1941 *Present:* **Howard C.J. and Keuneman J.**

GNANAMPIRAKAR-AMMAI *v.* CANDIAH.

78—D. C. (Inty.), Jaffna, 3,645.

Arrest of debtor in execution of decree for money—Inquiry essential before issue of warrant—Decree for payment of alimony—Civil Procedure Code, ss. 298, 299, and 301—Ordinance No. 4 of 1940.

The District Judge is bound to hold an inquiry before the issue of a warrant under section 298 or a notice under section 299 of the Civil Procedure Code.

Where the defendant was arrested in execution of a decree for the payment of Rs. 50 per mensem as permanent alimony.

***Held*, that the arrest was not justified by the terms of section 301 of the Civil Procedure Code.**

APPEAL from an order of the District Judge of Jaffna.

H. V. Perera, K. C. (with him *N. Nadarajah* and *A. C. Nadarajah*), for defendant, appellant.

N. E. Weerasooria, K. C. (with him *M. Balasunderam*), for plaintiff, respondent.

Cur. adv. vult.

February 19, 1941. KEUNEMAN J.—

The defendant appeals against the order of the learned District Judge committing him to jail under section 308 of the Civil Procedure Code for a period of six months.

This matter comes up for consideration under Ordinance No. 4 of 1940, by which sections 298 to 312 of the Civil Procedure Code (Cap. 86) were repealed and the new sections 298 to 312 enacted.

The plaintiff and defendant were wife and husband. In this action, the plaintiff obtained on July 31, 1935, a decree *nisi* for divorce, which was made absolute on April 12, 1937. The decree also dealt with permanent alimony and costs, the relevant portions of which are as follows :—

> "And it is further decreed that the defendant do pay to the plaintiff Rupees Fifty (Rs. 50) *per mensem* as permanent alimony to be applied towards the maintenance of the plaintiff and that this allowance is to continue until further order and be subject to variation as future circumstances may require.
>
> And it is further ordered that the defendant do pay to the plaintiff her costs of this action as taxed by the Officer of the Court."

On April 8, 1940, the proctor for the plaintiff filed petition and affidavit and moved for a warrant against the defendant. The District Judge made the following order :—

> "Notice under the new section 299 is allowed on the affidavit. Issue of warrant will be considered if no service is effected."

Later, the defendant appeared and filed objections and, after inquiry, the District Judge made the order appealed against.

Objection is taken to this order on two grounds, (1) that the District Judge failed to hold the inquiry required by section 298 (1), before issue of notice under section 299, and (2) that the decree was for a sum less than Rs. 200 and that no warrant could be issued—*vide* section 301.

As regards (1) (*supra*), I think it is clear law that, before the issue of a warrant under section 298, or a notice under section 299, the Court must hold "such inquiry as the Court may deem necessary". I do not accept the argument of Mr. Weerasooria that the District Judge will hold the inquiry only if he thinks it necessary. In my opinion the section postulates the necessity of an inquiry in any case, but leaves the nature and scope of the inquiry to the discretion of the District Judge. Certainly, no lesser or different form of inquiry is needed where a notice is issued under section 299. One can well understand that, before taking any step in respect of these penal provisions, the District Judge is required to satisfy himself by inquiry that the step should be taken. Further, I do not think that the mere perusal of the petition and affidavit is a sufficient inquiry. Under section 300, the petition and affidavit are necessary ingredients of the application, and the application cannot be entertained in the absence of the petition and affidavit.

Mr. Weerasooria further argued that this particular objection was not taken in the Court below, and must be regarded as waived. Ordinarily, this would be regarded as a point of substance, but where, as in this case, there is strong internal evidence to show how the District Judge acted, and where it is manifest that he did not hold the inquiry which is required under the section, I do not think we are precluded from considering an objection although it is taken for the first time in appeal. In dealing with these penal sections, I think it is open to the party affected by the order to show that the correct procedure has not been followed, where a failure to do so would have a bearing on the jurisdiction of the Judge to make the order—*cf. Costa v. Perera*[1].

