

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker, Mr. Justice Shephard, and Mr. Justice Handley.

SAMARAPURI (INSOLVENT DEBTOR), APPELLANT,

v.

PARRY AND COMPANY (CREDITORS No. 1), RESPONDENTS.*

*Insolvent Act—11 § 12, Vic. Cap. 21, ss. 47, 51—Civil Procedure Code, s. 642—
Exemption from arrest on civil process redeundo.*

The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act :

Held by the Full Bench, that an order made under s. 51 of the Insolvent Act is a final order : and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon v. Chartered Mercantile Bank* (L.L.R., 8 Mad., 97) overruled.

The insolvent having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor :

Held per Shephard, J., that the insolvent was not privileged from arrest as being on his way back from Court.

APPEAL by the insolvent against an order made on 15th July 1889 by Wilkinson, J., sitting as Commissioner of the Insolvent Court, on insolvent petition No. 70 of 1888.

On 11th March 1889 Kernan, J., the then Commissioner, made an order in this insolvency as follows :—

“It is ordered that the further hearing of this matter be adjourned to the fifteenth day of July next, and that the said insolvent, Mundy Samarapooru Chetty, be remanded to custody until the said fifteenth day of July next at the suit of the said creditors, Messrs. Parry and Company, creditors No. 1, and B. C. Narayanappa Chetty, creditor No. 17, and it is further ordered that the said Messrs. Parry and Company and B. C. Narayanappa Chetty do pay batta at the rate of 3 annas a day for the said period to the said insolvent.”

On the 15th July Wilkinson, J., made the order appealed against, which was as follows :—

* Appeal No. 14 of 1889.

“It is ordered that under 11 and 12, Vic. Cap. 21, s. 51, the said insolvent, Mundy Samarapoory Chetty, be not entitled to his discharge until he shall have been in custody at the suit of the said Messrs. Parry and Company for a period of one year from the date hereof, and that they, the said Messrs. Parry and Company, do pay batta at the rate of 3 annas per day for the said period of one year, and it is further ordered that the further hearing of this matter be adjourned for one year from the date hereof.”

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The judgment of Wilkinson, J., was as follows:—

“I do not consider that I am precluded by the order of Mr. Justice Kernan, passed on the 11th March last, from passing orders under section 51 of the Act as to the insolvent's detention in jail. Whether or not Mr. Justice Kernan intended his order to be one passed under section 51 or not seems doubtful; but, even if it were, I think the terms of section 51 are wide enough to permit the Court to extend the term of detention, so that on the whole the insolvent be not imprisoned for more than two years. Mr. Justice Kernan was of opinion that the insolvent had carried on trade recklessly. In that opinion I fully concur. The petitioner's present liabilities amount to Rupees 1,28,751. He has represented his assets as Rupees 23,864, but the Official Assignee has only been able to recover Rupees 110, and no explanation has been offered as to the balance which is not forthcoming.”

The further facts of this case appear sufficiently for the purpose of this report from the order of reference to the Full Bench.

Sections 47, 51 and 52 of the Insolvent Act are as follows:—

Section 47.—And be it enacted, that upon application to the Court for that purpose it shall be lawful for the Court to declare that the insolvent is entitled to his personal discharge under this Act, and to order the same accordingly, which order of discharge shall have the effect of protecting his person from arrest in respect of all demands inserted in his schedule or established in the same Court; and if such insolvent be in custody, it shall be lawful for the Court to order his immediate discharge from custody accordingly, or to dismiss or give leave to amend the petition aforesaid, or to order the insolvent to amend his schedule, or to adjourn the hearing until a future day, or to make a reference to the examiner or other officer of the said Court to make inquiry into any matter of account, or into the truth of the schedule or schedules, and to report thereon to the Court; and it shall also be lawful for the Court to remand the insolvent to prison, if a prisoner, until a further hearing, or until a further time to be named in such order, or to commit the insolvent to custody for any debt or demand, if he shall not be in custody at the time of the hearing, and to cancel or renew any such order as is hereinbefore mentioned which may have been given for the purpose of affording interim protection to the

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insolvent from arrest, and to order and direct that the Assignee shall make some reasonable allowance for maintenance of the insolvent until final order, the amount of which shall be fixed by the Court, and shall not exceed 5 Company's rupees per week; and the Court by which any order of discharge shall be made upon any such hearing as is hereinbefore mentioned shall by such order direct that the Assignee shall give such notice of such order as to the Court shall seem fit and convenient.

