Present : Lyall Grant and Drieberg JJ.

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SHAW & SONS *v.* SULAIMAN *et al.*

37—D. C. (Inty.) Colombo, 25,143.

Execution—Property seized by several creditors—Estate declared insolvent —Court orders executor to sell property—Order acquiesced in by creditors—Objection to sale.

Property which formed part of an estate administered by Court in testamentary proceedings, was advertised for sale after it had been seized in execution by several creditors. After notice to all the creditors the Court declaring the estate to be insolvent stopped the sale and directed the executor to sell the property and bring the proceeds to the credit of the estate.

Held, that it was not open to a creditor, who had acquiesced in the order to sell, to execute his decree by seizure and sale of the property.

Per DRIEBERG J.—In Ceylon there is no provision by which, on proof that an estate is insolvent, the administration proceedings can be transferred to the Court of Bankruptcy.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment of Lyall Grant J.

Croos da Brera, for plaintiffs, appellant.

H. V. Perera (with *Ameresekere*), for first and second defendants, respondents.

H. H. Bartholomeusz, for third respondent, purchaser.

March 27, 1929. LYALL GRANT J.—

This is an appeal from an order of the District Judge of Colombo directing the release of a seizure effected at the instance of the plaintiffs-appellants.

The plaintiffs, an English company, sued the defendants, the executors of one Ilema Lebbe Naina Marikar Hadjiar of Colombo, on certain bills and obtained judgment against the estate on July 8, 1928, for Rs. 24,000.

A number of other creditors had also obtained judgment against the estate, and in two cases decree was entered and writs issued against the property of the deceased.

The premises now in question were seized at the instance of a third creditor and were advertised for sale on July 28, 1928. Before this date five other creditors who had filed actions petitioned the District Court to stay the sale. It appeared at the inquiry that altogether three creditors had obtained seizure of the premises.

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Meanwhile testamentary proceedings had been instituted by the executors, and in this testamentary action the Court on February 29, 1928, declared the estate to be insolvent.

In these proceedings the plaintiffs took part. All the creditors except the plaintiffs agreed to participate in a judicial settlement. The position then taken up by the plaintiffs was that they were not interested in the matter as they claimed to have been paid in full. They also denied the insolvency of the estate.

It is quite clear that from this date the estate was treated by the Court as an insolvent estate, and on this footing the Court on July 24, 1928, proceeded to inquire into the application for the stay of sale. The sale was stayed and an order was made empowering the executors to sell the premises at a certain price to a certain purchaser and to deposit the proceeds to the credit of the case.

The negotiations with this purchaser fell through, and on the petition of the executors the Court directed that the premises should be sold by public auction, the mortgagee paid off, and the balance brought into Court for distribution among the unsecured creditors. It further directed that the conditions of sale should be approved by the Court and that the sale should be subject to the Court's confirmation. The premises were sold and the sale confirmed on December 13, 1928.

The appellants object that there were a number of irregularities in this transaction, for instance, that the conditions of sale were not approved by the Court and that the confirmation of the sale fixed a higher price than the amount bid at the auction, the higher amount being agreed to by the purchaser.

Whatever the importance of these irregularities may be, the plaintiffs did not appeal against this order.

They seek to justify their failure to appeal on the ground that they were not a party to the proceedings.

They have produced the proxy given to their Proctor in the testamentary proceedings and contend that it only authorized him to appear for the purpose of drawing out an amount of money lying in Court at the credit of the estate and alleged to have been seized by the plaintiffs. They contend that when permission to withdraw this money was finally refused the proxy ceased to be of any effect.

The powers given by the proxy are not clear and it might be read as giving the Proctor authority to press the plaintiffs' claim in the testamentary case.

In any event it is alleged for the respondent and not contradicted, that the plaintiffs actually participated in the testamentary action for the purpose of drawing a dividend from the estate.

The learned District Judge has held that the proxy empowers Mr. Motha to appear on behalf of the plaintiffs and to recover on their behalf in the testamentary case such moneys as he could. Mr. Motha was present at the inquiry which resulted in the order of December 13, 1928, and asked that his appearance be noted, and the Judge is satisfied that he was then acting in concert with others in opposing the confirmation of the sale.

I see no reason to disagree with the view taken by the District Judge, that the plaintiffs were represented at the inquiry which resulted in the order confirming the sale and that it was an order from which they had a right of appeal which they did not exercise.

Instead of exercising this right of appeal the plaintiffs proceeded to make a fresh seizure of the premises which they registered on December 22, 1928. At this time the conveyance to the purchaser under the order of Court had not been executed. It was only executed on January 28, 1929, and registered on January 30, 1929.

It is admitted that if the seizure was a valid one it has priority over the conveyance.

The seizure was brought to the notice of the Court and on February 8, 1929, the Court ordered it to be released and its registration cancelled. From that order the plaintiffs now appeal.

