ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

MAHOMED HAJI ESSACK ELIAS (APPELLANT AND OPPOSING CREDITOR) *v.* SHAIK ABDOOL RAHIMAN BIN SHAIK ABDOOL AZIZ EL. EBRAHIM (RESPONDENT AND INSOLVENT).*

1915. *August* 10, 16.

The Presidency Towns Insolvency Act (III of 1909), sections 6, 8, 25, 38, 39 (2), (a), (b), (c), (d), (f), (j)—Protection order—Appeal lies against a protection order—Opposing creditor, though not a decree-holder, a person aggrieved by the protection order—Protection order, a privilege to be granted or withheld, according to the character and circumstances of the insolvency—Insolvent guilty of malpractices, not entitled to protection.

Under section 8, clause (2) (*b*), of the Presidency Towns Insolvency Act (III of 1909) an appeal lies from a protection order made by a Judge in the exercise of the insolvency jurisdiction.

It does not appear from section 8 of the Presidency Towns Insolvency Act, that the Legislature wished to put any limitation upon appeals made from original orders of a judge except perhaps orders regulating procedure.

The expression "*any person aggrieved*" in clause 2 of the last mentioned section is not to be limited to a creditor who has obtained decrees against the insolvent.

Every application for protection after refusal or suspension of discharge must be judged on its merits. If the insolvent has acted recklessly and dishonestly the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows. A protection order is a privilege to be granted or withheld as the Court in its discretion may determine. In exercising that discretion, it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency. Where a Court finds that the insolvency is of a flagrantly culpable kind, being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered, protection ought to be refused.

Marris v. *Ingram* (1) and *In re Gent*: *Gent-Davis* v. *Harris* (2) referred to.

* Appeal No. 28 of 1915: Insolvency Petition No. 576 of 1913.

(1) (1879) 13 Ch. D. 338. (2) (1888) 40 Ch. D. 190 at p. 195.

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PROCEEDINGS in Insolvency.

The respondent, one Shaik Abdool Rahiman bin Shaik Abdool Aziz, an Arab, Pearl merchant of Bombay was adjudicated an insolvent on 27th October 1913. On the 10th February 1914, the insolvent filed his schedule showing liabilities to the extent of Rs. 29,20,499. The realizable assets were shown at about Rs. 2,90,000, but the Official Assignee's report showed that only Rs. 1,37,000 could be recovered.

The insolvent applied for his discharge under section 38 of the Presidency Towns Insolvency Act (III of 1909). On 8th April 1915, his petition was rejected by Davar J., the learned Commissioner sitting in the Insolvency Court. While refusing the discharge, his Lordship dwelt at great length upon the insolvent's gross recklessness, extravagance, and numerous malpractices. On the 12th April 1915, the insolvent applied for protection from arrest; and on 16th April 1916, the learned Commissioner granted an *interim* protection order for twelve months, delivering the following judgment.

DAVAR, J. :—The insolvent, Shaik Abdool Rahiman bin Shaik Abdool Aziz El. Ebrahim, whose discharge I refused on the 8th instant, now applies for a protection order. It has been pointed out to me that in a previous case where brother Macleod, as a Judge in Insolvency, refused an insolvent his discharge under section 39 of the Presidency Towns Insolvency Act, granted him a protection order when the insolvent subsequently applied for it. It has also been pointed out that in all cases dealt with under section 39 where discharge is suspended for a stated period, protection order as a matter of course is granted during such period of suspension. It must be remembered that I was unable at the hearing to convict the insolvent of any offences under the Act, and I dealt with his case only under

the provisions of section 39. And as I have just observed in all cases of insolvency dealt with under the section where the discharge is suspended, the insolvents have, as a matter of course, been granted protection orders during the period of such suspension. Only in, I think, two very exceptional cases I withheld protection order for a small portion of the period of suspension. In this case the insolvent has two creditors who have obtained decrees against him and if protection order is not granted to the insolvent, it is possible that they may be in a position of greater advantage over the insolvent than his other creditors. Besides this the inevitable result of refusing protection order to the insolvent would be to drive him to take refuge in the territories of either the Baroda State or the Portugese Government in the vicinity of Bombay or what is still more probable to drive him to depart to his native country Arabia. In this way the insolvent would disappear from British India for the next two years and only return to Bombay to renew his application for his discharge at the end of two years. The insolvent's presence is required by the Official Assignee who wants his assistance for the purpose of realizing his assets and administering his estate. The insolvent has undertaken not to leave the jurisdiction of this Court without leave previously obtained from this Court and has also undertaken to attend the office of the Official Assignee whenever called upon to do so.

