1921

*Nov. 9.
*Nov. 11.

MERCHANTS BANK OF CANADA APPELLANT;

AND

CHARLES ANGERS.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Special leave to appeal—Petition to sue in name of trustee—"Bankruptcy Act," 9 & 10 Geo. V., c. 36, sections 35, 3 and 74 ss. 3.

A judge sitting in bankruptcy having granted a petition by the respondent, under section 35 of the "Bankruptcy Act," to be authorized to take certain proceedings in the name of the trustee but at the respondent's own expense and risk, the Court of King's Bench held that it was a mere preparatory judgment and one not subject to the control of that court.

Held, that special leave to appeal to the Supreme Court of Canada should not be granted.

MOTION for special leave to appeal, under section 74, s.s. 3 of the "Bankruptcy Act," from a decision of the Court of King's Bench, appeal side, Province of Quebec, dismissing an appeal from the judgment of Loranger J. which granted respondent's petition to take certain proceedings in the name of the trustee.

The facts are fully stated in the judgment of Mr. Justice Mignault on the application for special leave.

Aimé Geoffrion K.C. and *A. R. Holden K.C.* for the motion.

E. R. Angers contra.

*PRESENT:—Mr. Justice Mignault in Chambers.

MIGNAULT J.—The petitioner-appellant, the Merchants Bank of Canada, has applied to me under section 74, subsection 3, of "The Bankruptcy Act" for special leave to appeal from a judgment of the Court of King's Bench, Appeal Side (Quebec), of the 25th day of October, 1921, whereby its appeal was rejected, on the respondent's motion for the following reasons:

Considérant que la permission préliminaire de poursuivre donnée par la Cour de Faillite ne préjuge rien du futur litige et n'empêche aucunement l'appelante de faire valoir tous les moyens de droit et de fait qu'elle peut opposer à l'intimé;

Considérant qu'un jugement accordant telle permission n'est pas sujet au contrôle de la cour d'appel;

To explain the circumstances under which this judgment was rendered, I may say that the respondent, in July last, presented to a judge sitting in bankruptcy a petition under section 35 of "The Bankruptcy Act," praying that he be authorized to take proceedings in the name of the trustee, but at his own expense and risk, to revendicate certain securities which he had furnished to the bankrupt as a margin on certain stock transactions made by him, but which he alleged the bankrupt had fraudulently transferred to the appellant.

It appears that in April last an arrangement of the nature of a transaction (art. 1918 C.C.) had been entered into between the trustee, duly authorized by the inspectors and the appellant, whereby the latter was allowed to keep the securities it held for a large claim against the bankrupt, on condition that it would not assert its claim against the estate, this arrangement, between the parties thereto, to have the authority of a final judgment.

1921

MERCHANTS BANK OF CANADA v. ANGERS.

Mignault J.

The respondent's petition coming before Mr. Justice Panneton, judge in bankruptcy, was referred to Mr. Justice Loranger. The present appellant, although it does not appear to have been served with a copy of the petition, appeared by counsel before the learned judge, and producing the above-mentioned arrangement opposed the granting of the petition.

The learned judge, however, on the ground that section 35 of "The Bankruptcy Act" does not distinguish between a justifiable or an arbitrary refusal of the trustee to institute proceedings, and that however serious the reasons for refusing the authorization might be, these reasons would have their full effect in a plea to the merits, granted the authorization subject to the present respondent furnishing security to the amount of $300.00

The petitioner-appellant appealed from this judgment to the Court of King's Bench, but its appeal was dismissed for the reasons above stated, and it now applies for special leave to appeal from the judgment of the Court of King's Bench to the Supreme Court of Canada.

The parties came before me by their counsel on November 9th and the matter was fully argued.

The petitioner-appellant alleged that this appeal involves matters of public interest and important questions of law with reference to the proper construction of the Bankruptcy Act, and that the said questions of law are applicable to the whole Dominion.

Mr. Geoffrion, K.C., for the appellant, argued that it was very important that section 35 of "The Bankruptcy Act" be construed by this court. This section reads as follows:

If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceedings after being duly required to do so, the creditor may, as of right, obtain from the court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate.

Mr. Geoffrion however admitted that the only right of which he was deprived by the judgment rendered under section 35—the effect of which was to subrogate the respondent in the rights of the bankrupt's estate with respect to the proceedings which he was authorized to institute in the name of the trustee—was what he termed the right not to be sued in view of the arrangement or transaction above mentioned. I am not convinced that this is any substantial right, for it is obvious that if the transaction has the effect of a final judgment against the bankrupt's estate, the present appellant can set it up by plea and get its full benefit.

Moreover this court would not be called upon to construe section 35 if special leave to appeal were granted. The judgment of the Court of King's Bench did not construe it, but dismissed the appeal on the ground that Mr. Justice's Loranger's judgment was a mere preparatory judgment and one not subject to the control of the court of King's Bench, and that the preliminary leave to institute proceedings in the name of the trustee did not decide in any way as to

1921

MERCHANTS BANK OF CANADA v. ANGERS.

Mignault J.

the merits of these proceedings, and did not prevent the appellant from availing itself of any defence in law and fact which it might have against the demand of the respondent.

But Mr. Geoffrion argued that it would be very important to determine whether the Court of King's Bench should not have entered into the merits of the appeal, and whether it had not jurisdiction to review the judgment granting authorization to institute proceedings in the name of the trustee.

The point however really involves the question whether such a preparatory judgment is appealable and, if appealable, whether under the Quebec Code of Civil Procedure the appeal should have been brought as appeals must be from interlocutory judgments, that is to say upon leave obtained. Under "The Bankruptcy Act" courts exercise their jurisdiction according to their ordinary procedure (section 63), and the whole question, were special leave granted, would probably be whether the appeal to the Court of King's Bench was properly brought. There would therefore be to my mind no question of public interest justifying the grant of special leave to appeal to this court merely in order to determine whether the Court of King's Bench had jurisdiction to hear the appellant's appeal, or whether the appeal was properly before that court, in view of the provisions of the Quebec law as to interlocutory appeals (arts. 46, 1211 et seq. C.C.P.).

What is certain is that the construction of section 35 of "The Bankruptcy Act" could not be passed on by this court if special leave to appeal were granted, nor can I see that any question as to the proper construction of section 74 would be involved in an appeal to this court. The issue would be, as I have said,

1921

MERCHANTS BANK OF CANADA v. ANGERS.

Mignault J.

whether such a judgment is appealable and whether or not the appellant should have followed the rules governing appeals from interlocutory judgments, and this being a question of practice and procedure, I cannot think that this court would interfere with the decision of the court below.

On the whole my opinion is that I would not be justified in granting special leave to appeal (for a reference to decisions governing the grant of special leave see my judgment in *Riley* v. *Curtis's & Harvey, Limited* (1)), and the appellant's petition is dismissed with costs.

Motion dismissed with costs.

(1) [1919] 59 Can. S.C.R. 206.