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Re Insolvency of BENEDICT DE CROOS.

D. C., Negombo, 61.

Insolvency—Certificate of conformity—Offence under s. 151, sub-s. 8 of Ordinance No. 7 of 1863—False statement by insolvent in his examination as to his trade—Carelessness and misfortune—Report, of assignee.

A person who commenced a business without being brought up to it and upon borrowed capital; who acted carelessly, rashly, and imprudently in several respects; who did not keep proper accounts, and whose insolvency was not brought about by misfortune, should not be refused a certificate altogether, if he was not guilty of actual fraud.

The Judge is not bound to act merely on the report of the assignee, but must satisfy himself whether an insolvent is entitled to a certificate of conformity or not.

The case of *Presslie* (1 N. L. R. 321) explained.

The case of a trader is very different from the case of a clerk or superintendent of an estate drawing a small monthly salary, and a Court in the former case should act with greater caution and circumspection before issuing a certificate of conformity which would enable a trader to at once re-commence his trade, should he desire to do so.

THE following judgment of the District Judge (Mr. E. F. Hopkins) sets out the facts of the case and the reasons why he refused to grant a certificate of conformity to the insolvent:—

“Benedict de Croos, the insolvent in this case, married a rich man's daughter and is the father of five children. He and his family live with his father-in-law, who supports them all and allows the insolvent Rs. 50 a month as pocket money.

“In April, 1889, the insolvent opened a cloth boutique at Kochchikada, a village near Negombo, where there is a large bazaar and many boutiques.

“He commenced business by borrowing Rs. 1,000 from Manikan Chetty (the first creditor in the list) at 15 per cent. He had no capital of his own, and admits that he did not apply to his relatives for funds to start on.

“With the borrowed Rs. 1,000 and goods to the value of another Rs. 1,000 procured on credit he opened his boutique.

“According to his own account he lost from the beginning, and continued borrowing. On 11th March, 1902, he declared himself insolvent, and his balance sheet shows liabilities amounting to Rs. 7,915.11, against assets valued at Rs. 2,800, viz., the stock in the boutique. This valuation is however far above the sum actually realized, for the gross proceeds sale were only Rs. 1,531.96, reduced by expenses to the net amount of Rs. 1,398.39. Detailed accounts of the steps leading to this position are not forthcoming, doubtless because the insolvent kept no proper books, and I am

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asked by the insolvent on these materials to grant him a certificate of conformity, the position being this. In April, 1889, he opened a boutique with stock and cash (both borrowed) amounting to Rs. 2,000. At the end of three years he has stock which realizes Rs. 1,998.89, and he owes Rs. 7,915.11. The only excuse is the passage marked A in the assignee's report to the effect that the insolvent, who traded on credit, could not compete with other shopkeepers who traded on cash! I should think it was quite unnecessary to make experiment in order to arrive at such an obvious conclusion!

"In my opinion the facts recorded are of themselves amply sufficient to justify the Court in refusing the insolvent the privileges of the Ordinance.

"The effect of a certificate of conformity is to wipe out all debts contracted by the insolvent, and to enable him to start afresh absolutely unhampered.

"What does the insolvent offer in return? He surrenders his shop goods—all purchased with the money of his creditors, for he did not put a single cent of his own into the business.

"Has he been 'unfortunate' in the meaning of the preamble of the Ordinance? Certainly not. He is provided with board and lodging for self and family and Rs. 50 a month as pocket money for himself. To vary the monotony of this life of lotus-eating, he at the expense of his creditors started business in an amateurish fashion and tried a costly experiment, viz., Can a man trading on borrowed capital compete with cash traders? The inevitable result followed, but where does the 'misfortune' come in?

"But, as it is apparently the general impression that an insolvent must get some kind of a certificate unless fraud is proved against him, the opposing creditors in this case have formulated certain charges against the insolvent, which I shall now consider, though quite apart from these charges, I consider that the insolvent is not entitled to protection.

"The first is of breach of sub-section 2, section 151, and is supported by passages marked B, C, and D of insolvent's examination.

"It is indisputable that the insolvent did not keep his books regularly or properly, but I think this was the result of sheer carelessness, and not of any intention to conceal the state of his affairs.

"The next is under sub-section 3, and this is clearly proved by passage E of insolvent's examination, where he admits that he made a false statement regarding his affairs to induce a creditor to lend him money.

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“ The third is under sub-section 9. I am of the same opinion in this matter as I was regarding the first charge. The insolvent has completely neglected to keep proper books, but I do not think it was with a fraudulent intent.

“ As regards general conduct and reckless trading, it is almost superfluous to comment. As already pointed out, the trade embarked in by the insolvent could at no time have held out any hopes of profit. From the very beginning there was an increasing loss.

“ As regards general conduct, I think it necessary to draw attention to passages F, G, and H in the insolvent's examination regarding the transfer of the shop goods to the insolvent's wife's cousin on a deed. The excuse given is not credible, and I cannot credit the insolvent's statement that no consideration passed. Nor is the subsequent transfer by Odris Fernando Pinno to Annamalai Chetty explicable, except on the assumption that the insolvent wished to defraud his creditors. True it is that the remainder of insolvent's stock-in-trade has been sold, but it is by no means certain that Annamalai Chetty may not yet claim the proceeds to the detriment of the other creditors.

