
(1949) 10 MAD CK 0036
In the Madras High Court
Case No : Original Side Appeal No. 68 of 1947

Mrs. N. Lakshmi	Vs	APPELLANT
The Official Assignee of Madras		RESPONDENT

Date of Decision : 12-10-1949

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 36, 36(1), 36(4), 36(5), 7

Citation : AIR 1950 Mad 410 : (1950) ILR (Mad) 895 : (1942) 55 LW 115

Hon'ble Judges : Satyanarayana Rao, J;Raghava Rao, J;Panchapagesa Sastri, J

Bench : Full Bench

Advocate : M. Natesan, for the Appellant; C.R. Rajagopalachari and The Deputy Official Assignee, for the Respondent

Final Decision : Dismissed

Judgement

Satyanarayana Rao, J.—This appeal was heard by the Officiating Chief Justice (Rajamannar O. C. J. as he then was) and myself on 4th

February 1948, and as we felt that the decision of a Bench of this Court in Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad.

72: A. I. R. 1937 Mad. 775 which was followed by the learned trial Judge required reconsideration, we referred the matter to be heard by a

Bench of three Judges. The order we then made is as follows :

We consider it desirable that this appeal should be heard by a Bench of three Judges. The appeal raises more than one question of general

importance under the Presidency Towns Insolvency Act, and in regard to one of the points the decision of a Division Bench of this Court in Mrs.

Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad. 72 : AIR 1937 Mad. 775, which has been applied to the case by the learned

trial Judge in our opinion requires reconsideration.

The matter has accordingly been placed now before us for disposal.

2. The appeal is against the order of Clark J. passed on a notice of motion taken out by the Official Assignee of Madras, u/s 7, Presidency Towns

Insolvency Act to obtain a declaration that property No. 10, West End Street, Gopalapuram, belongs to the insolvent, and that the respondent

(wife of the insolvent) is only a benamidar of the insolvent in respect thereof. Before the learned Judge the motion was not tried on the merits, and

the hearing was confined to a consideration of two preliminary objections raised on behalf of the respondent in the motion. The preliminary

objections were overruled by the learned Judge, and he directed that the application should be tried on merits.

3. The two preliminary objections raised were (1) that the proceedings were barred by the proviso to Section 7, Presidency Towns Insolvency

Act, and (2) that it is not a fit case for disposal u/s 7 of the Act as it raises complicated questions of fact regarding property of considerable value.

4. When the matter was heard by the Officiating Chief Justice and myself on 4th February 1948, on behalf of the Official Assignee, who is the

respondent in this appeal, a preliminary objection was taken that the appeal itself was incompetent, as the order of the learned Judge does not

amount to a "judgment" within the meaning of Clause 15, Letters Patent, notwithstanding the provisions of Section 8, Presidency Towns Insolvency

Act under which a right of appeal is conferred from an order made by the Judge in the exercise of the Insolvency jurisdiction, the contention being

that it was necessary for an appellant against an order of a Judge passed in the exercise of the insolvency jurisdiction to satisfy not only the

requirements of Section 8, Sub-clause (2) (b), Presidency Towns Insolvency Act but that he must also satisfy that the order is such as fulfils the

requirements of a "judgment" as interpreted by the Full Bench in Tuljaram Rao v. Alagappa Chettiar, 35 Mad. 1: 8 I. C. 340. At the time of the

hearing now before us Mr. Sivaramakrishnayya the Deputy Official Assignee did not press this point in view of a decision of this Court and two

decisions of the Bombay High Court. The decision of our Court is V. A. V. S. Firm v. Muruganathan Ghatti, 48 Mad. 514 : A. I. R. 1925 Mad.

569 which takes a view against the contention of the respondent. The decisions of the Bombay High Court are Md. Haji Essack v. Abdul

Rahiman, 40 Bom. 461; A. I. R. 1915 Bom-273 and Nowroji Ardeshir Cooper Vs. The Official Assignee, . See also the opinion of Mulla's Law

of Insolvency at page 527, para. 785. This point therefore need not be pursued further.

