

(1937) 04 MAD CK 0027
In the Madras High Court

Mrs. Evelyn Popaly

APPELLANT

Vs

Official Assignee of Madras

RESPONDENT

Date of Decision : 06-04-1937

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 7

Citation : 172 Ind. Cas. 346

Hon'ble Judges : Beasley, C.J;Cornish, J

Bench : Division Bench

Judgement

Beasley, C.J.—The Official Assignee applied to the Insolvency Court u/s 7, Presidency Towns Insolvency Act. for a declaration that certain

houses are the property of the insolvent purchased in the " name of his wife. respondent No.?, or in the alternative, that the insolvent has a half

interest in those houses. At the hearing before Wadsworth, J., respondent No. 2 raised the preliminary objection that as respondent No. 2 had

been examined u/s 36 of the Act, the proceedings against her u/s 7 were barred. That objection the trial Judge overruled holding that the previous

examination u/s 36 of the Act was no bar to the proceedings before him. The hearing of the application has been stayed pending this appeal. The

point before us is to what extent this case is covered by the Full Bench decision in Official Assignee Vs. E. Narasimha Mudaliar, and for its

determination depends upon whether the subject-matter of the application is one which falls within Sub-section (5) of Section 36 of the Act. The

summons u/s 36 reads as follows:

Take notice that you are hereby required to appear before the Master in Chambers on Thursday,. August 20. 1936, at 3 p. m., and to give

evidence touching the insolvent, his dealings and property and regarding the properties standing in your name and suspected to be his properties

and to produce any documents in your possession or control relating to the said properties standing in your name and acquired by you since 1928

and the pass books of all the banks in which you have had accounts from the commencement up-to-date and also all documents relating to the

fixed deposit and chit transactions had by you.

2. From the questions put in the examination of respondent No. 2, it is perfectly clear that the sole object of the examination was to establish the

fact that the houses had been purchased by the insolvent in her name, that is to say. that the purchases were; benami Respondent No. 2 denied that

the property had been purchased with her husband's money, and as-period that she had herself purchased the house out of her own funds. The

appellant's case is that this was an examination to establish that respondent No. 2 had in her possession property belonging to the insolvent and

that no admission to that effect having been got from her, proceedings u/s 7 of the Act could not be taken against her without her consent by

reason of the amendment of Rule 7 by Section 2 of the Amending Act XIX of 1927, which adds the following Proviso:

Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising u/s 36, be

exercised only in the manner and to the extent provided in that section.

3. In Official Assignee Vs. E. Narasimha Mudaliar, which was a case of a simple money claim, it was held that when once the Official Assignee

has summoned a witness u/s 36 of the Act and the witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of

suit unless the witness agrees to the disposal of the matter in the Insolvency Court. In a later decision, namely Chinnappa Mudali v. Official

Assignee of Madras 55 M 385 : 135 Ind. Cas. 585 : AIR 1932 Mad. 167 : 62 MLJ 103 : 34 LW 849 : (1931) MWN 1253 : Ind. Ru1.(1932)

Mad. 169 it was held that the amendment of Section 7 of the Act by Section 2 of the Amending Act (XIX of 1927) refer only to such proceedings

u/s 36 of the Act as come under Sub-section (4) which deals with simple money claims and Sub-section (5) which deals with the examination of

persons supposed to be in possession of some property of the insolvent and to

no other matters and that Sub-section 5 of Section 36 does not touch the case of a person who is examined for the purposes of ascertaining whether the status of joint family is subsisting between the insolvent and the other members of the family and whether a business is a joint family business. The Full Bench case was on the question of simple money claims and in Chinnappa Mudali v. Official Assignee of Madras 55 M 385 : 135 Ind. Cas. 585 : AIR 1932 Mad. 167 : 62 MLJ 103 : 34 LW 849 : (1931) MWN 1253 : Ind. Ru1.(1932) Mad. 169 was distinguished on that ground. On p. 387 Page of 55 M.--[Ed.] it is stated: ""Throughout the decision in that case the only case in contemplation was the case of a simple money claim"".

4. The appellant's endeavour, in consequence of these two decisions, has been to show that the matter is one under Sub-section (5) of Section 36

contending that the subsection embraces not only cases where the property admittedly belongs to the insolvent but also where the Official Assignee

contends that property admittedly in the possession of the person examined belongs to the insolvent and not to the person in whose possession it is

and that if the person examined denies that the property belongs to the insolvent and asserts that it belongs to him or herself, it is a denial that that

person is in possession of property belonging to the insolvent and therefore, the sub-section applies. On the other hand, Mr. K.S. Krishna-swami

Iyengar contends that the section has in contemplation only cases where it is conceded that the property belongs to the insolvent and its possession

is alleged to be with the person examined and not cases where the title to property is in issue. It is for us to decide which of the two contentions is

correct. The matter is singularly bare of authority and the two cases already referred to and Calcutta decision to which reference is made in the Full

Bench case, and an earlier decision of this High Court, namely Abdul Khader Sahib v. Official Assignee of Madras 25 MLJ 308 : 20 Ind Cas 485