Section 51.—And be it enacted, that in case it shall appear to any such Court that such insolvent shall have contracted any of his debts fraudulently, or by means of breach of trust, or by means of false pretences, or without having any reasonable or probable expectation at the time when contracted of paying the same, or shall have fraudulently or by means of false pretences obtained the forbearance of any of his debts by any of his creditors, or shall have put any of his creditors to any unnecessary expense, by any vexatious or frivolous defence or delay, to any suit for recovering any debt or any sum of money due from such insolvent, or shall be indebted in costs incurred in any action or suit vexatiously brought or defended, or shall be indebted for damages recovered in any action for criminal conversation with the wife, or for seducing the daughter or servant of the plaintiff in such action, or for breach of promise of marriage made to the plaintiff in such action, or for damages recovered in any action for a malicious prosecution, or for a libel or for slander, or assault or battery, or malicious arrest, or in any other action for a malicious injury done to the plaintiff therein, or in any action of tort or trespass to the person or property of the plaintiff therein, wherein it shall appear to the satisfaction of such Court that the injury complained of was malicious, or if it shall appear that the insolvent's whole debts so greatly exceed his means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same, then and in every such case it shall and may be lawful for such Court to adjudge that such insolvent shall be so discharged and so entitled as aforesaid forthwith, excepting as to any debts, sum or sums of money, or damages to be specially mentioned in the order, and as to such debt or debts, sum or sums of money, or damages, to adjudge that such insolvent shall be so discharged and so entitled as aforesaid as soon as he shall have been in custody at the suit of the person or persons who shall be creditor or creditors for the same respectively, for such period or periods, not exceeding two years on the whole, as such Court shall direct.

Section 52.—And be it enacted, that in all cases where it shall have been ordered that any such insolvent shall be discharged from imprisonment as aforesaid at some future period, such insolvent shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his creditors with respect to whom it shall have been so ordered, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not passed. Provided nevertheless, that when such period shall have arrived, such insolvent shall be entitled to the benefit and protection of this Act, notwithstanding that he may have been out of actual custody during all or any part of the time mentioned in such order, by reason of such insolvent not having been arrested or detained during such time, or any part thereof.

Mr. *Johnstone* and Mr. *Norton* for appellant.

Mr. *Grant* for respondent.

The following were among the authorities cited in the argument:—

Nixon v. Chartered Mercantile Bank(1), *Bavachi Paeki v. Pierce Leslie and Company*(2), *Martin v. Lawrence*(3), *Cowie in re*(4), *Ratansi Kalianji in re*(5), *Mancharji Hirji Ready money in re*(6).

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This appeal having come on for hearing before Collins, C.J., and Parker, J., their Lordships made the following

Order of Reference to the Full Bench:—The appellant was a petitioner for relief under the provisions of the Insolvent Debtors' Act, and, on March 11th, 1889, he was remanded to custody until July 15th at the suit of Messrs. Parry and Company and of creditor No. 17, as a criminal charge was pending against him, and the learned Commissioner (Kernan, J.), was of opinion that he had carried on trade recklessly.

On July 15th the insolvent was brought before the present Commissioner (Wilkinson, J.), who, holding that he had been guilty of gross misconduct, directed, under section 51, that he should not be entitled to his discharge until he should have been in custody at the suit of Messrs. Parry and Company for one year from that date. The order directed that Messrs. Parry and Company should pay batta at 3 annas per diem, but did not contain any direction committing the insolvent to custody. Nor did the order contain any direction that the insolvent should be discharged with respect to the debts in his schedule other than that of Messrs. Parry and Company.

Messrs. Parry and Company were decree-debtors, but on July 15th the warrant which they had taken out against the insolvent had expired and was no longer capable of execution.

The insolvent was, however, sent to jail under the warrant of the Chief Clerk, and we must therefore take it that the absence of a direction for committal is a mere mistake in drawing out the order. The warrant purports to be issued under section 51.

The question before us is whether the order of the learned Commissioner committing the insolvent to jail under section 51 is legal, or whether under that section the judgment-debtors (Messrs. Parry and Company) should have been left to their

(1) I.L.R., 8 Mad., 97.

(3) I.L.R., 4 Cal., 656.

(5) I.L.R., 2 Bom., 148.

(2) I.L.R., 2 Mad., 219.

(4) I.L.R., 6 Cal., 70.

(6) 5 Bom. H.C., 55.

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ordinary remedy as decree-holders for the period of one year—after which the insolvent would be entitled to his personal discharge with respect to their claim. In support of the appeal, we are referred to in re *Mancharji Hirji Readymoney*(1).

