Ennis A.C.J. and Dalton J.

HADDEN & CO *v.* IBRAHIM.

1925.

194—D. C. (Inty.) Colombo, 8,631.

Principal and agent—Insolvency of agent—Proof of debt in insolvency—Action against undisclosed principal—Election—Ordinance No. 7 of 1853, s. 109—Evidence Act, s. 35.

Where the plaintiff proved a claim in respect of certain shortfalls on moneys advanced against a consignment of rubber in the insolvency proceedings of the firm which ship the rubber and subsequently withdraw the claim and sued the defendant as the undisclosed principal of the insolvent firm.—

Held, that such proof was no bar to the present action.

An entry made in a rubber register book, kept in pursuance of section 9 of Ordinance No. 21 of 1908, is admissible in evidence.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the argument and the judgment.

Samarawickreme (with him *Keuneman* and *Canakeratne*), for defendant, appellant.—The plaintiff company sues the defendant in this action for certain shortfalls on moneys advanced to A. H. Ismail & Co. against Rubber consigned to plaintiffs in London. The defendant is now sued as the undisclosed principal for whom A. H. Ismail & Co. were the agents in pursuance of the direction in the judgment in *Ramanathan v. Ebrahim Lebbe*.[1]

The plaintiff company has admittedly proved in the insolvency proceedings of A. H. Ismail for this amount and actually received a dividend, which they have refunded. The proof of a debt in insolvency proceedings and the adjudication thereon is in the nature of a judgment, and the principle in *Kendal v. Hamilton*[2] applies, viz., that where a party has sued the agent and obtained a judgment he cannot later seek to sue the undisclosed principal.

[ENNIS A.C.J.—But that has been annulled as it were by the Supreme Court judgment.]

Once the bar has been created it cannot be removed, and in this connection reference may be made to section 109 of the Insolvency Ordinance on the effect of proof in insolvency proceedings.

This is on the assumption that A. H. Ismail were agents for the defendant. But in point of fact the evidence that has been led discloses no such agency. The sales by defendant to Ismail were out-and-out sales, and not for shipment, as appears from the books produced. The words " for sale " appearing in document P 5 do not

[1] *(1922) 24 N. L. R. 321.*

[2] *(1879) 4 A. C. 514.*

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go to prove that the rubber was left at the stores for sale on account of the defendant. Furthermore, it is only a formal document drawn up by the clerk and signed by the defendant.

Even conceding that the proof in insolvency is no bar, and that agency has been established, there has been no evidence, or at the best, insufficient evidence, of the claim itself. The books produced in support of the claim are the books of Ismail & Co. Books of a third party are no evidence under section 34. Nor have these books been properly produced, as no witness, who can speak to their accuracy or explain items contained in them, has been called.

The rubber register is not evidence, and was not properly admitted in evidence.

[ENNIS A.C.J.—Is not the rubber register a public document within the meaning of section 35 of the Evidence Act ?]

No. It is a document kept by a private party, and hence cannot be a public document. The public have no access to it.

Hayley (with him *Choksy*), for plaintiffs, respondents, not called upon.

May 5, 1925. ENNIS A.C.J.—

This was an action by a firm of London merchants for the recovery of Rs. 29,845.76, being the balance of an account. This sum represents the sum of £2,114. 1*s*. 6*d*. the plaintiffs claimed against the present defendant on the ground that the present defendant through his agents, A. H. Ismail & Co., consigned to the plaintiffs certain parcels of rubber. Against the consignment Ismail & Co. drew against the plaintiffs. The rubber market fell, and in the result the consignment failed to realize the amount which Ismail & Co. had drawn from the plaintiffs. In consequence the plaintiffs claimed in respect of certain shortfalls the amount which is the subject of this action. The defendant denied the transaction altogether, and said that he had sold his rubber outright to A. H. Ismail & Co., who were, therefore, not his agents in the matter of the consignment with the plaintiffs.

