

1934

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

*In re Insolvency of H. H. A. ISMAIL*642—*D. C. Galle**Insolvency—Application for recall of certificate—Second adjudication—Validity—Voidable not void.*

A certificate of insolvency cannot be recalled merely because it follows on a second adjudication.

A second adjudication may be permitted where the insolvent had been allowed to carry on business and he had acquired other property and incurred fresh liabilities.

THIS was an application to recall the certificate of conformity granted to one H. H. A. Ismail in insolvency proceedings No. 642 of the District Court of Galle.

Nadarajah (with him *S. Alles*), in support of application.

de Zoysa, K.C. (with him *D. R. Jayakody*), for insolvent.

D. S. L. P. Abeyasekera, for petitioning, creditor.

Cur. adv. vult.

May 4, 1934. MAARTENSZ J.—

The respondent, H. H. A. Ismail, who was adjudged an insolvent in proceedings No. 3,791 of the District Court of Colombo, was refused a certificate of conformity on June 11, 1929, and this order was affirmed in appeal on September 24, 1929.

The respondent was again adjudicated insolvent by the District Court of Galle in proceedings No. 642 on October 13, 1930. The petitioner in those proceedings averred that the respondent was indebted to him in a sum of Rs. 500 on a promissory note dated February 27, 1930, that is, on a debt incurred by the respondent after he had been refused a certificate by the District Court of Colombo. He was granted a certificate of conformity on April 26.

The balance sheet filed in proceedings No. 642 is almost identical with the balance sheet filed in proceedings No. 3,791. The balance sheet filed in proceedings No. 642 shows on the debit side additional debts amounting to Rs. 1,020 and on the credit side additional assets to the value of Rs. 127.

One creditor, Ramanathan Chetty, besides the petitioner proved a claim in proceedings No. 642. Ramanathan Chetty had proved the same debt in proceedings No. 3,791. He was appointed assignee in proceedings No. 642 and was removed from office on October 5, 1931. On October 19, 1931, the petitioning creditor, O. L. M. Mohamed, was appointed assignee in his place.

The insolvent at his examination disclosed the fact that he had been refused a certificate by the District Court of Colombo, but the District Judge of Galle without stopping the proceedings and insisting on personal notice to the other creditors granted the respondent a certificate of conformity. In the meantime, the proved creditors in proceedings

No. 3,791 were taking steps to arrest the insolvent. The warrants were not executed. The last application for a warrant was made by and granted to Meyappa Chetty on August 29, 1930; the warrant was made returnable on September 8, 1931. There is no record of the return to the warrant. On January 18, 1932, Mr. Proctor Navaratne moved for a reissue of the warrant issued by another creditor on November 4, 1929.

The District Judge of Colombo directed notice to issue on the insolvent to show cause why he should not be arrested on a warrant. The insolvent in response to the notice appeared on July 5, 1932, and produced the certificate of conformity granted to him by the District Court of Galle and the District Judge of Colombo refused to make an order.

The petitioner on September 26, 1932, moved this Court under section 129 of the Insolvency Ordinance to recall the certificate granted to the insolvent by the District Court of Galle. The motion came up for hearing on September 28, when a notice on the respondent was allowed. On December 15 counsel for the petitioner and the respondent were heard by my brother Garvin and myself, and judgment was reserved. On December 20, we made order that notice of the application should be given to the assignee and the creditors in case No. 642, D. C. Galle, and the assignee in proceedings No. 3,791, D. C. Colombo, and the matter be listed before the same Bench after the holidays. The notices were not reported served till February 17, 1933. Unfortunately, the same Bench could not for various reasons be constituted until April 30 this year.

Ramanathan Chetty, the first assignee appointed in the Galle proceedings No. 642, has filed an affidavit in which he states that he has no cause to show against the application. The petitioning creditor, who was appointed assignee after Ramanathan Chetty was removed from office, has filed an affidavit in which he states that he is unable to support the petitioner's application. These affidavits were filed on February 16 and 17, 1933.

The petitioner contended that the certificate should be cancelled, firstly, because the respondent had obtained it by fraud and, secondly, because the second adjudication was *ipso facto* void.

I am unable to accept either contention. The respondent was not guilty of fraud as he made a full disclosure of the proceedings in the District Court of Colombo to the Judge who granted him the certificate. As regards the second contention, there was a conflict of authority in England¹ as to whether a second adjudication was voidable or void till the case of *Morgan and another v. Knight*¹. In that case Erle C.J. after reviewing all the decisions, held that a second adjudication was not *ipso facto* void but, at the most, voidable under certain circumstances. That decision was followed in the case of *In re Frederick Pulley*², and the case of *In re Jayasekere*³.

A second adjudication has been permitted by the English law where, after the first adjudication, the insolvent had been allowed to trade or carry on business without any interference by the assignee of the first insolvency and he has acquired other property and incurred fresh liabilities. This rule has been laid down in cases in which there has been an inquiry

¹ (1864) 33 L. J. C. P. 168.

² (1887) 8 S. C. C. 118.

³ (1926) 28 N. L. R. 319.

as to whether the insolvent had been allowed to trade or acquire fresh property and to incur fresh liabilities. Such an inquiry is necessary for the second adjudication which may be void in some cases and not in others. No case has been cited to us, nor have I been able to find one, in which a certificate was recalled merely because it followed on a second adjudication.

I am of opinion, therefore, that the application of the petitioner must be refused. Another reason why I would refuse to grant the application is the fact that the proceedings in the Galle case were brought to the notice of the District Court of Colombo and, I take it, to the creditors so far back as December 2, 1930, when in a motion filed to withdraw his promissory note a proved creditor's proctor stated that "the insolvent had once again filed papers for insolvency in the District Court of Galle". This motion was allowed. If the other proved creditors were vigilant they could have taken steps to stop further proceedings in the District Court of Galle or again proved their claims in the Galle case and opposed the grant of certificate. As they did nothing, it appears to me that they have now no right to have the certificate recalled.

In the circumstances of this case, I make no order as to costs.

GARVIN S.P.J.—I agree.

Application refused.

