

1941

Present : Hearne and Wijeyewardene JJ.

DE SILVA v. JAYAKODDY.

91—D. C. Colombo, 6,167.

Administration—Petition by creditor to compel payment of debt—The claim disputed by administrator—Jurisdiction of Court—Civil Procedure Code, s. 720.

Where a petition is presented to Court by a creditor under section 720 of the Civil Procedure Code praying for a decree directing an executor or administrator to pay the creditor's claim and the respondent denies the validity and legality of the claim,—

Held, that the Court is debarred from acting under the section and compelling payment of the disputed claim.

In such a case the petition should be dismissed without prejudice to the creditor's right to bring a separate action.

A PPEAL from an order by the District Judge of Colombo. The facts appear from the judgment.

H. V. Perera, K.C. (with him *C. E. S. Perera* and *Dodwell Goonewardene*), for appellant.—The District Judge has misconceived the whole purpose of section 720 of the Civil Procedure Code.

Chapter 54 of the Civil Procedure Code was enacted "for the purpose of aiding and controlling of executors and administrators and the Judicial settlement of *their* accounts".

Section 720 provides a speedy and summary method whereby the legal representative could pay up creditors of the estate.

The term "creditor" in section 720 (a) is an approved creditor, *i.e.*, a creditor whose debt is not disputed.

If the debt is disputed the summary procedure under section 720 and 721 is inapplicable.

The claim if any would have to be made by separate action. Under sections 720 and 721 the Judge is not empowered to hold an inquiry.

After citation is issued the administrator files an affidavit setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal. Then the petition must be dismissed.

Sections 720 and 721 were incorporated to our Civil Procedure Code from the Civil Procedure Code of the State of New York. The relevant sections are 2717 and 2718.

In the commentary by M. H. Throop, page 617 (*Tucker v. Tucker*¹) it was held that the surrogate had no jurisdiction to compel payment of a disputed claim or to try a question in dispute.

The District Judge is obviously wrong when he says that prescription does not apply to debts under section 720 (a).

Sections 7 and 10 of the Prescription Ordinance apply and in both cases the debt is prescribed in three years.

N. Nadarajah (with him *E. B. Wikremanayake*), for respondent.—The affidavit in this case does not specifically deny the petitioner's claim.

The administratrix avers "she is unaware of the circumstances under which the debt was contracted".

The District Judge is correct therefore in holding an inquiry under section 720 of the Civil Procedure Code.

The term "creditor" in section 720 (a) of the C. P. C. would include a creditor whose debt is disputed by the administratrix.

Chapter 54 of the C. P. C. should be given a wide interpretation.

Once citation is issued by the Court, the onus is on the administratrix to prove the debt is not valid and legal.

The American case cited does not help as the facts are not set out.

There is no doubt that a claim under section 720 of the C. P. C. by a creditor can be resisted on the grounds of prescription. But here there is concealed fraud.

Prescription therefore will only be arrested when the fraud is discovered (*Dodwell & Co., Ltd. v. John*²).

If not for concealed fraud sections 7 and 10 of the Prescription Ordinance would apply.

The District Judge is wrong when he says that prescription does not apply to debts under section 720 (a).

Cur. adv. vult.

February 13, 1951. WIJEYWARDENE J.—

This is an appeal from a decree passed under section 721 of the Civil Procedure Code.

The respondent and one R. H. de Alwis gave in May, 1927, the writing marked "P 2" by which they bound themselves jointly and severally to pay V. P. L. S. Saminathan Chettiar a sum not exceeding Rs. 25,000 on account of any balance that may be found due on loans made by Saminathan Chettiar to Alwis.

Alwis died on March 9, 1932, and his intestate estate is administered in D. C. (Testamentary) Colombo, 6,167, by the appellant.

On March 22, 1932, Saminathan Chettiar filed D. C. Colombo, 48,334, naming Alwis and the respondent as defendants, and claiming a sum of Rs. 19,375—Rs. 14,000 being on account of the balance principal due on the writing "B" and Rs. 5,375 as interest. Though Saminathan Chettiar became aware of the fact that Alwis was dead at the time of the institution of the action, he chose to continue the proceedings against

¹ 4 Keys 149.

² 20 N. L. R. 206.

the respondent alone without making the appellant a party to the action. The respondent filed answer, and after hearing evidence, the District Judge entered a decree against the respondent in November, 1933, for the amount claimed. The respondent appealed against that decree but later agreed to the appeal being dismissed. Thereafter the respondent made three payments of Rs. 3,000, Rs. 9,000, and Rs. 8,000 to Saminathan Chettiar in May, 1936, August, 1936, and August, 1937, respectively. In consideration of these payments, Saminathan Chettiar agreed to the satisfaction of the decree being entered of record in D. C. Colombo, 49,334, on August, 26, 1937. During the pendency of that action Saminathan Chettiar gave to the appellant a writing "R 1" in October, 1933, "waiving his claim" against the estate of Alwis and "discharging the estate from any liability".

On November 7, 1939, the respondent filed a petition and an affidavit under section 720 of the Civil Procedure Code against the appellant in D. C. Colombo (Testy.), 6,167, and asked for a decree against the appellant as administratrix for the sum of Rs. 20,000 paid by him in satisfaction of the decree in D. C. Colombo, 48,334. The respondent stated in his affidavit that he gave the writing "P 2" to guarantee the payment of the debt of Alwis to Saminathan Chettiar.

