[FULL BENCH.]

1923.

Present: Bertram C.J., De Sampayo, Porter, Schneider, and Garvin JJ.

In re GOONEWARDENE.

120—D. C. (Inty.) Galle, 493.

Appeals—Insolvency proceedings—Security for costs—Civil Procedure Code, s. 756.

Per FULL COURT—In appeals in insolvency proceedings the appellant need not give security for costs of appeal.

The insolvent was a resident of Galle. In November, 1921, he established a business at Matara as a boutique-keeper. He closed this business in March, 1922, and continued to live in the Galle house thereafter. The District Judge annulled the adjudication of insolvency, as during the six preceding months the appellant resided within the jurisdiction of the District Court.

Held (per DE SAMPAYO and GARVIN JJ.) that in the circumstances the insolvent did not cease to be a resident of Galle during the time he was carrying on business at Matara.

A man's residence is not dependent altogether on his physical occupation of any house.

THE appellant was adjudged an insolvent on May 9, 1922, the Court exercising jurisdiction on this behalf on facts urged in an application by a petitioning creditor.

The respondent to this appeal made an application to annul the adjudication on the ground that the Court had no jurisdiction, in that the insolvent had not resided within the jurisdiction of this Court for six months prior to the adjudication. The District Judge on July 24, 1922, allowed the application of the respondent annulling the adjudication and condemning the petitioning creditor to pay the costs of the applicant.

The insolvent appealed. As no security for costs of the respondent was given by the appellant, the District Judge ordered the appeal to abate. The insolvent moved the Supreme Court to call for the case. The Supreme Court directed the District Judge to send up the appeal, and ordered that it be listed for argument subject to the objection to be taken at the argument.

The order of the District Judge (T. B. Russell, Esq.) annulling the adjudication was as follows:—

> The question is whether the insolvent was residing in Galle for the previous six months as he says, or whether from last November to March of this year he was living and trading in Matara. That he was trading is admitted, and the applicant has adduced ample evidence that during

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this period he was not only recognized by others as a man of Matara (R 1 and R 3), but also that he described himself as such (see R 2 which is written entirely in his handwriting). Insolvent admits that it was quite correct to describe him as "of Matara." because he had his business there, but he has called a number of witnesses and put in a number of documents to prove that all the time he was living in Galle. As Mr. de Vos, for the applicant, has pointed out, of the documents I 1 to I 6 relied on by the insolvent, only I 1, the latest poll-tax receipt, is relevant. All the others were written prior to the period when insolvent was trading in Matara. This is so, but I 1 proves that on March 8, 1922, he paid his poll-tax in Galle. Poll-tax, however, is not always paid in the actual place where a person resides. Insolvent may have simply followed the custom of the previous years. It is not denied, furthermore, that he is keeping a mistress in Galle, and has done so for several years past, and the Peace Officer and the Vidane Arachchi both say that they always regarded him as a resident of Galle. But the rent of the present house where the mistress is, and where she has been since January last, is being paid by her, and not by the insolvent, and the insolvent's last witness, Kudahetty, says that the insolvent mostly lived in Matara, and that he only occasionally came to Galle to see his mistress. This is almost certainly the truth. The business in Matara was, on the insolvent's own showing, not a large one. It is not a business he would have been able to leave in charge of employees whilst he remained idle in Galle. The question, therefore, is "can a man who has his business in one place, and resides there for the most part, and only occasionally visits another place to see a mistress be said to live in the latter place?" I do not think he can. Insolvent's counsel urged that no one was prejudiced by the insolvent having taken proceedings in this Court, and that in fact, as most of his creditors were in Galle, it was most convenient that the proceedings should be taken here. He quoted authorities to show that according to English law the present plea of want of jurisdiction should not be entertained, and that in any case the Supreme Court was likely to exercise its power to order the proceedings to be taken here. The Insolvency Ordinance, however, sets out the jurisdiction, and in my opinion it is only the Supreme Court that can give jurisdiction to another Court. It is not for this Court to give itself jurisdiction. On the simple issue which I have to decide in this inquiry, I think I must find in favour of the applicant, and hold that this Court has no jurisdiction. I therefore direct that the adjudication be annulled. Costs to be paid by both the insolvent and the petitioning creditor.

Keuneman, for the respondent (creditor), took the preliminary objection that no security had been given by the appellant for costs of the respondent. Section 6 of the Insolvency Ordinance, 1853, provide that appeals in insolvency cases shall be prosecuted "under such regulations as now exist or shall be hereafter made by the Supreme Court." The Supreme Court has not made special rules since 1853. The old rules and orders governed appeals in insolvency proceedings. The rules and orders were abolished by the Civil Procedure Code in 1889. Insolvency appeals are now governed in the absence of special rules by chapter LVIII. of the Civil Procedure Code. See Interpretation Ordinance, No. 21 of 1901, section 10 (1). Otherwise there will be no provision as to appeals in insolvency

proceedings. In *In re Abdul Aziz* [1] the Supreme Court did not consider the effect of section 6 of the Civil Procedure Code. "Every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action." (Section 6.) Bonser C.J. is of opinion that insolvency proceedings are not actions. But *contra* see the judgment of Middleton J. in *Salgado v. Peris.*[2] Counsel also referred to *In re Phillippo.*[3]

Soertsz, for insolvent, respondent, not called upon.