5. The appellant has not canvassed before us the correctness of the opinion of the learned trial Judge on the second of the preliminary objections.

If therefore the Court is competent to try this motion u/s 7 of the Act the view of the learned Judge that ,this is a matter which could as well be

disposed of u/s 7 and that it is not necessary to refer the parties to a regular suit is correct, and the exercise of the discretion under the section by

the learned Judge is proper.

6. The only question that requires consideration, therefore, by us is whether the jurisdiction of the Court to try the matter is taken away by the

proviso to Section 7 of the Act.

7. It will be convenient at this stage to set out the facts of the case. One R. Muthuswami Iyer was adjudged an insolvent on a creditor's petition on

17th December 1946 in I. P. No. 26 of 1946. On 20th December 1946, the Official Assignee took out an application u/s 36 of the Act (in this

judgment the Act means the presidency Towns Insolvency Act) for an examination of the appellant, the insolvent's wife, as the Official Assignee

suspected that the appellant was in possession of property belonging to the insolvent. The property, house No. 10 West End Street, Gopalapuram,

according to the allegations of the Official Assignee, really belonged to the insolvent, though purchased benami in the name of his wife. The

appellant was examined by the Court, and she repudiated the claim of the Official Assignee in her examination. The Official Assignee moved the

Court on 11th July 1947 u/s 7 of the Act for an adjudication of the question whether the property belonged-to the insolvent or to his wife. In the

counter affidavit filed by the appellant she denied the right of the insolvent to the property and claimed that the property belonged to her. She also

raised the preliminary objection that the jurisdiction of the Court to deal with the matter u/s 7 of the Act was barred by the proviso to that section,

as she was previously examined u/s 36 of the Act. On similar facts this Court considered an objection of this nature in Nowroji Ardeshir Cooper

Vs. The Official Assignee, , and held that the proviso was not a bar, as Sub-

section (5) of Section 36 of the Act related only to property

admittedly belonging to the insolvent and not to property, the ownership of which was in dispute, and that therefore the matter was one not arising

u/s 36 of the Act so as to attract the bar under the proviso. The correctness of this view is challenged by the appellant.

8. For a better appreciation of the contentions urged it would be convenient to refer to the relevant provisions of the Act. section 7 is in the

following terms:

""Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever,

whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it

expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:

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.

The body of the section is modelled on Section 72, English Bankruptcy Act of 1869 and the Bankruptcy Act of 1883. A proviso was added to the

section as it originally stood, and the section in the Bankruptcy Act of 1883 corresponding to Section 72 of the Act of 1869 is Section 102. Under

the Bankruptcy Act of 1914 now in force the section is 105. The proviso to Section 7 was added by Section 2, Presidency Towns Insolvency

(Amendment) Act, 1927 Act XIX [19] of 1927) and Section 36, sub-clauses (4) and (5) of the Act were also amended by Section 4 of the

Amending Act. On a determination of the scope and object of these amendments, the decision in the case largely rests. The relevant clauses of

Section 36 are:

36. (1) 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.

(2) If any person so summoned after having been tendered a reasonable sum refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination.

(4) If on his examination any such person admits that he is indebted to the insolvent, the Court may, on the application of the Official Assignee, order him to pay to the Official Assignee, at such time and in such manner as to the Court seems expedient, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Court thinks fit, with or without costs of the examination.

(5) If on his examination any such person admits that he has in his possession any property belonging to the insolvent, the Court may, on the application of the Official Assignee, order him to deliver to the Official Assignee that property, or any part thereof, at such time, in such manner and on such terms as to the Court may seem just.

Sub-sections (4) and (5) of this section were amended by Section 4, Presidency Towns Insolvency (Amendment) Act of 1927 by substituting for

the words "If on the examination of any such person the Court is satisfied" the words "If on his-examination any such person admits". The

amendment of the two clauses was necessitated by the comment of the Civil Justice Committee on the procedure followed by this High Court

which was condemned by them as "anomalous and objectionable", and they recommended that the practice followed in Madras should be brought

in a line with that obtaining in the other Presidency towns and in England. The procedure of this Court which was objected to by the Civil Justice

Committee will be referred to presently.

