

1932

Present : Garvin S.P.J. and Maartensz A.J.

MOHAMED v. ANNAMALAI CHETTIAR *et al.*

D. C. Colombo, 3,795.

*Insolvency—Certificate of conformity refused—Appeal to Privy Council—Application for protection pending appeal—Powers of Supreme Court.*

The Supreme Court has inherent power to grant protection from arrest to an insolvent, while an appeal by him to the Privy Council against an order of the Supreme Court refusing him a certificate of conformity is pending.

**T**HIS was an application for protection from arrest pending an appeal to the Privy Council.

The petitioner was adjudged insolvent by the District Court of Colombo on November 23, 1927, and on December 18, 1930, the District Judge granted the petitioner a certificate of conformity of the second class.

On an appeal by the opposing creditors, the respondents, the Supreme Court reversed the order of the District Court and refused the petitioner a certificate of conformity. The petitioner thereupon applied to the Privy Council for special leave to appeal, which was granted on November 19, 1931. Since then, the petitioner applied for and obtained leave to appeal to the Privy Council in *forma pauperis*.

*H. V. Perera* (with him *Nadarajah*), for petitioner.—Leave to appeal *in forma pauperis* has been obtained. Stay of execution until appeal is heard is always allowed under the inherent powers of the Court. See (1905) 33 I. L. R. Cal. at 932-934. Whether or not a stay of execution has been obtained, the Court can order a stay of execution.

Once a Court is given jurisdiction, it must be deemed to have jurisdiction over all procedural matters incidental to such jurisdiction. In *Nityamoni Dasi v. Madhu Sudan Sen*<sup>1</sup> the Privy Council held that the High Court had power to stay execution notwithstanding that the appeal had been admitted by special leave of the Privy Council.

<sup>1</sup> (1911) I. L. R. 38 Cal. 335.

The matter is still pending, and is not finally determined. The Court referred to in section 152 of the Insolvency Ordinance, No. 7 of 1853, is the District Court, not the Supreme Court. The Appellate Court must be deemed to have, for this purpose, at least the power which by statutory provision is given to the District Court.

*N. E. Weerasooria*, for respondent.—The Court of Appeal has no original jurisdiction in insolvency proceedings.

[GARVIN S.P.J.—Even an Appellate Court must give directions incidental to carrying out its own decrees.]

The Appellate Court is not here asked to vary or set aside an order made by an original Court. This is not a matter which arises in regard to an execution of a decree. See *Mohes Chandra Dhal v. Satrugan Dhal*<sup>1</sup> where the High Court held that it had no jurisdiction to stay execution where leave to appeal was granted by the Privy Council.

Unless the Appellate Court is vested with jurisdiction, whatever injustice may be done, the Appellate Court has not the power to grant relief. The authorities are clear that insolvency proceedings are distinct from the remedies contemplated by the Code with reference to a stay of execution. In the absence of any provision, statutory or otherwise, or any decided cases in support of a grant of this application, the Appellate Court should not exercise its inherent power to grant relief.

*H. V. Perera*, in reply.—This Court made the order refusing a certificate. It is quite open for this Court to suspend the operation of this order until the matter is finally decided by the higher Court.

December 16, 1932. GARVIN S.P.J.—

This is an application for an order granting the petitioner protection from arrest pending the decision of an appeal to His Majesty in Council. The petitioner was adjudicated insolvent by the District Court of Colombo on November 23, 1927, and his estate was laid under sequestration. The proceedings thereafter followed the usual course and on December 18, 1930, the District Judge granted the petitioner a certificate of conformity of the second class.

The opposing creditors, who are the respondents to this application, then appealed, and this Court by its judgment dated June 25, 1931, reversed the order of the District Court and refused the petitioner a certificate of conformity.

The petitioner then applied to this Court for conditional leave to appeal to His Majesty in Privy Council. But this application was refused on the ground that the power of this Court to grant such leave is limited to applications for leave to appeal from judgments or orders of this Court in "civil suits or actions" and does not extend to the case of judgments and orders in insolvency proceedings which, by a long series of decisions binding on this Court, have been held not to come within the meaning of these words.