It appears that A. H. Ismail & Co. were declared insolvents in August, 1920, and the plaintiffs claimed and proved in the insolvency proceedings for the amount in question. They also received a dividend in respect of their claim. The assignee in bankruptcy appears to have written to the plaintiffs' lawyers the letter D 2 asking their assistance to enable them to take action against the defendant to indemnify them against the plaintiffs' claim in bankruptcy. Thereafter the assignee brought an action against the present defendant—action No. 1,175 of the District Court of Colombo. There was an appeal from the judgment in that action, and the appellate judgment is reported in *Ramanathan v. Ebrahim Lebbe* (*supra*). It was there held that it was unsatisfactory to give

a decision in the circumstances of that case, and the matter was postponed for four months to enable the English buyers to take some definite action in the matter of an election whether they would proceed against the agent or the undisclosed principal. The plaintiffs took the opportunity mentioned in that judgment and brought the present action. But before doing so they withdrew their claim in the insolvency proceedings, and returned to the assignee the dividend they had received. This course was taken in pursuance of the suggestion made in the course of the judgment referred to.

At the hearing of the case the learned Judge pointed out that the defendant had nothing but his own word to support his contention that there was an out-and-out sale, and further that the defendant had failed to produce his own books of account, alleging that they had been destroyed by fire. He failed also to call any evidence in support of his contention. The learned Judge held in favour of the plaintiffs, and the defendant appeals.

On appeal it was urged that the plaintiffs had not succeeded in proving that Ismail & Co. were merely agents. This point is really a matter of fact. A point of law was also raised, namely, that the plaintiffs' proof of their claim in the insolvency proceedings was a bar to this action. On the question of fact I see no reason whatever to interfere with the finding of the learned Judge. It was contended on appeal that the plaintiffs' case rested entirely on the books of account of the insolvent company, and it was urged that these account books were not sufficient to charge the defendant with liability as specified in section 34 of the Evidence Ordinance. It appears, however, that the books of account do not stand alone. There are two other books in the case, and the evidence of the clerk of Ismail & Co. The clerk was unable to speak with regard to the transactions in question. But he produced the books and swore that they had been kept in the regular course of business. He also produced the book P 2. On appeal it was urged that this document should not have been admitted in evidence. In my opinion, however, it was correctly admitted. The document is a register of rubber purchased, and is a register prescribed by Ordinance No. 21 of 1908, section 9. The entries show that the rubber received from the defendant was received for shipment shown in a column " if not purchased, how acquired." Moreover, the ships are named in the column " how disposed of ", and the column headed " price paid for lb. " is left blank. This book is not a book of account, and is admissible under section 35 of the Evidence Ordinance. In my opinion it is an official book. Section 9 of the Ordinance No. 21 of 1908 shows that it is a book supplied by the Government Agent, in which rubber dealers are required by law to make entries. Any entry, therefore, in this book is a relevant fact under section 35 of the Evidence Ordinance, and the book was properly admitted in evidence. The

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account books of the firm of Ismail & Co. support the fact deducible from the document P 2, namely, that Ismail & Co. were there acting as agents and not as principals in the matter of the consignment to the plaintiffs. There is one other piece of evidence apart from P 2, and that is the document P 5. The original of this document was lost in the course of the trial of action No. 1,175, and P 5 is produced by the clerk of Ismail & Co. as his recollection of the original document. It is the document which was signed by the defendant when sending rubber to Ismail & Co. It was the document required by the Rubber Ordinance, No. 39 of 1917, to be handed in when rubber was brought to the licensed premises. That document contained a printed form of question to be answered by the person delivering the rubber. The question was whether the rubber was for sale or otherwise. This question was filled in "for sale." The defendant contended that he was wholly unaware of the contents of this document ; that he did not know English ; that it was filled in by his clerk, who is not called ; and that in fact the rubber was brought to Ismail & Co. " on sale " and not " for sale." I see no reason to go behind the words of this document in favour of the defendant. The clerk of Messrs. Ismail & Co. has given evidence that they understand this entry as being an intimation to Ismail & Co., that the rubber was sent to them for sale on behalf of the person bringing it, which is the natural interpretation of the document. P 2 and P 5, therefore, constitute evidence that Ismail & Co. were merely agents of the defendant in the matter of this rubber transaction, and the books of account bear out this finding of fact.

