

(1933) 03 BOM CK 0009

In the Bombay High Court

Case No : O.C.J. Appeal No. 39 of 1932

**In Re: Goolbai Bomanji Petit.
 The Bank of India Ltd.**

Date of Decision : 01-03-1933

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 36

Citation : AIR 1933 Bom 309 : (1933) 35 BOMLR 546 : (1933) ILR (Bom) 665 : 145 Ind. Cas. 648

Hon'ble Judges : Rangnekar, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Beaumont, C.J.—These are two appeals from orders made by Mr. Justice Wadia sitting in insolvency. The orders were made in the insolvency of one Goolbai for the examination of the respondents on the two appeals, who are respectively the son and daughter of Goolbai. The appellants, the Bank of India, Limited, obtained a decree for Rs. 1,50,000 on January 31, 1931, against Goolbai. They presented a petition on August 31, 1931, for getting her adjudicated insolvent, and on February 16, 1932, Goolbai was adjudicated insolvent. The evidence filed on behalf of the bank discloses various dealings between the insolvent and her son and daughter into which it is not necessary that I should go in detail. It is sufficient to say that the transactions are of such a nature that on the face of them they may be open to attack in the insolvency of Goolbai. That being so, the bank made an application for the examination of the son and daughter, that is to say, the two respondents, u/s 36 of Presidency-towns Insolvency Act, and on June 14, 1932, Mr. Justice Barlee made an order for their examination. On July 14, Mr. Justice Wadia varied that order by excluding from the proposed examinations various specified matters, which in substance included all the particular matters referred to in the bank's evidence. The ground upon which the learned Judge imposed that restriction was, as I understand his judgment, that he thought that an order for examination u/s 36 ought not to be made if as a result of the examination litigation between the Official Assignee and the party examined might ensue.

2. Now, Section 36, Sub-section (1), provides that the Court may on the application of the Official Assignee or of any creditor who has proved his debt at any time after an order of adjudication has been made summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property. That section confers upon the Court a power which is general in its character; whenever the circumstances are such as to bring the section into operation the Court can require the person concerned to be examined, and I entirely dissent from the view that it is any ground for refusing or limiting the order that information to be obtained on the examination may result in litigation against the person examined. Indeed I think one of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not. I agree in that matter with the judgment of Mr. Justice Greaves in *Re Haripada Rakshit*. Ex parte Binodini Dassee ILR (1916) Cal. 374 Mr. Justice Wadia in his judgment has relied on the case of *In the matter of G.H. Ghanchee and Sons* ILR (1929) Ran. 675 and on two decisions of this Court, one, *In Re: Mahomed Esmail Fazla*, a decision of Mr. Justice Crump, and the other a decision of Mr. Justice Davar, *Haji Dada Nurmahomed v. Ismail Karim* (1928) 31 Bom. L.R. 420 The view which commended itself to the Courts in those cases appears to have been that the provisions of Sub-section (1) of Section 36 are controlled by Sub-sections (4) and (5) which provide a summary procedure for recovering money or property where there is no dispute. Sub-section (4) of Section 36 provides that if on his examination the person examined admits that he is indebted to the insolvent, then the Court may make a summary order for payment against him ; and Sub-section (5) provides that if on his examination such person admits that he has in his possession any property belonging to the insolvent, the Court may make upon him a summary order to deliver that property to the Official Assignee. It appears that those two sub-sections were originally not limited to the case of the person under examination making an admission, and in the cases to which I have referred the learned Judges seem to take the view that, because the Act has been amended by providing that summary orders under those two sub-sections can only be made on an admission, that shows that it was intended to limit the operation of the whole section to cases in which an admission was likely to be extracted, that is to say, cases in which there was no serious dispute. I do not see the smallest justification for that construction of the section. The examination can be ordered when the circumstances bring the case within Section 36, Sub-section (1). The examination may or may not result in some admission of liability on the part of the person examined. If there is an admission, then a summary order can be made under Sub-section (4) or sub-s, (5); if there is no admission, and the witness may refuse to make an admission however clear are the facts against

him, then no summary order can be made. But the mere fact that an admission is not likely to be made is no ground whatever for refusing to direct an examination. Mr. Justice Davar in the case in Haji Dado, Nurmahomed v. Ismail Karim said that the section should not be used for the purpose of instituting a fishing cross-examination for the purpose of eliciting information to be used in a subsequent suit. That no doubt is so; the Court must see that the section is not abused, and prima facie the Court ought not to make an order u/s 36 unless there is ground for thinking that the order is likely to be of some use. But, as I have said, the mere fact that the result of the examination may be of use to the Official Assignee and may be a subject of inconvenience to the person examined in future litigation is no reason for not making the order.

3. The learned Advocate General on behalf of the two respondents has also contended that we ought in our discretion to refuse to make an unrestricted order u/s 36 because he says that the two respondents have made a full disclosure to the Bank of all material matters. Well, if that is so, the order cannot possibly do them any harm. If the Bank has already in its possession full information, then it is no doubt wasting its money in proceeding with this order. But the Bank are entitled to say that they are not satisfied that full information has been given, and that they think they may acquire further useful information. On the materials which they disclose in their affidavit I am certainly not prepared to say that their view is necessarily wrong. In my opinion, therefore, the restrictions which the learned Judge incorporated into the two orders for the examination of these two respondents were not justified, and the two orders should be converted into the form they originally took when they were made by Mr. Justice Barlee.

4. The respondents desiring that the examination should take place before the Judge and the appellants not raising any objection we direct that the Judge take the examination himself rather than the Registrar.

