APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1936
Nov. 17.

MAUNG SEIN DONE
v.
A.K.A.C.T.V. CHETTYAR AND OTHERS.*

Insolvency—Agricultural landowner—Loans to tenants—Rent and loan recovered annually in kind—Activities of owner of a "business"—Books of account of such business—Practice of landowners—Not usual and proper to keep books—Presidency-Towns Insolvency Act (III of 1909), s. 39 (2) (b).

Failure to keep proper books of account within s. 39 (2) (*b*) of the Presidency-Towns Insolvency Act is not proved unless it is shown that the nature of a business is such that it is usual and proper to keep certain books showing the transactions therein.

The insolvent was a big owner of agricultural land which he annually leased out to tenants. He gave them loans and at the end of the season he recovered his rent and loans in kind, and the paddy so obtained was stored and sold as opportunity offered. The only documents he would have would be the leases and the promissory notes of his tenants which were usually discharged annually. There was no evidence that persons in the position of the insolvent kept any other books of account.

Held, that the insolvent was carrying on business within the meaning of the Act, but having regard to the nature of the business and the lack of evidence that it was usual or proper to keep books in such business he could not be penalized for the default mentioned in s. 39 (2) (*b*) of the Act.

Ex parte Board of Trade. In re Mutton, 19 Q.B.D. 102; *Harris* v. *Amery*, 15 Ch.D. 247; *In re Wallis*, 14 Q.B.D. 950—*referred to.*

Doctor for the appellant.

Basu and *Krishnaswamy* for the creditors.

DUNKLEY, J.—This appeal arises out of an order of Braund J., sitting as the Insolvency Judge, dated the 9th July, 1936, refusing the discharge of the appellant, who is an insolvent. The creditors opposed the appellant's discharge on two grounds falling

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* Civil Misc. Appeal No. 86 of 1936 from the order of this Court on the Original Side in Insolvency Case No. 80 of 1935.

within the provisions of section 39 (2) of the Presidency-Towns Insolvency Act, namely, under clause (*e*) of that sub-section, that the insolvent had failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities, and under clause (*b*), that the insolvent had omitted to keep such books of account as are usual and proper in the business carried on by him and as would sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency.

A third ground has been raised before us on appeal on behalf of the opposing creditors, but as no mention of it has been made in the order of the learned Insolvency Judge it must be assumed that it was not pressed before him, although it was mentioned in the creditors' grounds of opposition. This ground falls under section 39 (*1*), that the discharge of the appellant must be refused because he has committed an offence under section 103 (*a*) (ii) of the Act in that he has kept false books of account. It is based on the admissions made by the insolvent that the books of account which he produced to the Official Assignee do not contain entries regarding many of his financial transactions. But the appellant has never set up that these books contained a complete account of all his financial dealings or that they revealed his true financial position, and there is no evidence that they were ever put forward as doing so, and the Official Assignee in his report has not suggested that the appellant committed any such offence. Consequently it cannot be said that the appellant deliberately kept false books, designed to conceal the true state of his affairs. He kept insufficient and incomplete books, but inaccurate books are very different from false books. This ground therefore fails.

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The learned Insolvency Judge held, and in my opinion, with due respect, rightly held, that the loss of the appellant's assets was due to the unprecedented fall in the price of paddy which occurred in the latter part of the year 1929 and continued for some years, and in fact still continues, and the corresponding and sympathetic fall in the value of agricultural land in this Province, and not to any reason for which the appellant can justly be held responsible. It is well known that agricultural land is now not worth more than one-quarter of its value at the beginning of the year 1929 and, as the learned Judge has pointed out, until the depression set in, the appellant's assets were more than sufficient to meet his liabilities, and those assets still existed at the time of his bankruptcy, in May, 1935, but were not worth more than 25 per cent of their former value owing to circumstances entirely beyond his control.

As regards the objection based upon clause (*b*) of section 39 (*2*), in order to bring him within the mischief of that section the appellant must, within three years immediately preceding his insolvency, have been carrying on a business and also have failed to keep such books of account as are usual and proper in that business. It is therefore necessary to consider what were the activities of the appellant during the three years prior to his insolvency. It is common ground that during this period he was engaged in leasing out his agricultural land to tenants, and making advances to his tenants on promissory notes at the beginning of each agricultural season to enable them to carry on their cultivation, and beyond that it appears that he was also making loans to other persons. As is the common practice with big landlords in this Province, at the end of each agricultural season, as soon as the crop was threshed,

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the appellant or his agent collected from each of the tenants the rent due (which was expressed in kind) and also, so far as possible, obtained repayment in kind of the debts due by the tenants for advances given during the season. The paddy so obtained was stored and sold as opportunity offered. It has been urged on behalf of the appellant that such activities by a landed proprietor do not amount to carrying on a business; that they are merely those of a private gentleman living on the income of his property; and reference is made to the case of *Ex parte Board of Trade. In re Mutton* (1). The provisions of section 39 of the Presidency-Towns Insolvency Act are almost exactly the same as those of section 28 of the English Bankruptcy Act of 1883 and section 26 of the Bankruptcy Act of 1914, and therefore we are rightly referred to English authorities as a guide to our decision. But I can find nothing in the case of *Ex parte Board of Trade. In re Mutton* (1) which can be construed as authority for the proposition of learned counsel for the appellant that a landed proprietor living on the profits of his land and the activities connected therewith cannot be held to carry on a business. On the contrary, the term "business" has frequently been held to be wider in its application than the term "trade." In my view, a man's business consists of the continuous series of activities which occupy his time, attention and labour and which are carried on with the intention of thereby gaining and continuing to gain his livelihood. [*Harris* v. *Amery* (2), *Smith* v. *Anderson* (3), *In re Wallis. Ex parte Sully* (4), *In re Griffin* (5), *Re Harrison: Ex parte the Official Receiver* (6), and *In re a Debtor* (7).]

