

1893.
June 6.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

GOPAL DAS (APPLICANT) *v* BIHARI LAL (OPPOSITE PARTY).*

*Civil Procedure Code, s. 351, cl. (d)—Insolvency—“Other act of bad faith”—
Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.*

The expression “any other act of bad faith” as used in s. 351 cl. (d) of the Code of Civil Procedure means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution, and whether or not the bad faith is connected with the liability which has resulted in that decree. *Bavacki Pachi v. Pierce, Leslie & Co.* (1) approved. *Salamat Ali v. Minahan* (2) distinguished.

THIS was a reference to a Full Bench of the Court made by Tyrrell and Blair, JJ. The facts of the case sufficiently appear from the referring order, which is as follows:—

“One Babu Gopal Das was judgment-debtor under a decree which ordered him to pay to the decree-holder moneys which the judgment-debtor had dishonestly appropriated to his own use. When the decree came to execution the judgment-debtor made an application under s. 344 of the Code of Civil Procedure. At the trial the District Judge of Allahabad dismissed the application, holding that it was bad and must be defeated under s. 351 (d) of the Code. Mr. *Fateh Chand*, for the appellant, contended that the Judge erred in going behind the matter of the application as such and considering the nature of the particular debt for which the decree had been put in execution; that is to say, considering whether that debt was or was not tainted with bad faith. A ruling of this Court under similar circumstances in I.L.R. 4 All. 337 is in favor of this contention. In that judgment it was held that under the terms of s. 351 it was no part of the Judge’s duty to go behind the decree and see in what way the debt had been

* First Appeal No. 129 of 1892 from an order of G. F. G. Forbes, Esq., Officiating Judge of Allahabad, dated the 29th June 1892.

(1) I. L. R., 2 Mad., 219.

(2) I. L. R., 4 All., 337.

1893

GOPAL DAS
v.
BIHARI LAL.

incurred. We should have followed this ruling, which, to some extent at least, commends itself to us; but we were confronted with authorities for the contrary proposition, which are not without weight. In 12 B. L. R. App. 12, Pontifex, J., referred to some conflicting decisions upon this point, and in I. L. R. 2 Mad. 219 it was held by Innes and Forbes JJ., that the words of cl. (d) of s. 351 'the matter of the application' embrace the insolvency and all the facts and circumstances material to explain the insolvency. We think that the question is sufficiently important to be referred for decision to a Full Bench and it is accordingly referred."

Mr. *Fateh Chand* and *Babu Datti Lal*, for the appellant.

Pandit *Sundar Lal* and *Munshi Madho Prasad*, for the respondent.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX, BLAIR, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J.—

In this case *Bihari Lal* obtained a decree against *Babu Gopal Das* in his capacity of trustee. He also was entitled under a decree in appeal in the suit to costs. *Bihari Lal* proceeded to execute the decree. In execution of that decree *Babu Gopal Das* was arrested. *Babu Gopal Das* applied under s. 344 of the Code of Civil Procedure to be declared an insolvent. The Court, taking into consideration the bad faith and fraud in the matter of the misappropriation of the trust funds in respect of which the decree was obtained, refused to declare *Babu Gopal Das* an insolvent. From that order *Babu Gopal Das* has appealed to this Court.

It has been contended that the Court was not justified under s. 351 of the Code of Civil Procedure in rejecting the application of *Babu Gopal Das*, and could not for the purposes of that section take into consideration what were the circumstances under which the liability which ended in the decree in execution arose. In support of that contention Mr. *Fateh Chand*, for the appellant, cited the cases of *In the matter of—a prisoner in the Great Jail* (1), *In re Soopersaud* (2), *In re Khettsey Das* (3), *Butler v. Lloyd* (4),

(1) 1 Indian Jurist p. 8.

(2) 2 Indian Jurist p. 90.

(3) 3 B. L. R., App. 14.

(4) 12 B. L. R., App. 12.

