Present : Mr. Justice Wendt and Mr. Justice Grenier.

1908.
November 3.

In the Matter of the Insolvency of HADJIAR ABDUL GAFFOOR.

D. C., Kandy, 1,562.

Insolvency—Person in jail under civil writ—Right to discharge—Discretion of Judge—Grounds of exercise of discretion.

A debtor who is in jail under a civil writ is not entitled, as of right, to be discharged upon his adjudication as insolvent. It is in the discretion of the Court to release him or not.

APPEAL from an order of the District Judge refusing to release the appellant upon his adjudication as insolvent.

Bawa, for the insolvent, appellant.

Cur. adv. vult.

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The appellant, who had lain twenty-one days in prison upon execution against his person and was yet in custody, petitioned that he should be adjudicated insolvent. His proctor, in presenting his petition, moved that petitioner should be adjudicated, that the Fiscal be ordered to produce his body in order to his surrender and that the petitioner be given the protection of the Court. The printed forms containing these motions end with the printed words "Allowed and ordered accordingly," with the addition in manuscript: "It is further ordered that the insolvent be released from custody on furnishing certified security for Rs. 10,000." This is followed by the Judge's signature, and then follows a printed motion for the insolvent's release, with the printed order: "There being no objection, it is ordered that the insolvent be forthwith released from custody." The detaining creditor was not given notice, and so was not in a position to object. The two orders are contradictory, and the later one is unconditional. This is another instance of the careless use of printed forms. The lower half was intended to be filled up after the insolvent had been produced and had surrendered. The District Judge anticipated his production and his application for release from custody. The insolvent, who has not yet surrendered, appeals to this Court, and wishes to be released forthwith; but this irregularity is due to the anticipatory order made by the Distict Court. It not appearing what the security demanded was intended to ensure, we inquired of the District Judge, who replies that he made the order under section 36 of the Insolvency Ordinance, No. 7 of 1853; that the amount of Rs. 10,000 was fixed because that was the amount of the judgment under which the appellant was in custody; and that "the security was intended to ensure the insolvent's surrender in Court up to the

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appointment of an assignee of his estate." So far as the "surrender" properly so called was concerned, that is to say, the appearance in Court of the insolvent and his consent to the adjudication, security was unnecessary, because he was in the Fiscal's lawful custody, and his appearance in Court would be ensured by the Court's order for his production. It is after such protection and surrender and after the Court has granted protection from arrest (meaning a fresh arrest on some other writ) that the application for discharge may be made, when the Court is empowered (not required) to order his immediate release, either absolutely or upon such conditions as it shall think fit. Certain cases are specified in which the release is forbidden. It is nowhere enacted that a debtor in custody is upon adjudication entitled to his discharge, as, of course, the Court has a discretion. The detaining creditor being interested should have notice of any application for discharge, and is entitled to be heard (*Ex parte Preston*[1]). Then, how is the Court's discretion to be exercised? Obviously, it must have regard to the purpose for which the law allows the discharge of a debtor, lawfully detained, against the wishes of the detaining creditor. In *re Robinson*,[2] Mr. Commissioner Hobroyd said: "The object of the Statute in giving the Court power to discharge a bankrupt from custody is to enable him to assist his assignees in discovering and getting in the estate. The Court is, therefore, not in a position to decide as to the discharge till after the choice, unless all parties consent. Let the application stand over till assignees have been chosen." These words were quoted with approval by Clarence J. in *Re the Insolvency of Saraye Lebbe*.[3] In *Ex parte Stuart v. Waugh*,[4] Lord Westbury L.C. expressed himself as follows on section 112 of the Bankruptcy Act of 1849, which is re-enacted in our section 36: "I have here an order made by a Commissioner in exercise of a very great and singular discretionary power given to the Court of Bankruptcy by the Statute of 1849. The Commissioner is authorized to exercise that power only for the benefit of the creditors under the bankruptcy. If he is perfectly satisfied that it will conduce to the benefit of the creditors under the bankruptcy, he is to exercise that power." Assignees had then been appointed, and they supported the order of release, but the Lord Chancellor said: "It may be considered a probable thing that a man out of prison would find himself more frequently at the office of the assignees than the assignees would attend upon him at the prison. But that greater convenience is not, in my mind, a sufficient ground for the exercise of this power, keeping in view the right of the detaining creditor. The power is a discretionary judicial power and is not to be exercised, unless some great benefit is to result from its exercise, and unless the detaining creditor has the power of availing himself of the bankruptcy for the purpose of permitting the

[1] (*1861*) *5 L. T. N. S. 89.*
[2] (*1851*) *Fonblanque's Bank Cases, 205.*
[3] (*1891*) *1 S. C. R. 53.*
[4] (*1863*) *9 L. T. N. S. 466.*

bankrupt to be discharged from prison." In *ex parte Moss*,[1] the Court, acting upon Lord Westbury's dicta, refused to discharge the debtor (who had applied before the choice of assignees), but allowed his release upon giving bail for his due appearance at the sittings of the Court. The amount of bail fixed was apparently the amount of the detaining creditor's debt and costs, but, of course, the Court must in each case fix such sum as, while it is not prohibitive, will have the effect desired.

I am not prepared to over-rule the District Judge's refusal in his discretion to exercise his power in appellant's favour, and the appeal will therefore be dismissed. The District Judge will, however, order appellant to be brought up to surrender, and thereafter will re-commit him to custody. If the appellant desires later to renew his application for discharge, he must give notice to the detaining creditor.

GRENIER A.J.—I agree.

Appeal dismissed.