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*In re* V.K.P. CHOCKALINGAM AMBALAM *v.* MAUNG TIN.

PAGE, C.J.

It follows that, in my opinion, the orders for a refund of the court-fee passed in *Ma Saw and others* v. *Ma Bwin Byu* (1), *Daw Myin* v. *Maung San Kyaw* (2), in *K.R.R.M.P.L. Chettyar Firm* v. *Ma Ti Za* (3) and in *J. C. Galstaun* v. *Raja Janaki Nath Roy and others* (4) were not in accordance with law, and ought not to have been made.

I would answer the question propounded in the above sense. Neither party asks for costs.

MOSELY, J.—I agree.

BA U, J.—I agree.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

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*Jan. 16.*

### L. V. COLATO
*v.*
### U AUNG DIN AND OTHERS.*

*Bond for due appearance in Court—Debtor's release on undertaking to apply for insolvency and to appear in Court—Alleged settlement with creditors—Case fixed for mention as to settlement—Non-appearance of debtor—Dismissal of insolvency petition—Enforcement of bond against sureties—Special notice of Court to debtor to appear not necessary—Civil Procedure Code (Act V of 1908), s. 55 (4)—Interpretation of a bond.*

In execution of a money decree against the 1st respondent the appellant caused him to be arrested. The 1st respondent applied for his release offering to execute the requisite bond. The Court allowed the application, and the 1st respondent with his sureties executed a bond that was in common form. The bond provided *inter alia* that the 1st respondent would apply for his insolvency and appear in Court " on the day which may be fixed for his public examination or for his attendance for any other purpose and thenceforth

(1) (1925) I.L.R. 4 Ran. 66.

(2) Civ. First Ap. 112 of 1934, H.C. Ran.

(3) Civ. Second Ap. 94 of 1935, H.C. Ran.

(4) 38 C.W.N. 185.

* Civil Misc. Appeal No. 83 of 1935 from the order of this Court on the Original Side in Civil Misc. No. 61 of 1931.

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on the day or days to which the hearing of the said insolvency shall be adjourned until the disposal of the said application." The 1st respondent unduly prolonged the insolvency proceedings by obtaining numerous adjournments of the hearing of the petition and eventually a further adjournment was granted for the case to be mentioned after one week on the ground that the 1st respondent had very nearly completed an arrangement with his creditors and would then be in a position to withdraw his petition for adjudication. On the adjourned date the 1st respondent did not appear and his advocate withdrew from the case stating that he had no further instructions from him. The Court thereupon dismissed the petition. The appellant then applied for the enforcement of the bond against the sureties. The 3rd respondent, who was one of the sureties, contended that it was only when the insolvent had been served with a formal notice to appear on any particular occasion that it could be said that he had been "called upon" to appear within s. 55 (*4*) of the Code.

*Held*, that under the terms of the bond the sureties were liable if the insolvent did not appear on any day fixed for his attendance and on which for the purposes of the insolvency his attendance was required; that no specific formal notice calling upon him to appear was necessary; that the material terms of the bond were within the ambit of s. 55 (*4*) of the Code, and that the failure of the 1st respondent to appear on the date fixed by the Court for the 1st respondent to inform the Court whether or not he had settled with his creditors rendered his sureties liable under the bond.

*Abdul Hussein* v. *Mistri & Co.*, I.L.R. 46 Bom. 702; *Bhaiyat* v. *Abdul Mazid*, Civil Misc. Ap. 35 of 1935, H.C. Ran.—*referred to.*

A bond must be construed in the light of the order directing the security to be given.

*Raja Raghunandan* v. *Raja Kirtyanand*, 63 M.L.J. 85—*referred to.*

*Young* for the appellant. The respondent who was arrested in execution of a decree against him obtained his release under section 55 (*4*) of the Civil Procedure Code on executing a bond whereby he was bound to appear on all days on which his insolvency petition was posted for hearing. On 18-12-34 his case was fixed for mention as to an arrangement which he was about to enter into with his creditors, but he failed to appear, and his advocate withdrew from the case for want of instructions. The surety is not released by the mere fact that the debtor has filed his petition in insolvency; his liability continues until the proceedings terminate and a final order is passed on the petition.

