
(1937) 04 MAD CK 0008
In the Madras High Court

Mrs. Evelyn Popaly

APPELLANT

Vs

The Official Assignee of Madras

RESPONDENT

Date of Decision : 06-04-1937

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 7

Citation : AIR 1937 Mad 775 : (1938) ILR (Mad) 72 : (1937) 46 LW 327 :
(1938) 2 MLJ 377

Hon'ble Judges : Horace Owen Compton Beasley, J; Cornish, J

Bench : Full Bench

Judgement

Horace Owen Compton Beasley, Kt., C.J.—The Official Assignee applied to the Insolvency Court u/s 7 of the Presidency-Towns

Insolvency Act for a declaration that certain houses are the property of the insolvent purchased in the name of his wife, the 2nd respondent, or in

the alternative that the insolvent has a half interest in those houses. At the hearing before Wads-worth, J., the 2nd respondent raised the preliminary

objection that as the 2nd respondent 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.

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

Proprietor of James and Co., , and 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.

3. The summons u/s 36 reads as follows:

Take notice that you are hereby required to appear before the Master in Chambers on Thursday, the 20th day of August, 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.

4. From the questions put in the examination of the 2nd respondent 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. The 2nd respondent denied

that the property had been purchased with her husband's money, and asserted that she had herself purchased the houses out of her own funds.

The appellant's case is that this was an examination to establish that the 2nd respondent 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 Section 7 by Section 2 of 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 under S36, be

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

5. In *The Official Assignee Vs. E. Narasimha Mudaliar, Proprietor of James and Co.,* , 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 that 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 (1931) 62 M.L.J. 103 : ILR 55 Mad. 385, it was held that the amendment of Section 7 of the

Act by Section 2 of the Amending Act (XIX of 1927) refers 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 (1931) 62 M.L.J. 103 : ILR 55 Mad. 385 was distinguished on that ground. On page 387 it is stated:

Throughout the decision in that case the only case in contemplation was the case of a simple money claim.

6. 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 sub-section 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.

Krishnaswami Aiyangar contends that the section has in contemplation only cases where it is contended 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 hazy of authority and the two cases already referred to and the Calcutta decision to which

reference is made in the Full Bench case and an earlier decision of this High Court, namely, Khan Sahib Bangi Abdul Khadar Sahib and Others

Vs. The Official Assignee of Madras, , 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 of the 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 page 310, 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 4 months before the date of adjudication.

7. 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) to 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 in cases 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 the second respondent u/s 36 of the Act

and this appeal fails and must be dismissed with taxed costs.

Cornish, J.

8. 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 belong to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within the

meaning of Section 36(5); *Khan Sahib Bangi Abdul Khadar Sahib and Others Vs. The Official Assignee of Madras*, . 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 determination in a suit. That is a matter within the Court's discretion.

9. 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. The result of the Full Bench ruling in the *The Official Assignee Vs. E. Narasimha Mudaliar*,

Proprietor of James and Co., and the later Bench decision in *Chinnappa Mudali v.*

Official Assignee of Madras (1931) 62 M.L.J. 103 : ILR 55

Mad. 385, 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 subsections. 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.