5. Appeals allowed. Respondents must pay the costs here and in the Court below.

Rangnekar, J.

6. On the question of fact I desire to say very little and agree with the view taken by the learned Chief Justice that on the facts and circumstances disclosed in the affidavits in this case the learned Judge was not justified in varying the order made by Mr. Justice Barlee u/s 36 of Presidency-towns Insolvency Act for the examination of the two respondents in these two appeals.

7. On the question as to the true construction of Section 36 of the Presidency-towns Insolvency Act, with the utmost respect to the learned Judge, I am unable to agree with the view which has found favour with him as regards the object and the scope of the section. As I understand the judgment of the learned Judge, he seems to think that Section 36 provides a summary mode of discovery of the insolvent's property, for the purpose of delivering the same to the Official Assignee without recourse to any litigation, if the person examined admits it, as

being in his possession and belonging to the insolvent. The learned Judge came to this conclusion on the ground that the section was amended in 1927. Before 1927 the words in Sub-sections (4) and (5) were "If on the examination of any such person the court is satisfied &c." By the amendment these words were deleted and in their place the following words appear "If on his examination any such person admits &c." In support of his opinion the learned Judge relies on *In Re: Mahomed Esmail Fazla*, , *Lucas*, *In re ILR (1914) Cal. 109* *Haji Dada Nurmahomed v. Ismail Karim (1928) 31 Bom. L.R. 420* and *In the matter of G.H. Ghanchee and Sons ILR (1929) Ran. 675* The other ground on which the learned Judge thought that this case did not fall within the purview of Section 36 was, that, as a result of holding the examination, litigation might ensue between the Official Assignee and the respondents.

8. The first two cases can be distinguished, and, in my opinion, do not support the view which the learned Judge has taken. In *In re Mahomed Esmail Fazla* the real point was whether an order for delivery of property should be made summarily under the provisions of Sub-section (4) or (5), and it was with reference to that point that Mr. Justice Crump made the observations on which Mr. Justice Wadia has apparently relied. The observations are as follows (p, 553):-

If it is correct to say, as I think it is, that Section 36 (4) and (5) was intended to provide a summary procedure for ordering payments of debts due and delivery of property where there was no dispute...it is obvious that the procedure under that section is inappropriate in the case of such disputes as we have here.

9. *Lucas*, *In re ILR (1914) Cal. 109* The head-note In that case seems to me to be worded broadly and without reference to the actual point which arose for decision in the case. In that case an order was already made for examination of a lady u/s 36 and as a result of such examination an application was made that she should be ordered to deliver over to the Official Assignee certain Immovable property as being the property of the insolvent. Dealing with that point the learned Judge at p. 112 observed :-

An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent.

and on the facts came to the conclusion that no such order could be made. In the last two cases referred to by Mr. Justice Wadia it was undoubtedly held that the amendment introduced in 1927 in Sub-sections (4) and (5) of Section 36 restricted the scope of the inquiry under the section. With all respect I am unable to agree with this view.

10. Under Sub-section (1) of the section the Court has the power to summon any person known or suspected to have in his possession any property belonging to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property. Then, before the amendment of 1927, Sub-sections (4) and (5) provided that if on examination

the Court was satisfied that the witness was indebted to the insolvent or possessed property belonging to the insolvent, the Court had the power to order him to pay the debt or deliver the property to the Official Assignee, and it is only this latter power that the amendment of 1927 has curtailed. The wording of the amendment itself, in my opinion, shows that the legislature never intended to curtail in any manner the very wide power which it had conferred on the Court u/s 36 (1) for the purpose of inquiring into the dealings and affairs of the insolvent.

11. With regard to the second ground I think the very object of such an examination is to obtain information as regards the affairs and the dealings of the insolvent and to see if proceedings should not be taken in the interests of the creditors as a whole for the purpose of challenging the transactions entered into by the insolvent, and to say that litigation might ensue as the result of such an examination would, in my opinion, defeat the very object with which this section has been enacted. In this respect I agree with the view which Mr. Justice Greaves has taken in *Re Haripada Rahshit*. Ex parte Binodini Dassee ILR (1916) Cal. 374 The same view has been taken by this Court in *In re Bhagwandas Narotamdas* ILR (1897) Bom. 447 where though an order for examination of the two defendants who had filed their written statements was not made, the third defendant who had not tiled his written statement was ordered to be examined u/s 36. The only case in which, as far as I can see, any such order should not be made is where litigation has actually commenced and is pending between the parties with reference to the very question information about which is sought to be elicited by means of such an examination. The Courts in England have taken the same view. It is unnecessary to refer to the cases cited by Sir Chimanlal Setalvad, but I think I may refer to *Learoyd v. Halifax Joint Stock.Banking Company* [1893] 1 Ch. 686 and at pages 692 and 693 the Court observed that the whole object was to get information in order to see what course ought to be followed by the Official Assignee with reference to some matter or claim in the insolvency. I think the true principle on which Section 36 (1) is based is as stated by Wace on Bankruptcy at page 84 :-

It is of the utmost importance that a trustee [in bankruptcy] should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors, if he were compelled to rely only upon such information as the bankrupt may be able or willing to give, 01" as he can ascertain from persons ready to assist him voluntarily. Without it, ha would frequently be compelled to choose between abstaining from insisting upon a claim to property which he is probably entitled and commencing proceedings without knowing whether they are justified by the facts.

12. I agree that the order made by the learned Judge should be set aside and that made by Mr. Justice Barlee restored.