1944

Present: **Howard C.J. and de Kretser J.**

GANY, Appellant, *and* HAY, Respondent.

23—D. C., Kandy, 170.

Insolvency—Certificate of conformity—Application to revise order allowing certificate—Delay on part of creditor—Withholding of facts—Insolvency Ordinance (Cap. 82) ss. 133 and 137.

An application by a creditor under section 133 of the Insolvency Ordinance to revise an order allowing a certificate to an insolvent may be refused where the application has been unduly delayed and where the applicant has been guilty of a conspiracy of silence regarding facts within his knowledge.

Semble **where an insolvent opposes a claim made against him, the certificate granted to him would be of no avail to him upon proof of the facts stated in section 127.**

APPEAL from an order of the District Judge of Kandy.

H. V. Perera, K.C. (with him *A. Seyed Ahamed*), for the proved creditor, appellant.

No appearance for the insolvent, respondent.

Cur. adv. vult.

October 25, 1944. DE KRETSER J.—

After the insolvent had been granted a certificate of the third class on May 15, 1942, and after his assets had been distributed, the appellant, who was one of the earliest creditors to prove a claim and had actively interested himself in attempts at composition of the debts, moved the Court under section 133 alleging that the insolvent had not disclosed property worth Rs. 25,000 which he had inherited from his father. On the insolvent filing a counter-affidavit disclosing the fact that he had transferred this property to his sister in January, 1939, *i.e.*, 16 months before the adjudication, the petitioner filed an amended petition praying for action under either section 127 or section 133, alleging that a contemporaneous agreement existed on which the insolvent had certain rights.

Even now his affidavit was not at all what it should have been and many important facts were not disclosed or accounted for. He actually stated that because the insolvent induced him to refrain from opposing the certificate by promising to abide by the "deed of composition" (which provided for the appellant being paid in *FULL*) he was therefore "not in a position to bring to the notice of the Court the facts referred to in paragraphs 9 and 10". He was thus admittedly a party to a fraud practised by the insolvent and deliberately refrained from availing himself of the remedy then open. But he made no move even after the composition had been refused and a fresh certificate meeting ordered and he delayed a year therefrom. The affidavit is silent as to the amount due at its date and the reason for the delay in taking action. None of the many creditors took steps to be associated with the move made by the appellant. If the insolvent had assets they vested in the assignee who could receive them for the benefit of all the creditors. The appellant by proving his claim had elected to take relief in the insolvency case.

What then could be gained by this move? He could exert pressure on the insolvent and so get undue preference or he might commit him to jail perhaps.

The learned Judge in the Court below stated in his order that the application under section 127 was not pressed, but the petition of appeal says it was not abandoned, and Counsel has devoted most of his attention to this application. The Judge refused the application under section 133 on the ground that it was contrary to public policy to allow the appellant, who had known all the facts and refrained from disclosing them for his own benefit, to re-open proceedings.

It is necessary to consider both sections 127 and 133. No case decided under section 127 was found by the Judge or has been brought to our notice nor have I been able to discover one. As a matter of first impression it strikes me that no provision is made in section 127 to move the

Court to have the certificate declared void. An order allowing a certificate is final and conclusive until revised under section 133. Provision is made in sections 129 and 133 to have the certificate annulled and cancelled. All that section 127 declares is that the certificate is in fact void, if the facts mentioned therein are proved. This would mean that on the insolvent opposing his certificate to any claim made against him these facts may be proved and the certificate would be of no avail to the insolvent. Section 127 is drawn from 12 and 13 Vict. C 106 s. 201. This was similar to 6 Geo. 4 C. 16 s. 130, and exactly like 5 and 6 Vict. C. 122 s. 38. Under the statute of Geo. 4, it was held that in an action against the bankrupt, where he pleads his certificate, there was no need to specially plead the facts but it was sufficient to join issue on the plea and give evidence, for by the statute his certificate, in such a case, was a nullity. (*Hughes v. Morley*[1].) The words in that statute were " no bankrupt shall derive any benefit from his certificate ". It seems to me that the application to Court was misconceived.