Against this the decision of Turner, C.J., and Muttusami Ayyar, J., in *Nixon v. Chartered Mercantile Bank*(2), is quoted. In that case a precisely similar committal to jail was upheld on the ground that the combined effect of sections 47 and 51 justified the procedure. On referring to the judgment of the learned Commissioner in that case, we find that he discharged the insolvent under section 47 with respect to the general creditors, but with regard to the debt due to the bank he directed that he should be discharged when he should have been in custody at the suit of the bank for six months, and the order went on to direct that the insolvent be committed to custody for six months in respect of the debt to the bank, and that the Official Assignee do pay the insolvent while in custody Rupees 5 per week.

The former part of this order would appear to have been passed under section 51, and the latter under section 47 and not under section 52.

In the present case the order drawn out by the Chief Clerk on July 15th concludes with a direction "that the further hearing of this matter be adjourned for one year from the date hereof." This can only have been passed under section 47, so that if the decision in *Nixon v. Chartered Mercantile Bank*(2) is right, the present order can also be justified by a reference of the committal to the Commissioner's powers under section 47.

The decision of the Bombay High Court in re *Mancharji Hirji Readymoney*(1) appears to us in conflict with the Madras decision, and as we entertain doubts whether the latter is correct, we refer for the decision of a Full Bench the following questions:—

- (1) Has a Commissioner in Insolvency power to commit an insolvent to jail under section 51, or is the effect of that section to leave the judgment-creditors to their ordinary remedies for the term mentioned in the order?
- (2) If not, can any order be passed under section 51 pending a final order under section 47?

(1) 5 Bom. H.C.R., 55.

(2) I.L.R., 8 Mad., 97.

On the above reference, the Full Bench delivered the following

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JUDGMENT :—“ Section 47 empowers the Court to give the insolvent his personal discharge, and pending such discharge to adjourn the hearing for further inquiry and to commit the insolvent to custody at the expense of the Official Assignee *until final orders.*

Section 51 empowers the Court in certain cases to grant the insolvent his personal discharge immediately, except as to any debts, sums of money, or damages to be specially mentioned in the order, and as to such debts, &c., as soon as he shall have been in custody at the suit of such creditor or creditors for such period not exceeding two years as the Court shall direct.

Section 52 provides that where such insolvent is ordered to be discharged from imprisonment at a future period, he shall be liable to be arrested and charged in custody at the suit of such creditor abovementioned at any time before such period shall have arrived, in the same manner as he would have been liable if the Act had not been passed, and goes on to provide that if such insolvent be not arrested at the suit of any such creditor within the period mentioned in the order, he shall, at the expiry of such period, be entitled to the benefit and protection of the Act. Section 53 provides that the maintenance is to be at the expense of the creditor.

Section 51 does not empower the Court to commit to custody, and section 47 only empowers the Court to commit to custody at the expense of the Official Assignee pending a final order. Had the Legislature intended to empower the Court to commit to jail under section 51, it is reasonable to suppose that it would have given similar powers as in section 50,—but on the contrary it simply enabled any one or more specified judgment-creditors to enforce their remedies (which may have been previously stayed under section 49) in the same manner as if the Act had not been passed,—that is to say, that for a specified time the Court refuses to give protection to the insolvent at the suit of any special creditors.

It appears to us that the decision of the Bombay High Court in *re Mancharji. Hirji Readymoney*(1) is right; that an order

(1) 5 Bom. H.C.R., 55.

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under section 51 is a final order, and that a Commissioner has no power to commit an insolvent to jail under that section, but must leave the creditor or creditors mentioned in the order to their ordinary remedies for the term mentioned in the order without protection to the insolvent.

Holding that an order under section 51 is a final order, we do not consider that the Commissioner in Insolvency is entitled to fall back upon his powers under section 47 to justify a committal to jail when passing an order under section 51. The former section appears to us to authorize a committal only pending inquiry and final order in the Insolvent Court. In this respect we differ from the ruling of Turner, C.J., and Muttusami Ayyar, J., reported in *Nixon v. Chartered Mercantile Bank*(1).

Our answer to the first question is that a Commissioner in Insolvency has no power under section 51 to commit an insolvent to jail, but must leave the excepted judgment-creditors to their ordinary remedies for the time mentioned in the order; and to the second question that an order under section 51 is a final order."

