1939 *Present :* **Moseley A.C.J. and Nihill J.**

CASSIM *v.* SUPPIAH PULLE.

11—D. C. (Inty.) Colombo, 4,669.

Insolvency—Application to set aside the transaction of an insolvent—Proceeding arising out of but independent of insolvency—Evidence in insolvency proceedings inadmissible—Prescription—Insolvency Ordinance (Cap. 82).

Section 51 of the Insolvency Ordinance applies only to the case of a person who has been adjudged insolvent and is aimed at transactions effected at a time when such person is in fact insolvent.

An application under the section by way of petition is a proceeding arising out of the insolvency proceedings but independent thereof.

In such a proceeding the assignee is not entitled to rely on the evidence given in the insolvency proceedings by the insolvent and the respondent to this application.

Per NIHILL J.—Such a proceeding is an action within the meaning of section 2 of the Courts Ordinance and comes within the ambit of section 10 of the Prescription Ordinance.

Kandapper v. Moses (*8 T. C. L. R. 69*) and *Kandappa v. Ramasamy Chetty* (*6 C. L. Rec. 37*) followed.

THIS was an application by the assignee of an insolvent estate under section 51 of the Insolvency Ordinance. The insolvent was so adjudged on June 19, 1933. The certificate meeting was held on August 31, 1937, when a certificate of the third class was granted but suspended for four years.

On December 9, 1937, the asignee instituted proceedings under section 51 for the sale of certain property for the benefit of the creditors.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam*), for the first respondent, appellant.—The order for sale made under section 51 of Cap. 82 cannot be supported. Under section 51 insolvency at the time of the impugned conveyance has to be proved by the petitioner—*Kandapper v. Moses* [1].

The present proceedings are quite distinct from the certificate proceedings. The trial Judge, however, has treated them as parts of one and the same action and has improperly let in the evidence which had been taken in the certificate proceedings. In no sense can the appellant who was a purchaser from the insolvent be regarded as a party to the certificate proceedings. See *Kandappa v. Ramasamy Chetty* [2].

The assignee's application should be regarded as an independent action. The present claim, therefore, is prescribed—*Fernando v. Peiris* [3].

N. E. Weerasooria, K.C. (with him *C. Renganathan*), for the assignee, respondent.—The Prescription Ordinance would apply only in regard to actions. It has been held that an insolvency proceedings is not an action —*In re Hayne Thornhill* [4]; *Dias v. Palaniappa Chettiar.* [5] *Fernando v. Peries* (*supra*) was not a proceeding under the Insolvency Ordinance; it was an independent action to have a deed set aside.

[1] *(1930) 8 T. C. L. R. 69.*
[2] *(1924) 6 C. L. Rec. 37.*
[3] *(1931) 33 N. L. R. 1.*
[4] *(1895) 1 N. L. R. 243.*
[5] *(1932) 34 N. L. R. 195.*

An application under section 51 of the Insolvency Ordinance is only a step and incident in the insolvency proceedings. Any evidence previously given by the insolvent and the purchaser can, therefore, be incorporated in the present application.

H. V. Perera, K.C., in reply.—The appellant is not the insolvent. He is only a purchaser for valuable consideration. The whole of the insolvency proceedings are not binding on me. The certificate proceedings affect the insolvent only. A new person is brought in for the first time under section 51 and, under the fundamental principle of procedure and justice, only evidence properly led in the present application could be weighed. As to what part of the insolvency proceedings would be binding against the appellant see section 41 of the Evidence Ordinance, section 126 of the Insolvency Ordinance, and *Punchirala v. Kiri Banda et al.*[1]

In regard to prescription, section 51 contemplates a proceeding against a person for the redress of a wrong. It is the Courts Ordinance and not the Civil Procedure Code which should be looked at—the meaning of "action" in the interpretation section and the insolvency jurisdiction conferred on District Courts by section 62. The present application should be regarded as an action—*Silindu v. Akura*[2]. The Prescription Ordinance is applicable. In *Soosaipillai v. Fernando*[3] the proceeding was under section 58 of the Insolvency Ordinance and, by parity of reasoning, prescription would apply to a proceeding under section 51 as well.

Cur. adv. vult.

October 23, 1939. MOSELEY A.C.J.—

This appeal arises out of a proceeding under section 51 of the Insolvency Ordinance (Cap. 82 of the Laws). The insolvent was so adjudged on June 19, 1933. The certificate sitting closed on August 31, 1937, when a certificate of the third class was granted but suspended for four years. On December 9, 1937, the assignee initiated proceedings under the above-mentioned section for the sale of certain property for the benefit of the creditors.

