

1936

*Present: Akbar and Koch JJ.*GOONERATNE *v.* THE BANK OF CHETTINAD.

160—D. C. (Inty.) Colombo, 4,848.

Insolvency—Particulars of petition—Judgment-creditor in a position to sue out execution—Personal service of notice on person adjudicated—Ordinance No. 7 of 1853, s. 12.

In a petition for the adjudication of a person as insolvent the petitioning creditor must state that he is in a position to sue out execution upon his judgment and he must establish that fact.

The notice required by section 12 of the Insolvency Ordinance must be served personally on the person affected.

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

H. V. Perera (with him *N. Nadarajah*), for insolvent, appellant.

Cur. adv. vult.

July 10, 1936. AKBAR J.—

In this case the insolvent appeals from an order of the District Judge made under section 12 of Ordinance No. 7 of 1853, adjudicating him an insolvent under the provisions of that section at the instance of the judgment-creditor, the respondent to this appeal. Under that section, there are certain requisites which must be observed before a person in the position of the respondent can ask for an order attaching his debtor the insolvent.

In the first place, no evidence has been led except the petition and two affidavits, one by the attorney and manager of the petitioner and the other by the proctor appearing for the petitioner.

Mr. Perera has taken several objections to the correctness of the order. The first objection that he took was on the authority of the case of *de Zoysa v. Baur and Co.*¹. It was held in that case that in a petition for the adjudication of a person as insolvent, where the only material before the Court were the petition and affidavit of the petitioning creditor, they were insufficient proof of the petitioning creditor's debt. Poyser J. there mentions the case of *Ex parte Dodd in In re Ormston* where Bacon C.J. held that the petition and affidavit in support of the adjudication were not sufficient proof of the petitioning creditor's debts.

Another objection taken by Mr. Perera was that a very material requisite of section 12 has not been set forth even in the petition and affidavit, namely, the necessity of stating and proving that the petitioning creditor is in a position to sue out execution on the judgment. The documents filed simply show that the petitioning creditor had obtained a decree for the payment by the appellant of a sum of Rs. 43,600 with further interest and costs. It is not even stated there that the costs have been taxed, and if they had been taxed, the amount of such taxed costs is not shown in the documents filed.

A further objection taken by Mr. Perera is of the utmost importance, namely, that that section requires proof of personal service on the appellant. What is alleged in the affidavit is that the proctor for the respondent posted by registered post to the insolvent a letter, a copy of which has been filed with the affidavit, and that a reply was received from another proctor, referring to this letter which had been addressed to the appellant, and sending a cheque for Rs. 100, on account, and that the cheque was returned. I do not think that the law recognizes this as proof of personal service, as required by the section I have referred to.

Reference was made to an English case—*Goggs v. Huntintower*²—where evidence was furnished by affidavit to prove that the writ of summons was actually received by a certain woman on behalf of her master, the defendant, that it was further received by her employer, and that the defendant was heard to say: "Take it back; I won't have it". Referring to this Parke B. said as follows:—

"In consequence of those decisions the Judges have come to a determination that, in future, there shall be no equivalent for personal service."

and Alderson B. says as follows:—

"Service means serving the defendant with a copy of the process and showing him the original, if he desires it"

This indicates what is quite clear in our Civil Procedure Code, viz., that personal service means an actual service on the person affected, by a duly constituted agent who hands the document into the hands of the person so affected.

In my opinion each of the objections is entitled to succeed and the appeal should be allowed with costs in this Court and the Court below, the order of the learned District Judge being set aside.

Koch J.—I agree.

Appeal allowed.

¹ 35 N. L. R. 318.

² (Lord) 12 M. and W. 503.