacific Northwest Packing Co. v. Allen*, 109 F. 515 (9th Cir. 1901). Accord, *Mitchell v. Lay*, 48 F.2d 79, 85 (9th Cir. 1930). See also *Coskery v. Roberts & Mander Corp.*, 189 F.2d 234, 236–37 (3d Cir. 1951) (the rule enunciated in *Mitchell* was stated but not applied because the court felt that the appellant's petition to vacate was not his first opportunity to be heard); *Marion Mortgage Co. v. Edmunds*, 64 F.2d 248, 250–51 (5th Cir. 1933). But cf. *Maxwell v. Enterprise Wall Paper Mfg. Co.*, 131 F.2d 400 (3d Cir. 1942) (ex parte appointment of a receiver held to be a hearing for purposes of appellate jurisdiction).

The initial order appointing the receiver for TransPacific was granted without notice to Appellants. It was the financially troubled corporation who applied for the receivership, not Appellants. Appellants' first opportunity to contest the appointment was at the hearing on the

motion to vacate. We find that the circumstances of this case require some additional avenue for Appellants to test the lower court's order of appointment.

One matter raised by Appellants can be summarily disposed of. Appellants contend that the hearing judge erred in ruling that the High Commissioner acted within his authority pursuant to the corporate charter. Since the receivership for TransPacific in its present posture resulted from judicial appointment of a receiver, this court need not determine whether the prior act of the High Commissioner was proper.

In our view, the real question to be resolved by this Court is whether or not the lower court's appointment of the receiver should be upheld. The sub-issues which will be addressed in this opinion are:

I. Whether it was proper to appoint a receiver for TransPacific at the instance of the corporation.

II. Whether the circumstances existing at the time of appointment could be said to justify ex parte action.

III. Whether the appointment of a receiver ex parte under these circumstances comports with due process requirements.

I. *Appointment at the Instance of the Corporation.*

[2] Regarding the appointment of receivers in general, it has been stated:

> [B]efore a receiver will be appointed there must be real litigation between the parties for some purpose other than the mere obtaining of a receiver. Consent of the parties cannot confer jurisdiction to appoint such a receiver, where there is no real litigation between the parties. 65 Am.Jur.2d Receivers § 24, at 877 (1972).

Thus the rule emerges that with certain exceptions, a receivership must be ancillary to some other main relief sought. Appellants correctly contend that there is no such thing as a pure receivership case. See *Gordon v. Washington*, 295 U.S. 30, 38 (1934).

It must be pointed out right from the outset that this case is unlike the typical receivership cases in which the rule has been applied. In the typical case, the plaintiff is a creditor of the defendant, suing him for recovery of a debt. Because the defendant appears to be in financial trouble, the plaintiff asks the court to appoint a receiver to assure that the assets of the defendant are conserved. See 1 R. Clark, Receivers § 91 (3d ed. 1959) [hereinafter cited as Clark]. In the case at bar, it was the financially troubled party who sought relief in the form of receivership. Judicial supervision similar to a Chapter 11 arrangement under the United States Bankruptcy Act is not available in the Trust Territory.

[3] Appellants are correct in their contention that jurisdiction to appoint a receiver may not be conferred by consent of the party whose assets are sought to be conserved. 65 Am.Jur.2d Receivers § 129 (1972). See also 1 Clark, supra § 188(a). We find, however, that the action in which the receiver for TransPacific was appointed can be characterized as an ancillary one. The record establishes that there were other suits pending at the time the appointment of a receiver for TransPacific was sought. Therefore, the issue becomes not really jurisdiction, but rather the propriety of an appointment at the instance of the corporation.

On this point, Clark has written:

> It is not the business or the duty of courts of law or equity at the instance of the corporation itself to carry on the corporate business of those companies which find themselves in financial straits or are otherwise being pressed by their creditors or for some reasons are unable to meet their obligations. . . .
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> . . . [A] receiver is appointed very rarely, if ever, at the instance of the company itself. 4 Clark, supra §§ 751–752, at 1391–92.