The main interest on this appeal centres round a point of law which has been raised as to whether proof in the insolvency proceedings of a claim was a bar to the action. Our attention was drawn to section 109 of the Insolvent Estates Ordinance, No. 7 of 1853. That section is to the effect that proving or claiming a debt is deemed to be an election by the creditor not to proceed against the insolvent by action. It was contended that, therefore, the proof of th debt was equivalent to a judgment, and that the principle laid down in *Kendal v. Hamilton* (*supra*) applied. It is to be observed, however, that this case was referred to in the judgment in *Ramanathan v. Ebrahim Lebbe* (*supra*), and it was there said that there was only one conclusive form of election as between the agent and an undisclosed principal, and that is the recovery of a judgment against one of the persons liable. No authority has been cited to us to show that a claim in insolvency proceedings has the effect of a judgment, and it was suggested in the case of *Ramanathan v. Ebrahim Lebbe* (*supra*) that the English buyers might withdraw their claim in the insolvency proceedings, which, in fact, the present plantiffs did. It was contended on appeal, however, that the plaintiffs had no power to withdraw their claim in the bankruptcy, and that having once made it, it had the

effect of a judgment against one of the parties liable. The Insolvency Ordinance makes no provision for the withdrawal of claims. When we turn to the Civil Procedure Code, we find that in ordinary proceedings there is ample provision for withdrawal with the leave of the Court. This Court actually set out the proceeding on which the plaintiffs in the present action acted, and the District Court allowed the withdrawal of the plaintiffs' claim in the bankruptcy proceedings. As matters stand at present in this particular case, there is now no claim or proof by the plaintiffs in the bankruptcy proceedings, and I see no reason why the procedure adopted by the plaintiffs should be regarded as irregular, as it is consistent with the ordinary provision for the withdrawal of suits laid down in the Civil Procedure Code. The case of *Curtis v. Williamson* [1] is an authority for the proposition that the mere filing of an affidavit of proof against the estate of an insolvent agent to an undiscovered principal after that undiscovered principal is known to the creditor is not a conclusive election by the creditor to treat that agent as his debtor. In the present case the plaintiffs filed their claim against the estate if Ismail & Co. before they were aware that the defendant was the principal in the transaction. The first information which the plaintiffs appear to have received that there were principals behind Ismail & Co. was the letter D 2, and that letter did not disclose the names of the principals. It was the letter which led to the proceedings by the assignee which ultimately disclosed that the defendant in this action was a principal, and which led to the plaintiffs being put to an election as to whether they would proceed against the agent or the principal. I would add that I am unable to see in the case of *Scarf v. Jardine* [2] that the reference to the case of *Curtis v. Williamson* (*supra*) found in the judgment has any bearing in the present case. The question for our decision is not really one of law, but one of fact, as to whether the plaintiffs have properly exercised an election to proceed against one of the parties liable. In my opinion they have. They were not aware of the existence of an undisclosed principal until after the proceedings in insolvency were well under way. They have acted in this matter on the suggestion thrown out by this Court that they should take some definite action in the matter of an election.

In the circumstances I am of opinion that the learned Judge was right in holding in favour of the plaintiffs, and I would dismiss the appeal, with costs.

DALTON J.—

I concur in the conclusion arrived at, and I have nothing to add.

Appeal dismissed.

[1] *(1874) L. R. 10. Q. B. 57.*

[2] *(1882) 7 A. C. 345.*