

1931

*Present: Lyall Grant J. and Maartensz A.J.*MUTTU MOHAMMADU *v.* RAMASAMY CHETTY.35—*D. C. Colombo, 3,795.**Insolvency—Opposition to certificate—Onus of proof—Duty of Court.*

In insolvency proceedings the onus does not lie entirely on the opposing creditor to prove that the insolvent has committed an offence.

Where there are suspicious features in the case, it is the duty of the Court to make some inquiry before discharging the insolvent.

**A** PPEAL from an order of the District Judge of Colombo.

*R. L. Pereira, K.C.* (with him *A. H. M. Ismail*), for appellant.

*Hayley, K.C.* (with him *Nadarajah*), for respondent.

July 7, 1931. LYALL GRANT J.—

This is an appeal by an opposing creditor against the grant of a certificate of conformity of the second class to a Muslim trader.

The insolvent was a butcher who had various stalls in different markets in Colombo, where he sold beef and mutton. He filed his declaration of insolvency on November 21, 1927.

An assignee was appointed who reported that he examined the insolvent on June 5, 1928, and the insolvent's statement.

His balance sheet showed liabilities amounting to Rs. 180,108.10 and assets amounting to Rs. 46,161.67. The principal debtor was T. O. S. Rodrigo in respect of several cheques for Rs. 22,311.40, a debt which has proved irrecoverable.

The insolvent stated to the assignee that Rodrigo had left the Island. He said that the sum had been advanced to him to buy goats at Aden for the insolvent.

There is nothing to show that any examination was made by the assignee of the insolvent's books or vouchers or that he took any steps to check the truth of the insolvent's statements.

One statement made by the insolvent to the assignee was that, as he could not pay the rent of the various stalls to the Municipality, his licence was cancelled.

That statement has been shown in these proceedings to be untrue.

On November 17, 1927, a few days before his declaration of insolvency, the insolvent requested the Municipality to transfer his licence temporarily to one Poona Vana Nadar as he was going to India to recruit his health. He also requested the Municipality to transfer to him his three months' security deposited, the value of which has been given by the insolvent as Rs. 945.

The Municipality agreed to transfer to P. V. Nadar for six months and informed the insolvent that the security would continue to be held in his favour.

On June 20, 1928, the insolvent went again to the Municipality saying that his ill-health continued and asked it to extend the transfer in the same name for another six months. This request was granted.

The insolvent did not in fact go to India at the time. It is clear that the insolvent did not disclose to the Municipality the fact that he was insolvent nor did he disclose to the assignee the fact that he had a deposit lodged with the Municipality. The deposit does not appear in his list of assets.

It is alleged by the opposing creditor that the insolvent (1) unduly preferred P. V. Nadar, (2) concealed and put away from his creditors all his property and assets by handing over his business to his various nominees, (3) accounted for his insolvency by fictitious loans and expenses, and (4) is still carrying on a large and lucrative business in the name of his nominees.

In support of these allegations evidence was led. S. Mohamadu Cassim says that at the time of the insolvency, the insolvent, in addition to the stalls entered in his name, owned a number of other stalls in Colombo and elsewhere in the name of nominees, and he himself held a number of stalls in his own name but in fact these stalls belonged to the

insolvent and Cassim was only his paid servant. M. Sultan said that in 1928 the insolvent was carrying on business though the licence was in the name of Poona Vana Nadar.

Reference was made to a car belonging to the insolvent. According to him the car was bought on the hire purchase system and was seized by the agents for non-payment of instalments and was then bought by Poona Vana Nadar, who paid the balance instalments due.

Sultan, however, says that the insolvent regularly used the car till about August, 1930, when he exchanged it for a new one.

The insolvent admits that on November 18, 1927, he gave Poona Vana Nadar ten promissory notes for Rs. 15,000 and on November 19, 1927, a promissory note for Rs. 35,456.58. He says that this was on account of previous cheques, but it is not explained how he became indebted to Poona Vana Nadar in such a large sum.

Another witness, Seena Kavana Naina Mahamadu, gave evidence in regard to stalls at Moratuwa, in which he carried on business. He said that the stalls though registered in Mohamadu Cassim's name really belonged to the insolvent, into whose hands he paid money taken from the business.

The learned District Judge has disbelieved all the witnesses who speak to the insolvent carrying on business since the date of the insolvency.

The insolvent has however given no satisfactory explanation of several important matters.

He has not explained how he came to entrust Rodrigo with over Rs. 22,000 with which to buy goats at Aden a month or two before his insolvency. The evidence is that quite small sums were usually advanced for such a purpose.

He has not explained why he obtained a transfer of his licence to Poona Vana Nadar by false representations to the Municipality nor why he gave Poona Vana Nadar the benefit of his deposit, nor has he explained why six months later he obtained an extension of this transfer without disclosing the fact of his insolvency.

Further, he has given no explanation why he concealed these transactions and the existence of the deposit from the assignee, to whom he falsely represented that his licence had been cancelled.

He has given no satisfactory account of the transfer of large sums of money to Poona Vana Nadar just before the insolvency, a matter which calls for serious investigation.

An unsatisfactory feature of this case is the lack of evidence in regard to the insolvent's transactions. There is nothing to show that the assignee examined the books or vouchers or demanded explanations of various dubious transactions.

The assignee has not been called upon to give evidence. The material upon which we are asked to decide whether this insolvent should be cleared of his debts is altogether inadequate. The learned District Judge seems to have treated the matter as if the entire onus lay on the opposing creditor to prove that the insolvent has committed an offence. I do not think that this exhausts the duty of the Court in these cases.

The Court is responsible for releasing the insolvent from his indebtedness and allowing him to trade free of past obligations and it ought to make some inquiry into suspicious features in the case.

To my mind, in the absence of satisfactory explanation by the insolvent, his conduct appears to be fraudulent.

I would allow the appeal with costs and direct that a certificate of conformity be refused.

MAARTENSZ A.J.—I agree.

*Appeal allowed.*