On being cited by the District Court to show cause against the application of the respondent, the appellant filed an affidavit stating that she was "unaware of the circumstances under which money was lent by V. P. L. S. Saminathan Chettiar to (the respondent) and R. H. de Alwis". She denied that the respondent was a "creditor of the late R. H. de Alwis", or that he had a valid and legal claim. She further pleaded as matters of law that the respondent's claim was prescribed and that the respondent should be directed to bring a regular action.

The learned District Judge did not dispose of the matter on the affidavits but fixed the matter for inquiry. After a hearing which took place on two days when the evidence of the respondent and another witness was recorded, the District Judge entered the decree from which this appeal is taken and ordered the appellant to pay Rs. 20,000 and costs to the respondent.

Does the evidence led at the inquiry prove that there was a debt of Rs. 20,000 due by Alwis, at the time of his death, to Saminathan Chettiar? The fact of the payment of Rs. 20,000 by the respondent to Saminathan Chettiar and the plaint and the decree in D. C. Colombo, 48,334, do not by themselves prove the indebtedness of Alwis to Saminathan Chettiar. The respondent did not give any evidence on this point. In fact, he stated that Alwis was an "honest" man and he agreed to stand surety in 1927 as Alwis told him that he would settle the debt "in a short time". The respondent met Alwis some time later and "understood from Alwis that the money had been paid and settled". The plaint in D. C. Colombo, 48,330, shows that even according to Saminathan Chettiar, Alwis's debt was reduced from Rs. 25,000 in May, 1927, to Rs. 17,000 in June, 1929. Considering that Alwis died in March, 1932, it is possible that Alwis may have effected a substantial reduction of the debt after June, 1929. A Court has to insist on very strict proof of a claim against the estate of a deceased person. There is no doubt whatever as to the

good faith of the respondent who has had to pay Rs. 20,000 under the decree in D. C. Colombo, 48,334, but that does not relieve him from the necessity of adducing sufficient and definite legal proof of the indebtedness of Alwis to Saminathan Chettiar in a sum of Rs. 20,000.

I do not think it proper to express any opinion on the question of prescription in view of the order that is going to be made on this appeal. I may add however that the plea should have been carefully considered by the Judge at least with regard to that portion of the respondent's claim which was based on the two payments made by him to Swaminathan Chettiar in May, 1936, and August, 1936. I am unable to appreciate the argument that seems to have found favour with the learned District Judge that a claim made under section 720 of the Code by a creditor cannot in any case be resisted on the ground of prescription. When the learned Counsel for the respondent was invited to address us on this question he stated that he was unable to support the view of the District Judge.

There remains the important question whether the District Court had jurisdiction, in the circumstances of this case, to enter a decree under section 721 of the Code directing the appellant to pay the amount asked for. That section, no doubt, enacts that "upon the return" to the citation the Court "shall make such decree in the premises as justice requires". These words have to be interpreted however in the light of the other provisions of the section. It is distinctly stated therein that where "the administrator files an affidavit setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality absolutely or upon information and belief of where the Court is not satisfied that there is money or other movable property of the estate applicable to the payment in satisfaction of the petitioner's claim the decree shall dismiss the petition". Here the appellant filed an affidavit denying the validity and legality of the respondent's claim and raising a plea of prescription. The various averments in the appellant's affidavit should have made it doubtful"—to quote the words of the section—"whether the claim was valid and legal". The District Judge himself felt that he could not pass a decree without holding an inquiry and hearing evidence in support of the claim. I think that in these circumstances the Court was debarred from acting under this section and compelling payment of a disputed claim or trying the question in dispute. Moreover there is no evidence to show that "there is money or other movable property of the estate applicable to the payment or satisfaction of the petitioner's claim and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction". On the other hand there is a reference in the judgment to a "final account" filed by the appellant in the testamentary case showing that there were several debts payable by her and that the liabilities exceeded the assets by about Rs. 14,000. The Judge has further stated that some of these debts have been paid in 1940 "after the sale of certain lands with the permission of the Court".

In the absence of any local decision on the scope of sections 720 and 721 I have referred to the New York Code of 1876 the analogous

provisions of which were sections 2717 and 2718. By an amendment in 1893 these two sections were consolidated into one section which appears as section 2722 of the amended New York Code. The relevant words of that section are as follows :—

On the presentation of such a petition the surrogate must issue a citation accordingly, and on the return thereof he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or accounting, in behalf of the petitioners—

- (i) when an executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or on information and belief ;
- (ii) where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction.

The notes of the decisions of the American Courts given in Stover's New York Annotated Code of Civil Procedure (6th edition) dealing with the jurisdiction of the surrogate under section 2722 of the New York Code appear to support the construction I have placed on section 721 of our Code. I have not had the advantage of reading the judgments referred to by Stover as the Law Reports mentioned by him are not available to me.

I hold that the District Court had no jurisdiction to pass a decree allowing the disputed claim and direct that the respondent's petition be dismissed without prejudice to his right to bring a separate action if he is so advised.

The appellant is entitled to the costs here and in the Court below.

HEARNE J.—I agree.

Appeal allowed.

