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Present : Fisher C.J. and Drieberg J.

DEEN *v.* ALAGAPPA CHETTY.

104—D. C. Colombo, 3,798.

Insolvency—Opposition to certificate—Failure to give notice—Adjournment of meeting—Ordinance No. 7 of 1853, s. 124.

In insolvency proceedings a District Court has power to adjourn a sitting held for the purpose of granting a certificate, in order to enable a creditor to be heard, who desired to oppose the certificate but had failed to give the statutory notice.

APPEAL from an order of the District Judge of Colombo.

The appellant having been adjudged insolvent, a certificate meeting was fixed, when the respondent appeared on the appointed day to oppose the granting of the certificate. The appellant objected to the respondent being heard on the ground that the latter had failed to conform to the requirement of the Ordinance with regard to the notice of opposition. The learned District Judge adjourned the certificate meeting to allow the opposing creditor or any other creditor to give notice of opposition.

[1] *31 N. L. R. 1.*

Weerasooria, for insolvent, appellant.—Section 124 of the Insolvency Ordinance (No. 7 of 1853) requires that a creditor who desires to oppose the certificate must give three clear days' notice to the Secretary of the Court. Notice handed over to a clerk is not due notice, and even the clerk says he saw the notice among his papers for the first time only on the day of the certificate meeting. The District Judge has not held whether the notice was given on the day it is alleged to have been given or not. He has no power to adjourn the certificate meeting to cure the non-compliance of the provisions of the section. The adjourned date must be taken to refer back to the original date fixed for such meeting. Counsel cited *Silva v. Siddambaram Chetty*.[1]

Rajapakse, for opposing creditor-respondent.—The District Judge has power under section 124, *ex mero motu*, to ask for assistance from a creditor with regard to the consideration of objections to the grant of a certificate, whether such creditor has given notice or not. Here the Judge stopped the evidence and adjourned the meeting. In interpreting section 124 grounds of public policy must be remembered, and the insolvent's conformity to the provisions of the Ordinance. An opposing creditor to some extent represents the public. The notice has to be given to the Secretary, *not to* the insolvent. The Judge has discretion to adjourn the sitting for the purpose of giving even a creditor, who has not given due notice, an opportunity of giving the required notice. (*Ex parte Woods* [2]; *Archbold* (*1856 ed.*), *pp. 402-403.*) The passage in *4 C. W. R. 217* is *obiter dictum*.

August 22, 1929. FISHER C.J.—

This appeal arises under the following circumstances: The appellant having been adjudged insolvent, the certificate meeting under section 124 of the Insolvency Ordinance, No. 7 of 1853, was appointed to be held on March 26, 1929. The respondent, who wished to oppose the granting of the certificate, took certain steps to comply with the provision of the section which requires an opposing creditor to give "to the Secretary of the Court three clear days' notice in writing of his intention to oppose," and appeared on the appointed day to oppose the granting of the certificate. The appellant objected to his being heard on the ground that the requirement of the section with regard to notice had not been complied with. The learned Judge, without specifically deciding the question whether due notice had been given or not, and after having heard some evidence, made order as follows: "In view of the facts I think that the fairest order I can make is to adjourn the certificate meeting for June 11. The opposing creditor who has given notice, or any other creditor, will be allowed to give notice

[1] *4 C. W. R. 217.*

[2] *20 L. J. Chanc. 619.*

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of opposition in the usual way. I do not think it fair to the Court that I should not have the assistance of Counsel for the opposing creditor, and the only grievance that the insolvent can have is that he has not had due notice. The adjournment which I have ordered will enable fresh notice to be given to the Secretary as required by the section."