(1) (1887) 19 Q.B.D. 102.
(2) (1865) 35 L.J. (C.P.) 89.
(3) (1880) 15 Ch.D. 247.
(4) (1885) 14 Q.B.D. 950.
(5) (1890) 8 Morr. Rep. 1.
(6) (1892) 10 Morr. Rep. 1.
(7) (1927) 1 Ch.D. 97.

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In *Harris* v. *Amery* (1) (at page 92) Willes J. observed :

"It has never been doubted that farming was a business though it could not properly be called a trade.",

and in *In re Wallis. Ex parte Sully* (2) it was observed that if farming is carried on with a view to profit as a means of livelihood it would be a business. During the period in question, that is, 1932 to 1935, the appellant was letting his land to his tenants, making advances to them, collecting their crops in payment of his rent and repayment of advances, and selling the produce, with the intention of thereby gaining and continuing to gain his livelihood. I have no hesitation in concluding that the learned Insolvency Judge was right in holding that the appellant was carrying on a business.

But that single conclusion is not sufficient to bring him within the mischief of clause (*b*) of section 39 (2). It is further necessary to find that he omitted to keep such books of account as are usual and proper in that business. Lord Esher M.R. said, in *Ex parte Board of Trade. In re Mutton* (3) (at page 106) :

"If there are no usual books in the business which the bankrupt carries on, you cannot bring him within the words 'such books of account as are usual and proper in the business carried on by him' ",

and later on

"In my opinion the meaning is, that a man in business must keep his books properly, but if his business is one in

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(1) (1865) 35 L.J. (C.P.) 89. (2) (1885) 14 Q.B.D. 950.
(3) (1887) 19 Q.B.D. 102.

which it is not usual to keep any books, * * * then he need not keep any books at all."

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With these observations I respectfully concur.

Now, what are the books which are usual and proper in the business carried on by the appellant between the years 1932 and 1935? There is on the record no evidence as to the usual and proper books in a business of this kind. Consequently the conclusion must be that there are no books which are usual and proper. The appellant was carrying on a business similar to that carried on by every large landed proprietor in this Province, and yet, so far as my experience goes, I have never heard of such a landed proprietor keeping any books of account which could be properly so called. Their business papers usually consist of a bundle of yearly leases and a number of promissory notes, and ordinarily these documents are annually discharged by the tenants. These are sufficient to enable the landlords to calculate their yearly dues from their tenants; they serve the purpose and no other books are necessary and ordinarily none are maintained. So far as this Province is concerned, in my opinion there are no books of account which are usual and proper in the business carried on by a large proprietor of agricultural land. For this reason I am of opinion that clause (*b*) of section 39 (2) of the Act has no application to the case of the appellant.

Nevertheless, under the circumstances of this particular case it cannot, in my opinion, be held that the appellant is entitled to his immediate and absolute discharge. It appears from the evidence that he became a landed proprietor on a large scale in or about the year 1927, and from that time it is clear that he spent money in the most reckless

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manner. According to his own statement, between that date and the date of his bankruptcy he had spent no less than Rs. 90,000 on lawyer's fees in connection with litigation with other members of his family, and he had owing to him, on advances made to tenants and to other persons without any security, a sum of about one lakh of rupees. Although he was successful in this litigation he has never recovered anything towards his costs, and as regards the advances to his tenants and loans to other persons he was either unable or unwilling to recover anything. The position was that before the depression set in, although his assets were more than equal to his liabilities, they were barely sufficient to cover them, and therefore when the depression in the paddy trade occurred he had no reserve of assets from which he could meet his liabilities. Moreover, from his own statements it would appear that he has exaggerated to a considerable extent much of his expenditure, and assuming that he honestly believed that he had spent the moneys which he stated that he had spent, then his financial position should have appeared to him to be worse than it actually was, and it is difficult to avoid the conclusion that for some time he continued to carry on his business knowing that he was not in a position to meet his liabilities.

Under these circumstances I consider that the order of the learned Insolvency Judge, refusing the discharge of the appellant, should be varied by an order suspending his discharge for a period of two years from the date of this judgment. There will be no order as to the costs of this appeal.

GOODMAN ROBERTS, C.J.—In my opinion it is clear from the wording of the section that failure

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to keep proper books of account within section 39 (*2*) (*b*) of the Presidency-Towns Insolvency Act, 1909, is not proved unless it is shown that the nature of a business is such that it is usual and proper to keep certain books showing transactions therein. When a person is carrying on a business respecting which no evidence is offered or forthcoming that the keeping of certain books is usual and proper, the result must be concluded to be that it is unusual and unnecessary for him to keep books. The production of books of account by the insolvent in such a case is a work of supererogation: he need not produce them, and, if he does produce them, then in the absence of actual fraud they are not open to criticism since they are merely in the nature of private notes in relation to a business in which there is no evidence that it is usual or proper to keep books at all. I accordingly agree that in this case the insolvent ought not to be penalized by reason of any default mentioned in section 39 (*2*) (*b*) of the Act. But having regard to the general course of his conduct and the nature of the liabilities he continued to incur I agree that his discharge should be suspended for two years.