9. The decision in England under the corresponding provisions of the Bankruptcy Acts and the decisions in India interpreting Sections 7 and 36

have now established certain principles. In order to appreciate the background of the arguments, it will be helpful to state them succinctly. In the

administration of the bankrupt's estates-and the realisation of the assets of the bankrupt two kinds of claims arise; (1) claims arising out of

bankruptcy, and (2) claims not arising out of bankruptcy. There being no common law of bankruptcy, certain rights were created by the statute in

favour of the Official Assignee or the trustee in the bankruptcy as the case may be. The rights so conferred upon the Official Assignee are higher

and better than the rights of the bankrupt himself. Certain transactions effected by the insolvent can be avoided by the Official Assignee though the

insolvent himself could not get rid of them. Transfers of property by the bankrupt falling under Sections 51, 65 and 56 of the Act are of this nature.

Besides this, the Official Assignee is entitled to the possession of the goods though not belonging to the bankrupt but of which the bankrupt is the

reputed owner: vide Section 52(2). Similarly, transfers which themselves constitute acts of bankruptcy can be avoided by the Official Assignee. In

all these matters it will be noticed that the insolvent himself could not have impeached those transactions or claim title to the goods; but the

bankruptcy law both in this country and in England recognises and confers a superior title on the trustee in the bankruptcy or the Official Assignee,

to recover possession of the property after avoiding the transfers. In such matters the Official Assignee or trustee in bankruptcy, as the case may

be, has a higher and better title than the bankrupt himself. These are matters therefore which really arise out of the bankruptcy and in fact are the

creation of the law of bankruptcy. These rights are exercised by the Official Assignee for the benefit of the general body of creditors, and they are

compendiously described as "claims arising out of bankruptcy."

10. Apart from this, the Official Assignee would be entitled also by virtue of the vesting section to recover possession of all the properties of the

insolvent, moveable and immovable, and also to realise the debts due to the estate of the insolvent. These rights are exercised by the Official

Assignee as representing the insolvent and his title to them is derived from the insolvent himself. What the insolvent could have done with a view to

recover the property or to realise the debt, the Official Assignee standing in his shoes is entitled to do. By virtue of the vesting of the property of

the insolvent in him, the insolvent no longer has the right to realise the debts or recover possession of the property; but the Official Assignee alone

is entitled to them. These rights are rights not dependent upon the Bankruptcy law for their existence but are dependent upon the ordinary rights of

the insolvent which became vested by reason of the adjudication order in the Official Assignee as representing the insolvent. These claims therefore

do not arise out of the bankruptcy but are outside it. Under the wide powers conferred upon the insolvency Court u/s 7 of the Act it is open to the

Official Assignee to have both kinds of claims adjudicated by a motion u/s 7. The remedy however u/s 7 as now established is a discretionary

remedy. It is open to the Court in the exercise of its discretion to refer the Official Assignee to a regular suit. In England, however, a practice has

grown up to invariably refuse to deal under the corresponding provisions of the Bankruptcy Act questions or claims which arise outside

bankruptcy. The practice has become firmly established by judicial decisions, In *Ex parte Brown*; In *re Yates*, (1879) 11 Ch. D. 148: 48 L. J. Bk.

7), dealing with Section 72, Bankruptcy Act of 1869, James L. J. observed at page 149 as follows:

questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy,

Where the trustee takes only that which the bankrupt himself would have taken the matter should be left to the ordinary tribunals. But, where, by

the operation of the bankruptcy law, the trustee claims by a higher and better title than the bankrupt, the matter is one which was intended to be

dealt with by the Court of bankruptcy.

