

1932

Present : Macdonell C. J. and Dalton J.

MOHAMED v. RAMASAMY CHETTIAR *et al.*

17—D. C. (Inty.) Colombo, 3,795.

Insolvency—Supreme Court refuses certificate—Appeal to Privy Council—Power of District Court to grant protection—Ordinance No. 7 of 1853, ss. 32, 132, 133 and 152.

A District Court has no power to grant protection to an insolvent to whom the Supreme Court has refused a certificate, while an application by him to the Privy Council for leave to appeal is pending.

APPEAL from an order of the District Judge of Colombo.

N. E. Weerasooria, for creditor, appellant.—A District Court has no jurisdiction to extend protection after a certificate has been refused by the Supreme Court. The protection granted is a temporary protection till the question of the grant of a certificate is considered. Once it is refused no question of further protection can arise. The order finally made is an order of the Supreme Court and the Court which has power then to grant protection is the Supreme Court and not the District Court (*Hamil v. Lilly*¹). The material on which the application was granted is entirely insufficient.

N. Nadarajah, for insolvent, respondent.—Either the District Judge is completely *functus officio* as soon as he refuses a certificate or he has some further power to grant protection pending an appeal to the Supreme Court. He can according to the Ordinance grant protection till the certificate is allowed. An insolvent has a right to appeal to the Supreme Court. He has also a right to appeal to the Privy Council. The District Judge can grant protection pending the appeal (*Ex parte Nicholson*²). The District Judge has the right to grant protection even after he refuses a certificate till the Supreme Court grants or refuses a certificate. Even where the Supreme Court refuses a certificate the District Judge can grant it on the ground that the presence of the insolvent is necessary for the assistance of the assignee. If a person has a right to appeal to

¹ 19 Q. B. D. 83.

² *De Ger, Fisher & Jones* 270.

the Privy Council and the Judge is satisfied that his freedom from arrest is necessary for him to prosecute his appeal, he has a right to grant protection. The District Judge is satisfied that the insolvent is making *bona fide* endeavours to prosecute his appeal before the Privy Council.

August 4, 1932. MACDONELL C.J.—

This appeal involves construing the Insolvency Ordinance, No. 7 of 1853, particularly sections 36, 132, and 152. The facts were as follows:— The respondent was made insolvent on November 21, 1927, and was eventually granted a certificate of conformity of the second class by the District Court of Colombo, on December 18, 1930. The creditors appealed to the Supreme Court against this grant of a certificate, and their appeal was allowed and a certificate refused, by order of June 10, 1931. The insolvent then applied to the Supreme Court for conditional leave to appeal to the Privy Council against the order of the Supreme Court of June 10, 1931, refusing him a certificate, but the Supreme Court refused to give him this leave by an order of August 6, 1931. The insolvent then applied to the Privy Council itself for leave to appeal to it and on September 2, 1931, applied to the District Court for protection from arrest under section 36 of the Ordinance till the determination of this application to the Privy Council. The District Court granted him this protection by an order of October 5, 1931, the protection to be for three months, conditioned on his entering into a bond for Rs. 1,000 with one surety. It is from this order of October 5, 1931, granting the insolvent protection that the present appeal dated October 10, 1931, is brought. To continue the statement of facts. On November 9, 1931, the insolvent obtained from the Privy Council leave to appeal to it conditional on his depositing £400 as security for the costs of the appeal but he had not up to the date of this appeal deposited that or any sum. On June 18, 1932, he applied to the Privy Council for leave to appeal *in forma pauperis*.

It will be noticed that since the protection granted the insolvent on October 5, 1931, was for three months only, it expired on January 5, 1932, several months before this appeal could be heard, consequently when the appeal was heard, it was an order no longer operative. None the less the appeal was pressed on the ground that the District Court, when it granted protection to the insolvent, had no longer any jurisdiction to do so.