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*Abdul* v. *Mistri* (1); *PL.RM.KR. Karuppan Chettyar* v. *A.CT.N. Nagappa Chettiar* (2); *Janki Das* v. *Ram Partab* (3); *M. E. Bhaiyat* v. *Abdul Mazid* (4).

*Ba So* for the 3rd respondent. The words "called upon" in section 55 (*4*) do not have reference to all dates to which a case may be adjourned. The case was fixed on 18-12-34 only for "mention", and the petitioner would not have been examined on that day. Moreover, it is only when a special notice calling upon the debtor to appear on a certain date is issued that he can be said to have been "called upon" to appear.

PAGE, C.J.—This appeal is allowed.

On the 7th September, 1928, in Civil Regular No. 475 of 1928 the appellant obtained a decree against the 1st respondent on the Original Side of the High Court for Rs. 2,685 and costs Rs. 267-8-9, being the price of a motor car supplied to the 1st respondent and his wife. It is stated that thereafter the appellant applied on four occasions to execute the decree but that he was unable to obtain information as to the whereabouts of the 1st respondent until the 16th September, 1932, when he was arrested in execution of the decree. The amount set out in the warrant for the arrest of the 1st respondent issued on the 17th August, 1932, was Rs. 3,677-10-9. Thereafter an application was made by the 1st respondent under section 55 of the Code of Civil Procedure that he might be discharged from arrest upon complying with the terms of section 55 (*3*) and (*4*). On the 20th September, 1932, Ba U J. ordered that "on execution of the necessary bond the judgment-

(1) I.L.R. 46 Bom. 702.
(2) I.L.R. 57 Mad. 688.
(3) I.L.R. 16 All. 37.
(4) C.M. Appeal No. 35 of 1935.

debtor will be released", and on the 21st September, 1932, the 2nd and 3rd respondents became sureties for the 1st respondent by executing a security bond the operative terms of which were that

"the condition of the abovewritten obligation is such that if the said U Aung Din the Judgment Debtor abovenamed applies for insolvency within 30 days from this date and if he appears in the High Court of Judicature at Rangoon on the day which may be fixed for his public examination or for his attendance for any other purpose and thenceforth on the day or days to which the hearing of the said insolvency application shall be adjourned until the disposal of the said application or the cancellation of this security and if he shall duly prosecute his insolvency petition, then this obligation shall be void and of non-effect. Else to remain in full force and virtue."

Now, "the bond must be construed in the light of the order directing the security to be given", [*per* Lord Tomlin in *Raja Raghunandan Prasad Singh and another* v. *Raja Kirtyanand Singh Bahadur* (1)], and having regard to the order of Ba U J. of the 20th September, 1932, that "the necessary bond" should be executed it appears to me that the bond in the present case must be a bond such as is required under section 55 (*4*) of the Code. That sub-section runs as follows :

"Where a judgment-debtor expresses his intention to apply to be declared an insolvent, and furnishes security to the satisfaction of the Court that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree."

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(1) 63 M.L.J. 85 at p. 90.

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The condition set out in the bond under consideration is in common form, and in *M. E. Bhaiyat* v. *Abdul Mazid and one* (1) an appellate Bench of this Court held that the object and effect of inserting in the bond the words "appears in the High Court of Judicature at Rangoon on the day which may be fixed for his public examination or for his attendance for any other purpose" "was to make it an obligation thereunder that the sureties should be liable if the insolvent did not appear on any day fixed for his attendance and on which for the purposes of the insolvency his attendance was required." In my opinion these words so construed are within the ambit of section 55 (*4*), and are merely an amplification of the words "that he will appear, when called upon, in any proceeding upon the application." The construction that we place upon section 55 (*4*) appears to be in consonance with that put upon the sub-section by the Bombay High Court in *Abdul Hussein Essufalli* v. *D. J. Mistri & Co.* (2).

In the application out of which the present appeal arises, in which the appellant sought to have the amount of the surety bond estreated for non-compliance with the conditions set out therein, Leach J. held that

"it is true that the bond provided that the first respondent should attend on the day or days to which the hearing of the application was adjourned, but that again went beyond the provisions of section 55 (*4*)."

With all due respect, in my opinion, in so holding the learned trial Judge did not correctly interpret the meaning and effect of that sub-section. It is unnecessary for the purpose of disposing of

(1) Civ. Mis. Ap. No. 35 of 1935, H.C. Ran. (2) (1921) I.L.R. 46 Bom. 702.

