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ELPINIKI EV. CHRYSOSTOMIDES v. THE OFFICIAL RECEIVER (TRUSTEE OF THE ESTATE OF ZENON TH. CHRYSOSTOMIDES AND EVAGORAS TH. CHRYSOSTOMIDES, BANKRUPTS).

[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

ELPINIKI EV. CHRYSOSTOMIDES, *Appellant*,

v.

THE OFFICIAL RECEIVER (TRUSTEE OF THE ESTATE OF ZENON TH. CHRYSOSTOMIDES AND EVAGORAS TH. CHRYSOSTOMIDES, BANKRUPTS), *Respondent*.

(*Civil Appeal No.* 3688.)

Bankruptcy Law, 1930, *sec.* 87—*Bankruptcy Rules* 190, 191—*Courts of Justice Laws*, 1935 *to* 1940, *sections* 6 *and* 16 (6)—*Power in Bankruptcy of District Court Judge sitting alone.*

On a sale by auction of property belonging to a bankrupt's estate one of the members of the Committee of Inspection, having obtained leave of the Court, consisting of a single District Judge, bid for and purchased at the sale some immovable property at a price of £2,100. This application was brought by a creditor in the bankruptcy to set aside the sale on the ground that a member of the Committee of Inspection could not purchase property of the estate except by leave of the Court, and that, as the value of the property purchased exceeded £100, a single District Judge had no jurisdiction to make the order giving leave to purchase.

Held: Section 16 (6) of the Courts of Justice Laws, 1935-1940, empowers every member of a District Court, notwithstanding the amount in dispute or value of the subject matter, to make any order in any action that does not finally dispose of the action on its merits. By section 87 of the Bankruptcy Law, 1930, the District Courts are given all the jurisdiction and powers in bankruptcy matters that they have on the trial of a civil action. Bankruptcy Rules 190 and 191 are separate rules and not to be read together; and, under Rule 190, the District Judge had power to make the order appealed against, as it did not dispose of the bankruptcy on its merits.

Appeal from an order of the District Court of Limassol sitting in Bankruptcy.

Ch. Mitsides for the appellant.

Sir P. Cacoyannis for the respondents.

J. Potamitis for an interested party.

The facts of the case are set forth in the judgment of the Court, which was delivered by the Chief Justice.

CREAN, C.J.: This is an appeal from an order of the District Court of Limassol sitting in Bankruptcy. The order was made on the 6th July, 1940, and by that order an application of the appellant to set aside the sale of property of the bankrupts to one Hercules Michaelides was dismissed.

The bankrupts Zenon Th. Chrysostomides and Evagoras Th. Chrysostomides were adjudicated as far back as the year 1932, and the trustee is still in the process of realising their estate for the benefit of the creditors. From what counsel states their liabilities amounted to £10,000 and their assets £15,000, which facts make one wonder why they were made bankrupts.

The appellant is the wife of one of the bankrupts and by far the largest creditor of the estate.

A sale by public auction of the bankrupts' property known as the Evdhimou Chiflick was decided on by the Committee of Inspection and the trustee on the 25th January, 1940, and the sale was fixed for the 25th February, 1940. This property is situate in three different places—Evdhimou, Paramali and Prastio—and consists of 200 different pieces of land.

The appellant filed an application opposing the sale, and an interim order was made on the morning of the 24th February, 1940, postponing the sale on the appellant giving security for £400 before 1 o'clock of the same day. That security was not furnished within the given time by the appellant and so the sale by auction proceeded and the property was sold on the following day to Hercules Michaelides for the sum of £2,100.

Reasons were given by the appellant why the sale should not take place on the 25th February as advertised, and one of those was, that February was a bad time to sell property such as this, another was, that the property should not be sold *en bloc* but in separate parcels.

On the 17th April, 1940, a further application was filed by the appellant. This time, for a declaration that the sale to Hercules Michaelides for £2,100 be declared null and void and that it be set aside. An affidavit in support of this application was filed by her, and in that affidavit she says that the real value of the properties sold is much above the sum of £2,100, the price for which it was knocked down to Hercules Michaelides. And she further says that as she had an interim order of the Court postponing the sale it should not have been proceeded with and particularly that the property should not have been sold to Hercules Michaelides as he was a member of the Committee of Inspection and therefore had conflicting interests in the matter.

This application came before the learned President, District Court, Limassol, and the District Judge on the 6th July, 1940, and after hearing evidence and counsel for all parties interested, it was dismissed, and the reasons therefor were given by the President of the District Court.