For the purpose of deciding this appeal we must proceed on the footing that the learned Judge was not satisfied that the notice given was a good notice within the meaning of the section. It was contended for the appellant that once a creditor had failed to give notice in accordance with the section it was not open to the Court to hear any objection by him to the granting of the certificate, and an opinion expressed by this Court in the case of *Silva v. Siddambaram Chetty* [1] seems to support that view. The headnote of the report is as follows:—"Notice of objections not given in time—Court has no power to adjourn meeting to enable objecting creditors to give sufficient notice." The headnote, however, does not set out what was actually decided by the Court. The facts in that case were that at the certificate meeting the District Judge upheld a contention that three clear days' notice had not been given in conformity with section 124 and adjourned the meeting for another date to give the objecting creditors the opportunity of filing a fresh notice. Two points were raised on the appeal, namely, whether three clear days' notice had been given or not and whether the Judge was right in adjourning the meeting. Wood Renton C.J. expressed himself as unable to agree with the learned Judge on either of the points. He says in his judgment : "It is clear, and this was indeed conceded by the insolvent's Counsel, that the Court has an inherent power to adjourn proceedings in insolvency cases. But I do not think that that power can be exercised in favour of creditors who have failed to give the prescribed statutory notice of their objections. On the other hand I am of opinion that the notice here in question was good." De Sampayo J. was of opinion that the provision as to giving three clear days' notice clearly contemplated "the public sitting first appointed for the consideration of the allowance of the certificate and not any adjournment thereof," but he held that the notice of opposition given was quite sufficient. The question of the power to adjourn a meeting was not therefore, under the circumstances, before the Court for decision. I think, however, we may take the opinions expressed by the learned Judges in that case as authority for the proposition that an objecting creditor who does not comply with the provision as to giving notice is not entitled *as of right* to be heard.

[1] *4 C. W. R. 21* .

But in this case there is another feature for consideration. It is clear that the learned Judge desires to have the assistance of Counsel for the opposing creditor in discharging the difficult and responsible duty cast upon him by the section, and it seems to me clear on a consideration of the section that he is entitled to have such assistance. It would certainly be difficult to say that a creditor, to whose notice something materially affecting the probity and honesty of the insolvent is brought for the first time within three days of the holding of the meeting, cannot bring it to the notice of the Court and put forward such evidence as he may have on the point if the Court should desire to hear it. This is not the case here, but it seems to me material by way of illustration in considering the question of the scope and extent of the power of the Judge under section 124. The section provides that the Court, " whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate. . . . . " Those words give the Court a wide discretion as to hearing objections, and an English decision on the construction of section 198 of 12 & 13 Vict. c. 106, which contains those words and is in very similar terms to section 124 of our Ordinance, which was cited by Mr. Rajapakse (*Ex parte Woods* [1]), is authority for the proposition that the Judge is not limited to hearing only such objecting creditors as may have given due notice should he think fit to allow others to come forward to assist him in his inquiry. That case came before the Lord Chancellor—on special case—by way of appeal from a decision of Vice-Chancellor Knight Bruce, and it was held that the Commissioner in Bankruptcy had discretion to adjourn generally the sitting held for the purpose of granting a certificate at the instance of creditors who desired to oppose the granting of the certificate but who had omitted to give the three days' notice required by the section. The Lord Chancellor (Lord Truro) in giving judgment said: " My duty is to give such a construction to this 198th section as, looking to the whole act, will best carry into effect the intention of the legislature. It appears to me that the objections urged against the proceedings of the Commissioner cannot be sustained. There was a great public object contemplated by this part of the statute, as is obvious from the form of the certificate given in the schedule; this form differs from the old certificate, which was to the effect simply, that the bankrupt had only conformed to law from the date of the bankruptcy, and previous conduct was not held a sufficient ground for impeaching his claim to the certificate; but, under the present act, a much more extensive duty falls to be performed by the Commissioner, for in granting the certificate he is further required to govern his judgment by the conduct of the bankrupt, as a trader,

[1] *(1851) 20 L. J. Chanc. 619.*

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both before and after the bankruptcy; having a due regard to the circumstances under which he has become bankrupt, in order to determine to which class of certificate he may be entitled. This general object of public interest must not be lost sight of in construing the statute," and concluded his judgment by expressing the opinion that the Commissioner had "exercised a sound discretion, and that the Vice-Chancellor was right in declining to interfere."

The form of the certificate under our Ordinance contains similar provisions to those commented on by the Lord Chancellor, and his judgment is therefore directly in point in this case.

In my opinion, therefore, the District Judge had power to adjourn the meeting as he has done. It does not appear from the record before us whether he gave instructions that a fresh notice should be given in the *Gazette*, but in the case to which I have referred the Commissioner in Bankruptcy directed that a fresh notice should be given and the judgment of the Lord Chancellor endorses his action. In my opinion it would be well to follow the same course in this case, and we therefore direct that twenty-one days' notice of the meeting be given in the *Gazette* as provided in section 124. The appeal is dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.