: AIR 1915 Mad. 107 : 14 MLT 51 : (1913) MWN 876 appear to be the only ones relating to it. In the last-named case the scope of Section 36

was discussed and it is stated that the main object of Section 36 is discovery. There, the facts were that property had been transferred by the

insolvent four months before the order of adjudication though under circumstances which might render the transfer voidable u/s 55, Presidency

Towns Insolvency Act, and it was held not to be "property belonging to the debtor" within the meaning of Section 36 (5) of the Act and that it was

not, therefore, open to the Court under that section on the examination of the transferee to declare the transaction bad u/s 55 and direct the

delivery of property to the Official Assignee and that the object of. Section 36 is to enable the Official Assignee or any creditor who has proved his

debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of

impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preferences and cognate

matters. On p. 310 Page of 25 M. L. J.-[Ed.], Sir Arnold White, C.J., says:

Now I do not think it can be held that the property in question in this case at the time that this examination was held can be said to be property

belonging; to the insolvent within the meaning of the sub-section. Prima facie, it belonged to the man in whose name the title deeds stood and who

had taken a transfer of property in January 1912, i.e., about four months before the date of adjudication.

5. This case, in my opinion strongly, supports the contention of the respondent. It shows that the sub-section has in view only the case of property

admittedly belonging to the insolvent at the time of the examination. The object of the sub-section is to enable the Official Assignee to discover its

whereabouts. The procedure in Sub-sections 4 and 5 of Section 36 is of the most summary nature; and before the amendment of those sub-

sections, if the Court on the examination of the person was satisfied under Sub-section 4 that he was indebted to the insolvent and under Sub-

section 5 that he had in his possession any property belonging to the insolvent, the Court could at once order the payment of the amount owing or

the delivery up of the property to the Official Assignee. Clearly, Sub-section 5 at that, date did not enable the Court to pass any such drastic order

under this very summary procedure incases where the title to property was in issue. The amendment substituted for "if on the examination of any

such person the Court is satisfied" the words "if on his examination any such person admits". The amendment does not touch the words "property

belonging to the insolvent". "Property belonging to the insolvent" both before and after the amendment has the same meaning. I am satisfied that

Sub-section 5 to Section 36 relates only to property admittedly belonging to the insolvent and not property, the ownership of which is in dispute.

The proceedings u/s 7 of the Act are, therefore, not barred by reason of the examination of respondent No. 2 u/s 36 of the Act and this appeal

fails and must be dismissed with taxed costs.

Cornish, J.

6. I agree. In his application to have Mrs. Popaly examined, the Official Assignee stated that she had considerable properties in her name and that

his information was that these properties were purchased with moneys belonging to her husband, the insolvent. Neither the application nor the

summons indicates the character of these properties, but it appears from the examination of Mrs. Popaly that they are houses. The purpose of the

examination was, therefore, to discover whether Mrs. Popaly or the insolvent was the owner of this immovable property. This involved enquiry into

the title to the property, which is a different thing from discovery whether Mrs. Popaly was in possession of property belonging to her husband.

Indeed, property which prima facie belonged to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within

the meaning of Section 36 (5) : Abdul Khader Sahib v. Official Assignee of Madras 25 MLJ 308 : 20 Ind Cas 485 : AIR 1915 Mad. 107 : 14

MLT 51 : (1913) MWN 876. There is nothing in the amended Section 7 of the Act to prevent the Insolvency Court from deciding a disputed

question of title between the Official Assignee and some other person. It is open to the Court, if it thinks fit to refer the question for defer-maintain

in a suit. That is a matter within the Court's discretion. But whether the Official Assignee proceeds u/s 7 or by suit, he can only recover by the

strength of the insolvent's title to the property which he is asserting and which he must establish The jurisdiction given to the Insolvency Court by

Section 7 to decide all questions arising in any case of insolvency is qualified only to the extent laid down in the proviso to the section. What

exactly is intended by the words in the Proviso "any matter arising u/s 36" is not at all clear, but I do not think they necessarily mean any matter

which has been the subject of examination u/s 36. If that had been the intention, the Act could easily have said so.

7. The result of the Full Bench ruling in Official Assignee Vs. E. Narasimha

Mudaliar, and the later Bench decision in Chinnappa Mudali v. Official

Assignee of Madras 55 M 385 : 135 Ind. Cas. 585 : AIR 1932 Mad. 167 : 62 MLJ 103 : 34 LW 849 : (1931) MWN 1253 : Ind. Ru1.(1932)

Mad. 169 is that there are two matters arising u/s 36 which are subject to the special provision, namely the question under Sub-section 4, whether

the person examined is indebted to the insolvent, and under sub Section 5, whether he is in possession of property belonging to the insolvent. If he

admits indebtedness or possession, there is nothing for the Court to decide; an order for payment or delivery may be made on the application of

the Official Assignee. But if he denies indebtedness to the insolvent or possession of the Insolvent's property then unless the parties otherwise

agree, the jurisdiction of the Insolvency Court to decide the matter is excluded and the Official Assignee must proceed by suit to enforce his claim.

The subject-matter of Mrs. Popaly's examination, however, is not a matter arising u/s 36, sub Section 4, or Sub-section 5. It is a question of title

which falls outside the scope of these sub-sections. I am accordingly of opinion that the objection raised to the Insolvency Court's power to

decide it is ill-founded and that the appeal fails.