This argument seems well founded. Section 36 secures the insolvent from arrest or imprisonment by any creditor when he surrenders "and for such further time as shall be allowed him for finishing his examination and for such time after finishing his examination until his certificate be allowed as the Court (*i.e.*, the District Court) shall from time to time . . . think fit to appoint". The District Court had jurisdiction then to grant the insolvent protection up to the date when it allowed him a certificate of conformity, which was on December 18, 1930. But the order allowing insolvent a certificate may be appealed against, as this one was, and this case is provided for in section 132. "No such certificate shall be delivered to the insolvent until after the expiration of the time allowed for entering an appeal; and if an appeal be duly

entered against the judgment of such Court for the allowance of the certificate or for the refusal, the withholding or the class of the certificate the certificate shall be further kept by the Court and abide the judgment of the Supreme Court thereupon". According then to sections 36 and 132 the District Court may grant the insolvent protection "until his certificate be allowed" and this in the event of appeal to the Supreme Court will not happen until the Supreme Court has confirmed the order of the District Court granting him a certificate, the protection granted by the District Court under section 36 will last till then. But in this case the Supreme Court has reversed the order of the District Court and instead of allowing has refused the certificate. This case is provided for by section 152 which, after stating who are judgment-creditors, goes on:—"The Court (i.e., the District Court) when it shall have refused to grant the insolvent any further protection, or shall have refused or suspended his certificate shall on the application of any such creditor, grant a certificate in the form R in the schedule to this Ordinance annexed," i.e., a certificate entitling the creditor to whom it is granted to issue a writ of execution against the person of the insolvent. Now the position here is that the Court (i.e., the District Court) has refused the insolvent a certificate, since that is the effect of the order of the Supreme Court of June 24, 1931, which reversed the order of the District Court allowing him a certificate. Can the District Court now grant him protection since it has refused him a certificate? It would seem not. Clearly this section 152 confers no power on the District Court to grant protection or to issue a certificate of conformity; those powers must be sought in other sections of the Ordinance. All this section does is to enable the District Court to grant a certificate in form R if one or other of certain conditions has been fulfilled, and in the present case one of those conditions has been fulfilled, a certificate of conformity has been refused. The only section to which the attention of the Court was directed during this appeal as enabling a District Court to grant protection to an insolvent is section 36, and that section says clearly that protection may be granted until the certificate of conformity is allowed, it gives no further powers to a District Court of granting protection to an insolvent. Then it would appear to follow that in making the order of October 5, 1931, granting to the insolvent a certificate of protection, after it had refused him a certificate of conformity—that was the effect of the order of the Supreme Court reversing the previous allowance of a certificate of conformity—the District Court was doing something which under this Ordinance—the sole law which enables it, under section 64 of the Courts Ordinance, to adjudicate on insolvency matters—it had no power to do. If so, the certificate of protection granted by it on October 5, 1931, was wrong and must be set aside.

In this connection section 133 of the Ordinance No. 7 of 1853 seems important—"The allowance of the certificate by the District Court and any order for the refusal or suspension of the allowance thereof (except in case of appeal), shall be final and conclusive, and shall not be revised by the District Court unless the said Court shall thereafter see

good and sufficient cause to believe that the allowance of such certificate, or the refusal or suspension thereof, has been obtained on false evidence, or by reason of an improper suppression of evidence, or has otherwise been fraudulently obtained, in any of which cases it shall and may be lawful for the District Court, . . . to grant a rehearing of the matter, and to rehear the same accordingly". It will be noticed that this section makes the allowance or refusal of a certificate of conformity by a District Court final and conclusive. If it allow a certificate, protection becomes unnecessary; if it refuses the certificate, then section 156 becomes operative and it must grant a certificate in form R allowing the imprisonment of the debtor. If on any of the grounds set out in this section 133 it grants a rehearing of the application for a certificate of conformity, then clearly it can grant protection to the insolvent during such rehearing, for by section 36 it has power to grant protection "until the certificate be allowed", and the allowance of such a certificate is the very point for decision on such rehearing. But this is the only discoverable provision in this Ordinance which can give a District Court power to grant protection once a certificate of conformity has been allowed or refused, and there is no suggestion in this case that section 133 was being or could be used.

If the insolvent in this case desired protection pending his application to the Privy Council for leave to appeal to it, the Court to apply to would seem to be the Supreme Court. The case of *Ex parte Thomas Nicholson*' was cited to us. This seems to decide that when a Court of first instance has refused a certificate and such refusal has come before an appeal Court, the proper tribunal to which to make application for protection is such appeal Court. This was a decision upon the then English Law of Bankruptcy of 1849, from which our own probably does not very much differ. The decision certainly seems to suggest that if the insolvent in this case desired protection, it is from this Court that he should have asked it. If this is so it would be an additional reason for holding that in this case the District Court had no power to grant protection.

For the foregoing reasons I am of opinion that the District Court had no power to grant the protection by the order appealed from and that this appeal must be allowed with costs here and below.

DALTON J.—I agree.

Appeal allowed.