The appellant, together with the insolvent, was made respondent to those proceedings and was served with notice to show cause why the property should not be sold, since it appeared that the appellant, who was the father-in-law of the insolvent, had purchased the property from the latter on August 7, 1931. The deed of sale C 7, set out that the consideration of Rs. 10,000 had been paid at the time of execution.

The insolvent did not appear at the hearing and there was evidence that he was in hiding. The appellant was represented by Counsel who applied for an adjournment on the ground of the illness of his client. The request appears to have been refused and the inquiry proceeded. In the absence of the insolvent and the appellant, Counsel for the assignee moved that their evidence given in the course of the certificate proceedings should be read. Counsel for the appellant objected to this course and further pointed out that it would be improper for the Court to take notice of the finding of the Judge on those proceedings in which he had expressed

[1] *(1921) 23 N. L. R. 228 at p. 231.*
[2] *(1907) 10 N. L. R. 193.*
[3] *(1924) 26 N. L. R. 52.*

the opinion that the transaction in question was of a fraudulent nature. The District Judge appears to have overruled the objection as the evidence of both the insolvent and the appellant was referred to, as was the finding of the Judge on the certificate proceedings.

The application, which was by way of petition was allowed and it was ordered that the property be sold for the benefit of the creditors.

The grounds of appeal are, in short, that the petitioner, that is the assignee, has failed to prove the facts necessary to support an order for sale under section 51 of the Insolvency Ordinance, and further that the claim is prescribed by section 10 of the Prescription Ordinance.

Section 51 of Cap. 82 applies only to the case of a person who has been adjudged insolvent, and is aimed at transactions effected at a time when such person is insolvent. Obviously, that is not to say that the person must have been, at the time of the transaction, adjudged insolvent, but that he must have been in fact insolvent. That he was so in fact appears to be the first fact which must be proved, that he was subsequently adjudged so being a matter of record.

As to the onus of proof we were referred to the case of *Kandapper v. Moses*[1] in which an insolvent prior to his adjudication assigned certain mortgage bonds. It was open to the assignee to claim the proceeds either under section 51 or section 56. "If", said Macdonell C.J., "he makes it under section 51 he must prove that the assignor, that is the insolvent, was actually insolvent at the time of making this assignment, and that the assignment was voluntary, or not for valuable consideration."

In the present case, the onus of proof of these facts being upon the petitioner, was it open to him to invite the Court to read the evidence of the insolvent and the appellant, and to reply very largely upon that evidence in support of his application? Counsel for the appellant objected to such evidence being read. There is no ruling by the District Judge apparent from the record beyond a note that Counsel for the assignee referred to the evidence of the insolvent and the admission of the first respondent, that is the present appellant.

In my view the property of admitting this evidence in the way in which it was admitted depends in the first place upon the character of the proceeding. Is an application for an order of sale under section 51 merely an incident in the insolvency proceedings, or is it a proceeding arising out of the insolvency proceedings but independent thereof? It must be borne in mind that the certificate sittings began in March, 1936, and closed, as far as the taking of evidence is concerned, in June, 1937. The insolvent was of course examined and the appellant also gave evidence. His character at that time was merely that of a witness. He no doubt was aware that the genuineness of the transaction of August 7, 1931, was being attacked, but he was not represented by Counsel and could hardly know that the financial position of the insolvent at that date, some two years before the petition in insolvency was filled, was a matter which could in any way effect him personally. Some months later he is served with the petition in the present proceedings and for the first time becomes a party. The learned District Judge appears to have held the

[1] *(1930) 8 T. C. L. R. 69.*

view that this application is merely a step in the insolvency proceedings as a whole, for he says:—"When the Court made its order (*i.e.*, suspending the certificate) in August, 1937, it was perhaps open to the Court under section 51 of the Insolvency Ordinance to order that this property should be sold for the benefit of the creditors".

Here we are faced with a difficulty which arises from the statute under which the proceedings are brought, an antiquated and unsatisfactory piece of legislation. The difficulty is in no way lessened by the fact that no rules have been framed to regulate the practice and the forms of proceedings under the Ordinance. There is something to be said therefore for the view taken by the District Judge since the wording of section 51 does not suggest that any particular procedure is a condition precedent to the making of the order for sale. But there can be no doubt that to make such an order in the manner suggested by the District Judge, that is at the certificate sitting, would in many cases inflict an injustice upon third, and, in some cases no doubt, innocent parties. In cases such as this it is the rights of third parties that are being attacked and it is inconceivable that the law should permit an absolute order prejudicial to their interests to be made without giving them an opportunity of being heard. Such an opportunity was given to the insolvent in this case, and I hold the view that the motion by way of petition is a proceeding arising out of the insolvency but independent thereof.

