July 18, 1910

Present: Mr. Justice Middleton and Mr. Justice Wood Renton.

In re the Insolvency of SILVA

D. C., Kalutara, 136.

What is frivolous and vexatious defence?—Within six months—What is to be deemed the date of the offence?—Ordinance No. 7 of 1853, s. 151 (7).

A defence which is false to the knowledge of the person putting forward the same is a vexatious one within the meaning of section 151 (7) of the Insolvency Ordinance.

The offence created by section 151 (7) of the Insolvency Ordinance is not the mere filing of a vaxatious and frivolous defence, but the putting of a creditor to unnecessary expense thereby. The point of time at which it is judicially determined that such expense has been caused to a creditor is that at which it should be held the offence has been committed.

A. St. V. Jayewardene, for the appellant (insolvent).—The insolvent filed his declaration on December 9, 1909. Judgment was entered against the insolvent in the Colombo District Court case (28,480) on October 6, 1909. There is no evidence to show that the insolvent filed answer in D. C., Colombo, 28,480, within six months next preceding the filing of the petition for sequestration. The mere fact that the defence in D. C., Colombo, 28,480, was a false one is not enough to show that the defence was vexatious. See *In re Pownall*,[1] *Ex parte Daniel Turton Johnson*,[2] *De Silva v. Mammadu*.[3]

Cur. adv. vult.

[1] *Fonblanque's Bankruptcy Cases 221.* [2] *4 De Gex & Smale's Reports 25.*
[3] *(1897) 3 N. L. R. 3*

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The insolvent in this case has been refused a certificate altogether on the ground that he has been guilty of an offence under sub-section (7) of section 151 of the Insolvent Estates Ordinance. For him it is contended on appeal (1) that there is no evidence on the record to show that the alleged vexatious defence occurred within six months next preceding the filing of his petition; (2) that it was not shown that the defence set up was in fact vexatious or frivolous.

The reason given, *i.e.*, " that the creditor was a Chetty lady," by the District Judge for accentuating . . . the gravity of the alleged offence was also criticised as unfounded. It is not, as suggested by counsel, a reason given by the Judge for holding that the offence had been committed, but simply a circumstance of supposed aggravation, which I shall allude to no further, and which may or may not be true, but which, from the caption of the judgment in question, there is some reason to believe is true.

Counsel for the appellant cited *re Pownall*,[1] *Ex parte Daniel Turton Johnson*,[2] and referred to section 197 of the Criminal Procedure Code; *De Silva v. Mammadu*.[3]

It seems more convenient to deal with the second point first. I think the present case is to be distinguished from *Ex parte Daniel Turton Johnson*. There the alleged vexatious plea were offered with the assent of the bulk of the insolvent's creditors, who were defending the action in the debtor's name for the supposed benefit of the creditors. In *Ex parte Pownall* the pleas may have been untrue, but it does not appear that the debtor supported them by his evidence.

Here, from the judgment of the Additional District Judge of Colombo, it is clear that the plea raising the defence was supported by the debtor's evidence, which the Judge held to be false. It is clear then to me that the debtor must have put forward a defence which was false to his knowledge, and in my opinion such a defence would be clearly vexatious.

We then come to the question whether the insolvent did, within six months of the filing of his plaint, put any of his creditors to unnecessary expense by a vexatious defence. The act forming the offence is the putting to an unnecessary expense by a vexatious defence, and it must occur within six months of the filing of the petition. What, then, is the date of the offence? In *In re Pownall* the Commissioners of Bankruptcy seem to have supposed that the offence took place at the time of filing on the record the eight special pleas. The mere filing of pleas on the record here would not put the the opposing party to any unnecessary expense. The raising of the defence which they involved would cause the expense,

[1] *Fonblanque's Bankruptcy Cases 221.* [2] *4 De Gex Sm le's Reports 25.*
[3] *(1897) 3 N. L. R. 3.*

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but it would not be determined whether the expense was unnecessary or who was to bear it until the Judge bound to determine the question gave his decision.

In my opinion, therefore, the offence in this case under sub-section (7) of section 151 of our Insolvency Ordinance must be deemed to occur upon the date of the judgment deciding the facts upon which the offence is based. In my opinion, therefore, the insolvent was guilty of the offence in question, and the District Judge was right in refusing his certificate.

I think the appeal should be dismissed with costs.

WOOD RENTON J.—

I think that the evidence in this case is amply sufficient to support the finding of the learned District Judge, that the insolvent-appellant had set up a vexatious and frivolous defence to Mrs. Annandappa's claim, and the only point that has given me any difficulty is as to whether his case can be brought within the provisions of section 151, sub-section (7), of Ordinance No. 7 of 1853. On the whole, I agree with my brother Middleton that the cases of *In re Pownall* [1] *and Ex parte Daniel Turton Johnson* [2] are distinguishable on the grounds stated by him. I would point out that the offence created by section 151, sub-section (7), of Ordinance No. 7 of 1853 is not the mere filing of a vexatious and frivolous defence, but the putting of a creditor to unnecessary expense thereby. It seems to me that the point of time at which it is judicially determined that such expense has been caused to a creditor is that at which it should be held that the offence has been committed. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

[1] *Fonblanque's Bankruptcy Cases 221.* [2] *4 De Gex & Smale's Reports 25.*