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Present : Garvin and Lyall Grant JJ.

MARIKAR *v.* SUPPIAH PULLE.

180—D. C. (Inty.) Colombo, 3,899.

Insolvency—Judgment-debtor on bail—Adjudication in Insolvency—Freedom from arrest—Ordinance No. 7 of 1853, s. 36.

When a judgment-debtor, who is on bail pending inquiry into his petition for discharge under section 306 of the Civil Procedure Code was adjudicated an insolvent,—

Held, that he was not in custody within the meaning of section 36 of the Insolvency Ordinance and that he was entitled to the privilege of freedom from arrest until his examination is finished.

In re Insolvency of Punchihewage Don Juanis[1] followed.

APPEAL from an order of the District Judge of Colombo

Tisseveresinghe (with *Marikar*), for appellant.

Peri Sunderam (with *G. M. de Silva*), for respondent.

December 20, 1928. GARVIN J.—

The facts material to this appeal are these :—In execution of a judgment obtained by the respondent in case No. 24,250 of the District Court of Colombo the appellant was arrested. He was produced in Court on March 6, 1928, and committed to prison. On the following day he filed papers under section 306 and moved that he be released from arrest on the ground that he was not possessed of property which could be sold in execution of the decree. The Court fixed the inquiry into the application for May 28, and in the meantime allowed the accused to stand out on bail in Rs. 750. The inquiry was postponed for July 9, 1926. In the meantime, by its order of July 5, 1928, the District Court in its Insolvency Jurisdiction adjudicated the appellant an insolvent and appointed a date for the insolvent to surrender and conform. On July 5 the appellant duly surrendered himself and consented to being adjudicated. On the 13th of that month the respondent to this appeal, who is the judgment-creditor in case No. 24,250, moved "that the insolvent's protection be withdrawn as the same has been allowed *ex parte* without notice to him." This matter came up before the learned District Judge, who made order as follows :—" In the

[1] *1 C. L. R. 23.*

circumstances the only order I can make in this case is to withdraw the protection I have granted to the insolvent." The present appeal is from this order.

Section 36 of the Insolvent Estates Ordinance, No. 7 of 1853, enacts as follows :—" If the insolvent be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this Ordinance limited for such surrender, 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 shall from time to time by endorsement upon summons of such insolvent, or by writing under the hand of the Judge of such Court, think fit to appoint." It is contended for the appellant that at the date of adjudication he was not " in prison or custody," and that if that contention is admitted the section confers a protection upon him, which it was not competent for the Court to withdraw. In short, that if at the date of the adjudication the insolvent be not in prison or custody he receives protection from arrest at least up to the time of finishing his examination, from the Act itself, which the Court has discretion neither to grant nor withhold or withdraw. Both these points appear to be concluded by the case of *ex parte Leigh*.[1] As to the first of these two questions, it was held that the custody of bail on arrest is not custody within the meaning of the statute, at least so long as the bail permits him to be at large. There can be no question here that at the date of the adjudication the appellant was at large and was free to move about as he wished. That is not custody within the meaning of the Ordinance.

It remains to consider whether the appellant was entitled absolutely to protection till the conclusion of his examination or, whether it was discretionary for the Court to grant or withhold such protection or to withdraw it after it had been granted. On this point the judgment in *ex parte Leigh* (*supra*) strongly supports the contention of the appellant. It is true that of the determination the question was arrived at with reference to the Statute 5 (*Geo. II. c. 30*). But it seems to me that upon a consideration of section 36 we are driven to the same conclusions. The section declares that " if the insolvent be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment in coming to surrender, and after such surrender during the time limited to surrender, and for such further time as he is liable for his examination." The section then proceeds " and for such 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 shall from time to time by endorsement upon the summons

[1] (*1823*) *1 Glyn and Jameson 264.*

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of such insolvent, or by writing under the hand of the Judge of such Court, think fit to appoint.". It seems to me that the only stage at which any question of the protection from the Court arises is after an insolvent has finished his examination. In the interval between the examination and the certificate he cannot claim protection of right, and he will enjoy protection for such period or periods as the Court shall from time to time grant him.

This view of the section is in accordance with the judgment of Lawrie J. in *In the matter of the Insolvency of Punchihewage Don Juan.*[1] "I read the Ordinance," said Lawrie J. "as giving an unconditional privilege and freedom from arrest until the examination is finished to all who were not in custody at the time they were adjudicated insolvent."

The judgment of the learned District Judge has been largely influenced by the submission that the Court had no jurisdiction to enlarge him on bail pending the inquiry into his petition for release from arrest. Upon that point I do not desire to express any opinion. It is sufficient for the determination of the matter before us that at the date of his adjudication the appellant was neither in prison nor in custody within the meaning of section 36, and that he thereupon became entitled to the privilege of freedom from arrest until his examination was finished. That privilege is conferred by law, and it is not within the power of the Court to deny or withdraw it. It is customary for the Court to issue a writing intimating that an insolvent is entitled to protection, and it is customary to refer to such a writing, whether it be a separate document of itself or an endorsement upon a process as the protection. The true legal effect of such a writing is that it is an authoritative statement that in the case of a particular insolvent those circumstances exist which entitle him to protection, and the principal purpose of such a writing is to satisfy an officer seeking to arrest him, that he is protected by law. I refrain from any expression of opinion on any of the matters arising upon the petition for his discharge filed in D. C. 24,250 by the appellant.

The order under appeal is set aside, with costs to the appellant.

LYALL GRANT J.—I agree.

Set aside.

[1] *C. L. R. 23.*