This appeal is from that decision, and as to the ground that the sale should not have been held on the 25th February, 1940, because an interim order was made postponing it on the appellant giving security, we think there is not much substance in it. The order postponing the sale was conditional on the appellant fulfilling the condition before a certain time ; that condition was not fulfilled by her : Consequently, we take the view that it was quite regular for the sale to proceed as advertised by the trustee.

It was held by the District Court that the appellant was not aggrieved by the acceptance by the trustee of the offer of £2,100 of Hercules Michaelides, and that in all the circumstances of the case such an offer was a reasonable one. There was evidence to support these findings, therefore, we are not inclined to interfere with them, as the learned judges were in a better position to decide these issues, with the witnesses before them, than we are with only the written record of the case before us.

The last ground of appeal and the substantial one is, that Hercules Michaelides was precluded from buying this estate, because he was at the time of sale a member of the committee of inspection of the bankrupts' estate and therefore in a fiduciary relation to it. To a certain extent, he must be considered a trustee of the estate for the general body of creditors, therefore by law he is bound not to do anything which places him in a conflicting position or in a position which has a tendency to interfere with his own duty in discharging the trust,

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It is said by Lord Herschell in the case of *George Bray* v. *John Rawlinson Ford* (1896 Appeal Cases, p. 51) that "It is an inflexible rule of a Court of Equity that a person in a fiduciary position is not entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear that this rule is founded upon principles of morality, but is rather based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect".

This rule does not, however, go the length of avoiding all transactions between parties standing in a fiduciary relation and those towards whom they stand in such relation. The law seems to be that if the purchaser can show that the transaction is fair, then, it will not be avoided. But the burden of proof lies in all cases upon the party who fills the position of confidence.

The Bankruptcy Rules of 1931 have regard to this principle of law, as section 172 says, "Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the official receiver or any other creditor".

If therefore a member of the committee of inspection shews that he obtained leave of the Court to purchase before he did so, then the sale to him will not as a rule be avoided. Hercules Michaelides, the purchaser, got such leave of the Court; then *prima facie* the sale to him should not be interfered with. But it is argued that as the leave of the Court was given by a District Judge sitting alone, such cannot be considered an order of the Court as the Bankruptcy Law, 1930, sets out that the Court as contemplated by section 87 thereof must include the President, District Court, and therefore the order was granted without jurisdiction, and so a nullity.

In this argument the Bankruptcy Law of 1930 was referred to by counsel for the appellant. Section 87 of this law says, "The Courts having jurisdiction in bankruptcy shall be the District Courts and in the exercise of such jurisdiction shall subject to the provisions of this Law have all the powers conferred on District Courts as in the trial of a civil action".

From the wording of this section it is said that only the Court as constituted for the trial of an action can make any order in bankruptcy, and as a trial is the conclusion by a competent tribunal of questions in issue in legal proceedings, whether civil or criminal, then only a District Court as constituted for a trial could make the order appealed against.

Following that argument it is submitted that only a Court constituted as for a trial, that is to say, by the President, District Court, and a District Judge could have made this order effectual as the amount involved in the transaction is £2,100.

The respondents rely on section 2 of the Cyprus Courts of Justice Order, 1927, which says, " ' District Court ' shall mean the President of a District Court sitting with one or two District Judges, or alone, or a District Judge sitting alone ".

And on sections 6 and 16 (6) of the Courts of Justice Laws, 1935 to 1940, which are :—

" 6. A District Court shall consist of the President of the District Court and such District Judges and Magistrates as the Chief Justice may from time to time direct."

" 16.—(6) Every member of a District Court shall, notwithstanding anything in any other Law contained and notwithstanding that the amount in dispute or the value of the subject matter is in excess of the jurisdiction conferred upon him by this section, have power . . . to make any order in any action not disposing of the action on its merits."

The respondents also rely on Bankruptcy Rules 190 and 191 which read :—

" 190. Any order in bankruptcy not disposing of the bankruptcy on its merits may be made by one judge of the Court."

" 191. Any judge of the Court sitting alone shall have all the powers of the Court to hear and determine any proceeding in bankruptcy involving or relating to an amount or property not exceeding £100 in value."

In section 16 (6) of the Law of 1935 it is provided that a member of the District Court shall have power to make any order in any action not disposing of the action on its merits, notwithstanding anything in any other law contained. And on this it may be argued that notwithstanding anything in the Bankruptcy Law of 1930, and in particular anything in section 87 thereof, one Judge can make an order such as was made in this case.

