Present: Fisher C.J. and Akbar J.

1930

DORASAMY *v.* FERNANDO.

238—D. C. (Inty.) Kandy, 35,005.

Insolvency—Deed in fraud of creditors—Action to set aside brought by proved creditor—Insolvency Ordinance, ss. 51, 71, and 109.

An action may be brought, during insolvency proceedings, by a proved creditor to set aside a transfer made by the insolvent in fraud of creditors.

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

Weerasooria, for first defendant, appellant.

Navaratnam, for plaintiff respondent.

February 28, 1930. FISHER C.J.—

In this case the plaintiff (the respondent) is a creditor of one de Silva, the first defendant, the appellant, is also a creditor of de Silva, and the second defendant is de Silva's assignee in insolvency. The plaintiff prayed for a declaration that a transfer by de Silva in favour of the first defendant be declared null and void and that the land which was the subject-matter of the tranfer should be vested in the assignee and be declared liable to be sold to meet the claims of the creditors of the insolvent. The date of the transfer is December

11, 1926, and on December 16, 1926, the first defendant filed a petition for the sequestration of the estate of William de Silva in consequence of which the latter was declared insolvent. Both the appellant and the plaintiff-respondent proved their debts in the insolvency. On March 18, 1927, the present action was brought. The insolvent subsequently received a certificate, the issue of which was suspended for a period of one year which had expired prior to the hearing of the action. The only point which has so far been considered by the learned Judge, and the only point for our decision on this appeal, is embodied in the following issue: "Can the plaintiff maintain this action inasmuch as the insolvency proceedings of William de Silva were pending at the date of the institution and an assignee having been appointed in such proceedings ?"

The question whether the decision of the learned Judge, which on the face of it leaves the action still to be tried, is one from which an appeal lies was not argued before us, and I do not think it is necessary to express an opinion on the point.

Clearly the plaintiff has an interest in seeing that all assets which are available or can be made available for creditors should be got in, and the transfer which is impeached is alleged to have been made with the intention and to have had the effect of putting the property in question out of the reach of the general body of creditors. It would certainly seem that the plaintiff has a *primâ facie* right to bring this action, and the question is whether there is anything in the Insolvency Ordinance which precludes him from exercising it. It was said that the plaintiff's cause of action, if any, vested in the assignee on his appointment by virtue of section 71 of the Insolvency Ordinance. In my opinion, an action against a transferee to set aside the transfer on the ground that the transferor acted fraudulently is not an action which can be brought by the transferor himself, and therefore could not vest in the assignee under the section referred to.

It was further contended for the appellant that the case is covered by section 109 of the Insolvency Ordinance. I do not think that contention can prevail. That section contemplates a claim which can be expressed or assessed in money, and that cannot be said of the present action.

In my opinion, the reasoning set out by the learned District Judge in his judgment entirely justifies the conclusion at which he arrives.

The appeal is dismissed with costs.

AKBAR J.—

The plaintiff-respondent sued the first defendant-appellant to have a deed of sale executed by one William de Silva set aside on the ground that it was executed in fraud of creditors. This William de

Silva, it appears, had been declared insolvent and the second defendant was appointed his assignee. The case went to trial on certain admissions and arguments of Counsel, no evidence being led. It was admitted that William de Silva had been given a certificate of insolvency suspended for one year. The material dates are as follows:—The action was instituted on March 18, 1927; the second defendant was appointed assignee on January 28, 1927; the Court issued a certificate of the third class to the insolvent on August 9, 1928, which was suspended for a year. The date of the District Court judgment was October 28, 1929; the plaintiff was one of the proved creditors, and the first defendant-appellant was the petitioning creditor for the sequestration of the insolvent estate; the impugned deed was executed by the insolvent on December 11, 1926, in favour of the first defendant, and the second defendant petitioned for sequestration of the insolvent estate on December 16, 1926, which is just five days after the execution of the deed. The case was decided by the District Judge on a point of law, namely, whether the plaintiff can maintain this action inasmuch as the insolvency proceedings were pending and an assignee had been appointed. The District Judge held that the action could be maintained and he has condemned the first defendant to pay the costs of contention. The appeal is from this order. The plaintiff in his plaint asked for a declaration that the impugned deed be declared null and void and that the land mentioned in the deed be vested in the second defendant as assignee to be utilized by him to meet the claims of the creditors. One would have thought that no objection could possibly be raised to an action of this sort which was brought by a creditor at his own cost and risk to retrieve property which had gone astray for the benefit of all the creditors, but Mr. Weerasooria has taken certain legal objections. His first point is that under section 109 of the Insolvency Ordinance, a proved creditor had no right to bring an action in respect of his debt. But section 109 refers to a creditor who having already brought an action against the insolvent to vindicate his claim afterwards proves the same claim in the insolvency proceedings. Clearly this section does not apply to this case because the subject-matter of this action is not identical with the debt which the creditor proved in the insolvency case. The second point was that under section 51 these proceedings should have been taken in the insolvency proceedings. I do not think, however, that that section lays it down that such proceedings are to be exclusively brought in the insolvency proceedings and no authority has been quoted that it has been so laid down. On the other hand, the case of *Poulier v. Alles* [1] shows that such actions have been brought in the past. Further, it will be noticed that section 51 refers to a voluntary conveyance without valuable

[1] *27 N. L. R. 219*

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AKBAR J.

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consideration. It does not appear in this case that the impugned deed was one which was *ex facie* executed for no consideration. At any rate this objection was not taken in the lower Court, the only point taken being whether the assignee was not the proper person to sue, as the right of action involved in this case was vested in him under section 71 of the Insolvency Ordinance. On this point I fully agree with the reasons given by the District Judge, and I fail to see any reasonable objection to the manner in which this action has been framed, because the assignee was made a party to this case and the plaintiff asked for a declaration that the land involved in the deed be vested in him for the purpose of the insolvency case. In my opinion, the appeal should be dismissed with costs in both Courts.

Appeal dismissed.