March 12, 1923. DE SAMPAYO J.—

This is an appeal in an insolvency case taken by the insolvent. When the appeal first came before my brother Schneider and myself, a preliminary objection was taken by counsel for the respondent to the appeal being heard, as no security in appeal had been given by the appellant, and in view of certain decisions of this court, we thought it right to refer the case to a fuller Bench.

The argument on behalf of the respondent is that the provisions of section 750 of the Civil Procedure Code with regard to security in appeal are applicable to insolvency cases. The reasoning by which this argument is supported may be summarized as follows:— Section 6 of the Insolvency Ordinance provides that appeals in insolvency cases "shall be brought on and prosecuted in such manner and shall be subject to such regulations as now exist or shall be hereafter made by any rule or order of the Supreme Court." No special rules with regard to insolvency appeals having been made by the Supreme Court, the general rule as to security in the rules and orders framed under section 51 of the Charter of 1833, and existing at the date of the Insolvency Ordinance, governed; these rules and orders having been absolutely repealed by the Civil Procedure Code, the provisions of section 756 of that Code were by force of the principle stated in section 10 (1) of the Interpretation Ordinance, No. 21 of 1901, took the place of the old rules and orders, and were, therefore, now applicable to all insolvency appeals. It is clear, however, that the provisions of section 756 and connected sections have regard only to appeals in civil actions, whether of regular or summary procedure. But insolvency proceedings do not come under either of these descriptions of "actions." They constitute a "matter" of a special kind, and unless the Supreme Court makes any rule in exercise of its powers under section 6 of the Insolvency Ordinance, it appears to me that there is nothing to require security to be given in insolvency appeals. Apart from this consideration, the point is covered by authority. It is true that *In the Matter of the Insolvency of Phillippo* (*supra*)

[1] *(1895) 1 N. L. R. 196.* [2] *(1909) 12 N. L. R. 379.*
[3] *(1890) 9 S. C. C. 120.*

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a bench of two Judges held that the provisions of the Civil Procedure Code relative to the giving of security for the respondent's costs of appeal were applicable to appeals in insolvency proceedings, but in the later case of *Abdul Aziz* (*supra*) the Full Court expressly considered and dissented from that view, and decided that security was not required in insolvency appeals. This decision is binding upon us, and in my opinion the objection should be over-ruled and the appeal should be heard. I think the appellant is entitled to the costs of the argument.

BERTRAM C.J.—I agree.

PORTER J.—I agree.

SCHNEIDER J.—I agree.

GARVIN J.—I agree.

Objection over-ruled.

The appeal was subsequently listed for argument on the merits before De Sampayo and Garvin JJ.

April 23, 1923. DE SAMPAYO J.—

This is an insolvency case in which on the application of the respondent the adjudication of the insolvent was annulled on the ground that the District Court of Galle had no jurisdiction. The Ordinance provides that insolvency proceedings should be initiated in the Court within whose jurisdiction the insolvent resided six months previously. It appears that the insolvent was a resident in Galle for many years. He had a mistress in a house at Galle, where he himself lived with his mistress. But in November, 1921, he established a business at Matara as a boutique-keeper, and the respondent's standpoint is that the insolvent then ceased to be a resident at Galle, and became a resident at Matara. That business, however, lasted a short time. It was closed in March, 1922, and the insolvent would appear to have continued to be in the Galle house from that time. The District Judge has found that during that interval from November to March the insolvent resided at Matara, and as he had not then on that footing resided within the jurisdiction of the District Court of Galle for six months preceding the application the Court had no jurisdiction. But I cannot agree with the District Judge's finding of fact. A man's residence is not dependent altogether on his physical occupation of any house. It may be that in connection with his new business the insolvent lived in the boutique whenever in Matara. But nothing in the case shows that he ceased to be a resident of Galle. His house as a matter of fact was at Galle, and I think that all the circumstances justify an inference

that for all the purposes of the Ordinance the insolvent was a resident of Galle. This being the view I take of the facts, it is not necessary to consider the further question introduced, whether the respondent has a right to make the application for the annulment, as he has not proved his claim and has not become a proved creditor.

I would set aside the order annulling the adjudication, and would send the case back for proceedings in due course. The appellant, I think, is entitled to his costs of appeal.

GARVIN *J.*—I agree.

Sent back.