1893

GOPAL DAS
v.
BIHARI LAL.

Smith v. Boggs (1), *In re Gurudas Bose* (2) and *Salamat Ali v. Minahan* (3), and he referred us to *Buvachi Pakhi v. Pierce, Leslie Co.* (4) as opposed to his contention.

To dispose of these cases to which we have been referred in Lower Bengal, it is difficult as to some of them to ascertain whether Act No. VIII of 1859 was or was not the Act which applied. In some of them s. 281 of Act No. VIII of 1859 appears to have been the section upon which the decision was based. None of those cases were decided on the construction of s. 351 of the present Code of Civil Procedure. There is one decision on the construction of s. 281 of Act No. VIII of 1859, but that decision cannot in our opinion be applied to the construction of s. 351 of Act No. XIV of 1882. The object of the two sections was essentially different, and the effect of an order under one of those sections is different from the effect of an order under the other. The governing words in s. 281 of Act No. VIII of 1859, as far as those cases were concerned, were the words by which the plaintiff "may make proof that the defendant, for the purpose of procuring his discharge without satisfying the decree, has wilfully concealed property or his rights or his interests therein, or fraudulently transferred or removed property or committed any other act of bad faith." It is obvious that the "other act of bad faith", to be within that section, must have been committed by the defendant for the purpose of procuring his discharge without satisfying the decree. The discharge in that case was the discharge from jail, and not from the debt. Section 281 of Act No. VIII of 1859, dealt only with the question between the particular creditor who had caused his judgment-debtor to be arrested and the particular judgment-debtor who was arrested, whereas s. 351 of the Code of Civil Procedure deals with the order to be made upon an application to declare a judgment-debtor an insolvent, which declaration, if made, would affect not only the creditor who was executing his decree against the person or the property of the judgment-debtor, but all the scheduled creditors.

(1) 5 B. L. R., App. 21.

(2) 7 B. L. R., App. 23.

(3) I. L. R., 4 All. 337.

(4) I. L. R., 2 Mad. 219.

1893

 GOPAL DAS
 v.
 BIHARI LAL.

Section 351 of Act No. XIV of 1882 is essentially different in its terms to s. 281 of Act No. VIII of 1859. It is true the matters to be inquired into in cl. (b) of s. 351 are confined to concealments, transfers and removals of property subsequent to the institution of the suit in which the decree in execution was passed with intent to defeat creditors. Clause (c) of s. 351 relates to matters which might be anterior or might be subsequent to the institution of the suit in which the decree in execution was passed, and certainly authorises an inquiry into matters preceding the application to be declared an insolvent. It is contended, however, that the other act of bad faith mentioned in cl. (d) of s. 351 must be an act of bad faith in or during the pendency of the application to be declared an insolvent. In our opinion there is nothing in cl. (d) to so limit the scope of the inquiry. If the contention of the judgment-debtor were correct, the general words "any other act of bad faith regarding the matter of the application" in cl. (d) could not be construed as *ejusdem generis* with the words in clauses (b) and (c). It appears to us that "any other act of bad faith" mentioned in cl. (d) means any act of bad faith not in s. 351 before mentioned which bore directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and would not exclude any act of bad faith by which he had incurred a then still subsisting liability to any of his creditors, whether the particular creditor was or was not the creditor whose decree was in execution, and whether or not the bad faith was connected with the liability which resulted in that decree. In our opinion the High Court of Madras in *Bavachi Pachi v. Pierce, Leslie & Co.* (1) correctly held in reference to the construction of cl. (d) of s. 351 that "the matter of the application embraces the insolvency and all the facts and circumstances material to explain the insolvency." This view is inconsistent with a decision of this Court in *Salamat Ali v. Minahan* (2). It is to be observed that in that case this Court was influenced by the findings of facts.

With this expression of opinion the Bench which referred the question will be left to deal with the appeal.

(1) I. L. R., 2 Mad, 219. (2) I. L. R., 4 All, 337