<sup>1</sup> (1899) 27 I. L. R. Cal. at p. 3.

Application was then made to the Privy Council for special leave to appeal which was granted on November 19, 1931. Since then the petitioner has applied for and obtained leave to appeal to the Privy Council in *forma pauperis*.

Pending his application to the Privy Council for special leave the petitioner applied to the District Court to grant him protection and that Court by its order of October 5, 1931, allowed the application. An appeal was entered by the present respondents which was successful. It was held that the District Court had no power to grant protection once this Court had refused the petitioner a certificate. In the course of his judgment, Macdonell C.J. held that the proper Court to which such an application should be addressed is the Supreme Court.

Such an application has now been made and the question for us is whether this Court has power to grant the petitioner the relief he prays for and, if so, whether this is a case in which such powers should be exercised.

It is not disputed that the Privy Council Appeals Ordinance does not apply to the case before us, nor is there any other legislative enactment by which provision has been made for such a matter as the one with which we have to deal. This Court has no statutory power to entertain or grant such an application, but it is urged that it has inherent power to do so. I should be reluctant to subscribe to the proposition that this Court has no powers other than those derived from express legislation. Like other Courts in the Empire, and, in particular, superior Courts, this Court has always been considered to possess a certain reserve of powers which are generally referred to as its inherent powers. It has been said that these powers are equal to its desire to order that which it believes to be just. This is perhaps too wide and somewhat misleading a statement. No Court may disregard the law of the land or purport in any given case to ignore its provisions. Where a matter has been specifically dealt with or provided for by law, there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court of its inherent powers can arise. Section 839 of the Civil Procedure Code recognizes the existence of such powers and to an extent defines them when it says that nothing in that Code "shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

Subject to the limitations above referred to, the inherent powers of this Court would seem to extend to the making of such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. But these powers must be exercised in accordance with sound legal principles and not arbitrarily or whenever a case arises which is not provided for by legislation.

The case under consideration is not dealt with or provided for by the Legislature. Is it a case which comes within the scope of the inherent powers of this Court, and is it one in which those powers should be exercised?

The refusal of a certificate to an insolvent immediately brings section 152 into operation and every proved creditor becomes entitled to receive a certificate in form R and to issue and enforce a writ of execution against the body of such insolvent. The effect of an order refusing a certificate is that the insolvent immediately becomes liable to be arrested and cast in prison at the instance of a proved creditor. This is the situation in which the petitioner finds himself as a result of the judgment of the Supreme Court refusing him a certificate from which he has obtained the leave of the Privy Council to appeal. Finality has not yet been reached and it is possible that the Privy Council may reverse the order of this Court and grant him a certificate. The allowance of a certificate would necessarily imply that he should have received it in the first instance and should not therefore have been exposed to the risk of being arrested and imprisoned. An interval of some months, at least, must intervene before the Privy Council decides the petitioner's appeal. If in the interval he is arrested and cast into prison—and this is what the opposing creditors claim to be entitled to do—the appeal if successful would be rendered largely nugatory.

Where a matter is *sub judice* by reason of the pendency of an appeal to His Majesty in Privy Council it is but right and proper that this Court should be able to stay proceedings based upon its decree in any case in which not to do so will be to render the decree of the Privy Council partly or wholly infructuous or nugatory or to make orders in regard to such further proceedings so that no injustice or prejudice will be caused to a successful appellant or his interests. It seems to me to be a sound principle that this Court should have power to control action taken on its own decree while that decree is under appeal to the Privy Council, so as to prevent irreparable loss or injury to the appellant in the event of his appeal being allowed.

Section 761 of the Civil Procedure Code vests in the Court of first instance power in appropriate cases and on terms to stay the execution of appealable decrees before the expiry of the time allowed for appeal.