Apart from the question of the status of the plaintiffs in the testamentary case, a matter I have already dealt with, the plaintiffs raise the objection that the Court had no power to sell the property without notice to the mortgagee or to the seizing creditors. This objection might have been raised on the order allowing the sale or on the order confirming the sale if the plaintiffs had no notice of the former inquiry. But I do not think it is now open to the plaintiffs who had notice of the proceedings to question the correctness of the procedure adopted in the testamentary case.

The plaintiffs in effect now claim the right to ignore proceedings to which they have been a party and orders by which they are therefore bound, and to enforce their decree without reference to the rights of other creditors and in defiance of the Court.

I think their position has only to be stated to carry its own condemnation.

In *Andrishamy v. Silva*,[1] which has been brought to my notice by my brother Drieberg, de Sampayo J. held :—

> "When the Court exercised its jurisdiction and took upon itself the sale of the property, the executor had no longer any authority to dispose of the property, except upon further orders of Court, and cannot be allowed to defeat the acts of the Court in regard to the sale, for that would be not only directly to defy the Court, whose jurisdiction had been exercised at his own instance, but to set himself above the Court."

[1] *18 N. L. R. 454.*

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There an executor who had applied to Court for and obtained an order for the sale of immovable property upon which the property was sold to A was held to have no right to sell the property to B pending the conveyance to A, and in an action *rei vindicatio* by A against B, A was held entitled to succeed although B's conveyance was earlier in date.

The same principle applies to a creditor who has notice of the proceedings and who has appeared in the administration case.

The appeal is dismissed with costs.

DRIEBERG J.—

I agree with the judgment of my brother Lyall Grant.

It appears to me that the appellants are concluded by their acquiescence in the course ordered by the Court on the 29th February.

We have no provision similar to section 125 (4) of the Bankruptcy Act, 1883, by which on proof that an estate is insolvent the administration proceedings can be transferred to the Court of Bankruptcy. Under section 199 of the Civil Procedure Code the administration of a deceased person's estate as insolvent according to the law regarding the estates of persons adjudged insolvent, which is governed by Ordinance No. 7 of 1853, can be effected only in the course of an administration suit (*Hay v. Administrator of the Estate of Nunn*[1]). Administration suits, which were of common occurrence before the passing of the Civil Procedure Code, have since fallen into disuse owing to the very complete provision made for the judicial settlement of accounts by executors and administrators and to the power given to the Court under section 724 of the Civil Procedure Code of compelling the legal representative to render an account at any time (*Karonchihamy v. Angohamy*[2]).

On the 29th February, 1928, the position was simply this. Some unsecured creditors had seized these premises, and they would in the usual course have proceeded to sell them. Subject to the preferential claim of the creditors who held mortgages over these premises, the balance proceeds of sale would under section 352 of the Civil Procedure Code have been divided among all those judgment-creditors who had prior to realization applied to the Court for execution of their decrees. The appellants would have been in a position to recover a rateable share of the proceeds. All that the Court did was to direct that the sale should not be effected in the course of execution by any particular creditor, but that it should be carried out by the executors under its own supervision and directions so as to ensure the best price being realized in the interests of all the creditors. This order in no way affected the right of the appellants to share rateably in the proceeds in precisely the same manner as

[1] *(1906) 9 N. L. R. 161.* [2] *(1913) 4 Bal. Notes 15.*

if the sale had been carried out by the Fiscal in execution of the decrees of any of the execution-creditors who had seized the property. This order, which I may say is in accordance with the regular practice of the Court, was made with notice to the appellants. The appellants only contended that they did not wish to participate in the judicial settlement, *i.e.*, the settlement by the Court of the accounts to be rendered by the executors, but they did not object to the Court taking away from particular creditors the right to sell the property on their own writs and itself controlling the sale of the property. It must be taken that they agreed to a sale by the executors under the direction of the Court and that they waived their right to seize and sell the property under their decree.

What they now seek to do is to ignore the order for sale by the Court and to defeat the title of the purchaser under the sale by executing their decree and effecting a seizure which by reason of its registration will give it priority over the conveyance to the purchaser at the sale.

The respondents fear that this registration will give the rights of the appellants under the seizure priority over the purchaser's conveyance by reason of the provisions of section 238 of the Civil Procedure Code, and the appellants undoubtedly claim that it will, for that is the reason underlying their action. The sale by the order of Court was not a sale in execution of a decree but a sale by the executors who had power to sell without the order of Court. The fact that in the special circumstances of this case they got the sanction of the Court and were subject to its directions may not deprive the sale of the character of a private alienation. The only grounds the appellants have for objecting to the order of February 29, 1928, are concerned with the manner in which that order was carried out. If they were prejudiced in this way, the proper course open to them was to have moved in the testamentary proceedings by application in the Court or by appeal if necessary. It is not possible to permit them by independent action to defeat the execution of an order in which they acquiesced.

Appeal dismissed.