In *Williams on Bankruptcy*, 15th Edition at page 434, the learned author summarises the position in the following passage;

The refusal of the Court of Bankruptcy to entertain claims against third persons did not extend to cases where the trustee claimed by a higher and

better title than that of the bankrupt *Ex parte Brown*; In *re Yates*, (1879) 11 Ch. D. 148: 48 L. J. Bk. 78; nor when the third person was willing to

submit to the jurisdiction, in which case the trustee will not be heard to object, *Ex parte Fletcher*; In *re Hart*, (1878) 9 Ch. D. 381: 39 L. T. 187

nor where the third person has submitted to the jurisdiction (*Ex parte Davis*; In *re Sadler*, (1881) 19 Ch D. 86: 45 L T. 632 nor where the

objection to the jurisdiction is not taken at the earliest opportunity. But the Court may at any time decline *mero motu* to exercise its

jurisdiction.

Before the amendment of Sections 7 and 36 in 1927 the Bombay and the

Calcutta High Courts followed the English practice and the decision of Rankin J. in *Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others*, adverts to the practice obtaining in England and considers the question fully. In Madras, however, a different practice obtained. It is enough to refer to two decisions of this Court in this connection. In *Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others*, , the Official Assignee took out a garnishee summons in which he prayed that certain Immovable property situate in Chingleput district outside the limits of the ordinary original civil jurisdiction of the High Court and standing in the name of the insolvent's wife might be declared to be property of the insolvent and as such vested in the Official Assignee consequent on the order of adjudication. The application was dismissed by Bakewell J. sitting in the insolvency Court on the ground that he had no jurisdiction to try the question as, in his opinion, under the Insolvency Act, questions arising between the Official Assignee and third parties, should be dealt with in an ordinary civil Court having jurisdiction over the matter and not by a motion u/s 7. This decision was reversed on appeal by Abdul Rahim O. C. J. and Seshagiri Aiyar J. who held that the language of Section 7 was wide enough to confer upon the Court power to decide all questions. It cannot be said that the interpretation placed by the learned Judges in that case is wrong. The language of the section is general and gives the Court jurisdiction to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in the course of insolvency. But in the exercise of discretion under the section Courts in England and other provinces to which the Act applies have refused to deal with questions and claims arising between the Official Assignee on the one hand and a stranger to the insolvency on the other as a matter of practice. The learned Judges who decided *Abdul Khader v. Official Assignee, Madras*, 40 Mad, 810: A. I. R. 1917 Mad, 832 referred to the English decision and refused to give effect to the practice recognised in them. The other decision is *K. Krishnarao, In re*, 51 Mad. 540: A. I. R. 1928 Mad. 732. In that case, garnishee summons were taken out by the Official Assignee against two limited-corn-panics claiming 5 lakhs of rupees as damages for breach of contract. The contract was made in Calcutta, and the registered office of one of the companies was at Calcutta

while that of the other was at Rangoon. None of them had any branches or carried on business in Madras presidency. The objection taken on

behalf of the companies was that the High Court in the exercise of its insolvency jurisdiction had no jurisdiction to entertain the application, as the

contract was entered into outside the Madras presidency, and the companies were also resident outside the Presidency. It was held that u/s 7 the

High Court had jurisdiction to adjudicate upon the claims and that Clause 12, Letters Patent did not govern or control the provisions of clause 18

so as to limit the insolvency jurisdiction of the Court and the decision in Abdul Khader v. Official Assignee, Madras, 40 Mad. 810: AIR 1917

Mad. 832 was approved. From this brief statement of the facts, in this case it will be seen that the jurisdiction u/s 7 of the Act is put to the

extraordinary use of assuming power to decide claims against strangers who are not only not resident within the original jurisdiction of this Court

but are even outside the Presidency. These decisions certainly worked a great hardship on persons residing outside the jurisdiction and naturally

elicited the comment of the Civil Justice Committee that the exercise of jurisdiction in such matters was ""anomalous and objectionable"", and that it

should be put an end to, which resulted in the amendment of Sections 7 and 36 of the Act.