Under these circumstances I think the insolvent should be protected from arrest and for the present I grant him an *interim* protection order for twelve months.

Costs of the opposing creditors must be paid from the assets of the insolvent.

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Against this order, the appellant, an ordinary creditor, filed an appeal.

Bahadurji, for the appellant.

Desai, for the respondent.

Two preliminary points were raised on behalf of the respondent, (1) the *interim* protection order was not appealable, (2) the appellant was not the "person aggrieved" within the meaning of cl. (2) of section 8 of the Presidency Towns Insolvency Act.

The learned Chief Justice delivered the following judgment on the preliminary points :—

SCOTT, C. J.:—Two preliminary objections have been taken to this appeal. First, it is said that this is an order which, under the Presidency Towns Insolvency Act (III of 1909), is not appealable. Section 8 deals with appeals. It is headed with the introductory title of appeals. Clause (1) provides that the Court may review, rescind or vary *any* order made by it under its insolvency jurisdiction. Clause (2) states that orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows: An appeal from an order made by an officer with delegated powers under section 6, which order under that section is to be treated as an order of the Court, lies to the Judge assigned under section 4 to dispose of insolvency matters, and no further appeal lies. The other orders, being orders made by the Judge himself as original orders, are appealable, and shall lie in the same way and be subject to the same provisions as appeals from orders made by a Judge in the exercise of the ordinary original civil jurisdiction. Now, it is to be observed that the first clause deals with *any* orders made under the insolvency jurisdiction. The second clause deals with orders in insolvency matters; and there does not appear to us to be any reason for limiting them so as

to include something less than orders referred to in the first clause. Clause (*a*) does not indicate that the Legislature wished to put any limitation upon appeals from orders made by the delegated officer; and similarly it does not appear to us that it wished to put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure. Those appeals must be preferred in the same way and subject to the same provisions as Original Side appeals. "In the same way" would refer *inter alia* to the filing of a memorandum of appeal in the Prothonotary's Office and so forth, as provided by the Original Side Rules.

"Subject to the same provisions" would be subject to the law of limitation and other statutes enacting adjective law. We do not think it should be held that this order made as an original order by the Judge exercising jurisdiction under the Act is not appealable. Of course, there may be orders which are merely orders regulating procedure for the convenience of the Court or for the convenience of the parties. Such orders, we take it, are not affected by these provisions. The orders made must be judicial orders intended to decide some point judicially. It cannot be contended that the present order is not a judicial order

Then, it is said that an appeal only lies at the instance of any person aggrieved, and it is contended that the appellant, who filed this appeal, is not a person aggrieved. The order complained of is an order which granted protection, although refusing discharge, to the insolvent; and it is said that such an order only affects the interests of creditors who have obtained decrees and therefore would otherwise have the right of arresting the judgment-debtor. But the only reason why the appellant is not himself a judgment-creditor is that the insolvent, since the filing of the appeal, has

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prevented the creditor-appellant from attaining that position by opposing proceedings before the Original Side Judge which were actually suggested by the Insolvency Court in order that the appellant might put himself in the position of an aggrieved person. The view that the appellant is not an aggrieved person is one which this Court is not disposed to regard with favour under the circumstances; but as counsel for the appellant appears also on the instructions of the Alliance Bank, a judgment-creditor and opposing creditor, who would undoubtedly be an aggrieved person and consents to be added, and actually applies to be added as a party appellant in this appeal, we, in pursuance of the powers vested in Courts under section 107 of the Civil Procedure Code and Order I, Rule 10, cls. (2) and (3), and Order XLI, Rule 33, direct that the Alliance Bank be joined as appellants in this appeal.