In our opinion, however, this argument is not sound because of the rule " *Generalia specialibus non derogant* ". In other words as the Bankruptcy Law of 1930 was passed to carry out a particular object, no subsequent statute in merely general terms will override the special powers or enactments in it. And if section 16 (6) of the Courts of Justice Law, 1935, be taken in its literal meaning then a Magistrate can make any order in Bankruptcy which does not finally dispose of the matter and as to this we do not know if it were intended to give Magistrates such power. If the rules 190 and 191—which are undoubtedly two separate and distinct rules with no sign that they are to be read together—are *intra vires* then it is clear that the District Judge had the power to make the order giving Hercules Michaelides leave to bid as the order does not finally close the bankruptcy.

We must admit there is a certain amount of conflict between the different relevant sections, and that it could be argued that the wording of section 87 indicates that the District Court as constituted for the trial of an action is the only Court that can make an order in a bankruptcy matter.

From the rule 190 it is seen that one judge can make any order which does not dispose of the bankruptcy on its merits. The order appealed from does not dispose of the bankruptcy on its

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merits. In our opinion it is only one step in this bankruptcy, which has been moving slowly and gradually towards its end since the year 1932.

Section 108 of the Bankruptcy Law gives the Governor with the advice and assistance of the Chief Justice power to make rules for carrying into effect the objects of the law, and it is argued that it would not be a correct interpretation of that section to say that a rule such as rule 190 can be made under it. As to this argument it has to be remembered that very often the statute is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the persons authorized to do so by the statute.

The law as to Bankruptcy matters which has been discussed in this case could be considered as a framework ; for some of the sections undoubtedly need filling up by rules. So, if the framers of the rules expand the working of section 87 it cannot be said it is not within the scope of the authority given by the law to make such a rule if the rule making authority thinks it is for carrying into effect the objects of the law.

We think that the case of *Guarantee Trust Co. of New York* v. *Hannay & Co.* (1915 (2) King's Bench Division, p. 563) is of much assistance in deciding whether rule 190 is *ultra vires*. In this case Pickford, L.J., in his judgment, we think, makes the position clear as to what can be done by a rule of Court and what cannot be done.

The question in this case is whether rule 190 is *ultra vires*. And as the statute is worded in such a way that it can be argued that only the Court with the President as a member of it has jurisdiction to make the order the words of Pickford, L.J., seem to be very relevant to the above question. His Lordship says, " The word ' jurisdiction ' and the expression ' the Court has no jurisdiction ' are used in two different senses which I think often leads to confusion. The first, and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, *i.e.*, that although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances ".

If a rule adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is *ultra vires*. But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances, it is according to the above decision only dealing with practice and procedure and is *intra vires*.

For instance, if a bankruptcy rule prescribed the doing of some act which is peculiarly within the jurisdiction of the Admiralty Court and totally outside the jurisdiction of the Court of Bankruptcy, that rule would be *ultra vires*. But if the rule relates to the process, practice and mode of pleading to make or guide the *cursus curiae* and regulate the proceedings in a cause within the walls or limits

of the Court itself, then the rule would appear to be *intra vires* as a power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction.

The rule 190 attacked in this case does not involve or imply any power to alter the extent or nature of the jurisdiction of the Bankruptcy Court. It regulates how the Court shall be run, and if it has been deemed expedient for the better running of the Court that a single judge should hear applications which do not dispose of the whole case on its merits, that, in our opinion, appears to be within the powers of the rule making body and so the rule should be considered *intra vires*.

Apart from the rules, and apart from the different statutes referred to, it seems to us that we are mainly concerned with the action of Hercules Michaelides in purchasing part of the bankrupts' estate when he was a member of the Committee of Inspection of that estate. And if the facts relating to that purchase shew that he infringed the inflexible rule of the Courts that a person in a fiduciary position must not make a profit out of the estate of which he is trustee then the sale to him ought to be set aside.

The evidence shews he obtained the leave of a judge of the Court to bid at the sale, and even if that leave given by the judge were not within the judge's power, the purchaser complied with the spirit of the rule, because by applying for leave of the Court and obtaining what he thought was necessary he complied with the essential of the rule by disclosing openly to the Court that he proposed to bid for the property.

In addition to leave of the Court being given notice of the application for such leave was given to the Official Receiver and he signified his assent to Hercules Michaelides bidding at the public auction. Having done all this, it is impossible for us to say that the purchaser has committed a breach of trust or offended in any way against the above inflexible rule of equity, and for that reason and the other reasons given, the appeal should, in our opinion, be dismissed with costs.