In *Kandappa v. Ramasamy Chetty*[1], it was held that, where in an inquiry under section 56 of this Ordinance no evidence was offered, and the District Judge relied on the judgment in earlier proceedings between the insolvent and other parties and held the transaction in question to be a fraudulent assignment, the earlier judgment should not have been admitted.

In the order now appealed from the following passage occurs:—"At the certificate meeting, after a good deal of evidence was gone into, the Court held there was no consideration for the transfer to the father-in-law and practically the transfer itself was fictitious". There is some indication that the District Judge had in mind the earlier proceedings and the evidence upon which the certificate of conformity was suspended.

Now holding the view that these proceedings are distinct from the certificate proceedings I know of no authority for the admission in the former of the evidence of the insolvent. In the District Court, Counsel for the assignee referred to section 33 of the Evidence Ordinance (Cap. 11) but the first condition, viz., that the proceeding was between the same parties or their representatives in interest, appears to me to be absent and I cannot see how the section is in any way useful in these circumstances. At a later stage Counsel for the assignee sought to have the evidence of the appellant treated as admissions by him and therefore admissible. But if his evidence is to be so treated, it should have been proved in proper manner, such as formal production by an officer of the Court of the record in the previous proceedings, or the evidence of a witness who was in a position to testify that certain admission had been made. But all that the record shows in that Counsel "refers to the evidence of the insolvent and the admissions of the first respondent" (*i. e.*, the appellant).

[1] *(1924) 6 C. L. Rec. 37.*

Now, although in my view the evidence was improperly admitted, I do not know that it was of any great use to the case for the asignee. Counsel for the respondent before us contended that the District Judge did not act on the previous evidence or judgment but that he had before him ample evidence of insolvency. He relied largely upon a balance sheet which made. But all that the record shows is that Counsel "refers to the purported to show the position of the insolvent's affairs at May, 1932, on the ground that it was prepared from the insolvent's books which were closed in 1931. But the assignee in the course of his evidence said :—"I do not know what his (the insolvent's) liabilities were at the time of the execution of the transfer . . . . I found that the liabilities were about one lack of rupees . . . . Insolvent said that he had *stock* to the extent of Rs. 10,000 at the time . . . . I cannot find out from the books what the debts due to the insolvent were and *vice versâ* at the time of transfer . . . . I have not prepared a balance sheet of the insolvent's state of affairs at the time of the transfer of the property for the purpose of this inquiry . . . . *I cannot say what his state of affairs were at the time of the transfer*".

The extracts which I have just quoted are a fair sample of the evidence upon which, in my view the District Judge should have considered the application. To me the evidence falls considerably short of the standard of proof desirable in such proceedings. The case no doubt is full of suspicious circumstances in regard not only to the financial position of the insolvent at the relevant date but to the genuineness of the alleged consideration for the transaction, but suspicion is not a ground upon which to base an order such as this. I have already said that in my opinion the evidence which I have held to have been improperly admitted does not help the assignee's case. I would merely refer to one extract from his evidence, which is as follows :—"At the time I sold my share in the properties I had creditors to the extent of Rs. 100,000. I had book debts and stock-in-trade worth more than Rs. 100,000 . . . . Most of the books debts are irrecoverable". There is nothing to show that the debts were irrecoverable at the time of the impugned transaction. The insolvent's statement was not contradicted and, if believed, is an answer to the allegation of insolvency.

In my view the assignee has failed to prove the necessary fact of insolvency, and on this ground the appeal must succeed.

NIHILL J.—

This is an appeal from an order of the District Judge directing a sale of certain properties in favour of an insolvent's estate. The properties were purchased by the appellant from the insolvent in August, 1931. The adjudication of the insolvent took place in June, 1933. On August 31, 1937, the insolvent was granted a certificate of the third class which was suspended for a period of four years. The grant of a certificate was opposed by the largest creditor on the grounds, *inter alia,* that the sale above referred to was fraudulent and had been executed to defraud the creditors. The sale was to the insolvent's father-in-law who is the present appellant.

The District Judge in the course of his certificate order stated that he was "inclined to think that no consideration in fact was paid for the

transfer of these immovable properties" and reached the conclusion that the transfer was merely intended to put the property beyond the reach of the creditors of the insolvent.