The appeal must proceed.

On further hearing of the appeal, the following judgments were delivered :—

SCOTT, C.J.:—This case comes before us on appeal from an order of Mr. Justice Davar sitting as Judge in Insolvency, dated the 16th of April, 1915, whereby the insolvent after refusal of his discharge and notwithstanding opposition by a judgment-creditor was given an order protecting him from arrest till April, 1916.

The order refusing the insolvent's application for discharge was passed on a judgment of the 8th of April in which the reasons for refusing discharge were stated and it was shown that numerous facts falling within the categories (*a*), (*b*), (*c*), (*d*), (*f*) and (*j*) of section 39 (2) of the Presidency Towns Insolvency Act had been proved against the insolvent. It was found *inter alia* that on the day preceding his petition in insolvency the respondent to make good certain defalcations assigned a debt worth Rs. 29,000 and properties worth over two

lacs to creditors whom he had defrauded by breaches of trust. The learned Judge stated that he would have tried the insolvent in respect of these assignments under the penal section 103, if it had not been for the decision of the House of Lords in *Sharp* v. *Jackson* [1] which seemed to render a trial on a charge of fraudulent preference hopeless. Nevertheless the learned Judge, because he believed that in almost all cases where the discharge was suspended under the present law, the insolvent had, as a matter of course, been granted protection for the period of suspension, granted protection for twelve months out of the period of two years which would elapse between the order refusing discharge and a fresh application for discharge by the insolvent.

It is clear that the Court has a discretion in the matter. If an application for protection was necessary in April under section 25, the Court could have refused it for good cause. If ever there can be such good cause, it seems to me to exist in the present case. There is nothing to be said for the insolvent in face of the findings of the learned Judge. We are moreover informed by the Official Assignee that the learned Judge is mistaken in thinking the insolvent's assistance is required for the purpose of realizing assets. All known assets of value had been recorded before the application for discharge. It would, in my opinion, be dangerous as well as unnecessary to adopt any such rule of practice as the learned Judge believed to exist. Each application for protection after refusal or suspension of discharge must be judged on its merits. The Court has no longer power to permit the imprisonment of an insolvent for two years at the suit of a judgment-creditor as it had under section 51 of the Indian Insolvent Act : the period of six months is the maximum term of

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civil imprisonment under the Civil Procedure Code. But if the insolvent has acted, as here, recklessly and dishonestly, the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows : compare *Marris* v. *Ingram*[1] and *In re Gent* : *Gent-Davis* v. *Harris*[2], cases under the English Debtors' Act of 1869. In my opinion the order of protection now under appeal should be set aside.

BATCHELOR, J. :—This is an appeal in insolvency proceedings from an order made by the learned Commissioner granting the insolvent protection from arrest under section 25 of the Presidency Towns Insolvency Act, 1909. The appellant before us is the Alliance Bank of Simla, a judgment-creditor in the sum of Rs. 50,000.

The respondent was adjudicated insolvent on 27th October 1913. On 10th February following he filed his schedule, showing liabilities amounting to Rs. 29,20,499. The realizable assets are stated to come to Rs. 2,90,000, but the amount recovered up to the time of the Official Assignee's report is only Rs. 1,37,000, and between that date and this the further sum realised is, we are told, the mere driblet of Rs. 4,000.

On 8th April 1915 the learned Commissioner refused the insolvent's discharge for reasons which he explained in an exhaustive judgment, in which he animadverted in severe terms on the insolvent's recklessness, extravagance and numerous malpractices. On 16th April 1915 the same learned Commissioner made the order now under appeal granting the insolvent protection from arrest. The question is whether that order should be affirmed.

The order is, under the Act, a discretionary order ; in this case it was made by my learned brother, Davar J.,

(1) (1879) 13 Ch. D. 338. (2) (1888) 40 Ch. D. 190 at p. 195.

whose experience in the administration of the law of insolvency is far greater than mine. It is, therefore, with sincere diffidence that I find myself compelled to take another view ; and since we are differing from Davar J., I desire to state my reasons in my own words. The conclusion which I reach is based entirely on Davar J.'s judgment as to the character of this insolvency and on the consequences which seem to me to follow from that character. On this point I rely on the following passages in which the learned Commissioner has given his reasons for refusing the respondent's discharge.