Section 763 of the same Code which deals with applications for execution pending appeal empowers the Court to protect the interests of the appellant by requiring the applicant for execution to give security for the restitution of any property which may be taken in execution or the payment of the value of such property and for the due performance of the order which may be made in appeal.

Similarly, in the case of those appeals to His Majesty in Council from decrees of the Supreme Court which are admitted by leave of this Court, rule 7 seems to contemplate that there will be no execution of the decree under appeal but empowers this Court to allow execution on the decree-holder entering "into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make thereon".

These provisions clearly proceed upon the principle that when a decree of a Court is under appeal to a higher tribunal the Court which passed the decree should remain vested with such powers of control over the proceeding subsequent to and based on its decree as are necessary to prevent injustice or prejudice to the person who may ultimately be successful.

In acting in accordance with this principle we shall be acting in accordance with a principle that has the approval of the Legislature.

An order refusing an insolvent a certificate is not executable as such. But as has already been said its effect is to decree every proved creditor entitled to proceed to personal execution against the insolvent. Should His Majesty in Privy Council hold that he is a person to whom a certificate of conformity should have been granted, it would amount to a declaration *inter alia* that he was not liable to arrest and imprisonment.

Must we stand by and do nothing to prevent the arrest and imprisonment of the applicant in the interval, which may well be a long one, before the order of the Privy Council is made known? His estate is under sequestration and no pecuniary or other loss or prejudice to the opposing creditors is involved in granting his prayer for protection. It only means that their right to arrest his person and cast him in prison for debt will be postponed until the Privy Council decides whether he is a person who is liable to be arrested and imprisoned.

For my part I am satisfied that this is a case in which this Court has inherent power which should be exercised to prevent what might prove to be a grave injustice to the applicant and that in granting his application we shall be acting on a sound judicial principle and in accordance with the intention of the Legislature manifested in parallel cases for which it has made provision.

I would accordingly direct that the insolvent be granted protection until the decision of His Majesty in Council upon his appeal is made known.

The applicant is entitled to the costs of this application.

MAARTENSZ A.J.—

The petitioner is an insolvent who was granted a certificate of conformity by the District Court. In appeal this Court held that he was not entitled to such a certificate and he has obtained leave to appeal from it to the Judicial Committee of the Privy Council. The present application is for an order protecting him from arrest pending the proceedings in the Privy Council.

The application is opposed by the respondents who opposed the grant of a certificate to the insolvent. They contended that this Court had no jurisdiction to make the order prayed for, as an order protecting an insolvent from arrest could only be made by a District Court in the circumstances provided for by sections 36 and 133 of the Insolvency Ordinance, No. 7 of 1853.

The question for decision is whether the Court has jurisdiction to make the order prayed for, and if so whether the petitioner is in the circumstances entitled to protection from arrest until his appeal to the Privy Council is decided. Section 36 enacts that—

“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 the summons of such insolvent, or by writing under the hand of the Judge of such court, think fit to appoint; . . . .”

By section 152 of this Ordinance—

“the assignees for the time being of the estate and effects of any insolvent, when the accounts relating to his estate shall have become records of the court, shall be deemed judgment-creditors of such insolvent for the total amount of the debt which shall by such accounts appear to be due from him to his creditors and every creditor of any insolvent, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment-creditor of such insolvent, to the extent of such proof; and the 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 such assignees or of any such creditor grant a certificate in the form R in the schedule to this Ordinance annexed, and every such certificate shall have the effect of a judgment entered up in the said court, until the allowance of the certificate of conformity of such insolvent; and the assignees or the creditor to whom according to such certificate, the insolvent shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such insolvent; and the production of any such certificate to the secretary of such court shall be sufficient authority to him to issue such writ; Provided always that every such last mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such insolvent, from the time of such allowance;

Section 132 of the Ordinance enacts that—

“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 such certificate, or for the refusal, the withholding, or the class of the certificate, and notice thereof be given to the court in such manner as may by any general rule or order to be made in pursuance of this Ordinance be directed, the certificate shall be further kept by the court and abide the judgment of the Supreme Court thereupon; . . . .”

