1902.
March 11 and 19.

Re M. A. PERERA, Insolvent.

D. C., Colombo, 1,979 (Insolvency).

DAVIES & Co., Petitioners.

M. A. PERERA, Respondent.

Insolvency Ordinance, 1853, ss. 124, 129, 133, 134—Application for recall of certificate of conformity—Time within which such application should be made.

Section 129 of the Ordinance No. 7 of 1853 refers solely to the allowance of a certificate by the District Court which had not been appealed against, and was intended to give a summary remedy in cases where no appeal has been taken under section 132.

Section 129 does not apply at all to orders made by the Supreme Court on appeal from the District Court.

Where a District Court refused to grant a certificate of conformity to an insolvent, and the Supreme Court by its judgment of 24th October, 1900, directed that a certificate of the third class be given to him, but suspended its issue for a year from 24th October, 1900,—

Held, that any application to recall such certificate should be made under section 133, and that any order made thereunder by the District Court would be appealable to the Supreme Court.

Held also, that section 129 was intended to give to the Supreme Court a special jurisdiction where there has been no appeal from the allowance of the certificate by the District Judge.

Held further, that the petitioner was out of time in applying for a recall of the certificate in October, 1901.

ON the motion of Van Langenberg for Messrs. W. H. Davies & Co., that the Supreme Court do issue an order on the insolvent, M. A. Perera, to show cause why its order dated the 24th October, 1900, should not be revised, and the order of the District Judge dated the 2nd August, 1899, be restored,—

BROWNE, A.J., ordered as follows on the 24th October, 1901:—

"In this matter the District Court of Colombo on the 2nd August, 1900, refused to grant to the insolvent any certificate of conformity whatever. The insolvent appealed, and the Supreme Court on the 24th October, 1900, directed that the insolvent be given a certificate of the third class, but suspended the issue of it for a year from that date.

"The insolvent had in his balance sheet scheduled the petitioners to be creditors for Rs. 45,000. They however held security for their claim, and deferred proving their claim, till they should realize their security and then prove for the balance.

"The security was not sold till the 15th September, 1900, and when petitioners moved to prove for the unsecured balance of Rs. 36,247, this motion was opposed, and proof was not accorded till the 28th February, 1901.

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" It is clear from the above that, at the date of the allowance by this Court of certificate of conformity to the insolvent, the parties had no status in Court which would entitle them to be heard on the question of whether it should be granted or refused. Their application to have it re-considered might certainly have been made at any time since February last, but their counsel has informed us that, though their proof was allowed, there is now pending a motion to expunge it.

" They desire now a rule on the insolvent to show cause why the order of the Court granting certificate should not be revised on the ground that, though of the original debt of Rs. 45,000 admitted by the insolvent there remained due to the petitioners Rs. 36,247, for which they held no security, he, in appealing for grant of certificate, stated that he had through his friends settled with all his creditors except as to some Rs. 3,000, which the funds in the hands of the assignee and the unsold property would be more than enough to pay in full, and that his creditors were thus satisfied and made no opposition to the grant of the certificate.

" The delay in now moving has not been so excessive that we should refuse it for the reasons given in 162, D. C., Kandy (*Ram. 1875, p. 95*), and the petitioners may, in my opinion, be allowed a rule, but on giving security for costs, viz., Rs. 100."

Upon notice served on the insolvent that on the 11th March, 1902, the Supreme Court would consider whether its order of the 24th October, 1900, should not be revised,—

Layard, A.-G., appeared for the insolvent and took the preliminary objection that under section 129 of the Insolvency Ordinance of 1853 the petitioners, as creditors of the insolvent, should have applied to the Supreme Court within six months from the date of its judgment, and that the period for the recall of the certificate elapsed on the 23rd April, 1901.

Van Langenberg, for the petitioners,—The motion on behalf of the petitioners is not made under section 129, but in pursuance of the inherent right of this Court to vacate an order granted in consequence of the false statements of the insolvent. If the Court holds that the rule on the insolvent was not justifiably issued, then the six months contemplated by section 129 must be counted from the day of the expiration of the year mentioned in the judgment of the Supreme Court, that is, six months from the 24th October, 1901, in which case the period for the recall of the certificate would expire on the 23rd April, 1902.

Cur. adv. vult.

