

In re STUART FINLAY-BISSETT (in Bankruptcy).

HIGH COURT CIVIL CAUSE No. 26 OF 1939.

Meaning of salary or income in section 51 subsection (2) of the Bankruptcy Act, 1914.

Where a person is employed at remuneration of so much a shift and so much for overtime this is not salary or income under section 51 subsection (2) of the Bankruptcy Act, 1914, and consequently no order can be made for payment of part of this remuneration under the section. See also *The Official Receiver v. Stuart Finlay-Bissett*, p. 227 *ante*.

O'Donovan, Registrar: At the conclusion of the Public Examination of the above-named bankrupt on the 20th December, 1939, and as a consequence of certain information elicited from him during that examination the Official Receiver applied for an Order under section 51 subsection 2 of the Bankruptcy Act, 1914, for the payment of £3 per month from the salary or income of the bankrupt and in addition thereto to one-half of whatever sum the bankrupt earned as remuneration for overtime work.

Section 51 subsection 2 reads as follows:

“Where a bankrupt is in receipt of a *salary or income* other than as aforesaid (i.e., as an officer of any army or navy, or an officer or clerk, or otherwise employed in the service of the Crown) or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the Court, on application of the trustee shall from time to time make such orders as it thinks just for the payment of the salary, income, half-pay, pension, or compensation or any part thereof to the trustee to be applied by him in such manner as the Court may direct.”

The bankrupt is employed as a fitter by the Mufulira Copper Mines, Ltd. at Mufulira and according to the evidence adduced at his Public Examination he is paid for each shift worked and usually works twenty-six shifts per month for which he receives approximately £37 10s. 0d. or about 25s. per shift. He is also paid for any overtime work performed. This overtime varies, but normally amounts to from twenty to thirty hours per month and depends entirely upon the existence of those circumstances which render the performance of overtime work necessary. He further states that he does not receive any wages if he is ill or does not attend work. He consented to an order for payment of £2 10s. 0d. per month plus one half of his overtime remuneration.

At the time of the application the Court felt some doubt as to whether the Order asked for came within the scope or provisions of section 51 (2) of the Bankruptcy Act, as it appears questionable whether the bankrupt's earnings, either from shifts or overtime work performed, are, in fact, salary

or income within the meaning of the section referred to above. The Official Receiver has contended that orders against a bankrupt employed in circumstances similar to those in the present case have frequently been made, both by this Court and by the High Court at Ndola. I have referred to those cases and find this to be so, but I neither feel myself bound to follow the procedure adopted in those cases, nor to abide by what apparently has become established practice.

Whilst no precise definition of the words "salary or income" has been formulated the meaning of the term has been made abundantly clear in a series of cases. I propose to refer to four of those cases which appear to me to put the matter beyond doubt. In case of *Ex parte Benwell: In re Hutton* 14 Q.B.D., where the Court was dealing with the future earnings of a professional man, BRETT, M.R. at p. 301 states as follows:

"Then here is the general word 'income'. The rule is that general words added to particular words do not include everything that would come within them according to the literal meaning of the English language, but are limited to things *ejusdem generis* with those things which have been previously mentioned.

Income, therefore, must mean 'income' in the nature of a 'salary'. The question is whether that which a man earns by the exercise of his professional skill and which is dependent upon the accident whether people come to consult him or not, and upon whether he chooses to be consulted, is income in the nature of salary. It is only necessary to state the case to show that it is not."

In the same case LINDLEY, L.J. stated the law in the following words:

"It is obvious that he (the bankrupt) could defeat the Order by declining to see any patients. Whether it would or would not be in his interest to do so is immaterial. It appears to me that income of this nature cannot be impounded under section 90."

The decision of the Court in *Ex parte Lloyd* (1891) 2 Q.B.D., p. 231, in my view answers the point at issue completely. That was a case in which the trustee sought an order for the payment of part of the wages of a working collier for the benefit of his creditors. In refusing the order CAVE, J. followed the decision in *Ex parte Benwell* and the following extract from his judgment appears very applicable to the application under consideration:

"Although the debtor was making large sums of money, amounting to more than £1,000 per year, yet inasmuch as he was not entitled to receive that money with respect of any particular period, such as a year or some part of a year, irrespective of the amount of work he did, the money so received was not income, *ejusdem generis* with salary within the meaning of the Bankruptcy Act, and therefore an order could not be made to pay any part of his earnings to his trustee in bankruptcy to be applied for the benefit of his creditors. I cannot distinguish the case of the working collier from that case, for there it was pointed out that

it was impossible to compel the debtor to go on working and earning money, and in the same way here, if the debtor does not choose to go to work, he will earn nothing. It is impossible that the wages of a working man come within section 53 of the Bankruptcy Act, 1883."

The foregoing cases were in the following year once again approved of and followed by the Court in *Shine ex parte Shine* (1892) 1 Q.B. p. 522 when FRY, L.J. for the first time gave a definition of the term salary in the following terms:

"Whenever a sum of money has these four characteristics—first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; fourthly, that it is payable at a fixed time—I am inclined to take it that it is a salary."

I wish finally to make a reference to *In re Landau ex parte Trustee* (1934) Chancery Division, page 554 in which case the decision *In re Benwell* was distinguished by LORD HANWORTH, M.R. in the following terms:

"In that case the Court was dealing with the prospective earnings of a professional man known as a 'bone-setter'. If he did not work he did not earn fees. His income was precarious in the sense that it depended upon his health and his assiduity."

As I have mentioned above these decisions appear to me to answer the present case. The bankrupt's earnings in the present instance depend upon "his health and his assiduity", he could defeat any order by refusing to work, or to do overtime, which is an entirely discretionary matter and solely one for his own election. His employers the Mfulira Copper Mines, Ltd. could not compel him to go on working and earning money. If he elected not to work he would not earn money. The conditions of his employment do furthermore not fulfill the third essential of the definition of salary which has been given by FRY, L.J. in *Ex parte Shine*.

I hold that his wages or remuneration are neither salary nor income within the meaning of section 51 (2) of the Bankruptcy Act. For these reasons the application of the Official Receiver for an order for the payment of part of the bankrupt's wages and overtime remuneration is refused.

With reference to the second application under section 129 of the Bankruptcy Act it is ordered that as the property of the bankrupt is not likely to exceed £300 in value his estate be administered in a summary manner.

END OF VOLUME II.