1937 *Present :* **Soertsz and Hearne JJ.**

WRIGHT *v.* MUNASINGHE *et al.*

18—D. C. (Inty.) Colombo, 48,533.

Insolvency—Adjudication of defendant during pendency of action—Decree after adjudication—Costs not provable in insolvency—Composition with creditors not binding on plaintiff—Ordinance No. 7 of 1853, s. 108.

A decree for costs obtained against a person after his adjudication as an insolvent is not provable under section 108 of the Insolvency Ordinance.

Fernando v. Fernando (*4 S. C. C. 38*) and *Cadiravel v. De Silva* (*1 Browne 374*) followed.

Held further, that the plaintiff in the case, who did not prove his claim was not entitled to question the regularity of the insolvency proceedings.

THE plaintiff sued the defendant in this action and obtained decree with costs after the defendant had been adjudicated an insolvent. Thereafter the defendant entered into a deed of composition with his creditors and his adjudication was annulled. The plaintiff contended that he was not bound by the deed of composition and that he was entitled to claim the full amount of his decree and costs.

J. R. Jayewardene (with him *S. de Zoysa*), for plaintiff, creditor-appellant.—This creditor was not a party to the deed of composition. The District Judge held him bound by the deed though no creditor was present at the first meeting; as regards the other meeting required by section 140, to decide on such offer of composition, no meeting was ever advertised or held.

[SOERTSZ J.—You say the composition is void as there should be two meetings, section 140.]

The deed is invalid as section 140 is not complied with. As regards the necessity for holding two meetings (*Taylor v. Pearse*[1]). The second meeting is one where the offer must be made to all creditors, even to those who oppose. (*In re A. C. L. Abobakker Lebbe*[2].) The English section is similar to ours. (*Section 230, 12 & 13 Vict. 106.*)

Even if there is a proper deed of composition and I am bound by it, I must get costs given me by the decree, as they were not a "debt provable at the time of the deed". *Fernando v. Fernando*[3] followed in *Caderavail v. De Silva*[4]. The amount claimed is not taxed and this not being provable would not come into the deed of composition.

[SOERTSZ J.—What was your status then ?]

I was never a party, but the District Judge is seeking to make me a party as I had put in a motion in the application for the balance due on my writ. The District Judge should not have considered it. Nowhere does our Ordinance say that the deed discharges the debtor from paying debts that have not been proved.

[1] *(1857) 2 H. & N. 36.*
[2] *(1881) 4 S. C. C. 103.*
[3] *(1881) 4 S. C. C. 38.*
[4] *1 Browne's Rep. 374.*

[HEARNE J.—Where the deed of composition was approved by the Court and the adjudication annulled, has the creditor who has not proved his claim all his rights intact ?]

What does "creditor" in section 140 mean ? There are provisions in the Bankruptcy Act which are not found in our Ordinance. *Lewis v. Leonard* [1].) It is a question of fact whether a creditor assented to the composition. Here I am asking for an order of payment in part settlement of my claim. If I assented to the composition, my prayer would be "in full satisfaction".

The question of costs is to be decided independently of the composition, and costs can be recovered if they are not provable in insolvency.

[HEARNE J.—The decree for costs is before the annulment of insolvency. Therefore they could have been proved.]

Costs decreed after the adjudication of the insolvent are not provable. (*Cadiravel v. De Silva* [2].) Here the decree was entered on June 19, 1933, and the adjudication was in August 3, 1932. The only section under which debts can be proved is section 94.

The fact that I was aware of the composition is insufficient to hold me as assenting to it and if the composition is not binding on me, I can proceed to execution for the balance due to me of section 126 and section 131 as regards the certificate of conformity. There is no corresponding section as regards composition.