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In this case the applicants, creditors of one Perera, insolvent, ask that this Court will order the withdrawal of the certificate granted by its order of the 24th October, 1900, and which certificate was to be suspended for one year from the date of that order.

A preliminary objection was taken by the Attorney-General that the proper mode of procedure in this case was under section 133 of Ordinance No. 7 of 1853. To this objection it was urged (1) that this Court might revise its own judgment on the ground that it had been obtained by fraud; (2) that under section 129 the allowance of the certificate meant the date on which it was to come in force, and that therefore their application was within the six months limited by that section.

The argument in support of this latter ground for our hearing this application is, I believe, founded on a somewhat plausible fallacy. This fallacy is that section 129 may have reference both to orders made by the Supreme Court in the course of a regular appeal as well as to the particular and extraordinary jurisdiction thereby conferred by it. That this section does confer on the Supreme Court a jurisdiction beyond its ordinary appellate jurisdiction, I think there can be no doubt, and that it was purposely so conferred, I think, appears from the position of this section and the context of the preceding section relating to the certificate of conformity.

If now we look at sections 124 to 128, I think it is clear also that the words in section 129, "at any time within six months after any certificate of conformity shall have been allowed," refer solely to the allowance of a certificate by the District Court which has not been appealed against, and that section 129 is intended to give a summary remedy in cases where no appeal has been made. In my opinion sections 130 and 131 also still refer to the unappealed allowance of a certificate of the District Court. But when we get to section 132 the procedure on appeal is set out, and it is only if you place section 129 after that section that it is possible to give the meaning contended for by the learned counsel for the applicants to the word "allowance." It is difficult to believe the Legislature made such a mistake as to misplace this section.

In my opinion, therefore, section 129 only refers to the extraordinary jurisdiction conferred on the Supreme Court to give a remedy against an allowance by the District Court of a certificate which has not been appealed against. This being so, the order

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made by the Supreme Court was not an order made under that section, and the argument addressed to us by Mr. Van Langenberg does not, in my opinion, apply. In my opinion this Court can only exercise its jurisdiction under section 129 within six months from the date when the District Court has ordered the allowance of a certificate of conformity which has not been appealed against. I do not think section 129 applies at all to orders made by the Supreme Court on appeal from the District Court.

As regards the second point, that we are entitled to revise our order on the ground that it has been obtained by fraud and misrepresentation, I do not think it necessary to express any binding opinion on this question, but would point out that the Legislature have themselves devised a remedy for such a state of things as is alleged to exist there under section 133, and that in my opinion the proper course will be to proceed under that section, any order made thereunder being, I presume, appealable to this Court. In my opinion the application must be refused, and with costs.

MONCREIFF, A.C.J.—

I am of the same opinion. I agree with my brother Middleton that section 129 of the Insolvents' Estates Ordinance was intended to give the Supreme Court a special jurisdiction where there has been no appeal from the allowance of the certificate of conformity by the District Judge. And I agree that, even if we have the power to entertain this application, it is more proper for the applicant to proceed under section 133 of the Ordinance.

I think, however, that the applicant could not in any case proceed under section 129. This Court granted the insolvent a certificate on the 24th October, 1900, but suspended it for a year. Section 129 requires that application for cancellation under the section shall be made "within six months after any certificate of conformity shall have been allowed." More than a year has elapsed since the order of the 24th October was made, but the applicant says he is in time, because the "allowance" of the certificate dates from the 24th October, 1901, when the period of suspension came to an end.

I think this argument is not sound. The Ordinance (see sections 124, 129, 132, and 133) speaks indifferently of the suspension of the certificate and the suspension of the "allowance," and not improperly, because the meaning is the same in each case. A certificate cannot be suspended unless it exists, unless, that is, it has been allowed; and again, if the allowance is suspended, it

must have come into being before or at the moment it was suspended. The order of the Court is not that a certificate shall be granted at some future date which is named, but that the certificate is allowed from the date of the order, subject to suspension for the period named. In the form "Q" (schedule "B" attached to the Ordinance) the words of the District Judge run thus: "I did then and there find the said insolvent entitled to such certificate and did allow the same." A few lines lower down is a note to the effect that "if the certificate be allowed with conditions, the same are to be inserted here." I am therefore of opinion that the allowance spoken of in section 129 dates from the order of the Court, and that the applicant is out of time.