Present: Fisher C.J. and Drieberg J. 1929

SOCKALINGAM CHETTY *v.* MARAKAYAR

165—D. C. (Insolvency), Jaffna.

Insolvency—Proof of debt—Further inquiry—Motion to expunge debt—Effect of order—Ordinance No. 7 of 1853, ss. 93 and 110.

In insolvency proceedings a creditor filed an affidavit in proof of a debt which was noted, and the Court ordered further inquiry. Thereafter two creditors moved to expunge the debt and the motion was disallowed.

Held, that under the circumstances the debt must be regarded as proved.

APPEAL from an order of the District Judge of Jaffna. The facts appear from the judgment.

H. V. Perera (with *Choksy*), for appellant.

Hayley, K.C. (with *Subramaniam*), for respondent.

December 20, 1929. DRIEBERG J.—

This is an appeal by the appellants against an order requiring them to bring into Court a sum of money which they undertook to pay to Secretary of the District Court on the fulfilment of a certain condition.

By a bond dated August 5, 1927, the first appellant as principal and the second and third appellants as sureties undertook, in consideration of all the available assets of the two insolvents, K. V. Saminathan Chetty and K. V. Kasivisuvanathan Chetty, being assigned to the first appellant to pay to S. N. Karutha Marakayar at the rate of 31 cents on the rupee " on the amount that is decided to be declared proved by the Honourable the Supreme Court in appeal or such other amount fixed by this Court. " It was also recited in the bond that the security was being given " for the amount that might be found due to the appellant S. N. Karutha Marakayar . . . . if he succeed in the appeal which is now pending in this case and to be decided by the Honourable the Supreme Court. "

The appeal referred to is dated February 28, 1927, and was filed under these circumstances. The first appellant, Sockalingam Chetty, concluded an arrangement with the insolvents, the asignee, and the majority of the creditors by which all the assets of the insolvents were to be assigned to him and he was to pay the creditors a certain proportion of their claims. This deed of assignment (X5) was executed on August 5, 1927, and of the amount due on it, Rs. 56,868.11, the first appellant deposited in Court Rs. 45,233.65.

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As the claims of the respondents was then undecided a separate agreement was made regarding it and this was embodied in the bond executed on the same day.

Before their adjudication the insolvents had sued the respondents in D. C. Jaffna, No. 19,190, for the recovery of Rs. 97,048.83. The respondents denied the claim, the first respondent claiming in reconvention Rs. 8,640 and the other respondents a sum of Rs. 37,520.32. The respondents elected to prove their claim in the insolvency proceedings, and this amounted to an election not to proceed with their counter claim in the action. The insolvents' claim against them was included in the assignment (X5) to the first appellant, the claim being described as " amount advanced on account of shares of K. V. S. N. firm sued in case No. 19,190, D. C. Jaffna, Rs. 125,546.47. "

On November 15, 1926, the first respondent filed an affidavit stating that the sum of Rs. 8,640 was due to him from the insolvents, and on some day before November 17 he filed affidavit that sums aggregating Rs. 37,610.32 were due to the other respondents. I cannot find the motion papers submitting these claims, but they were before the Court on November 17, 1926. The claims were challenged by the insolvent, who said they would " take steps to have it expunged under section 110." The Judge made an entry " The claim now made may be noted " and adjourned the matter for inquiry.

On December 13, 1926, a motion was submitted by two creditors, Kandiah and Subramaniam, who " moved under section 110 that the Court should summon and examine Karutha Marakayar (the first appellant) regarding the various claims sought to be proved by him on behalf of the second to tenth defendants in D. C. 19,190, and if after investigation, these claims, or any of them, are found not to be just or *bona fide* to have such claims expunged from the proceedings in the case. " Summons was accordingly issued on the respondents, the two creditors giving security and filing a statement of their objections. In this statement, in addition to the grounds which were upheld by the Judge, they said the claims were not just and *bona fide*.

The Court on February 15, 1927, upheld the objections taken by the two creditors that the claim of the first respondent for Rs. 8,640 was barred by the Prescription Ordinance, that the power of attorney under which the first respondent acted in proving the claim of the other respondents was defective, and further that their claim could not be maintained unless the estate of Segu Mahamadu, through whom they claimed, was administered. Order was made that the claims be expunged in terms of section 110 of the Insolvency Ordinance.

The present respondents appealed from that order, the assignee, the insolvents, and Kandiah and Subramaniam being named respondents to the appeal. On September 11, 1928, the Supreme Court held that there was no proof of the matters on which the District Judge based his judgment, *i.e.*, that the second to eighth respondents were vested with their interests as the heirs of Segu Mohamadu, and the minority of the two respondents, which the District Judge held, rendered their power of attorney to the first respondent defective. It was also held that there was no material before the Court to support the finding of prescription of the first respondent's personal claim. The appeal was allowed, the decree being that " the judgment of the District Court dated February 1, 1927, be set aside and the application be dismissed. " Costs were allowed against Kandiah only, as Subramaniam stated at the hearing that he did not oppose the appeal.

