waiting in the stream and the shore, were exempt from the payment of tolls. Unless, in the absence of such exemption, these persons come within the provisions of section 15 of the Act, the necessity for the issue of such a notification would never have existed. Now, this notification was cancelled by Financial Department Notification No. 26, dated the 1st March 1917, and, consequently, since that date persons engaged in this kind of traffic come within the provisions of section 15, and in the absence of any notification by the Local Government under the proviso of that section, they commit an offence under section 27 of the Act unless they have obtained the sanction of the District Council or of the lessee of the ferry. The applicant has therefore been rightly convicted, and this application in revision is dismissed.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

P. M. HAMID

v.

P. K. MOHAMED SHERIFF.*

1935
July 2,

Insolvency—Adjudication—Immunity from arrest not automatic—Application for protection against execution upon the person necessary—Policy of the Legislature—Honest debtors—Protection order when withdrawn—Presidency-Towns Insolvency Act (III of 1909), ss. 17, 25—Provincial Insolvency Act (V of 1920), ss. 23, 28, 31—Civil Procedure Code (Act V of 1908), O. 21, rr. 37, 40.

An order of adjudication does not operate automatically as a protection against execution upon the person of an insolvent. He must apply to the Court to grant him the privilege of protection against arrest which the Court will do only if the circumstances of the case justify it.

Neither in s. 17 of the Presidency-Towns Insolvency Act nor in s. 28 of the Provincial Insolvency Act is any mention made of leave being necessary in respect of remedies against the person of the insolvent, both these sections referring not to the person but to the property of the insolvent.

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* Civil Miscellaneous Appeal No. 17 of 1935 from the order of this Court on Original Side in Insolvency Case No. 188 of 1933.

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Mahomed Elias v. *Shaik Abdool Rahiman*, I.L.R. 40 Bom. 461 ; *Mahomed Roshan* v. *Gulam Mohiddin*, 31 Bom. L.R. 206—*referred to.*

Tan Seik Ko v. *C.A.M.C.T. Firm*, I.L.R. 6 Ran. 27—pro tanto *dissented from.*

The policy of the Legislature, however, is to provide protection for honest debtors, and a protection order if once granted shall not be cancelled save on exceptional grounds. If an insolvent's conduct has been flagrantly dishonest, or by being sent to jail he is likely to make a fuller disclosure of his affairs, the Court should not grant him protection.

It is open to a debtor who is arrested to rely in the execution proceedings upon the provisions of Order 21, rule 37 or rule 40, of the Civil Procedure Code.

Bhattacharya for the appellant. The question in the present case is whether a fraudulent insolvent, whose discharge has been refused, should be given the protection of the law against execution on his person. The mere fact that a person has applied to be adjudicated insolvent should not give him more rights than an ordinary person. S. 17 of the Presidency-Towns Insolvency Act [s. 28 (*2*) of the Provincial Act] deals only with the property of the insolvent on adjudication, and does not purport to give any protection to the insolvent from arrest in execution proceedings. Under s. 25 of the Act a protection order may be given to the insolvent, and it may be revoked. Consequently, no leave of the insolvency Court is necessary to execute a decree against the person of an insolvent. *Mahomed Roshan* v. *Gulam Mohiddin* (1) ; *Hariram* v. *Sri Krishna* (2).

No protection should be granted to an insolvent whose conduct has been dishonest and who is further guilty of grave malpractices in order to deprive his creditors of their just dues. *Mahomed Haji* v. *Shaikh Abdul Rahman* (3).

If it is held that the mere fact that a debtor has been adjudicated insolvent entitles him to a protection order, the present application for leave to

(1) 31 Bom. L.R. 206. (2) I.L.R. 49 All. 201.
(3) I.L.R. 40 Bom. 461.

execute the decree against the respondent should in effect be treated as application under s. 25 of the Act for revocation of the protection order.

The decisions to the contrary contained in *M.A.V.L. Viswanathan* v. *Abdul Majid* (1); *Maung Po Toke* v. *Maung Po Gyi* (2); *Tan Seik Ko* v. *C.A.M.C.T. Firm* (3); *Easwara Iyer* v. *Govindarajulu* (4); *Alamelu* v. *Venkatarama Iyer* (5) do not correctly state the law.

Ray for the respondent. There is no proof that the debtor has any liquid assets at present. A debtor should not be sent to jail except to bring him to his senses. Moreover, an order of adjudication implies that the insolvent is immune from process against his person and property.

The burden of proof in the present case was on the appellant to show that the respondent was not entitled to any protection. He did not in fact make any formal application for the revocation of the protection that the respondent enjoyed. On the other hand, under O. 21, r. 40, it is on the debtor to show that he is poor.

In any event the appellant has made out no special case for granting leave to execute the decree against the person of the insolvent.

PAGE, C.J.—This appeal is allowed.

