VALLIAPPA *v.* PIERIES.

1897.

November 3.

D. C., Colombo, 9,640.

Application for discharge by judgment-debtor—"Bad faith"—Inquiry into circumstances of original debt—Civil Procedure Code, ss. 306, 307, and 311.

In the case of an application by a judgment-debtor under section 306 of the Civil Procedure Code for discharge from custody, the consideration of "bad faith" under sub-section (c) of section 311 must be limited to the matter of the application for discharge, and it is not open to the Court to go behind the decree into which the original debt had been converted to see in what way the original debt had been incurred.

IN this case the defendant, who was in custody under the warrant of arrest issued at the instance of the plaintiff, petitioned the Court for his discharge under section 306 of the Civil Procedure Code. The decree in the case against the defendant was one on a promissory note for Rs. 2,000. The Acting District Judge (Mr. F. Dias) entered into an inquiry into the circumstances in which the debt on the promissory note had been contracted by the defendant, and held as follows: "I think the cross-examination of the "defendant and the evidence of the plaintiff leave no room for "doubt that the defendant has deliberately defrauded his creditor, "and so it cannot be said that he had not been guilty of bad faith "regarding the matter of his petition, namely, his release from "jail in connection with the Rs. 2,000 debt. I think this is a "matter which I am entitled to take into account under section "311 (c) of the Code." He accordingly refused the application.

In appeal, *W. Pereira*, for appellant.—The District Judge had no right to go behind the decree and see in what way the original

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debt had been contracted. The provisions of the Indian Code analogous to those of section 306 and the following sections of the Ceylon Civil Procedure Code are to be found in sections 344 to 360A of the Indian Code. There was a difference in the procedure under the two Codes, the Indian Procedure requiring the debtor to be first adjudged an insolvent and then discharged. Sub-section (*c*) of section 311 of the Ceylon Code, however, was the same as sub-section (*d*) of section 351 of the Indian Code, and in *Butler v. Lloyd* (*XII., B. L. R., App. 12*) "bad faith" in the latter sub-section was limited to bad faith in respect of the application, and held not to extend to acts committed in incurring the liability, and in *Salamat Ali v. Minahan* (*I. L. R., IV. Alla., 337*) it was held that where the original debt had been converted into a judgment debt the Judge should not go behind the decree to see in what way the original debt had been incurred.

Sampayo, for respondent, cited *Bavachi v. Leslie* (*I. L. R., II. Mad., 219*), in which it was held that a Judge is, under the above sub-section of the Indian Code, entitled to enter into all acts of bad faith towards creditors at the period at which the applicant was contemplating insolvency.

W. Pereira, contra.—The case of *Bavachi v. Leslie* had reference to certain sub-sections of section 351 of the Indian Code which were not copied into the Ceylon Code. Besides, the "period" mentioned in the judgment in that case can only be, in Ceylon, the period at which the applicant was contemplating his application for discharge, and that was, manifestly long after he contracted the original debt.

Cur. adv. vult.

3rd November 1897. LAWRIE, A.C.J. —

In these proceedings for the discharge from jail of a civil debtor it has been sufficiently proved that he has no property. The evidence before it ought to have satisfied the Court of the facts required to be proved in section 311.

But while the District Judge seems to be satisfied that these facts have been proved, he has refused to discharge the debtor because he deliberately defrauded his creditor in the making of the note sued on.

During the argument in appeal, I expressed the opinion that that was not one of the issues or matters which were relevant in an inquiry under sections 306 to 311. I remain of that opinion. I did not then remember the provisions of section 299, by which a discretion is given to a Court to order in the decree that a defendant who has fraudulently incurred a debt may be taken and detained in execution for any time not exceeding six months.

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That section seems to me to be in this debtor's favour. His creditor sued him for debt on a promissory note, and at the *ex parte* hearing he said nothing about fraud, so that the Court had no reason to include in the decree an order of detention in execution. It seems to me to be too late now to make charges which ought to have been earlier made and substantiated, and that the penniless debtor ought not to be remitted to jail.

I agree that the order should be set aside and the debtor be discharged.

BROWNE, A.J.—

Reading together our Insolvency Ordinance and the provisions of sections 306–312 of the Civil Procedure Code, it would appear that when a debtor in insolvent circumstances is now arrested he may do one of three things :—

(1) Suffer detention for twenty-one days and then file his petition for adjudication (Ordinance 7 of 1853, sections 19 and 20).

(2) Petition at once, showing he can pay Rs 2·50 on every Rs. 10 (section 20).

(3) Offer to hand over all his property whether or not it would pay such a dividend, or, if he has none, prove his poverty (Civil Procedure Code, sections 306, 307), and thereafter he may apply for his discharge from the arrest. We are in this case concerned with the third of these only.

In the Indian Code of Civil Procedure this last course may (section 351, Indian Civil Procedure Code) pass him into the insolvency side of the Court, but our Code limits the relief allowable to him under section 311 to the mere discharge from the arrest, and if he or his creditors desire insolvency proceedings to follow thereafter, the ordinary procedure under the Insolvency Ordinance must follow.

It was very possibly in view of the procedure in India being susceptible of extension to insolvency procedure [for which purpose the debtor there has (351 c) to negative any reckless contracting of debts or giving undue preference which our section 311 does not require] that it was there held that under the procedure now being considered when a debtor applies to obtain his discharge from the arrest the Judge (not *ought* to, but) was entitled to enter into any examination of all acts of bad faith towards creditors at the period at which he was contemplating insolvency. In other cases very possibly when the Court did not think it a proper case for insolvency with the formalities of receivership, &c., the consideration of bad

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faith was limited to the matter of the application for discharge from custody, and it was held that the Judge should not go behind the decree into which the original debt had been converted to see in what way the original debt had been incurred.

I therefore consider that under our section 311 our courts have not to consider this more remote question, for that is properly and only determinable on the consideration of allowance of certificate of conformity when insolvency proceedings shall supervene. Were it to be now considered and ruled in defendant's favour it might be possibly argued to be *res judicata* on an objection to allowance of certificate, and that section 312 might bar the detaining creditor from obtaining certificate R afterwards. The procedure in the Code must therefore be kept entirely distinct from our insolvency procedure.

The order of this Court of the 19th August last therefore rightly limited the procedure it directed to the consideration of bad faith in the matter of the application for discharge, and the District Court was wrong when it declined to read it in that restricted extent. No concealment, &c., of property has been established against the debtor, nor any falsity in his averments made to satisfy what section 307 requires, and the appellant is consequently entitled to his discharge from this arrest with costs of his application and of this appeal.