11. The object therefore of the proviso to Section 7 is to curtail to some extent the very wide jurisdiction conferred upon the Court by the main

body of the section. To what extent and subject to what limitation is this curtailment effected is the question for consideration in this appeal.

12. Turning now to the language of the proviso, it will be noticed that it definitely states that the power conferred by the body of the section is

restricted to the manner and to the extent provided in Section 36 for the purpose of deciding any matter arising u/s 36, subject to the qualification

however that if all the parties otherwise agree, the jurisdiction may be exercised even in such matters without any limitation. The difficulty however

is created by the language employed in the proviso when it states ""for the purpose of deciding any matter arising u/s 36"" as the meaning of this part

of the proviso is by no means clear. At the time the proviso was introduced in 1927 there was a proposal to draft the proviso on the model of the

proviso to Section 105 (1), Bankruptcy Act 1914, which employed the phrase ""claims not arising out of the bankruptcy""; but for some reason that

language was-not followed in the proviso to Section 7 as it finally emerged. One thing is clear under the proviso that unless all the parties otherwise agree the power u/s 7 should not be exercised by the Court for the purpose of deciding any matter arising u/s 36 except in the manner and to the extent provided in Section 36. The manner and extent provided in Section 36 are indicated in Sub-clauses (4) and (5) of that section. Under Sub-section (4) if a person examined u/s 36 admits that he is indebted to the insolvent the Court in a further application by the Official Assignee has the power to direct such person to pay to the Official Assignee the amount so admitted. This clause is, therefore, confined to many claims in the nature of debts owing to the insolvent. Under clause (5) of that section, if the person examined u/s 36 admits that he is in possession of any property belonging to the insolvent, the Court on an application by the Official Assignee has also the power to direct such person to deliver possession of the property so admitted.

13. The expression ""matter arising u/s 36"" creates difficulty in understanding its precise meaning. Mulla in his lectures at page 46 paints out that no matter can arise for decision u/s 36, unless the person against whom the claim is made has been examined under that section and denies the claim of the Official Assignee in the course of the examination. It is necessary, as pointed out by the learned author, that the third person should have been examined u/s 36. If the third person however is not examined under the section, according to this interpretation, the Court would have unfettered jurisdiction and powers to decide all matters outside the bankruptcy. It may be that the Legislature did not intend this result. It could not have contemplated in the exercise of jurisdiction u/s 7 in matters relating to the property of the insolvents should depend upon the accident whether the person against whom the claim is made was or was not examined u/s 36. This interpretation of the section however was accepted by a Full Bench of our Court in *Official Assignee Vs. E. Narasimha Mudaliar*, . Dunkley J., of the Rangoon High Court is not prepared to accept such a narrow interpretation of the proviso, as according to his opinion there was nothing in the proviso limiting its application in that manner. Vide In the matter of *T. S. N, Chettiar Firm*, 1939 Rang. L. R. 731 ; *A. I. R. 1940 Rang. 39*. If the expression had been ""any matter falling"" or ""any matter

within Section 36"" the interpretation of Dunkley J., would be correct; but the word employed in the proviso is ""arising"" and this has given room for a further contention on behalf of the respondent that the proviso is really intended to prevent a Court from converting a proceeding u/s 36 to a proceeding u/s 7 and to restrict the scope of a proceeding, even if so converted, by cutting down the power of the Court and confining it to the manner and extent provided in Section 36. This, it was urged, is really what happened in the Full Bench case in Official Assignee Vs. E. Narasimha Mudaliar, , and that, therefore, we should construe the proviso as having only that effect and no more. It is difficult to accept such a construction of the proviso. The object is, as plainly stated in the section, to restrict the power given in the body of the section in matters arising u/s 36 to the extent of authorising the Court to order delivery of the property or to direct payment of the debt to the extent to which it was admitted by the persons examined under Section. 36. The mere accident that in Official Assignee Vs. E. Narasimha Mudaliar, , there was an attempt to convert a proceeding u/s 36 to a proceeding u/s 7 gives no basis for holding that the question was decided in the manner contended for on behalf of the respondent. The said decision is not an authority in support of the narrow construction sought to be placed on the decision. In the present case as the appellant was examined u/s 36 it is unnecessary to express a, final opinion on the question whether the view of Mullah which was accepted in Official Assignee Vs. E. Narasimha Mudaliar, , is correct or the interpretation put on the proviso by Dunkley J., of the Rangoon High Court should prevail.

