1929.
Dec. 18.
—
IOANNIDES
v.
HALIL.

[BELCHER, C.J., DICKINSON AND SERTSIOS, JJ.]

J. P. IOANNIDES AND E. THEOPHANIDES (SYNDICS IN THE BANKRUPTCY OF HAJI FEHMI HASSAN)

v.

MUSTAFA HAKKI HALIL.

Bankruptcy—Agreement between land-owner and farmer—Bond—Two documents evidencing different parts of one transaction—Rights of syndics.

A land-owner entered into a share-farming agreement in writing, and on the same day and as part of the same transaction gave the working partner a bond for cash then advanced by the latter, the bond (but not the share agreement) containing a provision for deduction of the bond debt from the proceeds of the crop. Shortly afterwards the land-owner became bankrupt. The syndics claimed the share of the bankrupt in the farming without deduction of the bond debt.

Held, that the real agreement though contained in two separate documents was one and indivisible and that the working partner was entitled to deduct the bond debt before paying over to the syndics the balance of the bankrupt's share in the produce of the farming.

Appeal by defendant from judgment of District Court of Nicosia–Kyrenia (Nicosia No. 320/28).

Behaeddin for appellant: There was evidence of a pledge of the seed, and in any case appellant must be allowed to set-off what respondent owes on the bond from his half-share of the grain when threshed. The syndics cannot take the benefit of the partnership and refuse its burden

Triantafyllides for respondents: I say no security was created. Appellant verified deliberately as an ordinary creditor. There can be no assignment of a partnership share so as to create a security: in this case the goods were not yet in existence.

The judgment of the Court was delivered by the Chief Justice.

JUDGMENT:—

BELCHER, C.J.: This appeal arises out of a share-farming agreement, reduced to writing, made between a land-owner and the appellant, and of a bond in customary form given on the same day by the land-owner, who later became bankrupt, to the appellant. The partnership agreement makes no mention of the loan, but on the other hand the bond does refer to the partnership agreement, for it says that the amount (£59) is to be paid out of the produce of the partnership grown in the first year, and if the produce is insufficient the land-owner is liable to be sued for whatever balance may remain outstanding.

From the evidence given in the District Court it seems proper to infer that the bond and the partnership deed evidence different parts of one set of inter-related transactions. The land-owner owed a debt of £100 to one Yiorghallides and was being pressed for it: the appellant found the money for him by agreeing to buy some assets of the land-owner for £41 and to lend him the other £59, while he intended to secure himself as to the latter by the farming agreement out of whose proceeds he would deduct his debt.

The bond on a first reading suggests that the parties meant to treat the £59 as a partnership debt deductible before the equal division into half shares of the produce which the other agreement provides for, but this is negatived by the purpose to which the money was put and by the clear intention that the land-owner should remain solely liable to his partner for any balance of the £59 which could not be met out of the crop.

Pursuant to the share-farming agreement the land-owner gave the necessary seed to the appellant: the crop was sown, and either during or just after the sowing the land-owner became bankrupt. The appellant put in a proof for his £59 as for an unsecured debt, but later, claiming that the seed had been given him by way of a pledge, refused to hand over the bankrupt's half share of the produce when harvested.

The syndics sued for the share in kind, and the District Court, on the question of pledge or not, which was all that was argued before it, held there was no pledge, and gave judgment for the syndics.

As to the facts, we think the Court below was right in finding there was no pledge, for the land-owner was already bound by agreement to hand the seed to the appellant and as it was intended to sow the seed at once the subject-matter would simultaneously disappear, for once the seed went into the ground appellant lost his individual possession of it (if he had such before) and it became part of the partnership assets, and subject to the partnership agreement and to nothing else. Nothing is said about any pledge in either document, and the appellant's subsequent conduct was inconsistent with its existence.