The proceeding out of which the appeal arises was a petition by one of the creditors in the insolvency of the respondent for leave to execute two decrees which he had obtained against the insolvent in the High Court and the Small Cause Court of Rangoon respectively against the person of the insolvent. The respondent was adjudicated insolvent on the 16th of

(1) I.L.R. 3 Ran. 187, 191.
(2) I.L.R. 3 Ran. 492.
(3) I.L.R. 6 Ran. 27.
(4) I.L.R. 39 Mad. 689.
(5) I.L.R. 50 Mad. 977.

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August 1933. The schedule disclosed unsecured liabilities amounting to Rs. 26,488 and assets nil with the exception of an endowment policy on his life for Rs. 2,000 which the respondent admitted that he had assigned to his wife. On the 1st of May 1934 the respondent's application for his discharge was refused, Sen J. observing that it was "a case which has no merits." In the course of the order refusing the respondent his discharge Sen J. stated that he was satisfied

"that the insolvency is not due to trade depression alone but is due to two partners carrying on business and being afraid to disclose their state of affairs, and making away with their books of account."

The learned Judge added

"it also appears that since the insolvent's return he has been carrying on business in his own name, and the creditors have been able to prove one transaction where one hundred tons of beans were sold to Messrs. Steel Brothers & Co., and the suggestion is that he is still carrying on business in the name of his brother-in-law."

On the 29th of August 1933 a protection order was granted to the respondent, under which he was given *inter alia* protection from arrest and detention in custody; and on the 3rd of August 1934, by filing the present application for leave to execute the decrees, the appellant in effect applied that *pro tanto* the protection order should be cancelled. On the 9th of January 1935 Braund J. dismissed the application, holding "that an application such as this is wholly contrary to the principles of the insolvency law." His Lordship in the course of his order stated

"if I understand the principles of insolvency and bankruptcy jurisdiction at all one of them is this that when in a state of

insolvency or bankruptcy a debtor has the protection of the law against executions upon his person. I see no reason, so long as the insolvency is subsisting, why he should forfeit that protection except on most exceptional grounds."

Now, with all due deference it does not appear that that is quite how the matter stands. In my opinion it is plain, having regard to the course of legislation in India, that it was not intended by the Legislature that a person upon being adjudicated insolvent should necessarily be given protection against personal arrest in respect of debts provable in his insolvency, much less that an insolvent "has the protection of the law against executions upon his person." As I construe section 17 and section 25 of the Presidency-Towns Insolvency Act and the corresponding sections 23, 28 and 31 of the Provincial Insolvency Act upon adjudication an insolvent not only has not *ipso facto* the protection of the law against execution upon his person, but must apply to the Insolvency Court to grant him in its discretion a protection order [*Mahomed Haji Essack Elias* v. *Shaikh Abdool Rahiman Bin Shaik Abdool Aziz El Ebrahim* (1) and *Mahomed Roshan Sheikh Alli Kaskar* v. *Gulam Mohiddin* (2)]. In *M.V.A.L. Viswanathan Chettiyar* v. *Abdul Majid* (3) Dentaigne J. did not express a definite opinion to the contrary, and in *Tan Seik Ko* v. *C.A.M.C.T. Firm* (4), which overruled *Maung Po Toke* v. *Maung Po Gyi* (5), the learned Judges with all respect were misled in thinking that section 28 of the Provincial Insolvency Act provided "that nothing shall be done against the property of the insolvent *or against the insolvent* without the leave of the Court during

(1) (1915) I.L.R. 40 Bom. 461.
(2) 31 B.L.R. 206.
(3) (1925) I.L.R. 3 Ran. 187.
(4) (1927) I.L.R. 6 Ran. 27.
(5) (1925) I.L.R. 3 Ran. 492.

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the pendency of the insolvency proceedings." Neither in section 28 of the Provincial Insolvency Act nor in section 17 of the Presidency-Towns Insolvency Act is any mention made of leave being necessary in respect of remedies against the person of the insolvent, both these sections referring not to the person but to the property of the insolvent. Having regard to the amendments that have been made in both these Acts in connection with the subject in hand in my opinion it was intended and enacted by the Legislature that an order of adjudication should not operate automatically as a protection against execution upon the person of an insolvent, but that the insolvent should be compelled to apply to the Court to grant him the privilege of protection against arrest which the Court would do only if the circumstances of the case justified it. I respectfully agree with the opinion expressed by Braund J. that a protection order should not be refused, or if once granted cancelled, save on " exceptional grounds " ; but at the same time I am satisfied that whereas it was the policy of the Legislature to provide protection for honest debtors, the Legislature did not intend or enact that freedom from arrest should be granted to flagrant or dishonest insolvents.