14. In order to appreciate the meaning of the expression ""matter arising u/s 36"" it is necessary to consider the scope and effect of an examination of a person u/s 36 of the Act. This was considered by the Courts in England under the analogous provision of the Bankruptcy Act and also by the High Courts in India before the amendment of the section in 1927. The object of the section is to obtain information regarding the property of the insolvent and is concerned more with matters outside the bankruptcy. The Court is empowered under clause (1) of the section to summon 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. The Official Assignee who is charged under the Act with the administration of the insolvent's estate immediately after he takes possession of it is in the dark regarding the available assets of the insolvent. He does not know in whose possession they are and whether particular persons are or are not indebted to the insolvent and it so, to what extent their debts are subsisting and remain unpaid. Before launching a litigation against such persons he requires some sort of information. The Court is therefore empowered under this section to summon persons who are suspected to be in possession of the property of the insolvent or supposed to be indebted to the insolvent. The proceeding is in the nature of a secret proceeding and is not a litigious proceeding between two contesting parties. The examination of the witness under the section is not like the examination under the Evidence Act, and the whole object of the examination under the section is to obtain information and discovery. Mr. Sivaramakrishna Ayya, the Deputy Official Assignee, in an able and exhaustive argument has placed before us all the authorities throwing light on the construction of this section. A similar power exists under the Companies Act and in construing Section 115, English Companies Act of 1862, Jessel M. R. summarises the object of the section in these words in *In re Gold Co* , (1879) 12 Ch. D. 77: 48 L. J. Ch. 650: In fact the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought in action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.

The nature and object of the enquiry are also stated by Stirling J., in *Learoyd v. Halifax Joint Stock Banking Co.*, (1893) 1 Ch. 686 : 62 L. J. Ch.

509 as follows:

The nature of this Section 27 (corresponding to Section 36) is explained by Chitty J., in *In re Greys Brewery Co.*, (1883) 25 Ch. D. 400 : 53 L.

J. Ch. 262, which was a case u/s 115, Companies Act, 1862. That learned Judge, in the course of his judgment says: The 115th section of the

Companies Act, 1862, was undoubtedly inserted by the Legislature in that Act on the same principle as a similar clause in the Bankruptcy Act of

1849, and there is in the Bankruptcy Act of 1869 a section which is substantially to the same effect as that which was in the older Act of 1849 and

in the Companies Act of 1862. Now, the object of all these sections is to enable the Court to obtain information. I do not say that is the sole

object because other matters are mentioned in the 115th section, but the principal object is to obtain information from any person capable of giving

any information concerning the trade and affairs of the company. The nature of the proceedings is essentially this : The person examined is not

examined as a witness; and to talk of examination-in-chief, or cross-examination, or re-examination in case of this kind, is to use terms that are

really not applicable. What is being done is this : discovery is sought to be obtained which may be useful to the Court in the conduct of the

proceedings in the winding up and to my mind, looking at the section and the purpose for which the provisions of that section were inserted, an

examination of this kind must be considered in the nature of a secret proceeding.

Abdul Khadar v. Official Assignee, Madras, 25 M. L. J. 308 ; 20 I. C. 485, In Re: Goolbai Bomanji Petit., and. Shadanchandra Bhandari Vs.

Shewnarayan Golabrai, are also to the effect that the object of the section is discovery.