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this appeal to determine whether the condition that the sureties should be liable if the debtor did not "duly prosecute his insolvency petition" was *intra vires* section 55 (*4*) or not, because in the events that have happened, in our opinion, the debtor failed to appear on a "day fixed for his attendance and on which for the purpose of his insolvency his attendance was required."

The debtor appears to be an adept in escaping from the consequences of a decree that may have been passed against him, because not only did he succeed in evading the execution of the decree for four years, but he was able to stave off the evil day when in the normal course he would be adjudicated insolvent on his own petition for more than two years. From a perusal of the learned Assistant District Judge's diary in the insolvency proceedings at Pyapôn it is apparent that on many occasions between the 22nd October, 1932, when the 1st respondent filed his petition to be adjudicated insolvent, until the 18th December, 1934, when the petition was dismissed, the debtor succeeded in obtaining adjournment after adjournment of the hearing of the petition upon one pretext or another, the main pretence being that he was on the point of making an arrangement with his creditors. On the 11th December, 1934, the following diary entry occurs :

"Called. Mr. K. K. Roy for petitioner present.

U Ba Shein for Mr. Munshi for creditor No. 1 (that is the present appellant).

Mr. K. K. Roy says he has received instructions from his client saying he had made arrangement with his creditors and that he had nearly completed all the terms and that within 7 days he would be prepared to withdraw the application.

U Ba Shein says he has nothing to say.

Put up for mention on 18-12-34."

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Now, it is quite obvious that the object and effect and necessary intention of that order was that on the 18th December the 1st respondent was called upon to state whether the arrangement with his creditors had been satisfactorily completed, because if no arrangement had been effected the result would have been either that an order of adjudication would have followed or the petition might have been dismissed. On the 18th December, 1934, however, the 1st respondent did not appear, nor did he instruct any advocate or pleader to appear on his behalf. Indeed, Mr. Roy on that occasion stated that he had no further instructions from the debtor, and asked for permission to withdraw from the case, and this was granted. The result was that neither the 1st respondent nor any one upon his behalf appeared, as he had been called upon to do, to inform the Court whether or not an arrangement with his creditors had been arrived at by the 1st respondent. In the circumstances the 1st respondent's petition for adjudication was dismissed with costs.

The 2nd respondent, who was one of the sureties, filed a written objection to the petition of the appellant that the amount set out in the bond should be estreated, but he did not appear at the hearing before Leach J.

The 3rd respondent, who was the other surety, however, did appear, and he is the sole respondent who contests the present appeal. On his behalf U Ba So has contended that it is only when some special notice calling upon a debtor or insolvent as the case may be to appear on any particular occasion has been served upon him that he is "called upon" to appear within the meaning of section 55 (*4*).

So to hold, in my opinion, would be neither expedient nor reasonable. It would involve an enormous waste of public time and expense if on every

occasion upon which a debtor or insolvent was "called upon" to appear in any proceeding in connection with his insolvency a specific formal notice requiring him to do so had to be served upon him. I am of opinion that it was sufficient to satisfy the requirements of section 55 (*4*) that the learned advocate who had represented the 1st respondent on many previous occasions in the insolvency proceedings should have been informed on his behalf that the 1st respondent would have to state on the 18th December whether or not an arrangement had been arrived at between the debtor and his creditors. It must have been abundantly clear to the debtor, who had instructed Mr. Roy on the 11th December to inform the Court that he had substantially effected an arrangement with his creditors, that on the 18th a day had been fixed when he must attend in order to inform the Court how matters then stood. If the debtor had instructed a learned advocate to appear for him on the 18th December it may or may not be that the Court would have been prepared to dispense with the personal attendance of the debtor, but as the debtor did not instruct a learned advocate or pleader to appear for him and did not appear himself on that occasion there was, in my opinion, a failure on the part of the 1st respondent to appear when called upon on a day fixed for his attendance within the meaning of the condition in the bond.

For these reasons, in my opinion, the appeal is allowed, the order from which the appeal is brought is set aside, and an order will be passed against the 2nd and 3rd respondents as prayed with costs, the advocate's fee in each Court being five gold mohurs.

MYA BU, J.—I agree.