H. V. Perera, K.C. (with him *N. E. Weerasooria* and *H. A. Wijemanne*), for defendant, respondent.—Section 140 as it stands is against the appellant. Once the order is made by the District Judge having jurisdiction, the consequences set out in section 140 follow. The question is whether every creditor means a creditor without exception. The object of the second notice is to enable other creditors to come in. Assuming there is an irregularity the District Judge has made an order annulling the adjudication. The irregularity would enable a creditor (though no claim is proved by him in the insolvency) to take appropriate proceedings to set aside the order of annulment. As this is not done, the order stands and every creditor is bound by the deed of composition. The plaintiff cannot come in collateral proceedings. Where there is an irregularity which vitiates an order, an application to set it aside should be made in the same proceedings. (*Pinhamy v. Pieris* [3] and *8 Moore 90, P. C.*)

Once the adjudication is annulled, the assignee has no longer any rights to insolvent's property. Then how could this creditor execute his present decree ? He will have to reopen the insolvency proceedings ; as long as the order for annulment stands, the rights of the creditors stand with the deed of composition.

The act of a creditor who draws out money after the annulment is an acceptance of the annulment and the deed of composition. A creditor cannot take a further benefit for the balance. The fact of the debtor being discharged from further liability by the deed of composition is implied.

I concede he is entitled to 25 per cent. costs. The deed of composition is voidable and not void, for it cannot otherwise affect those who joined in the deed—only voidable at the option of the appellant.

[1] *(1880) 42 L. T. 351.* [2] *1 Br. 374.* [3] *(1908) 11 N. L. R. 102 at p. 104.*

When annulment takes place, the insolvent and assignee both go out, and the creditors are relegated to the deed of composition. Section 140 discusses the amounts due to the creditors, irrespective as to whether he is aware of proceedings or not.

J. R. Jayewardene, in reply.—If the creditor has not acquiesced in the deed, he can proceed against the insolvent for the balance due. It is not the annulment but the composition which binds the creditors. In English law there are special provisions as to the order in composition. There is a clear difference between a discharge of the insolvent after the certificate of conformity and a discharge of a debtor who entered into a deed of composition. As regards costs, I am entitled to all my costs or to nothing. The composition is not bad, but does not bind me.

Cur. adv. vult.

July 1, 1937. HEARNE J.—

The plaintiff in action No. 48,533 of the District Court of Colombo sued the defendant who before the trial became an insolvent. After the insolvent's adjudication a decree was entered in favour of the plaintiff with costs which have not yet been taxed. Thereafter the insolvent entered into a scheme of composition with his creditors and his adjudication was annulled. It was argued by Counsel for the plaintiff, here the appellant, that the approval of the scheme of composition by the Court was irregular and does not bind him especially as he was not a proving creditor in the insolvency proceedings. It would appear that the procedure laid down in section 140 of the Insolvency Ordinance was not followed but it is impossible to concede to the plaintiff in District Court case of Colombo No. 48,533 the right to question the propriety of the insolvency proceedings. He was not a proving creditor and in those proceedings had no status at all. He cannot in this appeal raise any question regarding the correctness or otherwise of orders made in the insolvency proceedings which for the purposes of this appeal are not even before us. *Pinhamy v. Pieris*[1] which, although the facts were there different, covers this point.

The appellant's second point is that as he was not a party to the composition he is entitled to the full amount that has been decreed in his favour together with the entire costs when they are taxed.

No argument was put forward to show why the original claim for which judgment had been obtained after adjudication but before the composition was not provable and in accordance with the provisions of section 140 both the appellant and all the creditors of the insolvent are entitled to no more than the composition which had been approved, in this case 25 per cent., in respect of all provable claims in the insolvency. The appellant would in fact appear to have adopted the composition in respect of his original claim, for he withdrew the sum of Rs. 493 being 25 per cent. thereof which had been deposited in Court in D. C. Colombo, No. 48,533. But the point he stresses is that he is entitled to recover the whole of his costs on the ground that they were not provable in insolvency. The Insolvency Ordinance is a very old one and there appears to be authority for the view that as section 108 applies only

[1] *(1908) 11 N. L. R. 102. at p. 104.*

to costs payable in respect of judgments obtained before the date of insolvency and that as costs subsequent to bankruptcy are not a claim which is anywhere made provable under the Ordinance, such costs are outside the scheme of composition and may be recovered in full. (*Fernando v. Fernando*[1] and *Caderavail v. De Silva*[2].

There will therefore be a direction to the District Judge that the appellant is entitled to a writ in respect of costs in his Court after taxation thereof and to this extent the appeal is allowed. But as the appellant only succeeded on one point of three taken by him there will be no order of this appeal.

SOERTSZ J.—I agree.

Appeal allowed.