Present : Lascelles C.J. and Wood Renton J.

1912

PERERA v. JOSEPH et al.

46 and 47—D. C. Colombo, 2,447.

Mortgagee proving debt in insolvency proceedings—Is he bound to share proceeds pro rata *with unsecured creditors?—Who is a "trader"?—Reckless trading—Books not kept.*

A mortgagee who elects in the first instance to prove in the insolvency would not lose the advantage of his security, and is not bound to share *pro rata* with the unsecured creditors in the proceeds.

Section 109 deals with the case of a creditor who has brought an action against the insolvent in respect of a demand prior to the filing of the petition. In that case the creditor cannot prove in the insolvency without relinquishing the action, and the act of poving the claim amounts to a relinquishment of the action.

The correctness of the definition of the term "trader" in *In re Kanagaratne* [1] doubted.

An insolvent who failed to keep books, and who was guilty of reckless trading, was in the circumstances of this case granted a certificate in the third class, which was suspended for two years.

IN this case there were two appeals. No. 46 was an appeal by a mortgage-creditor against the order of the District Judge holding that by proving his claim in the insolvency proceedings the mortgagee had elected to come in as an unsecured creditor and share in the proceeds *pro rata* with the other creditors.

No. 47 was an appeal preferred by the insolvent against an order refusing to grant him a certificate of conformity.

H. A. Jayewardene, for appellant in No. 46.

Talaivasingham, for the fourth respondent.

A. St. V. Jayewardene, for the seventh respondent.

Sansoni, for the assignee.

Cur. adv. vult.

June 17, 1912. LASCELLES C.J.—

The appellant is a creditor in the insolvency, whose debt was secured by a secondary mortgage of certain house property in Colombo. The property comprised in the mortgage, together with other property, having been sold in the course of the insolvency,

[1] *(1900) 1 Br. 70.*

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the appellant by his proctor moved for an order for payment to him of Rs. 1,741.06, representing the balance of the proceeds of the sale of the mortgaged property after satisfaction of the primary mortgage. The learned Acting District Judge took the view that the appellant, by proving his claim, had surrendered his security, and had elected to come in as an unsecured creditor and share in the proceeds *pro rata* with the other creditors, and dismissed the appellant's motion. From this order the appellant now appeals.

The question turns upon the construction of sections 111 and 109 of the Insolvency Ordinance, and with regard to this there has been some divergence in the decisions of this Court. In *S. T. Mathiah v. Meera Lebbe Marcar Tamby,*[1] Lawrie J. held that it was competent to the mortgagee to claim the property under the mortgage bond, and when the mortgaged property is sold, to draw the whole proceeds or so much as are sufficient to satisfy the debt. The learned Judge was of opinion that the mortgagee's right to draw the full amount of his debt from the proceeds of the sale of the property was reserved by the exceptions stated in section 111. In *In re Ingleby,*[2] the same learned Judge delivered a similar opinion that a creditor by proving his claim did not renounce any of the rights which his mortgage bond gave him. In *Karthan Chetty v. Pakir Bawa Mohamadu Lebbe Marcar,*[3] Burnside C.J., without definitely deciding the point, stated that he was inclined to think that a mortgagee who elected in the first instance to prove in insolvency would not lose the advantage of his security. The contrary opinion was expressed by Dias J., who did not understand section 109 as applying only to cases where the creditor has brought the action against the insolvent before the filing of the petition. In *Ramen Chetty v. Anstruther,*[4] the question related to the rights of a judgment-creditor, who had seized the insolvent's land before the petition in insolvency was filed, to be paid in full in preference to the other creditors. The right of the creditor to payment in full was allowed. Of these authorities, the one which is most directly in point is the decision of Lawrie J. in *S. T. Mathiah v. Meera Lebbe Marcar Tamby,*[1] and in my opinion the construction there adopted of section 111 of the Insolvency Ordinance accords with the expressed meaning of the section. The general rule that secured creditors, and creditors who have attached any part of the effects of the insolvent, are entitled only to a rateable part of the debt is, subject to certain exceptions, stated in the section; one of them is that where the security consists of a mortgage or lien on the property of the insolvent before the date of the filing of the petition the rule is not applicable. The present case is within the exception.

With regard to section 109, the marginal note is misleading. The section deals with the case of a creditor who has brought an action

[1] (1884) 6 S. C. C. 85.
[2] (1885) 7 S. C. C. 39.
[3] (1886) 8 S. C. C. 11.
[4] (1889) 9 S. C. C. 54.

against the insolvent in respect of a demand prior to the filing of the petition. In that case the creditor cannot prove in the insolvency without relinquishing the action, and the act of proving the claim amounts to a relinquishment of the action. This section, it seems clear, does not apply to the present case.

For the above reasons, I am of opinion that Mr. Justice Lawrie's judgment in *S. T. Mathiah v. Meera Lebbe Marcar Tamby* [1] ought to be followed. I would set aside the order appealed against, and remit the case to the District Judge to deal with the appellant's motion on the footing that by proving in the insolvency he has not lost his security. The appellant is entitled to the costs of the appeal.