[4] The case law reveals a split of authority on this issue. See generally cases cited at Annot., 84 A.L.R. 1443, 1464–66 nn. 42 & 43 (1933). There have been cases in which

the appointment of a receiver at the instance of the corporation has been allowed. See, e.g., *Wabash, St. L. & P. Ry. Co. v. Central Trust Co.*, 22 F. 272 (C.C.E.D. Mo. 1884); *McIlhenny v. Binz*, 80 Tex. 1, 13 S.W. 655 (1890), *error dismissed*, 145 U.S. 641 (1892). The theory is that the directors, as trustees for the stockholders and creditors, are proper parties to institute the suit. See 75 Am.Jur.2d Receivers § 11 (1972). On the other hand, there have also been cases disallowing the appointment of a receiver which at first glance appear to be on point in that the appointment was sought ex parte by the insolvent corporation. See, e.g., *Jones v. Bank of Leadville*, 10 Colo. 464, 17 P. 272 (1887); *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009, 15 So. 33 (1894); *State ex. rel. Merriam v. Ross*, 122 Mo. 435, 25 S.W. 947 (1894). See also *Jones v. Schaff Bros. Co.*, 187 Mo. App. 597, 174 S.W. 177 (1915) (the appointment of a receiver on the ex parte application of an insolvent corporation made without notice to creditors or others interested is void).

Which line of authority this court ought to follow in the case at bar becomes clear once the reason for not allowing a receivership at the instance of the corporation is discerned. The reason for this postion is stated by Clark:

> [T]he main purpose of a receivership is to preserve property at the instance of the plaintiff because of fear of destruction or dissipation caused by the defendant or some one else in possession. If the company is in possession and control of its property, it should be unnecessary for the company to apply to the court and ask that a receiver be appointed to preserve or protect such property. It therefore follows that a receiver cannot ordinarily be appointed at the instance of the plaintiff company. 4 Clark, supra § 751, at 1392.

The record establishes that the directors of TransPacific were no longer capable of preserving or protecting the corporate assets. Day-to-day management of the corporation had been effectively neutralized. Under these circum-

stances, we find that it is not inappropriate for the corporation to *seek* the appointment of a receiver. Whether the circumstances in fact justified the appointment ex parte is a separate question that will be dealt with infra.

II. *Ex Parte Appointment.*

The rule regarding the ex parte appointment of a receiver has been enunciated as follows:

> A receiver may be properly appointed without notice, and before giving the adverse party an opportunity to be heard, in, and only in, an extreme and exceptional case, in which there is a great emergency and under facts and circumstances showing an immediate appointment . . . where it is absolutely and imperatively necessary for the court to interfere, before the lapse of the time required to give notice and afford a hearing, in order to prevent loss, waste, destruction, irreparable injury, . . . or the giving of notice would jeopardize the delivery, safety, custody, or control of the property over which the receivership is to be extended. 75 C.J.S. Receivers § 49(b), at 706–08 (1952) (footnotes omitted).

See also 65 Am.Jur.2d Receivers § 47 (1972). This rule has also been stated many times in the case law. In *Indianapolis Machinery Co. v. Curd*, 247 Ind. 657, 221 N.E.2d 340 (1966), the court wrote:

> There must exist a pressing emergency which shows that waste, loss or distribution of property will probably occur before reasonable notice can be given and the parties heard and the lack of any other available remedy before a court may appoint a receiver on an ex parte hearing. 221 N.E.2d at 343, quoting *Fagan v. Clark*, 238 Ind. 22, 26, 148 N.E.2d 407, 409 (1958).

See, e.g., *Huggins v. Green Top Dairy Farms*, 75 Idaho 436, 273 P.2d 399 (1954); *Wolf v. Murrane*, 199 N.W.2d 90 (Iowa 1972); *Wakenva Coal Co. v. Johnson*, 234 Ky. 558, 28 S.W.2d 737 (1930); *Best Investment Co. v. Whirley*, 536 S.W.2d 578 (Tex. Civ. App. 1976).

