

1932

Present : Garvin S.P.J. and Drieberg J.

RAMAN CHETTY *v.* ALLOPATHAM *et al.*

376—D. C. Colombo, 40,323.

Insolvency—Deed of composition—Secret agreement to pay more than their share to some creditors—Deed not binding on others.

Where, in insolvency proceedings, the insolvent has entered into a deed of composition with his creditors whereby they agreed to accept a certain proportion of their claims in full satisfaction thereof,—

Held, that a creditor, who has executed the deed of composition, is entitled to repudiate it if he discovers that the others have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition.

A PPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, for plaintiff, appellant.

Hayley, K.C. (with him *Gratiaen*), for the defendants, respondent.

Cur. adv. vult.

November 9, 1932. GARVIN S.P.J.—

This was an action on two promissory notes both made by the defendants, each for a sum of Rs. 1,000. One note was made on May 17, 1929, and the second on July 6, 1929. The plaintiff gave the defendants credit for payments amounting to Rs. 425 and claimed judgment for the balance principal sum of Rs. 1,575 and interest. The first defendant pleaded that he had been adjudged an insolvent in certain proceedings No. 4,082 of the District Court of Colombo, and that he entered into an arrangement with his creditors as a result of which they agreed to accept a composition of 25 per cent. of their several claims in full satisfaction. The deed of composition was produced in the insolvency proceedings and upon the application of the insolvent to which the provisional assignee agreed the insolvency was annulled. The first defendant takes his stand upon the deed of composition and pleading that he has in terms thereof paid to the plaintiff the sum of Rs. 502 being 25 per cent. of his claim prays that the plaintiff's action be dismissed. The second defendant pleaded that at the time of the making of these notes it was agreed and understood that he was not to be held liable on them or either of them. The plaintiff filed a replication in which he pleaded that the deed of composition was of no effect and void in law for the reason that the plaintiff had procured the signature of several of the creditors to this deed of arrangement upon the promise of paying them something additional to the sum which they would have received if the deed of composition had been faithfully adhered to. Three issues were framed at the trial. The first related to the first defendant's answer and the plaintiff's plea in reply that the deed of composition no longer bound him; the second was an issue as to the amount which had been paid by the first defendant to the plaintiff; and the third was an issue raised upon the second defendant's plea that the plaintiff had assured him that at the time of the signing of these promissory notes that he would not hold him liable to pay the same.

The learned District Judge has found as a fact that the first defendant did not pay to the plaintiff the sum of Rs. 502 as alleged by him.

He accepts the evidence that all he has received is two sums of Rs. 250 and Rs. 175 amounting in the aggregate to Rs. 425. As to the second defendant, there are indications in his judgment that he does not accept the suggestion that it was understood that as the joint maker of these promissory notes he was incurring no liability to the plaintiff. On the principal issue in the case, the District Judge has held very definitely that several of the creditors and in particular the firm of N. R. M. M. received money or other advantages and were induced thereby to enter into the deed of composition.

The evidence of the second defendant can leave no doubt whatever that the District Judge was right. He said "My father (first defendant) had about 30 creditors. About 8 or 10 of them wanted something more before they signed. In order to get them to sign I made them promises. Each man did not know what I was promising the other man. I made each person believe that all the others were accepting, except himself. When the people signed they signed on the assumption that all were willing". There can be no doubt, therefore, that this is a case in which these 8 creditors who were unwilling to enter into this deed of composition were bribed to do so by special inducements which placed them in a position of advantage as compared with the rest of the creditors who were given the assurance when they were invited to enter into this deed that every creditor would be treated upon the same basis and each of them only received payment at the rate of 25 per cent. of the amount of their claims.

"The essence of composition arrangement between a debtor and his creditors is equality between the creditors and consequently a creditor who has executed a composition deed is entitled to repudiate it if he afterwards discovers that other creditors have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition"—see *In re Milner*.¹

Thus far the evidence in the case and the findings of the learned District Judge thereupon justify the plaintiff in the attitude he has adopted. But the learned District Judge has proceeded further and has deprived him of the right to repudiate the agreement upon the ground that he was himself one of those persons who received a special inducement over and above what was due to him under the deed of composition in order that he might give his assent to the arrangement. The District Judge's finding is not a very definite one. To quote his own words, they are as follows:—

"I think the arrangement was that the plaintiff should have roughly about 50 per cent. of his claim. The idea was that he should realize on the two promissory notes, which amounted to Rs. 627, and be paid a further sum of Rs. 175 which would make about Rs. 800 for him". Now there is no one who says that there was any arrangement by which it was agreed that the plaintiff was to receive 50 per cent. of his claim

¹ (1885) 15 Q. B. D. 605.

unlike the other creditors who were to receive only twenty-five. The two promissory notes referred to by the learned District Judge have been shown to have been handed to the plaintiff at a date long anterior to the insolvency and this deed of composition. It would seem that the first of these two promissory notes was dishonoured on July 29, and on that date the defendants met the plaintiff and the second defendant endorsed two promissory notes, one for Rs. 400 and the other for Rs. 227, and handed them over to the plaintiff. It is not quite clear whether this was done in order that the plaintiff should have something in the nature of security for his debts or whether it was to be treated as a conditional payment *pro tanto* of the debt due upon the promissory notes. But whichever may be the true explanation it is clear that they were handed over at a totally different time and under circumstances which render it impossible to treat the act of the second defendant in endorsing and handing these notes over as part of an arrangement made long subsequent thereto at the time of the deed of composition with the intention of inducing him to come in with the rest of the creditors. The second defendant when giving evidence put his case upon a somewhat different footing. He stated that he gave the plaintiff a stamped agreement to pay him something more. The District Judge does not deal specifically with this evidence and it seems extremely unlikely that such an agreement was drawn up, signed, or delivered to the plaintiff. Proceeding, he stated "The agreement was merely that I should pay him something more. Apart from this I gave him a note. It was for Rs. 227. Apart from this I endorsed a note in my favour by a third party. There was a balance of Rs. 400 due on a Rs. 1,000 note which I endorsed to the plaintiff. This was to be held in security until the fulfilment of the agreement." Now so much of the evidence as refers to the endorsement and delivery of these notes clearly cannot be accepted, for, as the District Judge has himself pointed out, the endorsements are dated and the date upon them is July 29, 1929. One cannot therefore accept the second defendant's evidence that they were endorsed in pursuance of any agreement made at or about the time at which this deed of composition was signed.

There is therefore no evidence that the plaintiff was himself one of those who had in fraud of the other creditors received a special advantage or benefit to himself as an inducement for entering into this deed of composition. In the absence of such evidence he is clearly entitled to repudiate the deed of composition and make his claim upon the two promissory notes.

The learned District Judge has proceeded to consider whether if the deed of composition be treated as a good one and binding upon the plaintiff the second defendant was not in law released from his obligations on the promissory notes. In view of the conclusion at which I have arrived it is unnecessary to deal with the arguments which were addressed to us upon this aspect of the case.

The plaintiff is in my judgment entitled to a decree in his favour as prayed for, save only that he must give the defendants credit for the sum of Rs. 400 due upon the promissory note which was endorsed by the

second defendant and handed to him on July 29, 1929. As regards the other note for Rs. 227 the parties seem to be agreed that this amount is irrecoverable. We would therefore direct that this note be handed over to the defendants.

The judgment of the District Judge will therefore be set aside and judgment entered for plaintiff as directed with costs in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.