Now, what are the grounds upon which the present application is based ? At the hearing before Braund J. it appeared from the report of the Official Assignee and the affidavits filed in support of the application that the respondent had carried on a considerable business prior to his insolvency in buying and selling on his own account or on commission rice and boiled rice for export. It was alleged that the insolvent had transferred his endowment policy to his wife, and that the insolvent admitted. He also had a house in India. No

mention was made of this house in the schedule but it is conceded that in the event the house has been sold in execution of a decree obtained against him in India, and that the sale-proceeds have been realized by the Official Assignee in Rangoon. The insolvent admitted that since his insolvency he had carried through a business transaction whereby 100 tons of beans were sold to Messrs. Steel Brothers & Co. In the affidavits in support of the petition it was stated that there was reason to believe from information received that the respondent had several thousand rupees in his possession in cash, and that he was secretly carrying on business in Rangoon in the name of his relations.

The learned Judge in insolvency did not call upon the insolvent to admit the allegations made against him or to explain or deny them. In his order Braund J. stated :

" I cannot find in these vague allegations any such exceptional grounds. The allegations are unsupported by concrete evidence at all and I see no ground why I should depart from general principles and those are that any insolvent debtor is entitled to be protected. Insolvency is a proceeding for the administration and distribution of the assets among the creditors and it is not intended to be a means of harassing a debtor."

We were, however, of opinion that an opportunity should be given to the debtor to admit, explain or deny the allegations in the petition which received some support from the conclusion at which Sen J. had arrived, and the case was remanded in order that the public examination of the insolvent should be re-opened, and an opportunity should be taken to examine him upon the allegations in the present application and the affidavits filed in support of it. It appears that at his further examination the

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respondent admitted that a few months after he had been adjudicated insolvent his brother-in-law, T. M. Jamal Moideen, started business. It happened to be a business of exactly the same nature as that which the insolvent had been carrying on, which consisted of exporting rice and broken rice to Madras and Tuticorin.

The respondent stated that he was helping his brother-in-law generally in the business, that he received no pay, and that he was living with his brother-in-law who was maintaining his wife and children in India. He denied, however, that he was doing any business of his own. He stated that the business in which he was working belonged to his brother-in-law, and that he was merely assisting him. He further admitted that he had transferred the house in India to his wife as well as the policy of insurance. When questioned about the furniture which he had disposed of he stated that when the business was closed down in 1930 he possessed an iron safe, electric fans, table, chairs and an almirah. He was then asked what had become of them, and whether he had not transferred them to other people. His answer was that he was unable to say what had become of them, the fact of the matter being that at the time when they disappeared he was not in his proper senses, and therefore that he was unable to give any account of what had happened to these articles. It is strange, however, if his mind was in this confused state, that he was able, as he admitted, to renew four hundis after the business was closed down. Although the respondent conceded that he had been carrying on a considerable business in partnership with one Abdul Majid, who had long ago departed to India, he was unable to

produce,—and Abdul Majid has not produced,—any account books relating to the business that he had been carrying on. In this connection it is well to bear in mind the finding of Sen J. that the respondent's

> " insolvency is not due to trade depression alone but is due to two partners carrying on business and being afraid to disclose their state of affairs and making away with their books of account."

Now, the question is whether upon the facts that had been disclosed in the proceedings the Court ought to grant the appellant leave to execute the decree that he had obtained against the respondent, and *pro tanto* to cancel the protection order.

I entirely agree with Braund J. that the Court ought not to withdraw from the insolvent protection from arrest unless his conduct has been flagrantly dishonest, or unless it is satisfied that the circumstances are such that it may well be, if the ordinary law is allowed to take its course, that assets will be disclosed by the insolvent which otherwise he would not declare. I respectfully agree also with Sen J. in thinking that since his adjudication the insolvent in all probability has been carrying on business in the name of his brother-in-law, and in my opinion there is reasonable ground for suspecting that he is not carrying on the business which stands in the name of his brother-in-law without getting something out of it. The appellant and those who have sworn affidavits in support of the present application are firmly of opinion that the insolvent since his insolvency has been and still is carrying on business and refusing to disclose the real facts as to what he is doing to the Official Assignee. It may be that if the respondent is

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lodged in jail he will be disposed to inform the Official Assignee of the true position in which he stands. In my opinion the present case is one in which it is expedient that leave to execute the decree, so far as the Insolvency Court is concerned, should be granted, not for the purpose of harassing the insolvent but in order that he may be brought to his senses. Now, it does not follow, because the Insolvency Court grants the appellant leave to execute the decrees, that in the regular suit an application for leave to execute the decrees by arresting the respondent will be successful. That will depend upon whether under Order 21, rule 37 and rule 40, the respondent will be able to satisfy the Court that he has no assets, and therefore that to send him to prison would serve no useful purpose. If he succeeds in satisfying the executing Court that he has no assets, and that no sound object would be achieved by directing his arrest and detention in jail, I take it that the application for execution upon his person will be dismissed. But that is a question which I think in the present circumstances ought to be agitated and decided in the execution proceedings in the regular suit, and this Court must, of course, not be taken to express any opinion as to how the executing Court should act if and when an application for execution is presented to it.

For these reasons, in my opinion, the appeal must be allowed, the order from which the appeal is brought set aside, and leave granted to the appellant as prayed. The appellant does not ask for costs.

BA U, J.—I agree.