

1932

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

## WIJEYESEKERE v. PERERA

137—D. C. (Inty.) Colombo, 2,952.

*Insolvency—Expunging of debt—Inquiry upon proper material—Ordinance No. 7 of 1853, s. 110.*

In insolvency proceedings an order expunging a debt can be made only after an inquiry such as is contemplated in section 110 of the Insolvent Estates Ordinance and upon proper material placed before the Court.

**A** PPEAL from an order of the District Judge of Colombo.

Appellant in person.

*H. V. Perera* (with him *Nadarajah*), for respondent.

February 2, 1932. GARVIN S.P.J.—

The appellant claims to be a creditor of the insolvent estate of the late T. H. A. de Soysa. Some considerable time after these insolvency proceedings commenced, namely, on September 3, 1930, he filed an affidavit in support of his claim and moved the Court to appoint a special sitting for the proof of his debt. Such a special sitting was appointed and fixed for October 17, 1930. On that date there is a journal entry which reads as follows:—"Case called. Insolvent said to be dead. *Gazette* notice filed. Mr. O. B. Wijesekera's claim proved."

Now the order appealed from is one by which the learned District Judge directed that this creditor's debt be expunged and also dismissed his application asking that the first respondent be directed to bring a certain sum of money into Court. The proceedings which resulted in this order commenced with a motion by this creditor, dated October 11, 1930, referring to a certain order made by the Court on the first respondent directing him to bring into Court a sum of Rs. 20,000 with interest of which it was said that only Rs. 12,000 had been so deposited in Court and asking for a notice upon him "requiring him to deposit the balance in terms of the said order". The Court allowed the notice. Thereupon the first respondent by his proctor filed a statement of grounds upon which he objected to the motion, and the main grounds of objection were these:—That this creditor had no claim or interest in the sum of Rs. 20,000 referred to in the order, that that money belonged to the secondary mortgagees of Nellunkuliya estate. The fourth and fifth grounds related to the claim of the creditor and the substance of the objection was that these sums were not due to the creditor. In the meantime a proxy was filed authorizing a certain firm of proctors to represent the second to the thirteenth respondents to this appeal, and show cause against the application and to take steps to have this creditor's debt expunged. On January 20, 1931, all these different matters appear to have been taken up together. The first respondent was represented; so also were the other respondents. The appellant was present in person. An argument

took place in the course of which reference was made to certain records of other proceedings in the District Court of Colombo and thereafter the order complained of was made by the learned District Judge.

There were, in fact, two matters before the learned District Judge, the appellant's application, which had for its object an order directing the first respondent to bring the balance out of the Rs. 20,000 referred to into Court and the objections urged by the respondent to such an order being made upon it; next the application of the other respondents to have the debt of this creditor expunged. So far as the first of these matters was concerned, so long as the appellant's debt was not expunged he was entitled to be treated as a proved creditor. The only objections, therefore, with which the Court was concerned were those which consisted of the contention that he had no interest in this particular sum, inasmuch as it belonged to the secondary mortgagees of Nellunkuliya estate. The learned District Judge appears to have taken the view that the second to the thirteenth respondents and certain other creditors had a preferential right to this sum of money, but I am unable to find upon this record any material which would justify such a finding. No evidence has been led upon the point and the mortgage bond has not been produced. If it be the fact that the learned District Judge has come to this conclusion, after perusing one of certain records which he says he removed for the purpose, then all I can say is that if any entry in or part of that record was to be used as evidence it should have been properly produced in accordance with law. There is nothing here to show that the appellant had any notice of the material upon which the claim of the secondary mortgagees to preference in this sum was based or ultimately admitted.

It was urged, however, in appeal that there were other grounds upon which the first respondent was entitled to resist an order against him to bring any more money into Court. It may well be that there are good and sufficient reasons for resisting it but these must be properly formulated and placed before the Court in a proper proceeding upon proper material and in the manner in which such material should be placed before a Court of law with an opportunity to the appellant to submit such material or such answer as he may have to the submissions or contentions of the first respondent.

As regards the second of the matters before the Court, namely, the application to expunge the debt of this creditor, here again the whole proceeding appears to have been irregular. Beyond their proxy authorizing the proctor to take the necessary action to have this creditor's debt expunged, the record contains nothing to show that they proceeded in the manner in which persons must proceed if they desire such an order. The procedure is clearly laid down in section 110. It is not sufficient, as I have said previously, to base an order of this kind upon an argument in the course of which one or two statements of facts appear to have been made. The appellant has sworn that the insolvent owed him substantial sums of money, and the Court, acting upon his oath, has already admitted his debt to proof. There must, therefore, be sufficient material regularly placed before the Court and in a proceeding in which the creditor has an opportunity to place his defence before the Court. There is no indication that any such proceeding took place, and without expressing any opinion

whatever as to the merits either of the appellant's claim or of the contention that his claim is not well founded, it is sufficient to say that there is not in this record such material as should have been placed before the Court in a proceeding under section 110 or which would justify the making of an order expunging his debt.

For these reasons, I would set aside the order under appeal. The case will go back to the District Court. If within a fortnight from the date on which the record reaches the Court, the second to the thirteenth respondents and any other creditors whose interests may be identical with theirs do not take proper proceedings under the Ordinance for the purpose of expunging his claim, then the Court will fix the matter for hearing and determination in so far as it relates to the motion of the appellant for an order on the first respondent to bring the money into Court. But, if within the time prescribed, action is taken for the purpose of expunging this debt and is duly prosecuted, then I think that the matter of the motion made by the appellant for an order against the first respondent should remain in abeyance until the other matter is first determined.

The appellant is, I think, entitled to the costs of this appeal.

MAARTENSZ A.J.—I agree.

*Sent back.*