"The Official Assignee in his report says that the insolvent mixed up the monies received by him as receiver with his own moneys. The insolvent on 26th October 1913, a day before he filed his petition in insolvency, assigned over and transferred a good debt due by Maneklal Panachand to himself to the heirs of Esa Khalifa of whose estate he was receiver. And by this act a sum of Rs. 29,000 was disposed of a day before his insolvency. It further appears that, during the time the insolvent was carrying on business, he was entrusted by various Arab merchants with their pearls for the purpose of sale. The insolvent pledged those pearls, and used the moneys realised by such hypothecation for his own purposes. Again on 26th October, a day before his insolvency he executed four writings, whereby he assigned over and transferred all his interest in certain properties at Basra to secure payment of about Rs. 2,10,000 to the Arab merchants whose pearls he had wrongfully and unjustifiably pledged. Denuded of all extraneous circumstances, the facts which cannot be denied are that the insolvent, during the time he was carrying on business as a merchant, committed offences of criminal breach of trust in respect of property entrusted to him as receiver, and in respect of property entrusted to him for sale as a broker or commission agent. In order to save himself from criminal prosecutions which, he apprehended, would be started against him on its being known that he was insolvent or unable to meet his liabilities, he parted with properties worth approximately Rs. 2,40,000 on the day preceding his insolvency,... I have to take into consideration certain facts admitted by the insolvent himself. In addition to doing the pearl business he kept a racing stud. The Official Assignee in his report says that his racing expenses came to seven lacs of rupees spread over a period of six years. The statement as to seven lacs is correct, but the statement as to the period is not correct. To be exact, it appears that he spent a sum of Rs. 6,98,340 from November 1910 to October 1913 on his racing stud.... He

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was living in a style and expending moneys (in a way) which I venture to think very few citizens of Bombay have done, even though they may be admitted millionaires. . . . His books give no indication as to what his profits were, or whether there were profits at all, and in what year there were profits or losses. He has kept books, but he might well have omitted keeping books at all, because the books that he has kept are of no value whatever. The books are not balanced, balances are not drawn, nor are they carried forward, and quite light-heartedly the insolvent admits that entries in respect of all payments and receipts do not appear in his books. If they do not, the value of those books is absolutely nil . . . It seems to me that a man who is capable of regarding money in the light in which the insolvent has regarded it, and of dealing with his own and other people's moneys in the reckless manner in which he has done, that such a man as a merchant is a danger to the public. His assets are not equal to four annas in the rupee. The Official Assignee reports that in his opinion the insolvent cannot be held liable for his assets not being equal to four annas in the rupee on his unsecured liabilities. I differ from that conclusion altogether. It seems to me there can be no question whatever that the insolvent is solely and wholly responsible for his present state of affairs. . . . There can be no question that the insolvent continued to trade when he must have well known that he was in insolvent circumstances. A man does not incur debts to the extent of twenty nine lacs of rupees without realising that he is insolvent, and a debt of this description is not incurred in a day or a month. His indebtedness and insolvency must have been growing and growing continuously as every month of his reckless life progressed, and he must have been conscious, long before he filed his petition, that he was living a riotous and extravagant life at the expense of his creditors. He continued his business right up to the end with the fullest knowledge that he was dissipating his creditors' moneys."

The learned Commissioner concluded by finding against the insolvent that there was complete proof of the facts mentioned in cls. (*a*), (*b*), (*c*), (*d*), (*f*) and (*j*) of sub-section 2 of section 39 of the Act, and by expressing his regret that he could inflict on him no higher punishment than the refusal of his discharge. From this judgment there was no appeal, and this, therefore, is the state of facts in which we have now to decide whether this insolvent is entitled to a protection order.

