

## APPELLATE CIVIL.

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

1938

Nov. 16.

AH CHONE

v.

P.A. MOHAMED ALI AND OTHERS.\*

*Insolvency—Undischarged insolvent permitted to trade—Right of Official Assignee or receiver over person supplying insolvent with materials to trade—Surplus profits only vest in the Official Assignee or receiver—Provincial Insolvency Act, s. 28.*

If the Official Assignee or Receiver or creditors permit an insolvent, whose discharge has been refused, to trade they cannot claim upon the person who may be allowed to supply him with stock-in-trade, materials or cash for the purpose of carrying on his business to have those assets taken and applied for their own benefit in the insolvency. They are only entitled to the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid.

*In re Rogers ; ex parte Collins, (1894) 1 Q.B. 425, referred to.*

If a man having a lien stands by and lets another make a new security, he shall be postponed.

*Engelbach v. Nixon, 44 L.J. (C.P.) 396 ; Moses v. Benjamin, 8 M.L.A. 339 ; Troughton v. Gitley, 2 Amb. 630 ; Tucker v. Hernaman, 4 De. G. Mac. & Gor. 395, referred to.*

*P. K. Basu* for the appellant. The insolvent applied to the Court for permission to engage in trading activities, and the Court said there was nothing to prevent him from doing so, but the earnings were to be paid into Court. The Official Assignee or Receiver gets only the right and title of the insolvent, subject to all equities. The new debt incurred for the purposes of trading is not provable in insolvency, and the appellant's claim has priority. Only the surplus earnings would vest in the Official Receiver, and he is estopped from setting up his title adversely to subsequent creditors. See Sir Dinshah Mulla's Law of

\* Civil Misc. Appeal No. 35 of 1938 from the order of the District Court of Amherst in Insolvency Case No. 8 of 1935.

Insolvency, p. 372 ; *Troughton v. Gitley* (1) ; *Moses Kerakoose v. Brooks* (2) ; *Tucker v. Hernaman* (3) ; *Engelbach v. Nixon* (4).

1938  
AH CHONE  
v.  
MOHAMED  
ALI.

*K. C. Sanyal* for the respondent. The order of the Court does not authorize the insolvent to borrow money so as to give a prior claim to a creditor. The surplus earnings to be deposited mean all earnings after deducting expenses for carrying on the trade. No question of estoppel arises ; and the earnings vest forthwith in the Official Receiver. The appellant can only claim what is left after satisfying the creditors. The principle of the English law of estoppel does not apply in the face of the order of the District Court. See Sir Dinshah Mulla's Law of Insolvency, pp. 360—367, paragraph 536 ; *Kala Chand v. Jagannath* (5) ; *Ma Phaw v. Maung Ba Thaw* (6).

ROBERTS, C.J.—This appeal comes before us in the following circumstances. One Ah Yin was adjudged insolvent under the Provincial Insolvency Act on the 11th April 1935. His discharge was refused in January the following year, and in September 1936, being desirous of carrying on business as a contractor, he made an application to the District Judge of Amherst in order that his position might be ascertained and regularized. Thereupon, on the 12th September 1936, the learned District Judge made a general order in the following terms :

“ Mr. Rahim files an application for an order to deposit one-fifth of the nett income into Court. No such order can be made now as discharge has been refused, no conditional discharge being granted with any stipulation as to future earnings. There

(1) 27 E.R. 408.

(2) 8 M.I.A. 339.

(3) 4 De. G. Mac. & Gor. 395.

(4) 44 L.J. 396.

(5) 54 I.A. 190.

(6) I.L.R. 4 Ran. 125.

1938

AH CHONE  
v.  
MOHAMED  
ALI.

ROBERTS,  
C.J.

is no prohibition against the insolvent undertaking work, but he will be liable to account for all his earnings and pay the surplus into Court after necessary expenditure for the subsistence of himself and his family."

After this order had been made the insolvent went to the present appellant Ah Chone to whom he disclosed the position and to whom he showed the order and obtained advance from him whereby to carry on his business as a contractor. When the bills came one of the creditors moved for payment into Court, and it is now sought to say that the words "account for all his earnings" in the order of the learned District Judge must mean "account for all his gross receipts from all sources", and that all property acquired by him at any time after the date of his adjudication and before his discharge, by reason of the words of the Provincial Insolvency Act, vests forthwith in the receiver. I notice in the judgment of the learned District Judge an observation that even if the insolvent created a charge in favour of his creditor the latter would have no remedy in the insolvency Court. This conclusion was arrived at by reason of the fact that the relevant authorities were not cited to the learned District Judge.

It is clear from a long line of English cases that if a man having a lien stands by and lets another make a new security, he shall be postponed. Those were the words of Lord Camden in *Troughton v. Gitley* (1) and the same principle was laid down in *Tucker v. Hernaman* (2). The English authorities have been applied in the case of *Moses Kerakoose v. Benjamin Brooks* (3) in which Lord Kingsdown, who delivered the judgment of the Board, dealt with the then Indian Statute (11th and 12th Vict. c. 21) under section 7 of

(1) 2 Amb. 630.

(2) 4 De. G. Mac. & Gor. 395.

(3) 8 M.I.A. 339.

which the assignee obtained rights over the insolvent's property. Another case which is in point is that of *Engelbach v. Nixon* (1). And the cases which I have cited have never been seriously questioned. Again in the case of *In re Rogers : ex parte Collins* (2) it is clear that the distinction which was discussed there between the personal earnings of an insolvent and the profits of his trade was one between nett earnings and nett profits. It has never been at any time suggested that if the Official Assignee or creditors permitted the insolvent to trade, they can claim upon the person who may be allowed to supply him with stock-in-trade, materials or cash for the purpose of carrying on his business to have those assets taken and applied for their own benefit in the insolvency. Their object in allowing him to trade must be taken to be with a view to obtain some advantage out of the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid.

Accordingly, in my opinion, the decision of the learned District Judge was wrong, and this appeal must be allowed and the Judge directed to deal with Ah Chone's application upon its merits, his claim, if substantiated, being one which constitutes a prior charge over any claim by the receiver. Costs seven gold mohurs.

MOSELY, J.—I agree.

1938

AH CHONE  
v.  
MOHAMED  
ALI.  
ROBERTS,  
C.J.

(1) 44 L.J. (C.P.) 396.

(2) (1894) 1 Q.B. 425.