

1959 Present: Weerasocriya, J., and H. N. G. Fernando, J.

NIKATENNE, Appellant, and PERUMAL CHETTY *et al.*, Respondents

S. C. 613—D. C. Kandy 200' Insolvency

Insolvency Ordinance (Cap. 82)—Withdrawal of protection granted to insolvent—Legality—Sections 36, 89, 151.

The insolvent-appellant had been ordered to deposit in Court a sum of Rs. 250 monthly out of his salary. He complied with the order for about six months, but defaulted thereafter. Subsequently an application was made by one of the proved creditors that the protection granted to the appellant be withdrawn as he had failed to deposit the Rs. 250 as ordered. The Court, without giving the appellant an opportunity of showing cause against the application, thereupon withdrew his protection holding that he had committed an offence under section 151(5) of the Insolvency Ordinance in that he concealed or made away with the money which should have been deposited.

Held, that the order withdrawing protection was bad for the following reasons:—(i) Section 151(5) of the Insolvency Ordinance was inapplicable in the present case. (ii) Under section 151, read with section 89, the power to withdraw protection cannot be exercised until the second public sitting for the examination of the insolvent is held. (iii) Under section 36 the appellant was entitled to protection during the time allowed for his examination.

APPPEAL from an order of the District Court, Kandy.

E. B. Vannitamby, for insolvent-appellant.

No appearance for respondents.

Cur. adv. vult.

October 22, 1959. WEERASOORIYA, J.—

This is an appeal by an insolvent from an order withdrawing protection granted to him.

The appellant was in October, 1956, ordered to deposit in Court a sum of Rs. 250 monthly out of his salary. He appears to have complied with this order up to April, 1957, but defaulted thereafter. On the 5th November, 1957, when the case was called in some other connection, an application was made on behalf of one of the proved creditors that the protection granted to the appellant be withdrawn as he had failed to deposit the Rs. 250 as ordered. The Additional District Judge, without giving the appellant an opportunity of showing cause against the application, thereupon withdrew his protection holding that he had committed an offence under section 151(5) of the Insolvency Ordinance (Cap. 82) in that he concealed or made away with the money which should have been deposited.

I do not think that the failure of the appellant to deposit the money amounts to a concealment or making away of his property within the meaning of section 151(5). Moreover, an offence under section 151(5) requires that there should have been an intent on the part of the insolvent to diminish the sum to be divided among his creditors or to give an undue preference to any of them. There is no proof of such intent in the present case.

There is another ground for setting aside the order withdrawing protection. Section 151 of the Insolvency Ordinance makes it clear that the power to withdraw protection cannot be exercised except at the sitting appointed for the last examination of the insolvent. That stage is not reached until the second public sitting is held—vide section 89. In the present case the second public sitting, originally fixed for the 5th June, 1956, has not yet been held.

Moreover, section 36 of the Insolvency Ordinance provides 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 ” The appellant not having finished his examination, he is entitled to protection during the time allowed for it. See in this connection the case of *Fernando v. Miller & Co. et al.*¹.

The order withdrawing protection is set aside and the record is remitted to the Court below with a direction to grant the appellant protection in terms of section 36 of the Insolvency Ordinance. The appellant's costs of appeal will be paid by the creditor-respondent at whose instance the order withdrawing protection was made.

H. N. G. FERNANDO, J.—I agree.

Order set aside.

¹ (1939) 41 N. L. R. 333.