This appeal coming on for final hearing before Collins, C.J., and Parker, J., the Court, in pursuance of the opinion of the Full Bench, delivered the following

JUDGMENT :—“ On the answer of the Full Bench to the questions referred, we must hold that the appellant cannot be detained under section 51, not having been arrested at the suit of Messrs. Parry and Company, and we must therefore order him to be discharged.

It appears to us that the order of the Chief Clerk has been wrongly drawn. If, as appears probable from the judgment, the learned Commissioner intended to discharge the insolvent with respect to all creditors, except Messrs. Parry and Company, and with respect to his debt to them as soon as he shall have been in custody for the time mentioned in the order, the order should be amended accordingly and we will ask the learned Commissioner to revise it.

The appellant is entitled to his costs in this appeal."

In pursuance of the above order the insolvent was discharged from jail. But as soon as he had left the jail he was arrested on a warrant obtained by Messrs. Parry & Company. This

(1) I.L.R., 8 Mad., 97.

application was then made before Shephard, J., for the discharge of the insolvent on the ground that his arrest was illegal.

Mr. *Johnstone* and Mr. *Norton* for the insolvent.

The insolvent was entitled to privilege *redeundo* from jail. When he was arrested, as it now appears by the decision of the Full Bench illegally, he was attending the proceedings in the Insolvent Court. But for that illegal arrest he would have returned home, and while returning he would have been exempt from arrest under civil process. See Civil Procedure Code, section 642; *Chauvin v. Alexandre*(1).

(*Shephard, J.*—Can you say your client was, when he was arrested, returning from a tribunal where a matter to which he was a party was pending?)

The order of the Commissioner in Insolvency must be treated as a nullity and the insolvent must be regarded as having been *redeundo* since the time when he was illegally prevented from returning home in pursuance of that order.

Rex v. Blake(2) was the case of one arrested under an illegal or irregular writ. See also in illustration of the privilege of one returning from the Insolvent Court. *List's case*(3), *Ex parte King*(4), Reference was also made to the unreported cases of *Gribble v. Arbutnot*(5), *Oakes v. Clegg*(6).

Mr. *W. Grant* for Messrs. Parry & Company.

The insolvent was not within the privilege under either section 642 or the rules laid down in the English cases.

The privilege is the privilege of the Court (*Magnay v. Burt*(7)), and the Court cannot be said to have been touched by his arrest unless an extravagant fiction is invoked:—See *per Campbell, C.J.*, in *Hare v. Hyde*(8), *Goodwin v. Lordon*(9), *Gilpin v. Cohen*(10).

Mr. *Norton* in reply.

SHEPHARD, J.—I have no doubt about this matter. The debtor was sent to jail under an order made by the learned Commissioner in Insolvency on the 15th July. The order purported to be made under section 51 of the Insolvent Debtors' Act. That order has since been held to be illegal, and the debtor was therefore entitled

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(1) 31 L.J.Q.B.N.S., 79. (2) 4 B. & A., 355. (3) 2 V. & B., 373.
(4) 7 Ves., 312. (5) Civil Suit 30 of 1885. (6) Civil Suit 268 of 1883.
(7) 5 Q.B., 393. (8) 16 Q.B., 394. (9) 1 A. & E., 373.
(10) L.R., 4 Ex., 131.

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to be released. He was accordingly released from the jail, but, immediately after he was released, was arrested on a warrant obtained by the judgment-creditor. It is argued that that arrest was illegal, because the debtor ought to be treated as if he stood in the position he was in on the 15th July, and was therefore privileged from arrest. The argument amounts to this, that because the imprisonment followed on the order of the 15th July was illegal, therefore the debtor must be treated in the meanwhile as either in attendance upon the Court or returning from it. This involves a fiction of a rather extreme character. No authority is cited for such an extension of the doctrine of privilege, and it appears to me to be inconsistent with the principle on which the doctrine is rested, namely, that it is the privilege of the Court and not of the party (See *Magnay v. Burt*(1). Looking to the language of section 642 of the Code of Civil Procedure, I can find no sanction for extending it to the present case. No doubt that section covers the case of parties attending the Insolvency Court, but I think it is impossible to hold that a debtor, who is arrested in the circumstances above stated, is either attending or returning from the Insolvency Court.

The motion for release must be dismissed with costs.

Ramanujacharyar, attorney for appellant.

Wilson and King, attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

GHOUSIAH BEGUM (PLAINTIFF), APPELLANT,

v.

RUSTUMJAH (DEFENDANT), RESPONDENT.*

Transfer of Property Act (Act IV of 1882), s. 55—Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract.

On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that