Section 133 is not relevant to this appeal.

The petitioner had applied for and obtained an order from the District Court of Colombo protecting him from arrest till the determination of his application to the Privy Council for leave to appeal.

This order was set aside in appeal on the ground that the powers of the District Court to grant protection from arrest were limited to the powers created by section 36 of the Ordinance and that once the certificate was refused the proviso to section 152 came into operation.

The Chief Justice was of opinion that 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.

This decision is reported in the 12th Volume of the *Ceylon Law Recorder*, p. 88, under the name of *Mohamed v. Ramasamy Chettiar and another*.

The petitioner's counsel admitted that he could not point to any provision of law under which the order prayed for could be made and appealed to the inherent powers of this Court to make an order which justice required should be made. He submitted that the purpose of the appeal to the Privy Council would be defeated if the insolvent was arrested and imprisoned pending a decision in his appeal, and cited the case of *Hukum Chand Boid v. Kumalanand Singha*<sup>1</sup>, where it was held that (I read the head note)—

“The Code of Civil Procedure binds all courts so far as it goes. It is however not exhaustive and does not affect previously existing powers unless it takes them away; in matters with which it does not deal the court will exercise an inherent jurisdiction to do that justice between the parties, which is warranted under the circumstances and which the necessities of the case require.”

It was argued on the authority of this case that the order prayed for could be granted by this Court as there was no provision of law which forbade the making of such an order. Counsel for the respondent cited, in support of his contention, that this Court had no jurisdiction to make this order—the case of *Mohes Candra Dhal v. Satrugan Dhal and others*<sup>2</sup>, where the High Court held it had no jurisdiction to order a stay of execution, where leave to appeal was granted by the Judicial Committee of the Privy Council and not by the High Court.

This decision was followed, but not with approval, in the case of *Nityamoni Dasi v. Madhu Sudan Sen*<sup>3</sup>. In the latter case the Judicial Committee of the Privy Council, on appeal to it, held that the High Court had power to stay execution notwithstanding that the appeal had, as in this case, been admitted by special leave of His Majesty's Council.

The rule in force in India is that “notwithstanding the grant of a certificate for the admission of any appeal the decree appealed from shall be unconditionally executed unless the Court otherwise directs—Rule 13 of Order 45.

There is no such rule in Ceylon. On the contrary, rule 7 of schedule I. of The Appeals (Privy Council) Ordinance, 1889, which enacts that—

“Where the judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, to direct that the said judgment shall be carried into execution if the persons in whose favour it was given shall before the execution thereof enter into good and sufficient security, to the satisfaction of the Court, for the performance of such order as His Majesty in Council shall think fit to make thereon.”

inferentially contemplates a stay of execution unless leave to execute is given.

There are therefore stronger grounds for holding that under our law this Court has jurisdiction to stay the execution of a decree pending the decision of His Majesty's Council in an appeal admitted by special leave.

<sup>1</sup> (1905) 33 I. L. R. Cal. 927.

<sup>2</sup> (1899) 27 I. L. R. Cal. 1.

<sup>3</sup> (1911) I. L. R. 38 Cal. 335.

It was next contended by the respondent that this was not an application to stay the execution of a decree.

I am unable to accept the distinction respondent's counsel sought to draw between the present application and an application to stay the execution of a decree in an action by way of regular procedure.

In my opinion, the certificate in the form R takes the place of a decree in a regular action, and an application to the secretary for execution against the body of an insolvent is as much an application to execute a decree as an application made in an ordinary action. I accordingly hold that this Court has jurisdiction to make the order prayed for. It is, I think, manifestly a case in which the order prayed for should be made. The object of the appeal to the Privy Council would be to a considerable extent nullified if the insolvent were to be imprisoned while the appeal is pending. The stigma of imprisonment would always remain and the petitioner would not be able to obtain restitution by way of damages as the imprisonment would be the result of legal process properly obtained.

I allow the application.

*Application allowed.*

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