APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

BAVACHI PACKI (PETITIONER), APPELLANT, *v.* PIERCE, LESLIE & Co. AND 3 OTHERS (JUDGMENT-CREDITORS), RESPONDENTS.*

1879.
March 31.

Chap. XX of Act X of 1877—Order under Sec. 351 refusing to discharge petitioner—Right of appeal—Bad faith regarding the matter of the application—Recklessly contracting debts.

An appeal lies against an order passed under Section 351 of Act X of 1877, although it was an order refusing to declare petitioner an insolvent.

The words used in clause *d* of Section 351, "the matter of the application," embrace the insolvency, and all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency may be held to be part of the matter of the application.

A Judge would not be exercising a right discretion under Section 351 if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually.

THIS was an appeal under Chapter 20 of the Code of Civil Procedure against the order of V. P. D'Rozario, Subordinate Judge of North Malabar, on Miscellaneous Petition No. 114 of 1878.

The applicant was a trader and carried on business at Tellicherry. About the end of April 1874 he absconded, and only reappeared in January 1878, when he was arrested by virtue of warrants issued by the Sub-Court of North Malabar at the instance of four of his creditors who had obtained decrees against him. He then applied to that Court under Chapter 20 of the Procedure Code to be declared an insolvent, and his application was resisted by five of his creditors. The Subordinate Court found that there was no evidence to prove that the applicant had, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suits in which were passed the decrees in execution of which he was arrested. The Court, however, refused his application on

* Civil Miscellaneous Appeal No. 424 of 1878, against the order of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 21st November 1878.

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the grounds (1) that his flight was an act of bad faith towards his numerous creditors, (2) that his liabilities were not honestly incurred, and (3) that he had, on more than one occasion, received money from his creditors on false pretences. Against this order an appeal was made to the High Court.

Mr. *Shephard*, Mr. *Ross Johnson*, and *A. Rámachandra Áyyar* for the Appellant.

The Advocate-General (Hon'ble *P. O'Sullivan*) and Mr. *Wedderburn* for the second Respondent, and Mr. *Cooper Abbs* for the first to third Respondents.

The Court (INNES and FORBES, JJ.) delivered the following

JUDGMENT:—In this case we held, at the hearing, that an order having been passed under Section 351, although it was not an order declaring petitioner an insolvent, an appeal would lie, and that the preliminary objection taken that there was no appeal must therefore be set aside.

There is the most ample evidence of bad faith on the part of the petitioner towards some of his creditors in obtaining large advances from them on the eve of his absconding.

It was argued that the 'bad faith' upon which the Judge was entitled to exercise his discretion in withholding petitioner's discharge was bad faith in respect of his application, and we were referred to some cases upon the construction of Section 281 of the old Procedure Code, in which it was held that 'bad faith' meant bad faith of the applicant for the purpose of procuring his discharge without satisfying the decree, and that the words did not refer to bad faith on previous occasions.

The decisions upon the precise meaning of the language of Sections 275 and 281 of the old Code upon this point are conflicting, it having been held in some of the decisions that bad faith in contracting the debt would justify the Judge in refusing a discharge. The weight of authority, however, seems to have inclined to the opinion that the inquiry must be confined to bad faith immediately connected with the application.

We think, however, that we are not bound by these decisions in determining the meaning of the language of Clause '*d*' of Section 351 of the new Code.

The words used are "bad faith regarding the matter of the application," and the application is not simply that the petitioner be dis-

charged from the particular debt or debts on which he may have been arrested, but that he be declared an insolvent. The matter of the application therefore embraces the insolvency, and therefore all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency and about to abscond are so connected with the insolvency and so necessary to show the real character of it, that they may be properly held, we think, to be part of the matter of the application. Although, therefore, there has been a long interval between the acts of bad faith immediately preceding the flight of petitioner to Arabia and his arrest on his return in 1878, when he no doubt had hopes of availing himself of the provisions of insolvency contained in the new Procedure Code, those acts of bad faith are still open to consideration, and the appeal might be dismissed upon the ground that the Judge had rightly found acts of bad faith towards creditors in connection with the insolvency.

But there was a further point also which we wished to consider, viz., whether the order for discharge had been rightly withheld on the ground that there was evidence that the applicant had recklessly contracted debts.

We were referred to Section 159 of the English Bankruptcy Act of 1861, and the cases upon the construction of it. The language of Section 159 of the Act of 1861 is different from that of Section 351 of the new Civil Procedure Code. It runs "or that he could not have had at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same." The two decisions to which we were referred, *In re Marks*(1) and *Ex parte Bayley*(2), turn upon whether in the particular circumstances of each case there was reasonable ground for the applicant expecting to be able to pay the debts at the time he contracted them. In the first case Lord Cranworth held that the absence of a reasonable ground of expectation of being able to pay the debts had not been made out. In the later case the firm was insolvent in January 1867, but continued trading till June. One of the partners had believed that they were still carrying on at a profit. The other

(1) L.R., 1 Ch. Ap., 334. (2) L.R., 3 Ch. Ap., 244.

admitted that he had believed the firm to be insolvent in January, but not to such an amount as was actually found, and he said that he thought the firm was then making profits and that they would be able to recover themselves. In these circumstances the Judges thought that the bankrupts might not unreasonably have entertained the idea that they would eventually be able "to pay for the drugs they bought and by the use of them make profits which would, by degrees, pay off their old debts."

The language of Section 351 of Act X of 1877 is "that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts."

The provisions of insolvency in the Code were intended for the relief of persons who, without dishonesty, had become embarrassed by debt, and a Judge would not be exercising a right discretion under this section if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually. So far, therefore, the standpoint from which the conduct of the insolvent is to be viewed is the same as that in the English cases mentioned.

But there is no room in the present case for any presumption of an honest belief that it was possible to pay the debts contracted, which amounted altogether to 32 lakhs of rupees, to meet which the assets were only 6 lakhs.

The Judge may have been wrong in thinking that the fixing the prices of the coffee to be supplied under the contract F at 43½ rupees arose from recklessness. But the loss resulting from this was only 3 lakhs, but a small portion of the 26 lakhs of liabilities remaining after realization of the assets. In the absence of accounts, the disappearance of which is not satisfactorily accounted for, and in the absence of explanation to justify the contracting this large amount of debt with so small an amount of assets to meet it, it must be held that the Judge was right in the view he took that there had been recklessness on the part of the applicant and that the discharge was rightly refused.

The appeal must be dismissed with costs.