[5] The appointment of a receiver without notice is entirely a matter of judicial discretion. E.g., *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728 (6th Cir. 1938); *Dixie-*

Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 235 Ga. 503, 220 S.E.2d 130 (1975). In the absence of a clear abuse of that discretion, the appointment will not be disturbed on appeal. *Collegiate Recovery & Credit, Etc. v. State*, 525 S.W.2d 900, 901 (Tex. Civ. App. 1975). See also 75 C.J.S. Receivers § 49 (1952).

Clark points out that "the appointment of a receiver without notice in exceptional cases does not violate the due process clause of the U.S. Constitution, because the appointment is primarily to receive and preserve the property." Clark, supra § 82(c), at 127.

[6] As indicated previously, the case at bar differs from the typical receivership case in that the applicant for appointment of a receiver was the corporation, not one of its creditors. We do not believe that this distinction should affect resolution of the issue. Our view is in accord with that expressed by the court in *Steinwart v. Susman*, 94 Ill.App.2d 471, 238 N.E.2d 200 (1968) (ex parte appointment vacated on ground that no bond had been posted):

> While the great majority of cases in which receivers are appointed are those where persons other than the applicants are in possession, we do not believe that possession of the property by the applicants necessarily eliminates the possibility of the appointment of a receiver.
>
> If the applicants have a definite interest in a particular property, which is in grave and immediate danger of dissipation, and only through the appointment of a receiver can immediate or substantial injury be prevented and complete justice be done, the fact that the applicants are in sole or partial possession of the property should not necessarily bar their right to the appointment of a receiver. The right would still depend upon the particular factual situation and the necessity of such action for the protection of all interested parties, and not from the protection of the applicants alone. 238 N.E.2d at 204.

[7] The purpose of the receivership for TransPacific was to marshal assets, pay claims, and arrange for the delivery of cargo. The goal was to put the company back

into an operating condition, or failing that, to provide a means for the equitable relief of the creditors by preserving the assets to the maximum extent. In a sense there could be no "adverse" party in this situation, because the interests sought to be protected by the party seeking the appointment were identical to the interests of all other interested parties. Further, Appellants have failed to explain satisfactorily to this court in what sense property was "taken" without due process of law as a result of the appointment of the receiver.

We believe that while the context is different in this case, the same considerations apply in testing the ex parte appointment as would apply in a typical case. We recognize that the insolvency of TransPacific alone would not be a sufficient ground for the appointment of a receiver. In addition to insolvency, it must appear that the corporate property was in peril or danger of loss. See 65 Am.Jur.2d Receivers §§ 34, 71 (1972). We believe that the critical additional factor in this case was sufficiently established by the record—the effective neutralization of the corporate management's capability to control the day-to-day affairs of the corporation. In support of this view, we note that according to American Jurisprudence:

> [D]issensions among the stockholders or officers of a corporation as a result of which a deadlock is created and the corporation is unable successfully to carry on the corporate business, have in some cases been regarded as sufficient grounds for the appointment of a receiver. 65 Am.Jur.2d Receivers § 62, at 899 (1972).

Support for this view may also be found in the case law. See, e.g., *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728 (6th Cir. 1938) (ex parte appointment upheld where corporation insolvent, and among other allegations the applicants alleged that the managing officers had abandoned the business, so that the corporation was drifting in hopeless financial condition); *Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co.*, 235 Ga. 503, 220 S.E.2d 130

(1975) (ex parte appointment upheld where a dispute had arisen between partners, and the lower court had found that the nature of the business was such that to leave the assets unattended would jeopardize the interests of the partners and creditors); *Friedman Oil Corp. v. Brown*, 50 S.W.2d 471 (Tex. Civ. App. 1932) (ex parte appointment upheld where the petition alleged that the corporation was insolvent, that there was a lack of available funds for the operation of the property, and that the property was therefore in great danger of being lost or irreparably injured). Cf. *Price v. Banker's Trust Co. of St. Louis*, 178 S.W. 745, 749 (Mo. 1915) (receivership not upheld, but court noted that "if there were an allegation that the [corporation] had no officers or directors to conserve its interests and protect its property, we can see readily why a court of equity would interpose").