“ To sum up. I am of opinion that the insolvent has shown no cause why the privileges of Ordinance No. 7 of 1853 should be extended to him. I further hold that he has committed an offence under sub-section 3, section 157. I also consider him to have been guilty of reckless trading, and I find that he acted fraudulently in transferring his stock-in-trade to Odris Fernando Pinno.

“ I therefore refuse to grant him a certificate of conformity, and withdraw the protection of the Court.”

The insolvent appealed. The case was argued on 29th January, 1903.

Dornhorst, K.C., for insolvent, appellant.

H. J. C. Pereira, for opposing creditor, respondent.

Cur. adv. vult.

3rd February, 1903. LAYARD, C.J.—

In this case the District Judge has refused to grant the insolvent a certificate of conformity on two grounds: first, because the insolvent has shown no cause why the privilege of the Ordinance No. 7 of 1853 should be extended to him; and secondly, because he finds that he has committed an offence under sub-section 3 of section 151.

I will first deal with the second reason. The Judge has found that the insolvent contracted the debt to Odris Fernando Pinno by means of fraud and false pretence. I have read over the insolvent's examination and more particularly the passage marked E

by the Judge. He appears to admit that he made a false statement in alleging that his trade was good. It does not appear, however, from the evidence as recorded, as to whether this false statement induced the creditor to make the loan, or whether the statement was made after the debt had been contracted. It is further urged by respondent that the passages marked by the District Judge F, G, and H and the insolvent's deposition show an intention on the part of the insolvent to defraud and defeat his creditors by the execution of a fraudulent conveyance of all his stock-in-trade. The transactions there recorded are at the most suspicious. The appellant's counsel points out that the insolvent has deposed that the object of executing the conveyance was to get his affairs settled, and certainly the action of Annamalie Chetty in remaining quiet and making no claim to the insolvent's stock-in-trade when sold supports that contention.

Section 151 of the Ordinance No. 7 of 1853 renders it obligatory upon the Court either to refuse or suspend the certificate of an insolvent for certain offences enumerated in that section.

This case, however, does not fall, in my opinion, within the range of that section. Had it done so, I should however share the doubts expressed by Lord Justice Turner in the case of *Ex parte Manico* (3 De G. M. and G. 50), whether the punishment awarded by the District Judge against the bankrupt had not gone too far, for, as he there says, "if the Court in cases of this description, where only one of the offences enumerated has been committed, is bound to inflict the extreme penalty, I know not what is to be done where every one of the offences has been committed."

I will now deal with the first ground. In a portion of his judgment the District Judge appears to suggest that no insolvent is entitled to a certificate under the Ordinance unless he can establish that he is "unfortunate" in the meaning of the preamble of the Ordinance. In a late judgment of this Court we pointed out that the operative part of this Ordinance is not limited by the preamble, and that the Judge issuing a certificate of conformity of the third class has not to certify that the insolvency has been brought about by misfortune. Undoubtedly, however, in every case in which a trader has been declared insolvent under the provisions of section 124 the Judge has to see whether the insolvent has conformed to the Ordinance, and to consider his conduct as a trader before as well as after his insolvency. The Judge has, I think, in this case properly found that the insolvent carried on trade recklessly, has neglected to keep proper books of account, and that his general conduct as a trader is open to suspicion.

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The insolvent commenced a business without capital, to which he had not been brought up, he acted carelessly, rashly, and imprudently in several respects, and he further did not keep proper books of account. I am however not satisfied from the evidence that he was guilty of any actual fraud, though some of the transactions appear to me to be suspicious. Taking all the circumstances into consideration, I think that the demands of justice will be satisfied by suspending the certificate of the insolvent for two years from the date of this judgment, and directing that, when issued, it shall be of the third class.

In coming to this conclusion, I desire to add I have not lost sight of the judgment of Chief Justice Bonser in the case of *Presslie* reported in *1 N. L. R. 321*, cited by appellant's counsel. In entirely agree with the views expressed by Chief Justice Bonser in that case. I have no more sympathy than he has with creditors who allow a man in receipt of a wretched monthly salary to run up big accounts, and I feel with him that if they lose their money they have only themselves to blame. I further concur with him in holding that, before adjudicating over an application for a certificate, the Court should have before it the report of the insolvent's assignee.

It is however for the Judge to decide in each case whether the insolvent is entitled to a certificate or not, and the Judge is not bound to act merely on the report of the assignee. The Court must satisfy itself before issuing a certificate of conformity that an insolvent is entitled to one (*In re Armitage*, 5 S. C. C. 216).

The case of a trader is very different from the case of a clerk or superintendent of an estate drawing a small monthly salary, and a Court in the former case should act with greater caution and circumspection before issuing a certificate of conformity which would enable a trader to at once re-commence his trade, should he desire to do so.

MONCREIFF, P.J.—I am of the same opinion.