We think, however, that the arrangement for deduction of the debt from the produce has been shown to be an essential part of the real partnership agreement between the parties, though expressed in a separate document. A question of law, therefore, at once arises, whether the bankruptcy prevents the carrying out of the original intention: that is, are the syndics entitled to avoid the effect of what was probably the vital provision (looking at the agreement as a whole) for the appellant? This question

1929. Dec. 18.

IOANNIDES v. HALIL.

was not argued except so far as it arose on the unsustainable defence of pledge, and we should not decide it on appeal if we thought that sending the case back would produce any more facts; but there is nothing to suggest that we have not all the facts before us, and in the circumstances we must decide the legal question and give what appears to us to be the proper judgment.

In our opinion no share which the bankrupt could have claimed as his arose till the £59 had been provided for. It is as if the agreement had been put in this way: the land-owner's share shall be ½x (x being the unknown value, that of the crop) minus £59, and the appellant's ½x plus £59, with retention of one partner's liability to the other for any sum by which a half-share might fall short of £59. The partners that is to say appear on the first agreement to be equally interested in the result of the crop, but the bond makes it clear that they are not. Had the £59 represented, not a debt, but a difference in agreed valuation of what the parties were contributing in land, seed, and labour, respectively, it is obvious that to take £59 worth from the share of the maker of the less valuable contribution after harvest and add it to the other would be the simplest method of making the adjustment. In such a case if the land-owner had become bankrupt the syndics could have had no claim, and it can make no difference that the cause of inequality in distribution is a debt incurred as an integral part of the agreement.

The matter cannot perhaps be treated as one of set-off, for the partnership contemplated a division in kind, not cash, but the principle is the same. In English law set-off is allowed in bankruptcy by Section 31 of the Bankruptcy Act, 1914, in the case of mutual dealings. The Ottoman Commercial Code is silent on the subject: and although in France set-off is not allowed in bankruptcy as a general rule (by application to the Code de Commerce of the provision of Article 1298 of the Code Civil) we find that Lyon Caen, Vol. VII., p. 189, para. 217, states that the rule would be productive of inequitable results if applied rigorously where one is dealing with credits and debts due to a connected cause. Here the appellant gave his labour, which was his contribution to the partnership, on the faith that he in turn would receive what he bargained for as part of the land-owner's contribution, and the syndics should not be allowed to take the benefit while refusing to pay the consideration, for in essence the partnership contract was one and indivisible. There was no other way, having regard to the bankrupt's financial position (which was known to the appellant beforehand), in which appellant could get his money back and it was perfectly open to the parties to enter into an executory contract of this

kind which would bind the syndics as much as it did the bankrupt himself, more particularly as by their conduct they acknowledged its existence and must be taken to have ratified it.

Lodging the proof of debt did not prejudice the appellant's position. He filed his claim before the crops were harvested. They might be a total failure, and he must provide for the possible objection to verification of his debt, the amount of which was uncertain and contingent upon the value of the crops, that the proof had not been lodged in time.

As to costs, the appellant chose to set up a defence (that of pledge) which he must have known to be baseless, and in the circumstances we think he should be left to pay his own costs. In allowing the appeal, therefore, we make no order as to costs.

Appeal allowed without costs.

[BELCHER, C.J., THOMAS AND FUAD, JJ.]

POLICE

v.

MUSTAFA SALIH.

Criminal Procedure—Magisterial Court—Conviction of offence not charged—Powers of Supreme Court—Law 12 *of* 1929, *Sections* 14 *and* 20: *C.C.J.O.*, 1927, *Clause* 101.

Accused was charged before a Magisterial Court with theft from the person (C.C. Code, Article 256 (*a*)) but was convicted of simple theft (Article 252) which offence was disclosed by the evidence but not charged.

Held, that the conviction was illegal within the meaning of Law 12 of 1929, Section 20 (1), and must be set aside: but that the Supreme Court had power under Section 20 (4) *ib.* to find accused guilty of simple theft.

Held, further, that a convicted person who is entitled to appeal under C.C.J.O., 1927, Clause 101, is not debarred thereby from applying to have the judgment enquired into under Section 20 (1).

Application to enquire into judgment of Magisterial Court (Nicosia No. 8717/29).

Behaeddin for applicant.

Pavlides, Crown Counsel, for the Crown.

The judgment of the Court was delivered by the Chief Justice.