

1939

Present : Nihill J.

ABEYWARDENE *v.* NONOHAMY.

91—C. R. Tangalla, 14,660.

Judgment-debtor—Application for discharge from custody—Undue preference to creditor—Matter not relevant to inquiry—Civil Procedure Code, ss. 306—311, Cap. 86.

In an application by a judgment-debtor for discharge from custody, the fact that he showed undue preference to another creditor before the institution of the present action is not relevant under section 311 of the Civil Procedure Code.

Valliappa v. Pieries (3 N. L. R. 31) followed.

A PPEAL from a judgment of the Commissioner of Requests, Tangalla.

L. A. Rajapakse (with him A. C. Alles), for appellant.

C. V. Ranawake (with him H. A. Kottagoda), for respondent.

October 23, 1939. NIHILL J.—

In this case the defendant-appellant was a judgment-debtor for a sum of Rs. 299.17 being in respect of goods sold and delivered. Six properties disclosed by him pursuant to action taken under section 219 of the Civil Procedure Code were sold but realized only Rs. 16.38. Personal execution against him followed and on December 6, 1938, he was brought before the Court under arrest. On the same day he filed an affidavit and petition for his discharge from custody. (See section 306.) An inquiry was held subsequently by the learned Commissioner at which his petition for discharge from prison was rejected.

It is against this order that the defendant appeals. The question is, whether on the evidence, the Court was justified in coming to the conclusion that the judgment-debtor had not satisfied the requirements of section 311 (1) (a), (b), and (c).

The learned Commissioner places in the forefront of his reasons the fact that just before the institution of the action by the creditor, the debtor transferred two lands to his brother in order to pay off another pressing debt and he concludes that in doing so the debtor showed an undue and unreasonable preference to that creditor.

Now this is a consideration concerning which the Court might have taken note, had it been raised at the proper time under section 299 (2), but it was not a matter pertinent to the consideration of the debtor's application under section 311. *Valliappa v. Pieries*¹. This then by itself would not support the order made.

The learned Commissioner however also found that the judgment-debtor has been carrying on a trade in paddy since the institution of the action and decree, and that he has had the means to pay some part at least of his debt. This if established might vitiate the substantial truth of the debtor's averment that he is a pauper and it would then provide a proper ground for the rejection of his application.

In his evidence the debtor admitted that he does buy and sell paddy but he stated that he does so on his brother's account who has a rice business. He stated that he was not in the business jointly with his brother and receives only a small share as salary.

Three witnesses were called for the judgment-creditor. I do not know that their evidence is conclusive but I think there is in it material upon which the learned Commissioner could form the view that he evidently did, namely, that the debtor's true position in the business is not as he has stated.

With regard to the non-payment of any portion of the debt other than the fractional amount satisfied by the sale of the debtor's disclosed properties, the debtor's explanation is that he offered to pay by instalments of Rs. 5 per month in August but the offer was refused by the judgment-creditor. This is admitted but as the present plaintiff-respondent is the administratrix of the original creditor's estate, it is understandable that the offer was not attractive.

Furthermore, the debtor made no earlier effort to pay by instalments. (The decree was entered in January, 1936.)

The last reason given by the learned Commissioner is I think against the weight of evidence. It refers to a land transaction by the debtor's wife which the Commissioner regards as suspicious.

In the absence of any evidence to the contrary, however, I feel bound to accept the debtor's statement that it was a transaction financed by his wife's mother with which he had nothing to do and on which in any case his wife lost heavily.

Although I have held that two of the reasons put forward by the Commissioner for his order are not sustainable, I am unable to say that,

taking the matter as a whole, he exercised his discretion wrongly. The debtor averred in his affidavit that he was a pauper and I think that there is evidence on which the Commissioner could come to the view that the debtor had not satisfied him with regard to the substantial truth of that statement.

I cannot therefore conclude that the order of the learned Commissioner was wrong and this appeal must be dismissed with costs.

Appeal dismissed.