We find, therefore, that under the state of affairs existing with regard to TransPacific on February 15, 1974, the ex parte appointment of a receiver was not an abuse of discretion.

III. *Requirement of a Hearing.*

[8] Having determined that the ex parte appointment of a receiver for TransPacific was not an abuse of discretion per se, the remaining question is whether due process was satisfied by the procedure used. Clark has written:

> An order made ex parte or without notice appointing a receiver should set an early time and provide that the party injuriously affected may come into court and move to set aside, vacate or modify the order. Unless we have such a provision in the order of appointment and/or unless the court does entertain such a motion, then we have the situation wherein the court is taking control and possession of property of a person or corporation without giving that person or corporation an opportunity to have his day in court and resist such order of the court. We believe failure to give the party injuriously affected an opportunity ultimately to be heard, violates the United States Constitutional provisions providing for due process of law. 1 Clark, supra § 82(g), at 129.

See also 65 Am.Jur.2d Receivers § 97 (1972). As indicated previously, we do not believe that Appellants have sufficiently demonstrated that any of their property was "taken" as a result of the order of appointment. Nevertheless, we are in accord with the view that "it unquestionably is error for a trial court to appoint a receiver without notice and fix no time whatever for a prompt notice and hearing." *Indianapolis Machinery Co. v. Curd,* 247 Ind. 657, 221 N.E.2d 340, 342–43 (1966).

[9, 10] In this case, while the original order of appointment was rendered ex parte, an extensive hearing was held upon Appellants' motion to vacate. Appellants were given an opportunity to be heard at that hearing.

It has been held that while an ex parte appointment may be erroneous under a set of circumstances, it is not necessarily void. 75 C.J.S. Receivers § 48 (1952). Such an erroneous appointment may be cured if followed closely by a hearing on the merits. *Wakenva Coal Co. v. Johnson,* 234 Ky. 558, 28 S.W.2d 737, 742 (1930). But see *Steinwart v. Susman,* 94 Ill.App.2d 471, 238 N.E.2d 200, 205 (1968) ("The hearing on the defendant's motion to vacate the order was not a substitute for the hearing he should have been afforded before the appointment of the receiver").

We prefer to follow the view that any defect in the ex parte appointment may be subsequently cured. After examining the record of the hearing on the motion to vacate, we find that Appellants have not been deprived of any due process protections.

CONCLUSION

TransPacific provided a transportation lifeline in the Trust Territory and in that respect occupied a special, if not peculiar, position with regard to the government and people of the Trust Territory. In context of this case, the receiver stands no more for the owners than the creditors,

similar to the railroads of the United States during the latter part of last century. *New York, P. & O. R. Co. v. New York L. E. & W. R. Co.*, 58 F. 268 (C.C.N.D. Ohio 1893).

The lower court's order of February 25, 1975 is affirmed.

One additional matter has come to the attention of this Court.

[11] Appellants' brief was filed and served on the receiver and his attorney on September 29, 1976. On November 12, 1976, the receiver's attorney, Donald R. Hazlewood, filed an application for additional time to file a brief. By court order the time period was extended until January 15, 1977. On January 17, 1977, Mr. Hazlewood filed an additional request for an extension of time and he was given until February 15, 1977 to file.

No brief was filed until May 13, 1977 and on oral motion of Appellants, the receiver's brief was stricken from consideration. Mr. Hazlewood was not allowed to argue.

This cavalier and careless attitude cannot be ignored.

This matter is returned to the trial judge supervising the receivership with directions not to allow the attorney for the receiver any fees for any services related to this appeal. If fees have already been approved and paid, the court shall cause the receiver's attorney to reimburse the receivership for all such fees.