

1936

*Present : Dalton A.C.J. and Soertsz A.J.*PERERA *v.* PERERA.

157—D. C. Colombo, 3,711.

Insolvency—Certificate in the Form R—Creditor's right to arrest—Discretion of Court—Ordinance No. 7 of 1853, s. 152.

A creditor who has obtained a certificate in the Form R is not entitled to a warrant of arrest as a matter of right.

A Court is entitled to refuse a warrant of arrest when the creditor does not explain his failure to enforce the remedy on a previous occasion.

A PPEAL from an order of the District Judge of Colombo.

N. Nadarajah (with him *C. X. Martin*), for opposing creditor, appellant.

No appearance for insolvent, respondent.

June 19, 1936. DALTON A.C.J.

This appeal arises out of insolvency proceedings. The respondent was adjudicated an insolvent, and on September 27, 1927, the District Court refused to grant him a certificate of conformity. The opposing creditor, the present appellant, had proved in the proceedings a claim for Rs. 750 and costs. On November 17, 1927, she obtained a certificate in Form R, under the provisions of section 152 of the Insolvent Estates Ordinance, No. 7 of 1853, and on the same date she obtained a warrant of arrest. The warrant was returned unexecuted. On further applications by the appellant in July, 1929, August, 1930, and October, 1931, the warrant was re-issued, but on each occasion the warrant was returned unexecuted. In the meantime in December, 1927, and February, 1928, the appellant received from the insolvent payment of Rs. 500 of the Rs. 750, and she was clearly therefore in touch with the insolvent. There is no suggestion that the insolvent was evading arrest.

In August, 1934, the appellant, after a lapse of nearly three years, applied again to the Court to have the warrant re-issued. By his order of September, 17, 1935, the District Judge refused the application, from which refusal the appellant now appeals.

At the hearing of this application the respondent set up the plea *inter alia* that the payment made by him was made on an agreement between him and the appellant to give the former a full release. The learned Judge does not come to any finding on this issue, as he holds, on other grounds, that the application must fail. He required some explanation from the appellant for her failure to have the warrant executed when it had been granted on her previous applications, and no explanation was forthcoming. He held that the Court was entitled to have some explanation of her failure to enforce the remedies given her on the previous occasions, and that it would seem the process of the Court was being abused. In the circumstances, I am quite unable to say he was wrong in so holding.

On the appeal it was urged that the appellant was entitled as of right to the warrant, under the provisions of section 152 of the Ordinance. That section, it is true, provides that the production of the certificate shall be sufficient authority for the Court to issue the writ, but I do not think it goes as far as Mr. Nadarajah urges. Even if the issue of the writ is, on the English authorities cited, merely a ministerial act, I am unable

to say the learned Judge was not entitled to ask for the explanation he required in this case, before performing that act, and, in the absence of that explanation, to refuse the application.

In these circumstances, it is not necessary to consider the further question as to whether the provisions of section 337 of the Civil Procedure Code, which requires due diligence on the part of the judgment-creditor to procure complete satisfaction of the decree, apply here.

The appeal must be dismissed.

SOERTSZ A.J.—I agree.

Appeal dismissed.