The application referred to in the decree is that of December 13, 1926, which I have set out. The present respondents subsequently applied to the Court for an order directing the appellants to pay them the sum of Rs. 14,309.70, being 31 per cent. of their claim, and in default of payment for an order directing a sale of the property mortgaged. The learned District Judge allowed this application, directing the appellants to bring the money into Court and that in default the bond would be declared forfeited and writ issued to recover the amount. The appeal is from this order.

The only ground urged at the hearing of this appeal was that the claim of the respondents had not been proved, and in support of this the appellants rely on the wording of the appeal by the respondents from the order of February 15, 1927, ordering the expunging of their claims. They prayed that that " order be set aside and the case remitted to the lower Court for the appellants to prove their claim and that an order be made for a correction of the irregularities that have occurred in this case. "

The grounds upon which the learned District Judge had acted were not sufficient, even if they were right, to justify the order which he made. Failure to administer the estate of Segu Mohamadu was not a ground for rejecting the claim of the respondents, for order on it could have been suspended until the estate was administered. Further, only two of the respondents who gave a power of attorney to the first respondent were minors; the power was not bad as regards the others, and even in the case of the minors the matter could have been set right.

At the hearing of that appeal, however, the only grounds of objection to the claim having been held not to be established, the application to expunge the claim was dismissed. The bond

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contemplated the possibility of a final determination in the Supreme Court of the claims of the respondents, and the judgment of the Supreme Court had that effect.

The provisions of the Insolvency Ordinance as to proof are not very definite. Proof is effected by an affidavit; this is sufficient, but the Court can require further proof and examine the creditor or other persons, if it thinks fit. There is no provision for a definite order admitting proof, and the mere fact that the insolvent does not admit a debt does not mean that the debt is not proved (*Mohamadu Cassim v. Perianan Chetty*[1]).

Here the Court merely ordered that the claims be noted, and I think this means that the Court thought the claim was one of which further proof was needed and deferred the matter for further inquiry under the proviso to section 93. The two creditors, however, treated the debt as proved and said they would move to expunge it, and the further inquiry was on their motion.

So far as the appellants are concerned it makes little difference whether the final order was made on the application to expunge a proved debt or as the result of an inquiry under the proviso to section 93 on a claim of which further proof was required. The final rejection of the only objections advanced to the respondent's claim was to leave it in either case a proved debt. The first appellant agreed to be bound by the result of the appeal and pay "the amount that might be due to S. N. Karutha Marakayar if he succeeds on the appeal."

It was open to Kandiah and Subramaniam to ask for an opportunity of proving what was necessary to sustain their objections and that the insolvents were not indebted to the respondents; they could have had the case remitted for that purpose. This apparently was not done.

It should be noted that the assignee was a party to the appeal.

In support of their contention that the claim cannot be regarded as proved, the appellants point to the words of the bond, that payment of 31 cents on the rupee was to be made "on the amount that is decided to be declared proved by the Honourable the Supreme Court in appeal on such other amount fixed by this Court," as indicating that it was intended that even if the objections advanced by Kandiah and Subramaniam at the inquiry failed, there was to be an inquiry as to what was the exact amount due to the respondent.

I do not think that this was intended. There were two claims, one by the first respondent personally and another by him on behalf of the other respondents. The objection to one might have succeeded and the other might have failed in appeal.

[1] *(1911) 19 N. L. R. 385.*

In my opinion the appellants are concluded by the judgment in appeal, which in dismissing the application of Kandiah and Subramaniam left these claims in the position of proved debts. If the matter was not affected by any arrangement with the first appellant, would not the respondents, after the order of the Supreme Court, have been entitled to demand payment of dividends from the assignee? Could the District Court have called for further proof of their claims? The answer must be in the negative. If the order of the Court that the claims should be noted be regarded as one requiring further proof, I take it that the Court was not obliged to take further action of its own motion when the two creditors took formal steps to question the claims under section 110 and such further inquiry as was wanted could be made in those proceedings.

The judgment of the learned District Judge is right. I had some doubts whether the amount on the bond could be recovered summarily by issue of writ and whether the proper course was not recovery by an action on the bond brought by the Secretary. Mr. Hayley has referred us to the case of *Vairavan Chetty v. Ukku Banda.* [1] It is possible, I think, to follow the principle laid down in this case and to regard the bond as one granted for the performance of a decree for the payment of money, and the recovery of the amount secured by the bond and the realization of the security can be effected in the manner ordered by the District Judge by issue of writ in these proceedings. The appellant does not question the correctness of the order of the District Judge directing recovery by writ. The appeal is dismissed with costs.

FISHER C.J.—I agree.

Appeal dismissed.