I have detailed these facts in order to assist in determining the exact nature of the proceedings which led to the order which is now appealed against. The order was on an application made by way of petition by the assignee of the insolvent and the learned District Judge in dismissing the plea of prescription does so on the grounds that the application was "more in the nature of execution proceedings" by which I take him to mean that the Court could have ordered the sale of the properties at any time under section 51 of the Insolvency Ordinance once it was satisfied that the transfer was fraudulent which was the view of the Court when the certificate order was made.

But before an order can be made under section 51, it must be proved that at the time of the transfer the insolvent was insolvent, and that the exceptions named in the section were not present. If there has been a *bona fide* purchased for valuable consideration by an innocent purchaser, he must be given his chance to demonstrate this to the Court, and he cannot do this until he is brought in as a party to the proceedings.

In the present matter the appellant was no party to the proceedings which led to the Certificate order being made, he comes in for the first time when the attempt is made to sell his properties.

Was not therefore the real nature of the proceedings now appealed aganist, however different in form they may have been, more in the nature of an action in which the appellant was an interested party than a mere inevitable, almost routine step in the insolvency proceedings?

It is hardly likely that this preliminary difficulty would arise but for the absence of Insolvency Rules. The archaic character of the law relating to insolvency has often been the subject for comment of this Court, and the difficulty is increased by the absence of rules. Without rules it is impossible to say with certainty how a proceeding under section 51 should be started. In the English Bankruptcy Rules, 1915, as given in *Williams' on Bankruptcy (15th ed.)* it is provided for that every application to the Court (unless otherwise provided for) shall be made by motions supported by affidavit, and it has been held that a motion made under section 105 of the Bankruptcy Acts, 1914 and 1926, which is a section dealing with general powers of Bankruptcy Courts is equivalent to an action, and that accordingly the Statute of Limitations would be an answer to a motion by the trustee if it would have been an answer to an action by the bankrupt. (*In re Mansel, 9 Mor. 189*) *Williams' on Bankruptcy (15th ed.) p. 438.*

Now if the application upon which the order appealed against was in truth "an action", would section 10 of the Prescription Ordinance (Cap. 55) apply? In *Silindu v. Akura*[1], an application for *restitutio in integrum* was held to be an action within the meaning of this section of the Prescription Ordinance. In his judgment Grenier J. commented on the section's comprehensive and far-reaching character. Wood Renton J.

[1] *(1907) 10 N. L. R. 193.*

in the same case concluded that "action" in the terms of the section must be construed as embracing any proceedings by which a legal right to redress is asserted.

According to section 2 of the Courts Ordinance (Cap. 6) an "action" is a proceeding for the prevention or redress of a wrong and the jurisdiction of a District Court by section 62 of the same Ordinance includes insolvency matters. It cannot be said therefore that the definition of an "action" in the Courts Ordinance can have no applicability to a matter which comes before a District Court under the Insolvency Ordinance but in the exercise of the Court's insolvency jurisdiction.

Now the essence of the application by the assignee in this matter was that he was seeking to redress a wrong alleged to have been committed against the creditors, but to succeed he had to bring in and defeat a party who was not a party in any way to the insolvency. How then can this be said to be a mere step in the insolvency proceedings? There are certain steps in insolvency in which the persons who make up an insolvency each plays his part—insolvent, assignee, creditors, but when it becomes necessary consequential on something that comes to light during the course of the insolvency to go outside and attack the rights of a third party to retain property which he has acquired, it seems to me that such proceedings must take on the character of an action, whatever they may be called in fact, for if they do not the third party is prejudiced.

It is significant that in this case the difficulties with regard to the admissibility of evidence arose because there was no clear distinction made by the learned District Judge between the insolvency proceedings as a whole and application before him in which a stranger to these proceedings was a party.

It should also be remembered that it would seem that the assignee could have pursued the same remedy in this case by instituting a Paulian action which is what was done in the well-known case of *Fernando v. Peiris*[1]. Although that case was decided on the facts, Garvin J. was prepared to hold that a Paulian action was prescribed in three years from the time when the cause of action arose which in the absence of concealed fraud he placed at the time when the alienation sought to be impeached took place.

If that be so, it seems to me illogical that the position of the purchaser-defendant should be worsened because the assignee moved the Court by way of petition to which the purchaser had to be made respondent.

I would therefore hold that the application was an "action" and as such came within the ambit of section 10 of Cap. 55.

If that view is correct, the application is prescribed because it was not taken by the assignee within three years of the adjudication for there is no question here of concealed fraud. I agree however with my Lord the Acting Chief Justice that apart from all other considerations, this appeal should be entitled to succeed because the assignee failed to prove that the insolvent was in fact insolvent at the time he conveyed these properties.

Appeal allowed.

[1] *(1931) 33 N. L. R. 1.*