

Present : Fisher C.J. and Drieberg J.

1929.

PERERA v. VALIAPPA CHETTY

43—D. C. Kalutara, 239.

*Insolvency—Protection—Insolvent in custody—Notice to creditor
Adjudication—Necessity to surrender and conform.*

A debtor who is in custody is not entitled to be discharged on being adjudged an insolvent without notice to the detaining creditor.

Protection is not a necessary consequence of adjudication. It can be granted to an insolvent only after he has surrendered and conformed.

A PPEAL from an order of the District Judge of Kalutara.

Rajapakse, for insolvent, appellant.

N. E. Weerasooria, for creditor, respondent.

June 28, 1929. DRIEBERG J.—

On November 27, 1928, at 9 A.M., the appellant was arrested at Kalutara on a warrant in execution of a money decree obtained against him by the respondent in D. C. Colombo, No. 21,610; after his arrest and while he was in custody these proceedings were initiated on the petition of a creditor, L. James Perera, for the adjudication of the appellant as an insolvent. These facts appear in the affidavit of the respondent and are not challenged. The act of insolvency relied on was a declaration of insolvency made by the appellant and attested by his Proctor. The declaration was submitted with the motion by the petitioning creditor for adjudication. This appears from the Secretary's note on the motion paper of the petitioning creditor's Proctor. On the declaration of insolvency is a note by the Secretary that it was filed at 12.10 on November 27. The declaration is imperfect in not stating the hour and day on which it was signed by the appellant, and, further, it was not filed by the appellant but submitted by the petitioning creditor.

On the motion paper of the petitioning creditor's Proctor there appears the following note : " Allowed. Protection till 21/12/28. Notice served 29/1/29." The formal order signed by the Judge, in a printed form, fixed two sittings, on December 21, 1928, and January 28, 1929, for the insolvent to surrender and conform; a special order of protection as provided for by section 36 of the Insolvency Ordinance and limited to December 21, 1928, was also made.

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Later in the day the appellant was produced before the District Court of Colombo by the Fiscal, when the appellant resisted his commitment on the warrant on the ground that he had obtained protection in these proceedings. The respondent desired to question the regularity of the grant of protection, and the appellant was allowed to stand out on bail pending steps for this purpose being taken by the respondent.

The respondent then moved in these proceedings to have the appellant's protection withdrawn on the ground that it was granted while the appellant was in custody on a warrant and that the appellant could obtain protection on his application only after notice to the respondent. On this application the Judge made order withdrawing protection. He said that if he had known that the appellant was in custody at the time he would not have allowed protection, by which I understand from the argument before him that he would not have allowed protection without notice to the respondent, on whose warrant he was then under arrest.

Allowing that the order for protection was otherwise regular, the Judge was quite right in withdrawing it for this reason. A debtor who is in custody is not entitled as of right to a discharge upon adjudication, and the detaining creditor, being interested, is entitled to be heard, *Ex parte Preston*¹ and *In the Insolvency of Hadjar Abdul Caffoor*.² There is good reason for this, for the Insolvency Court can refuse protection, among other grounds, if the arrest of the insolvent is on a judgment passed against him for a debt contracted by fraud or breach of trust. The only person who ordinarily will have knowledge, and would be interested in informing the Court, of the nature of the debt on which the insolvent is in custody is the execution creditor who caused his arrest.

On this ground alone, I think, the order of the District Judge is right and that the appeal should be dismissed.

But the order for protection was one which the Court had no power to make. The insolvent never appeared before the Court when this order was made. Protection is not a privilege which a petitioning creditor obtains for a debtor on obtaining an adjudication but one which an insolvent can obtain only by surrendering and conforming; it is not a necessary consequence of adjudication. In the notice of adjudication two public sittings are appointed for the insolvent to surrender and conform in case he does not dispute the adjudication and after he is served with notice of it—section 30, Insolvency Ordinance; but he can at any stage before this surrender to Court—section 31. "Surrender" is a personal act; the insolvent must "sign and subscribe the surrender," and if an insolvent fails to surrender after publication of the notice of adjudication he is guilty of an offence punishable under section 147

¹(1861) V. L. T. 89.

²(1903) 11 N. L. R. 353.

of the Ordinance. The provisions of sections 36 and 37 show clearly that protection cannot be granted to an insolvent until he has surrendered.

To conform is to consent to and assist in the conduct of the proceedings; an insolvent might get protection by surrender, but the Court may at any time thereafter withdraw protection if his conduct indicates that he is not conforming to the proceedings, by such acts as withholding information from the assignees, concealing books, or otherwise obstructing the administration of his estate.

The appeal is dismissed with costs. It is open to the appellant formally to surrender and apply for an order of protection with notice to the respondent.

FISHER C.J.—I agree.

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Appeal dismissed.
