

1936

*Present : Moseley J. and Fernando A.J.*DE SILVA *v.* DE MEL.

D. C. Kalutara, 293.

Insolvency—Application to Supreme Court to recall certificate—Alternative remedy open to applicant—Application to District Court—Ordinance No. 7 of 1853, ss. 129, 133.

The Supreme Court will not entertain an application to recall a certificate under section 133 of the Insolvency Ordinance where it is open to the applicant to move the District Court under section 129 of the Ordinance for the same purpose.

In re M. A. Perera (5 N. L. R. 291) followed.

THIS was an application under section 129 of the Insolvency Ordinance for the recall and cancellation of the certificate of conformity issued to the respondent by the District Court of Kalutara.

M. T. de S. Amerasekera, for applicant.

S. J. V. Chelvanayagam, for respondent.

Cur. adv. vult.

November 16, 1936. FERNANDO A.J.—

The applicant applies to this Court under section 129 of Ordinance No. 7 of 1853 for a recall and cancellation of the Certificate of Conformity issued to the respondent in the District Court of Kalutara, and the grounds on which that application is made are set out in the petition dated January 11, 1936, and may be summarized as follows:—(i) The petitioner was a creditor of the respondent, and had obtained judgment against him in a sum of Rs. 2,877.66, but his name was not disclosed as a creditor by the respondent in his statement of assets and liabilities, with the result that the applicant had no opportunity to prove his debt or oppose the grant of a certificate to the respondent. (ii) The respondent has withheld from Court a full and complete list of his assets. (iii) The respondent has made a false declaration of his liabilities, in that certain persons whose names appear as creditors now say that they have no claim against the respondent. (iv) The District Court of Kalutara had no jurisdiction to entertain the insolvency proceedings.

At the argument, Counsel for the applicant stated that the respondent had carried on business within the jurisdiction of the District Court of Kalutara, and that Counsel did not propose to press the objection on that ground. Before proceeding with these objections, it is necessary to refer to an argument submitted by Counsel for the respondent, namely, that in the circumstances as set out in the affidavit of the applicant, the remedy is not by an application under section 129, which is to be used only in special circumstances. He pointed to section 133 which gives jurisdiction to the District Court to refuse or suspend a certificate already allowed upon application on proper material. It seems to me that this application could have been made by the applicant in the District Court of Kalutara and in view of the existence of that section,

it seems to me that he cannot apply to this Court under section 129. The remedy provided by section 129 will not lie, or at any rate this Court will not exercise jurisdiction under that section, where the applicant has another remedy. The judgment of this Court in *In re M. A. Perera*¹ is to the same effect. As Moncrieff A.C.J. said in that case even if the Supreme Court has power to entertain the application under section 129, it is more proper for the applicant to proceed under section 133.

Even if we are disposed to consider the application, I do not think the applicant has placed sufficient material before us to entitle us to recall the certificate issued to the respondent. With regard to the statement that the respondent failed to disclose the petitioner's name as a creditor, it is clear from the copy of the Balance Sheet in exhibit B that the name of the applicant's brother, G. A. de Silva, is mentioned as one of the creditors, and the debt due to him is said to be Rs. 2,877.66. It is clear from exhibit A that the applicant claimed this sum of money as an endorsee of certain cheques drawn by the respondent in favour of G. A. de Silva, and I see no reason why we should not accept the statement of the respondent that he did not realize that the applicant G. A. de Silva had become his creditor.

With regard to the contention that the respondent has made a false declaration with regard to his liabilities, the position of the applicant is that certain persons have been named as creditors who make no claim, and he refers particularly to the case of E. B. Creasy & Co., against whose name the balance sheet contains an item of Rs. 95. There is no explanation of this in the affidavit filed by the respondent, but I do not see what the insolvent stood to gain by adding this name and this amount to his liabilities, and I am not satisfied that the name of this creditor was inserted with real fraudulent intention.

With regard to the objection that the respondent had not disclosed all his assets, there seems to be some difference of opinion between the applicant and the respondent. The respondent, however, persists in the statement that he has no other property, and that even if the entries in the land register show some properties in his name, he has no claim to them, and that he has parted with his rights in them. Mr. Chelvanayagam for him contends on this point that all properties belonging to the respondent vest in the assignee under section 71 of Ordinance No. 7 of 1853, and that the assignee can deal with the property even after the allowance of the certificate. It is not alleged that the insolvent is concealing any property or has parted with it fraudulently, and in view of these circumstances, I do not think this is a matter which would justify a recall of the certificate that has been issued. For these reasons, I come to the conclusion that even if this Court has power under section 129, this is not a case in which that power should be exercised. The application is therefore dismissed, and the appellant will pay to the respondent the costs incurred by him in these proceedings.

MOSELEY J.—I agree.

Application dismissed.