

1971

Present : Weeramantry, J.

F. E. SMALE, Petitioner, and THE COMMISSIONER OF INLAND
REVENUE, Respondent.

*S. C. 8/1971—Application in Revision in M. C.
Colombo South, 12707/A*

Insolvency Ordinance (Cap. 97)—Sections 36 and 164—Extent of the protection available thereunder to an insolvent—Income Tax Ordinance (Cap. 242)—Section 55 (1)—Proceedings for recovery of tax before a Magistrate—Whether or not sentence of imprisonment is obligatory in default of payment—Criminal Procedure Code, ss. 312 (1), 312 (1) (b).

The protection from arrest and imprisonment given to an insolvent by sections 36 and 164 of the Insolvency Ordinance is available not only when the insolvent is coming to surrender but also at later stages right up to the stage of examination and allowance of certificate. Such protection, however, does not extend to a case where the insolvent is one who has incurred a tax liability to the Crown.

“ A clear distinction must be drawn between the type of arrest or imprisonment which a civil creditor is entitled to inflict upon his debtor under the provisions of the Civil Procedure Code and the arrest or imprisonment which the Criminal Procedure Code provides as one of its essential sanctions . . . Consequently where the Income Tax Ordinance states that the tax due is to be recovered as a fine and thereby contemplates the use of the machinery of the Criminal Procedure Code for its recovery, it can scarcely be stated that insolvency by itself exempts the tax payer from liability to undergo a term of imprisonment provided in lieu of payment.”

In proceedings for the recovery of income tax under section 85(1) of the Income Tax Ordinance it is not obligatory upon the Magistrate to impose a term of imprisonment in default of payment ; it is open to him to decide whether or not the provisions of section 312 (1) of the Criminal Procedure Code should be made applicable. It is also open to the Supreme Court, acting in revision, to consider whether an order of imprisonment made by the Magistrate should be altered.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

M. Kanagasunderam, with *M. Amarasingham*, for the petitioner in Applications Nos. 8, 9, 10 and 11 of 1971.

Faisz Mustapha, Crown Counsel, for the respondent in all Applications.

Cur. adv. vult.

July 3, 1971. WEERAMANTRY, J.—

This is one of four applications filed by the same petitioner against the Commissioner of Inland Revenue.

The facts which I shall set out are those referred to in the first of this set of petitions. Apart from differences in figures and dates, the questions involved in all these applications are the same.

It would appear that the Commissioner, in terms of section 85 (1) of the Income Tax Ordinance, had issued a certificate for the recovery of a sum of Rs. 8,883, being the sum stated to be due as tax and penalty from the petitioner.

The petitioner had been adjudicated an insolvent by the District Judge of Colombo on the 5th of July 1970, and protection was issued to him until the 2nd of October 1970. Before this date, however, on the 21st of August 1970, the District Judge, under section 36 of the Insolvency Ordinance, directed that the insolvent be free from arrest or imprisonment by any creditor until his certificate was allowed.

While the petitioner was enjoying protection in terms of these orders, the learned Magistrate held an inquiry in terms of section 85 (1) of the Income Tax Ordinance on 13th October 1970.

At this inquiry the petitioner submitted to the learned Magistrate that he had already been adjudged an insolvent and that consequent upon the said adjudication he had been granted a certificate of protection in terms of section 36 of the Insolvency Ordinance. He also produced before the learned Magistrate certified copies of the insolvency proceedings showing that the period of protection had been extended up to 16th February 1971.

On the basis of the orders made in the insolvency case, the submission was made to the learned Magistrate that the sum of Rs. 8,883 was a debt due to the Crown and as such that by virtue of section 164 of the Insolvency Ordinance, read with section 36, the petitioner was free from arrest or imprisonment by or at the instance of the Commissioner.

Section 36 of the Insolvency Ordinance states that the insolvent shall be free from arrest or imprisonment not only in coming to surrender, but after such surrender and for such further time as shall be allowed him for finishing his examination. He is further protected for such time after finishing his examination until his certificate be allowed as the Court shall from time to time think fit to appoint. In the present case, at the date of the inquiry under section 85, this protection had accrued to the petitioner.

At this inquiry the learned Magistrate on 15th October made order against the petitioner. Referring to the submissions made on his behalf that sections 36 and 164 of the Insolvency Ordinance gave him protection, he has observed that that section has no application to the facts of the case before him as that section only gives protection from arrest *when coming to surrender*.

This is clearly a misreading of the section for it is not only when coming to surrender but also at later stages right up to the stage of examination and allowance of certificate that protection is available and the learned Magistrate's reasons on this matter are therefore clearly not sustainable.

The learned Magistrate has referred to the judgment of Sansoni, J., in *Kumatheris Appuhamy v. Commissioner of Income Tax*¹ to the effect that an assessee who is insolvent and has been adjudicated accordingly is not entitled to claim that no proceedings can be taken against him for recovery of tax under section 80 (1) of the Income Tax Ordinance (corresponding to section 85 (1) as the Ordinance stands today).

¹ (1955) 57 N. L. R. 164.

Although the learned Magistrate was clearly wrong in holding that section 36 is limited to the case of an insolvent coming to surrender, still the larger question remains whether the protection afforded by section 36 extends to a case where an insolvent is one who has incurred a tax liability to the Crown.

Section 36 seems to contemplate protection being granted to a debtor from arrest or imprisonment by a creditor, that is an arrest or imprisonment at the instance of a creditor who in default of payment seeks to use the provisions of the Civil Procedure Code for the arrest of a debtor as a means of enforcing the payment of his dues. The same would apply to the Crown where the Crown is a creditor.