It is, I think, certain from the judgment of Davar J., that the only reason why he felt himself unable to

enforce the penal provisions of the Act was that, in view of *Sharp* v. *Jackson*[a], he reluctantly concluded that criminal proceedings could not succeed as it would be open to the insolvent to plead that his immediate and direct motive in benefiting some creditors at the expense of others was to save himself from the criminal prosecution, to which his own acts had exposed him. I agree with Davar J., that, under the law as it stands, such a plea would suffice to save the insolvent, and, since that is the law, we must give effect to it; whether it is a satisfactory condition of the law must be left to the authorities whose province it is to consider such matters. What concerns us now is to decide whether the character of the insolvency has, or has not, any bearing upon the question whether the insolvent is entitled to protection: if it has, then, I think, it follows without further argument that this insolvent is disentitled. The contention for the insolvent goes, and must necessarily go, to this extent, that when once the Court finds itself for whatever reason, technical or substantial, unable to enforce the penal provisions, it must shut its eyes altogether to the character of the insolvency, and must consider exclusively the financial interests of the general body of the creditors. I can find nothing in the Act to countenance this view, though of course the interests of the creditors must receive some consideration. As I understand section 25, a protection order, though *prima facie* the insolvent is entitled to it, is still a privilege, to be granted or withheld as the Court in its discretion may determine, and the proposition on which I found my judgment is merely this, that, in exercising that discretion, it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency. Here the insolvency was, as I have shown, of a flagrantly

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culpable kind, being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered. That protection should ordinarily be granted, does not signify here, for this is an extraordinarily bad case; and if it is not refused here, it must follow that it could never be refused, a consequence which, in my opinion, would conflict with the provisions of the section. I must add that the recent commercial history of Bombay is not such as to encourage the Courts to interpret the Act in a manner calculated to favour reckless speculation with other people's money; and that, I think, would be the effect of allowing insolvents to suppose that, to whatever lengths they may go in misconduct or dishonesty, they may count on immunity from the one fear that might act as a deterrent, the fear of the stigma of imprisonment. It is, in my opinion, no answer to say that the creditors would be better off if the insolvent were at large, for I can see no very appreciable difference to the creditors whether he is at large or in jail; nor does it appear that there is any concealed property which the insolvent could produce. Moreover I think that even if his freedom could be shown to be of some advantage in the collection of assets, that advantage might well be sacrificed for the more obvious need of showing the Court's disapproval of the insolvent's conduct. Lastly, I do not feel embarrassed by the contention that the refusal of protection would merely confer a special advantage on the appellant Bank to the possible disadvantage of the general creditors. It seems to me that a creditor who has put himself in a position to invoke and to deserve the exercise of certain powers conferred on the Court is entitled to the Court's order in his favour. In fine, all these possible disadvantages, more or less remote, must be taken to have been within the contemplation of the

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Legislature, which yet has seen fit to empower the Court to refuse protection in suitable cases ; and I can scarcely imagine a more suitable case than this. As to *In the matter of Meghraj Gangabux*[1], that being the decision of a single Judge, is not binding on this Bench, and there the only point decided was as to the grant of protection pending the inquiry into the insolvent's conduct prior to the Court's decision on his application for discharge. It is true that certain general observations are to be found in the judgment, but they must, I think, be read as limited by the facts then before the Court, and the case cannot, in my opinion, be properly cited as an authority for any hard and fast rule.

For these reasons I agree that the protection order granted in this case should be set aside.

Attorneys for the appellant : Messrs. *Little & Co.*

Attorneys for the respondent : Messrs. *Payne & Co.*

Order set aside.

G. G. N.

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Before Mr. Justice Macleod.

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September 20.

SEWARAM GOKALDAS, PLAINTIFF *v.* BAJRANGDAT HARDWAR POTDAR, DEFENDANT.*

Suit on a Hundi—Hundi passed up-country and not made payable in Bombay—Consideration of the hundi being the balance of account between the Bombay merchant and the up-country merchant—Account settled up-country—Jurisdiction of the High Court—Letters Patent, cl. 12—Leave of the Court to sue—Cause of action.

[1] (1910) 35 Bom. 47.

* O. C. J. Suit No. 875 of 1915.