Present : Lascelles C.J. and Middleton J.

June 20, 1911

In re the Insolvency of MOHAMADU CASSIM.

MOHAMADU CASSIM *v.* PERIANAN CHETTY.

79—*D. C. Kandy*, 1,571.

Insolvency—Motion by insolvent to expunge debt after the appointment of assignee—Practice—Power of Judge to inquire into validity of judgment obtained by fraud—Summons—Service of summons on one partner after dissolution of partnership—Judgment obtained without service of summons null and void.

Before the close of the first sitting in insolvency proceedings one P. tendered proof of a debt. The insolvent did not admit the debt, but proof was admitted without further inquiry. Subsequently, after the appointment of assignee, the insolvent moved to have the debt expunged.

Held, the procedure of moving to expunge a debt is not open to the insolvent, but only to the assignee or to two creditors under section 110 of Ordinance No. 7 of 1853. The proper course would have been to have inquired into the bankrupt's objection at the time when it was made, or, at any rate, before the appointment of the assignee.

But a practice has grown up in our Courts under which debts are admitted to proof notwithstanding non-admission, and objection is allowed to be made subsequently by way of motion.

"A bankrupt has a right to petition for expunging of a debt proved by a creditor, provided that the admission of the debt was calculated to affect the surplus or the allowance of the bankrupt."

The power of a Judge to inquire into the validity of a judgment-debt, where there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice, is unquestionable.

In an action brought after the dissolution of a co-partnership against the former partner's nomination, service of summons on one of the defendants is not a good service on the others.

A judgment is null and void, and cannot be executed against a person who is not served with summons.

THE facts are set out in the judgment.

Bawa, for the appellant.—The Court ought not to have expunged the debt. The Court will listen to an insolvent only when he contests proof of a debt. Once the Court has admitted the debt, the insolvent cannot thereafter raise the question by moving the Court to expunge the debt. Only the assignee or two creditors can

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move the Court to expunge the debt. (Section 110 of Ordinance No. 7 of 1853.) The insolvent has no interest in having the debt expunged. Counsel cited *Archbold, p.* 194 (11*th ed.*) ; *In re Andris*[1]. If the judgment against the insolvent was bad for any reason, the assignee should bring a separate action to impeach that judgment. The judgment is perfectly valid as it stands.

The District Court of Kandy had no power in the insolvency proceedings to review the validity of the judgment of the District Court of Colombo obtained by the appellant against the insolvent.

The service of summons on the defendants in the Colombo case was good. Section 64 of the Civil Procedure Code enacts that service on one partner is a good service against the other partners. Counsel cited *Davis & Son v. Morris*,[2] *Ex parte Young*.[3]

Allan Drieberg, for the respondent.—The insolvent has a right to petition the Court to expunge a debt. See *In re Andris*.[1] The practice of our Courts is to allow proof of debts without inquiry in the first instance, though the debt be not admitted by the insolvent.

The District Court of Kandy has the power to review the judgment obtained against the insolvent in the Colombo case. It is open to the District Judge in these insolvency proceedings to inquire if summons were served on the insolvent. Counsel cited *Wigram v. Cox, Sons, Buckley & Co.*,[4] *In re Flatau*,[5] *Ex parte Lennox*,[6] *Boaler v. Power*.[7]

The service of summons on the insolvent in the Colombo case was bad, because summons was not served on him personally, and as at the date of the action the partnership was dissolved. It is only in the case of a continuing partnership that service of summons on one partner is a good service on the other.

Bawa, in reply.

Cur. adv. vult.

June 20, 1911. LASCELLES C.J.—

This is an appeal from an order of the District Judge of Kandy in an insolvency case, on the petition of the insolvent, expunging a claim of Rs. 5,381.25 and interest. It appears that on February 10, 1910, before the close of the first sitting, one Perianan Chetty tendered proof of a debt of Rs. 5,381.25. The insolvent did not admit the debt, but the proof was admitted without further inquiry. On November 16, 1910, after the appointment of the assignee, the insolvent filed an affidavit, on which Perianan Chetty was noticed to show cause why his claim should not be expunged. The learned District Judge, after examining the insolvent, expunged the debt.

[1] (*1900*) *4 N. L. R. 372 ; 2 Br. 31.*
[2] *L. R. 10 Ch. Div. 436.*
[3] *L. R. 19 Ch. Div. 125.*
[4] (*1894*) *1 Q. B. D. 795.*
[5] *L. R. 22 Q. B. D. 83.*
[6] *L. R. 16 Q. B. D. 315.*
[7] *102 L. T. N. S. 451.*

It was proved that the insolvent was a partner with several others in the firm of P. Adam Saibo & Co., carrying on business in partnership at Halgranoya in Uda Pussellawa ; that the partnership was dissolved as from October 2, 1904, notice of the dissolution being advertised in the local press ; that after the dissolution the managing partner, Abdul Rahiman Saibo, continued the business in his own name under the style Ena Abdul Rahiman Saibo & Co. ; that in D. C. Colombo case No. 27,499 the insolvent with nine other defendants were sued *nominatim*, and decree passed against them in October, 1908 ; and that the summons and copy of the decree *nisi* was not served on the respondent or on any other of the defendants than the first defendant. In these circumstances, the insolvent contended that the decree tendered in proof of the debt was not binding on him.