WOOD RENTON J.—

This appeal raises an interesting question as to the construction of section 111 of the Insolvency Ordinance, No. 7 of 1853. The appellant is one of several creditors who proved their claims in Insolvency case No. 2,447—D. C. Colombo. The appellant had, as security for his debt, a secondary mortgage over certain property belonging to the appellant in Prince street, Pettah, Colombo; certain household furniture and printing materials, the property of the insolvent; and an insurance policy on the life of the insolvent's son. At the date of his adjudication the insolvent was indebted to the appellant in the sum of Rs. 6,334.19, together with further interest on a sum of Rs. 6,192 at 18 per cent, per annum from March 26, 1911, on seven promissory notes and two I. O. U's. The payment of all these sums was secured by the mortgage above referred to. As the insolvent had no other available assets, his assignee proposed to sell the mortgage property, and the appellant consented to this being done tendering his mortgage bond, which is filed in Court. The life insurance policy had lapsed. The household furniture and printing materials were sold at Rs. 1,327.92, and the appellant was allowed to draw that money. The house and premises at Prince street were sold, and a sum of Rs. 11,682.53 was brought into Court. The primary mortgagee drew the whole sum due to him, namely, Rs. 9,941.47, and the appellant thereupon moved for leave to draw out the balance, namely, Rs. 1,741.06. The learned District Judge disallowed the motion on the ground that the appellant by surrendering his mortgage had elected to come in as an unsecured creditor and share in the proceeds *pro rata* with the other creditors. The present appeal is brought against the order disallowing that motion.

Apart from authority, I should have thought that the case was free from doubt. Section 111 of Ordinance No. 7 of 1853 provides that " no creditor having security for his debt, or having made any attachment of the goods and effects of the insolvent, shall receive upon any such security or attachment more than a rateable part of

[1] (1884) 6 S. C. C. 83.

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such debt, except in respect of any execution served and levied by seizure and sale upon or any mortgage of or lien upon any part of the property of such insolvent before the date of the filing of a petition for sequestration of his estate."

In the present case the seizure was effected before the insolvent filed his petition for sequestration. That being so, I should have thought that the clear effect of the saving clause in section 111 was to secure the appellant's preference, in spite of the fact that he had proved his claim and tendered his mortgage bond. There is nothing in the record to show that the appellant intended in any way to renounce his rights under the mortgage. The construction of section 111, which I have here suggested as the correct one, was adopted *obiter* by Lawrie J. in *In re Ingleby* [1] (and see *S. T. Mathiah v. Meera Lebbe Marcar Tamby* [2]). A different view of the law was taken, however, by the Supreme Court in *Brown v. Fernando.*[3] That case was not, however, followed in *Ramen Chetty v. Anstruther.*[4]

As the authorities are conflicting, we are at liberty, I think to choose between them. I unhesitatingly accept the view taken by Lawrie J. in *In re Ingleby.* [1]

Mr. A. St. V. Jayewardene, counsel for the seventh respondent, called our attention to the provisions of section 109 of Ordinance No. 7 of 1853, that " no creditor who has brought any action against any insolvent in respect of a demand prior to the fiiling of a petition for sequestration, or which might have been proved as a debt under the insolvency, shall prove a debt under such insolvency, or have any claim entered upon the proceedings, without relinquishing such action; and the proving or claiming a debt under a petition for sequestration by any creditor shall be deemed an election by such creditor to take the benefit of such petition with respect to the debt so proved or claimed."

It is quite clear, however, from the language of this section as a whole, that it is applicable only where an action has been brought against the insolvent prior to the filing of the petition for sequestration, a state of fact which does not exist in the present case. I would allow the appeal on the terms stated by my Lord the Chief Justice.

Set aside and sent back.

H. J. C. Pereira (with him *F. M. de Saram*), for appellant in appeal No. 47.

H. A. Jayewardene, for the opposing creditor.

Talaivasingham and *A. St. V. Jayewardene,* for the respondent.

[1] (1885) 7 S. C. C. 39.
[2] (1884) 6 S. C. C. 83.
[3] (1888) 8 S. C. C. 162.
[4] (1889) 9 S. C. C. 54.

LASCELLES C.J.—

This is an appeal from a refusal of the District Judge to grant a certificate of conformity to the insolvent. The principal grounds of the refusal are the failure of the insolvent to keep books, and the District Judge's finding that the insolvent has been trading recklessly. With regard to his failure to keep books, it has been contended that the insolvent is not a trader withing the meaning assigned to that term by Chief Justice Bonser in *In re Kanagaratne.*[1] Even accepting the correctness of this definition, as regards which, I admit, I have some doubt, there is sufficient evidence that the insolvent was a trader in the sense that he had followed the occupation of buying and selling goods; for during a part of the period with which we are concerned he did deal in cloths and combs. I am therefore of opinion that the insolvent in failing to keep books has been guilty of one of the offences set out in section 151 of the Insolvency Ordinance. There is also evidence of reckless trading. It is I think proved that the insolvent at the time that he was aware that he was in a state of insolvency borrowed more money and embarked on fresh enterprises. There is therefore ground, in my opinion, for dealing somewhat severely with the insolvent. On the other hand, I do not regard the case as one of the worst character. The insolvent was able to produce a fair proportion of assets, and it is possible that if his property in the Pettah had been sold more favourably his balance sheet would have been better. On the whole, I think that the justice of the case will be met if the certificate of the insolvent is suspended for two years, and then granted in the third class. The order of the District Judge must be set aside, and an order as I have indicated must be substituted accordingly. No order will be made as to costs.

WOOD RENTON J.—

I entirely agree, and I only desire to add that I share in the doubts of my Lord the Chief Justice as to the correctness of the decision of Chief Justice Bonser and Mr. Justice Moncreiff in *In re Kanagaratne.*[1] In the latest English case in which the meaning of the word " trade " has been discussed (*Commissioners of Taxation v. Kirk*[2]), Lord Davey, in delivering the judgment of the Privy Council, expressed himself as follows: " The word ' trade ' no doubt primarily means traffic by way of the sale or exchange or commercial dealing." It will be observed that, in that passage of the judgment, commercial dealings are treated as falling within the primary meaning of the word " trade."

Set aside.

[1] *(1900) 1 Br. 70.*

[2] *(1900) A. C. 592.*