In his order of April 8, 1940, the District Judge allowed notice "on the affidavit". I think this indicates that the only action taken by the Judge was a perusal of the affidavit and, it may be, the petition. No further inquiry of any sort appears to have been undertaken. The Judge further says that "the issue of warrant will be considered if no service is effected". I think this shows a complete misconception of the scope of section 299. Under that section, the notice on the judgment-debtor is "to show cause . . . . why he should not be committed to jail . . . . ". Section 299 is an alternative to the immediate issue of a warrant for arrest. The notice under section 299 does not contemplate a further inquiry preparatory to the issue of a warrant.

Mr. H. V. Perera argued, I think convincingly, that the Judge thought that there was another occasion to satisfy himself before the issue of the warrant, and therefore did not take the trouble to hold any inquiry before issuing notice. The District Judge does not appear to have appreciated the fact that the inquiry was essential, before either the issue of the warrant or the notice. The same misconception seems to run through the whole of his order in the present matter. For example, he says, "The defendant appears in Court in response to a notice under

[1] *17 N. L. R. 319.*

section 298 of the Civil Procedure Code to show cause why a warrant of arrest should not be issued against him". Not only is the wrong section mentioned, but also the scope of section 299 is misunderstood. He further says, "This is a case in which a warrant should issue on the defendant under section 298", but at the end of his order he says, "I commit the judgment-debtor to jail under the proviso to section 308 of the Civil Procedure Code for a period of six months".

The proviso to section 308 is as follows :—

> "If . . . . the Court is satisfied that a warrant for the arrest of the judgment-debtor may be issued *on any ground other than that on which the warrant or notice was issued* in the first instance, the Court may commit the judgment-debtor to jail."

This refers to an inquiry at the stage where the judgment-debtor is brought before the Court after arrest on a warrant or appears in Court in pursuance of a notice under section 299—*vide* section 306.

The matter of importance is that the District Judge did not satisfy himself by holding an inquiry before the issue of the notice under section 299. At the later inquiry, he satisfied himself on material, at any rate partly not contained in the affidavit. I think the procedure adopted by the District Judge was wrong and misconceived, and that the appellant is entitled to succeed on this point.

(2) The further point taken by Mr. H. V. Perera is based on section 301 which is as follows :—

> "No warrant under section 298 or notice under section 299 shall be issued in any case in which the sum awarded in the decree inclusive of interest, if any, up to the date of the decree but exclusive of any further interest and costs, is less than two hundred rupees."

The short point is that the sum awarded in the decree is less than two hundred rupees. The words, "in the decree", in this section are new and, I think, emphasize the fact that the decree alone is to be looked at for the purpose of determining whether the sum awarded is less than two hundred rupees. A case like the present is to be clearly distinguished from a case where, for example, a decree is entered for the sum of Rs. 1,000, payable by monthly instalments of Rs. 100. I cannot agree with the argument of Mr. Weerasooria that what has to be taken into account is the sum which at any time is found due under the decree. I do not think the words, "the sum awarded in the decree", can be given such an interpretation. In this case, the subsequent payments are contingent and are not certainly payable. This is inherent in the terms of the decree itself, and also in the nature of the alimony—*cf. Sithayamma v. Sinniah* [1]. If we examine this decree, the only sum awarded which can be regarded as certain is Rs. 50. I think the appellant is entitled to succeed on this point as well.

Mr. Weerasooria argued that apart from the sum awarded in the decree his client had an order for costs which had been taxed at a sum considerably over Rs. 200, and that he could base his application for a warrant on that. Counsel relied upon the judgment of the Divisional Court in

[1] *39 N. L. R. 126.*

Ran Menika v. Dingiri Menika[1] for the proposition that an order for costs amounting to more than Rs. 200 is enforceable by attachment of the person. This decision was based upon the older sections of the Code, and it is a matter for argument whether, in view of the amendment of section 298, that decision is still applicable. I do not propose, however, to deal with that matter, because in this case no mention of the fact that the costs amounted to more than Rs. 200 was made in the affidavit, and further, the District Judge has not rested his decision upon any such fact. Indeed, although some argument was addressed to him on this point, the District Judge did not deal with it at all, and I do not think we are justified in taking cognizance of any such fact in appeal.

I allow the appeal and set aside the order of the District Judge. In view of the relationship which existed between the parties, I make no order for costs in appeal or in the Court below.

HOWARD C.J.—I agree.

Appeal allowed.

[1] *25 N. L. R. 465.*