Before dealing with the principal question involved, it is necessary to consider several minor objections advanced by the appellant. It was argued that the procedure adopted in this case is faulty, inasmuch as the procedure of moving to expunge a debt is not open to the insolvent, but only to the assignee or to two creditors under section 110 of Ordinance No. 7 of 1853. I think that this objection, so far as it extends, is well founded, and that the proper course would have been to have inquired into the bankrupt's objection at the time when it was made, or, at any rate, before the appointment of the assignee. This appears to have been the practice under the corresponding English Act. (*Archbold, 11th ed., p.* 194).

But this technical objection is not necessarily fatal to the order under appeal. Mr. Drieberg stated—and his statement was not disputed—that a practice has grown up in our Courts under which debts are admitted to proof notwithstanding non-admissions, and objection is allowed to be made subsequently by way of motion. The course taken by the District Judge in *In re Andris*[1] points to the existence of some such practice. It would, in my opinion, be inequitable to deprive the insolvent on account of this irregularity, for which the insolvent was probably not responsible, of the opportunity of raising any objection which the law allows him to the proof of this debt.

The conditions under which an insolvent may object to a claim are discussed in *In re Andris*, where the Court adopted the ruling in *Ex parte Pitchforth*[2] that the bankrupt had a right to petition for the expunging of a debt proved by a creditor, provided that the admission of the debt was calculated to affect the surplus or the allowance of the bankrupt. There is hardly room for any doubt as to the insolvent's interest in objecting to this claim, as, besides the petitioning creditor's debt of Rs. 577, no other claim than that now in dispute has been preferred.

[1] *(1900) 4 N. L. R. 372.*

[2] *3 Deacon's Reports 487.*

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It was also contended that it was not competent for the District Judge of Kandy, in an insolvency case, to review a decree of the District Court of Colombo. This objection seems to rest on a misconception. There is no question of reviewing or setting aside a decree. The insolvent's contention is not that the decree is erroneous, but that it is not binding upon him, because he was not served with summons in the action.

A judgment is null and void, and cannot be executed against a person who is not served with summons (*Wigram v. Cox, Sons, Buckley & Co.*[1]). Further, the power of a Judge to inquire into the validity of a judgment debt, where there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice, is unquestionable. (*In re Flatau*,[2] *Ex parte Lennox*,[3] *Boaler v. Power*.[4])

The substantial point for consideration is the ruling of the District Judge that the decree in the Colombo case does not bind the insolvent. The question involved is whether, in an action brought after the dissolution of a co-partnership against the former partners *nominatim*, service on one of the defendants is a good service on the others. The question turns upon the construction of section 64 of the Civil Procedure Code, the material words of which are as follows : " And in case of an action against partners relative to a partnership transaction.....each partner is an agent so empowered (*i.e.*, empowered to accept service of summons) of each other partner, as is also the person, if any, not being a partner who has the management of the business of the partnership at the principal place of business within the local limits of the Court's ordinary jurisdiction."

A similar question was discussed in the English Courts in *Ex parte Young*[5] and in *Davis & Son v. Morris*[6], with reference to the construction of Order XVI., r. 10, which provided that partners might be used in the name of their firm. In *Ex parte Young* the Court was divided in opinion, and the question was left open whether the rule applied to a partnership dissolved before the issue of the writ. In *Davis & Son v. Morris* it was held that the rule in question was not limited to the case of partnerships carrying on business at the date of the writ.

But Order XVI., r. 10, on the construction of which these decisions turned, is so essentially different from section 64 of the Code in scope and expression that these decisions have little direct bearing upon the question under consideration. The question primarily turns upon the true construction of section 64. The section deals, in the first place, with specially appointed agents and with proctors holding warrants of attorney empowered to accept service ; it then goes on to deal with actions against partners, and declares that each

[1] *(1894) 1 Q. B. D. 795.*
[2] *L. R. 22 Q. B. D. 83.*
[3] *L. R. 6 Q. B. D. 315.*
[4] *102 L. T. N. S. 451.*
[5] *L. R. 19 Ch. Div. 125.*
[6] *L. R. 10 Ch. Div. 436.*

of the partners is an agent of each other partner " so empowered," that is, empowered in the same way as the agents referred to above to receive summons on behalf of their principals. The section thus turns upon the principle of agency. One partner is declared to be the agent of the other for a particular purpose, so that service on the one is service on the others, in the same way as service on an agent appointed under section 30 is a good service on the principal, and service on a duly authorized proctor binds the client. In the case of the specially-appointed agent or the proctor, it could hardly be disputed that the power to accept summons on behalf of the principal or client determines as soon as the relationship of principal and agent or proctor and client comes to an end. In the same way I think the power of one partner to receive service on behalf of his co-partners must be held, in the absence of express provision to the contrary, to determine on the dissolution of the partnership.

In my opinion the District Judge is right in holding that the insolvent was not served with summons in the Colombo case, and that the decree is therefore not binding on him. It is worthy of notice that the ruling in *Davis & Son v. Morris* does not represent the practice now in force in England. The rule now in force (Order 48*a*, r. 3) provides that, in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon any person within the jurisdiction sought to be made liable. This rule has now been adopted in India as Order XXX., r. 3. If we had been obliged to support the appellant's contention and to hold that the insolvent was bound by the Colombo decree, the necessity for an amendment on the lines of the English rule would have been imperative, for it would have been an intolerable injustice that the respondent, who lives at Halgranoya, a great distance from Colombo, should be held to be bound by a judgment given at Colombo, of which he had no notice, the summons having been served on a person who was his co-partner in a partnership which was dissolved as long ago as in 1904.

I think that the order appealed from is correct, but the order does not preclude the respondent from proving his debt *alieunde* if he is in a position to do so.

MIDDLETON J.—I entirely concur.

Appeal dismissed.