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Present: De Sampayo J. and Garvin A.J.

APPUHAMY *v.* RAMANATHAN.

37—D. C. Kegalla, 5,186.

Insolvency—Seizure of decree in favour of debtor in execution of decree against him—Subsequent adjudication of insolvency of debtor—Rights of seizing creditor to proceeds of execution—Insolvency Ordinance, s. 111—Civil Procedure Code, ss. 254 and 339.

A seized in execution of his decree against his judgment-debtor B a mortgage decree in favour of B. A few days thereafter B was adjudicated an insolvent. A however proceeded with the execution, and realized a sum of which was only sufficient to satisfy A's decree in part. The District Judge refused A's application to draw this sum on the ground that the proceeds should be paid to the credit of the insolvency proceedings.

Held, that A was entitled to draw the money.

By virtue of section 254 of the Civil Procedure Code, B in effect ceased to be the decree-holder when it was seized, and the decree was no part of B's estate when B was adjudicated insolvent.

It is impossible to apply to A the provisions of section 111 of the Insolvency Ordinance, and to hold that he only seized the decree and did not sell it before B's adjudication, as in the case of a seizure of a decree in execution there is no sale of a decree. Under section 339 of the Civil Procedure Code all that the seizing creditor does is to apply for execution of the decree for his own benefit and to execute it accordingly.

THE facts are set out in the judgment.

Samarawickreme (with him *Wijewardene*), for the applicant.

H. V. Perera, for first respondent.

Keuneman, for second respondent.

[1] *(1900) 4 N. L. R. 302.*

* *Note.*—The question of *res judicata* was not raised in this case.

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In this case an interesting and somewhat difficult point has arisen for decision out of the following facts. The plaintiff Carolis Appuhamy sued the defendant Ramanathan Chetty on a mortgage bond and obtained judgment for a large sum of money. Carolis Appuhamy himself was sued by the appellant in case D. C. Colombo, No. 289, and judgment was entered against him. The appellant as judgment-creditor in the Colombo action seized in execution the decree in Carolis Appuhamy's favour in this action. This was on March 18, 1921. It appears that Carolis Appuhamy was adjudicated an insolvent on March 22, 1921, in D. C. Kalutara, No. 170. The appellant, however, proceeded with his execution in this case, and realized a sum of Rs. 4,504 by sale of the defendant Ramanathan's property in May and June, 1921. This sum of money would only partly satisfy the appellant's decree in the Colombo action. The first respondent, on this appeal, appears to be another judgment-creditor of Carolis Appuhamy, and the second respondent is the petitioning creditor in the insolvency case. On July 26, 1921, the appellant moved to draw the said sum of Rs. 4,504, and was opposed by the first and second respondents. The District Judge refused the motion, and hence this appeal.

The ground of the District Judge's order is that "the money which was realized after Carolis Appuhamy was adjudicated an insolvent becomes an asset of the insolvent's estate, and should be paid to the credit of the insolvency proceedings at Kalutara." Even if this were so, the respondents had no status in the matter. The only person who could have opposed the appellant and claimed the money on behalf of the insolvent estate was the assignee in insolvency. As a matter of fact, on a previous occasion when the appellant sought to draw the money, the assignee appeared and stated he had no cause to show against the appellant's application, except that he suggested that the claim of the appellant as Carolis Appuhamy's judgment-creditor in the Colombo case, No. 289, had been fully paid off, and he stated that he would take steps in the Colombo case. The assignee then made himself a party in the Colombo case, and the District Judge made an inquiry as to the alleged satisfaction of the decree. The District Judge found that only part of the decree had been satisfied and payment was certified to that extent, and the appellant was declared entitled to recover the whole or any part of the amount in deposit in this action. Thus the assignee went wholly out of the matter, and I think that, so far as the argument in the District Court is concerned, the way is made clear for the appellant to draw the money in deposit.

At the argument of this appeal, the objection of the respondents was put on a new basis. It was contended that section 111 of the Insolvency Ordinance, No. 7 of 1853, prevented the appellant

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from claiming the money. The relevant portion of that section which corresponds to section 184 of the Bankruptcy Act of 1849 is as follows :—

> "No creditor having security for his debt, or having made any attachment of the goods and effects of the insolvent, shall receive upon any such security or attachment more than a rateable part of such debt, *except in respect of any execution served and levied by seizure and sale upon* or any mortgage of or lien upon any part of the property of such insolvent *before the date of the filing of a petition for sequestration of his estate.*"

The words in *italics* are those which have been emphasized.

This provision may not be easy to construe, but it certainly has only to do with proof of debts and payment, and both *Archbold on Bankruptcy* and *Griffith and Holmes* (*ed. 1869*) deal with it on that footing. It is obvious that the whole scope of section 111 is to provide that certain classes of creditors shall not be paid more than a rateable portion of their debts. Such creditors must, in order to get even that proportion, come into the insolvency case and prove their claims, for only proved creditors can be paid any dividend at all. I do not think that the section was intended to restrict the rights of execution creditors outside the insolvency proceedings. It appears to me also that the provision sanctions the crediting a mortgagee with the full value of his security, and the appropriation by an execution-creditor of the whole proceeds of an execution sale, but if either of them comes into the insolvency case and proves his claim, he is like other creditors entitled to receive only a rateable part out of the remaining assets of the insolvent's estate. Apart from this question of construction, it is clear that this section does not apply to this case or to any case in which a decree in favour of an execution-debtor is seized and is sought to be realized. Section 254 of the Civil Procedure Code declares that "when the property seized is a decree of Court the judgment-creditor at whose instance the seizure is made shall be deemed the assignee thereof under assignment as of the date of the seizure, made by the person against whom he is executing the writ of execution, so far as that person's interest extends, and he may realize the decree in the manner hereinafter provided for the execution of a decree by an assignee thereof." By reason of such assignment by operation of law, when the decree in this case was seized on March 18, 1921, the insolvent Carolis Appuhamy would appear in effect to have ceased to be the decree-holder and the decree to be any part of his estate. Moreover, in the case of the seizure of a decree in execution there is no sale of the decree, for under section 339 of the Civil Procedure Code all that the seizing creditor does is to apply for

execution of the decree for his own benefit and to execute it accordingly. This is what the appellant did in this case. Consequently it is impossible to apply to the appellant the provision of section 111 of the Insolvency Ordinance, and to hold that as he only seized the decree and did not "sell" it before Carolis Appuhamy's adjudication as an insolvent, he is obliged under section 111 of the Insolvency Ordinance to suffer the money to be paid to the assignee in insolvency for the benefit of all the creditors of Carolis Appuhamy.

In my opinion the appellant's application to draw the sum of Rs. 4,504 in deposit in Court should have been allowed, and I would set aside the order of the District Judge, and direct that the said sum of money be paid to the appellant. The respondents should pay to the appellant the cost of the proceedings in the District Court and of this appeal.

GARVIN A.J.—I agree.

Appeal allowed.