Present : Schneider and Garvin JJ. 1928.

FREUDENBERG *v.* WEERAPASS *et al.*

25—D.C (Inty.) Colombo, 3,592.

Insolvency—Proof of judgment-debt—Counterclaim by insolvent—Set off—Ordinance No. 7 of 1853, ss. 99 and 109.

Proof of a judgment-debt in insolvency proceedings does not deprive the judgment-creditor of the right to set off, as against the debt, a sum decreed to the insolvent by way of counterclaim in the action.

APPEAL from an order of the District Judge of Colombo. In action No. 16,521 of the District Court of Colombo, one Weerapass sued the appellant and another person to recover damages for wrongful dismissal. The appellant counterclaimed a sum of money due on certain promissory notes. Weerapass' claim was dismissed and judgment was entered for the appellant for a sum of Rs. 4,281·66. Weerapass was adjudicated an insolvent in the present action and the appellant proved his claim in the insolvency proceedings. Eventually, as a result of an appeal and a second trial, Weerapass got judgment against the appellant for a sum of Rs. 6,280 as damages. That sum and the sum payable to the appellant were set off against each other and satisfaction of the decree entered accordingly. The second respondent, a creditor of Weerapass, moved in the insolvency proceedings for an order directing the appellant to bring into Court the whole of the said sum of Rs. 6,280. The learned District Judge ordered the appellant to bring the said sum into Court and in default allowed writ to issue against him.

H. V. Perera, for the appellant.

March 28, 1928. SCHNEIDER J.—

There is no appearance for either one of the respondents to this appeal. Counsel, who appears for the appellant, Mr. Freudenberg, states the facts to be the following :—Weerapass, the insolvent in action No. 16,521 of the District Court of Colombo, sued the appellant and another person to recover damages for his dismissal in breach of an agreement for his service. The appellant counterclaimed a sum of money as due to him upon certain promissory notes. Weerapass' claim was dismissed and judgment was entered for the appellant upon his counterclaim for the sum of Rs. 4,281·66. Weerapass was thereafter adjudicated an insolvent in this action. Eventually, as the result of an appeal and a second trial, judgment was entered declaring Weerapass entitled to a sum of Rs. 6,280 as

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damages recoverable from the appellant and the other defendant. The appellant undertook the liability to satisfy the decree for the sum of Rs. 6,280. That sum and the sum payable to the appellant were set off one against the other, and the Proctor for the appellant and the Proctor for the assignee in that action moved that satisfaction of the sum decreed to be paid by and to the appellant be entered of record, the appellant having paid to the assignee's Proctor the balance due. The Court thereupon entered order accordingly. Before that order was made the appellant had proved in this action his claim for the debt due to him upon the decree in action No. 16,521. The assignee's Proctor brought to the credit of this action the sum received by him from the appellant. The second respondent, who is also a proved creditor, moved in this action for an order directing the appellant to bring into this action the whole of the said sum of Rs. 6,280. This the appellant resisted. The Judge of the lower Court, after hearing argument, made order that the appellant should bring into Court the whole of the said sum and that on his default the assignee was to issue writ for its recovery. In the course of his order he held that he was entitled to set aside the order made in action No. 16,521 of set off and satisfaction of decree; that the appellant by proving his claim in these proceedings in insolvency had extinguished his rights under the decree and that the appellant was not entitled to "take payment in full."

I am unable to accept the views of the Judge of the lower Court. Clearly he has no jurisdiction to set aside the order of adjustment made in action No.16,521. That power belongs solely to this Court. So long as that order stands he has no jurisdiction in this action to order the appellant to bring the sum of Rs. 6,280 or any other sum into Court. The appellant discharged all his legal liability by payment into the hands of the Proctor who acted for the assignee in that action. I am unable to take the same view as the District Judge that the appellant and the plaintiff in action No. 16,521 could not set off the sum adjudged to be paid by the one against the sum adjudged to be paid by the other. Even if it were otherwise it would make no difference. Those sums were "mutual debts" within the meaning of section 99 of the Ordinance No. 7 of 1853. Under the provisions of that section it is the duty of the Court to state the account between the insolvent and the appellant, and no more than the balance due could be claimed from the appellant. That balance the appellant has already paid. Even if the appellant should have brought the whole of the sum of Rs. 6,280 into Court he would have been entitled to claim payment of the debt due to him in preference to the other creditors out of the sum brought into Court. The learned District Judge appears to be in error in taking the view that when the appellant proved his claim his rights under the decree were extinguished by virtue of the provisions of section 109. So

far as the povisions of that section are applicable to the question before us that section precludes the appellant from enforcing the decree in his favour by execution in the ordinary course as by proving his claim he has elected to take the benefit of a proved creditor in the insolvency proceedings.

His rights under the decree are not extinguished, but as the section itself enacts, if the petition for sequestration be subsequently dismissed, the appellant might proceed to levy execution. In my opinion Mr. Abeyeratne acted rightly, and within his powers, in moving for the adjustment and satisfaction of the two parts of the decree.

For these reasons, in my opinion, the order of the Judge of the lower Court appealed from is wrong. I set it aside and hold that the whole of the sum which should have been brought into Court by the appellant has already been brought by him, and that the claim proved by him has been fully paid and satisfied. The costs of the appellant, both of the lower Court and of this appeal, will be paid by the second respondent whose agitation had resulted in the order appealed against.

GARVIN J.—I agree.