15. The Official Assignee, therefore, when he initiates the proceedings for summoning a person u/s 36 does not know whether the property which

he suspects to belong to an insolvent does, in fact, belong to him or not. He wants to elicit information by examination of the person suspected to

be in possession or supposed to be indebted to the insolvent, whether there is property belonging to the insolvent in the possession of the person

or not, and whether the person is indebted or not and if indebted, whether the debt is subsisting and remains undischarged. If, in the course of

examination, it emerges that the person is indebted or that he is in possession of property, movable or immovable, belonging to the insolvent,

because he admits, then it is open to the Official Assignee to apply under clause (4) of Section 36 for payment of the debt or u/s 36(5) for delivery

of possession of the property. If the person denies the debt or disputes the claim to the property, the Court has no power to decide the question

by taking further evidence. Before the amendment of clauses (4) and (5) in 1927, the expression used was ""If on the examination of any such person the Court is satisfied"" instead of ""If on his examination any such person admits."" Notwithstanding the use of the word ""satisfied"" before the amendment of clauses (4) and (5) in 1927 it was held that it made very little difference and that though the person examined did not actually admit the claim, if his evidence made it clear that he was liable to the insolvent, an order for payment or delivery could be made; but that if he denied his liability no order could be made under the two clauses (4) and (5). The Court had no jurisdiction to decide under that section disputed questions of title or disputed claims for recovery of debts. The question could only be disposed of either on a motion u/s 7 of the Act or by a regular suit, See Abdul Khadar Sahib v. Official Assignee, Madras, 25 M. L. J. 308: 20 I. C. 485, Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others, and In re J. M. Lucas, 42 Cal. 109 : A. I. R. 1916 Cal. 57.

16. The matters arising u/s 36, It has been held in Chinnappa Mudali v. Official Assignee, Madras, 56 Mad. 385 : A. I. R. 1932 Mad. 167 are matters appearing in Sub-sections (4) and (5) of Section 36 and not other matters. The examination under Sub-section (1) of Section 36 may relate to various other matters other than those falling under Sub-sections (4) and (5). For example, in Chinnappa Mudali v. Official Assignee, Madras, 55 Mad. 385 : A. I. R. 1932 Mad. 167, the father of the insolvent and one of his brothers were examined u/s 36 for ascertaining whether the joint family status between the insolvent and the other members of the family was or was not subsisting and whether a business was joint family business. In view of the evidence given by the two persons u/s 36, the Official Assignee filed an application u/s 7 of the Act for obtaining a declaration that a certain business was a joint family business and that a deed of partition entered into between the insolvent and the other coparceners of the family was void against him. Objection was taken to the jurisdiction of the Court to entertain the proceeding on the strength of the proviso to Section 7 introduced by the Amending Act of 1927. It was held by Beasley C. J. and Cornish J. that the examination regarding the status of the joint family and the binding nature of the partition deed was not a matter under Sub-sections (4) and (5) of Section 36 and that

therefore the bar under the proviso did not operate, Dealing with this question the learned Chief Justice observes at p. 388:

In my view, the amending section merely refers to such proceedings u/s 36 as come under Sub-sections (4) and (5). Sub-section (4) of course

deals with simple money claims. Sub-section (5) deals with examination of persons supposed to be in possession of some property of the

insolvent. In my view, Sub-section (5) does not touch the case of a person who is examined in order to discover whether the insolvent was or was

not a member of a joint family or whether the business carried on by him was a joint family business. That in my view is quite outside the scope of

Sub-sections (4) and (5). In my opinion, Section 7 of Act III [3] of 1909 as amended by Section 2 of Act XIX [19] of 1927 only applies to

matters appearing in Sub-sections (4) and (5) of Section 36 and to no other matters. That being so, Waller J. was quite right in holding that the

application u/s 7 against all the respondents was a proper one.

In my opinion, if I may say so with respect, this view of Sub-section (4) and (5) of Section 36 is correct.

