1930

Present: **Fisher C.J. and Drieberg J.**

KANAGASABAI *v.* KASINATHAR.

236—D. C. Jaffna, 17,738.

Civil warrant—Issue of warrant against judgment-debtor—Voluntary surrender —Application for discharge—Civil Procedure Code, s. 311.

A judgment-debtor, for whose arrest a warrant is issued and who surrenders voluntarily, is entitled to be discharged under section 311 of the Civil Procedure Code before committal.

APPEAL from an order of the District Judge of Jaffna.

Subramaniam, for plaintiff, appellant.

N. E. Weerasooria, for defendant, respondent.

January 31, 1930. DRIEBERG J.—

In this case, after unsuccessful endeavours to realize the amount of the decree by writ against the property of the respondent, the judgment-debtor, the appellant obtained issue of warrant of arrest of the respondent.

After issue of the warrant, but before the returnable date, the respondent appeared in Court and filed papers as required by section 306 of the Civil Procedure Code for his discharge. The journal entries do not show that he applied in person, but the District Judge speaks of his coming into Court.

The District Judge made order under section 309 fixing a date for the hearing of this petition, and the respondent entered into a bond with security for his appearance on that date.

On the day of inquiry, after hearing evidence, the District Judge ordered the discharge of the respondent under section 311.

The appellant contends that on the facts proved the respondent was not entitled to a discharge. Apart from this, Mr. Subramaniam for the appellant took two objections. One was that section 306 allowed an application for a discharge to be made by a judgment-debtor only after arrest or imprisonment, and that the respondent in this case had not been arrested or imprisoned. Though the words of the section taken literally will support this contention there is, I think, no real foundation for it.

The object of proceedings under section 298 is the commitment of a debtor to prison, and the warrant of arrest is issued to the Fiscal merely for the purpose of having the debtor produced before the Court so that the Court may commit him.

Under section 311 a debtor who can satisfy the Court regarding the matters stated in sections 307 and 311 is entitled to a discharge, and I cannot see why his right to be discharged should depend on his having been arrested by the Fiscal and why he should not have the same privilege if he surrenders voluntarily to Court. If, after such voluntary surrender, the Court at the inquiry is of opinion that the debtor is not entitled to a discharge, there is nothing to prevent the Court making an order for his committal.

It might, with equal force, be argued that the Court has no power to commit him if he vountarily surrenders, and that the committal could be made only after arrest by the Fiscal. I can imagine a case of a debtor being present in Court when the order for execution against his person is made and immediately surrendering and submitting himself to committal.

The other point is that, in an application for discharge, the debtor has to state the names and residences of his creditors and has to pay the cost of serving the interlocutory order on any judgment-creditor named in the affidavit. In this case there was one other judgment-creditor, and Mr. Subramaniam says that there is nothing in the record to show that notice was served on this creditor. This objection was taken for the first time in appeal. If it had been taken in the lower Court, the respondent would no doubt have been required by the Court to deposit the cost of serving notice of the order. The omission, in fact, is one for which the Court is partly responsible, for under section 308 the interlocutory order should not have been made, unless the costs of serving notice of the judgment-creditor had been deposited.

Both these objections fail and there only remains for consideration the merits of the order.

The judgment-debtor is an old man of seventy years of age and he ascribes his present condition to trade losses and has called a Chetty who supported him on this point. The original liability goes back to 1920. Judgment was obtained in 1923 and execution proceedings during all these years have realized only about Rs. 290. There is no good reason for interfering with the discretion exercised by the learned Judge.

The appeal is dismissed with costs.

FISHER C.J.—I agree.

Appeal dismissed.