There seems to be no warrant however for extending the operation of this section to cover cases of recovery under the Criminal Procedure Code. In cases where a fine has been imposed upon an accused person and he is arrested or imprisoned for default of payment of such fine, it is true that in such cases the accused is a Crown debtor and that the Crown is a creditor, but to make the provisions of the Insolvency Ordinance applicable to fines thus sought to be recovered under the provisions of the Criminal Procedure Code would be to deprive orders of Court in criminal cases of the sanction which must necessarily accompany them. Where for example a Magistrate sentences an accused person to pay a fine of Rs. 500 or in default to undergo a term of six weeks rigorous imprisonment, I do not think it would be reasonable to hold that the mere circumstance that the accused in that case happens to be insolvent would exempt him from the necessity to undergo a term of imprisonment in default of payment of the fine. The penal law cannot thus be robbed of those sanctions which are essential to its proper enforcement.

It seems therefore that a clear distinction must be drawn between the type of arrest or imprisonment which a civil creditor is entitled to inflict upon his debtor under the provisions of the Civil Procedure Code and the arrest or imprisonment which the Criminal Procedure Code provides as one of its essential sanctions. I do not think the Legislature ever contemplated that insolvents who committed crimes punishable with a default sentence in lieu of a fine should go scot free merely because of their insolvency. This would be an absurdity and in the interpretation of section 36 an interpretation leading to such a result must be avoided.

Consequently where the Income Tax Ordinance states that the tax due is to be recovered as a fine and thereby contemplates the use of the machinery of the Criminal Procedure Code for its recovery, it can scarcely be stated that insolvency by itself exempts the tax payer from liability to undergo a term of imprisonment provided in lieu of payment.

This view does not however mean that imprisonment automatically follows in the event of non-payment of tax due, for as this Court has observed before, it is not obligatory upon a Magistrate to impose a term of imprisonment in default of payment.

I should in this connection refer to the judgment of T. S. Fernando J., in *Perera v. Commissioner of Inland Revenue*¹ where the winner of a prize in a hospital sweep who had spent the prize money for legitimate and necessary expenses, was sought to be taxed under a Statute which rendered prize money subject to taxation. This legislation was passed about six weeks before she received the money and she had, at no time prior to the receipt of the prize money, been liable to pay income tax.

The petitioner in that case was unable to pay the tax at the time of the assessment and proceedings were taken against her under section 80 (5). The tax in default was deemed to be a fine and the learned Magistrate sentenced her to a term of two months rigorous imprisonment for non-payment of the tax. T. S. Fernando J., observed that where it is not disputed that the defaulter is not possessed of any money, he found it difficult to appreciate how the subjection of the defaulter to a term of imprisonment would result in a payment of the tax or even a part of it.

I find that much of the reasoning in T. S. Fernando J.'s judgment in that case is applicable to the present case as well.

T. S. Fernando, J., there referred to the learned Magistrate's belief that he was obliged at the time of imposition of the fine to make order also in respect of imprisonment in default of payment. Fernando J., while referring to the phraseology of section 85 (1) which states that tax in default *shall* be deemed to be a fine, observed that it was in his opinion open to the Magistrate to decide whether or not any of the provisions of section 312 (1) of the Criminal Procedure Code should be made applicable to the fine, for that section states that the Magistrate *may* make any direction which by the provision of sub-section 312 (1) he could have made at the time of the imposition of the sentence.

Another provision vesting a Magistrate with a discretion in a matter of ordering imprisonment is section 312 (1) (b). Consequently, although a Magistrate may decide to impose a term of imprisonment where the circumstances warrant it, there may well be cases in which even though he may have such power he does not think such action is appropriate and may therefore refrain from exercising that power.

Again quite apart from the Magistrate's discretion there is always the discretion in this Court, as T. S. Fernando J. observed, to consider whether in the circumstances the order complained of should be altered in the exercise of this Court's powers in revision.

I should refer also to the case of *de Jong v. Commissioner of Income Tax*². Weerasooriya J. there held that in proceedings under section 80 (1) of the Income Tax Ordinance, where the defaulter appears in court and has no cause to show why further proceedings for the recovery of tax should not be taken against him, but the Magistrate makes no direction

¹ (1968) 70 C. L. W. 46.

² (1955) 57 N. L. R. 272.

at the time that the defaulter should suffer a term of imprisonment in default of payment of the tax due, it is not open to the Magistrate to make such a direction subsequently. In the course of that judgment it was observed that the object of proceedings under that section was to ensure the recovery of the tax due from the defaulter by subjecting him to a term of imprisonment should he fail to pay the tax.

In the present case the learned Magistrate would not appear to have given his mind to the question whether the imposition of a term of imprisonment was called for in the circumstances, and seems to have assumed that a term of imprisonment should automatically follow upon non-payment of the tax. It is necessary therefore that before a term of imprisonment be imposed upon the petitioner the Magistrate be called upon to give his mind to the suitability of such an order, in the light of the principles laid down by this Court.

I therefore set aside the order of imprisonment imposed by the Magistrate and send this case back to the learned Magistrate so that he may determine whether a term of imprisonment is or is not appropriate in the circumstances of this case.

This judgment and order would apply to the three connected cases as well: S. C. 9/1971—M. C. Colombo South Case No. 12708/A, S. C. 10/1971—M. C. Colombo South Case No. 17550/A, S. C. 11/1971—M. C. Colombo South Case No. 17659/A.

Case sent back for further proceedings.