Besides the concealment must be after an act of insolvency or in contemplation of insolvency or with intent to defeat the object of the Ordinance. Under the statute 5 and 6 Vict. C. 122 s. 38 it was held that concealment of property rendered a certificate void, notwithstanding the bankrupt made a full disclosure before his last examination. (*Courtivron and Another v. Meunier* [2]). In that case the insolvent concealed boxes containing clothes, jewellery, &c. Pollock C. B. held that section 38 had reference to section 32 (our section 147) and must be read with the words " remove or embezzel ". Alderson B., Parke B. and Platt B. were of the same opinion and Parke B. remarked " It is unnecessary to decide whether the word ' concealment ' would be satisfied by the bankrupt not disclosing a full account of his estate and effects ". " Concealment " seems to me to refer to tangible assets. Section 127 seems to be concerned with an offence committed before the adjudication. Section 151 (5) which refers to property of any kind and to a subsequent period uses the words " cancel or make away with ". " Make away with " might be applied to intangible assets. Section 151 (5) does not render a certificate void or prohibit its issue. It seems, therefore, to contemplate something less serious than section 127.

Now, there is no proof that there was any concealment of property and the deeds referred to seem to have been executed by a Notary Public in pursuance of some agreement, between the heirs of the late Dr. G. P. Hay and a creditor or creditors of his. There is nothing to indicate, and it is not alleged, that the agreement was fraudulent or made in contemplation of insolvency or to defeat the object of the Ordinance. What is alleged is that the insolvent did not disclose to the Court his rights under the contemporaneous deed, but even if he did disclose them, the question would still remain whether he had concealed his rights in the way indicated in the section.

Besides there is no clear indication as to what his rights were. The deed itself was not annexed to the petition, and the alleged summary of its relevant provisions is quite unsatisfactory. The point would be

[1] *1 B. & A. 22.*

[2] *6 Exch. 74.*

whether the insolvent had assets at the time of his adjudication and up to the date of his certificate. The summary states that the insolvent's sister was empowered to sell all the 5 lands transferred to her and to pay Rs. 35,000. Meanwhile, presumably, the insolvent was to receive ⅓ of the rents "less various deductions". But there is no evidence there were any rents or what the deductions were or whether any balance remained. After the sale the insolvent was to have a life-interest in a ⅓ share of the properties remaining unsold and a life-interest in any investment made of a third of the balance remaining after payment of the debt specified. It would seem, therefore, that the insolvent merely had some contingent interests, which, if they are realizable, might or might not be available to the assignee.

In my opinion section 127 has no application to the present proceedings. Under it the Court does not cancel or recall the certificate, as it must do if it declares it to be void. The Supreme Court may do so under section 129, and under section 133 the Insolvency Court may re-open proceedings. The scheme of the Ordinance seems to provide for three safeguards, viz.: firstly, an application to the Insolvency Court to revise; secondly, an application to the Supreme Court; and thirdly, when neither is made the certificate might be nullified.

The provisions of the Ordinance render it extremely perilous to the insolvent to be other than frank in his dealings with his creditors, and the Court. Equally, the Court which is acting in the interests of the creditors, expects a high standard of conduct from them.

Turning to section 133, it says that the order of the District Court shall be final and conclusive and shall not be revised ordinarily. Finality is of the utmost importance once when an order has been made regarding the certificate. The Court is empowered to revise its order but only if it has *good and sufficient cause* to believe that its order has been obtained on false evidence or by the improper suppression of evidence, or has otherwise been fraudulently obtained. The application may be made by a creditor. It is the duty of the applicant to establish his right to have the proceedings re-opened by adducing good and sufficient cause. In my opinion the Court is not confined to considering only the suppression of evidence improperly made, but also whether in the circumstances it should re-open the proceedings. In the case of *Moule ex parte*[1] the Court refused to interfere to grant relief where there had been delay and where the petitioner was aware of all the circumstances. That case related to an application to annul an adjudication. This Court followed that principle in *Sedris v. Ramanathan*[2] and refused relief where the petitioner had not been diligent in procuring information.

As a matter of fact, the examination of the insolvent was not satisfactorily done. The creditors abstained from taking part. But even so the insolvent might have been questioned closely on the matters made important by the Ordinance. The Court was not misled by such evidence as it had in the insolvent's affidavit and there is nothing to show any evidence was improperly suppressed.

[1] *14 Vesey's Reports. p. 602.*

[2] *23 N. L. R. 315.*

I think the Court was within its rights in refusing an application by a creditor, who had not only delayed one year, but had also been guilty of conspiratorial silence regarding matters within his knowledge.

The appeal is dismissed.

HOWARD C.J.—I agree.

Appeal dismissed.