17. Sub-section (4) of Section 36 was the subject-matter of interpretation by a Full Bench of our Court in Official Assignee Vs. E. Narasimha

Mudaliar, , after the amendment of Section 7 and Section 36, Sub-sections (4) and (5) in 1927. The appeal in (hat case was against an order of

Waller J. passed in the exercise of the Original Insolvency Jurisdiction of the High Court on an application u/s 36 of the Act. One Narasimha

Mudaliar, it was alleged by the Official Assignee, owed to the estate of the insolvent a sum of Rs. 1445-2. A summons was taken out by the

Official Assignee to obtain payment of that money from the debtor. Before Waller J., the debtor -admitted that he owed to the estate only Rs. 173,

and denied his liability for the balance. Waller J. directed payment of the admitted amount to the Official Assignee but as regards the balance which

was disputed be declined to decide the question of his liability. The order of Waller J. was in these terms;

I think this is very clearly a case u/s 36 of the Act. The garnishee is a man supposed to owe money to the insolvent's estate and the Official

Assignee seeks to recover that money from him. The garnishee admits that he owes Rs. 178 and there will be an order for payment of that amount.

As regards the balance he does not agree to a trial of that question here It must therefore be tried elsewhere. No order as to costs.

The order shows that the parties did not agree for trial of the dispute in the insolvency jurisdiction which must necessarily refer to a trial winder

Section 7, as u/s 36 of the Act even by agreement of parties an adjudication of a disputed claim is not possible Two questions were raised before

the Full Bench. One was whether the Insolvency Court had jurisdiction to direct a person who is a stranger to the insolvency to pay money claimed

by the Official Assignee to be due to the insolvent but disputed by the stranger. The second question was, apart from the proviso and the

restriction imposed by it, whether under the body of Section 7, the Court had power to decide a claim not arising out of bankruptcy On the latter

question, following the view of Rankin J. in Jnanendra Bala Debi v. Official Assignee, Calcutta 64 Cal. 251: A. I. R. 1926 Gal 597 it was held that

under the section the Court had jurisdiction to decide the claim, though in a proper case it had discretion to refer the parties to a regular suit. On

the first question it was held that as the per son was examined as a witness u/s 36 of the Act and as he disputed his indebtedness, by reason of the

proviso to Section 7 the jurisdiction of the Court to decide the question was at an end and that the Official Assignee had no option but to proceed

by way of suit. The view of Beasley J., as he then was, which was concurred in by the other learned Judges is contained at p. 730 and is as

follows:

In view of the fact that I agree with Rankin J. that Section 7 before its amendment was not limited In its scope to matters in which the Official

Assignee by the operation of the insolvency law claims a higher title than the insolvent would himself have had, I have to consider whether the

amendment puts a limitation upon the jurisdiction of the Court, and in this connection, I have to consider why this amendment and the amendment

to Section 36 were introduced. It is obvious that the amendment to Section 36 was to prevent anything like a summary trial and orders being

passed against strangers to the insolvency except, upon the admission of those persons. It was to prevent a contested enquiry under the guise of an

examination under that section, and I think it was intended by the amendment to Section 7 to prevent the stranger to the insolvency from being first

of all examined u/s 36, and then, u/s 7 having used against him his deposition taken under the former section. I am of the view that it is only when the garnishee has previously been examined u/s 36 that any limitation is placed upon the jurisdiction of the Court. The proviso says "for the purpose of deciding any matter u/s 36" and Section 36 deals with the examination of persons suspected of being indebted to the insolvent. (The italics are mine). In all such matters, the Court has no jurisdiction u/s 7 to deal with them, unless the garnishee admits his indebtedness. For the reasons I have already stated, in my view, the Official Assignee is entitled to proceed by way of motion u/s 7 of the Act in those cases where he has a money claim against a stranger to the Insolvency. It is then for the Court to say whether the matter is one which it is reasonable having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit. But, in my opinion, no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims ; only simple cases capable of easy and speedy proof should be so dealt with. But I am clearly of the opinion, that, when once the Official Assignee has summoned a witness u/s 36 of the Act if that witness disputes his indebtedness, the Official Assignee has then no option but to proceed by way of suit.

It must be observed that in this paragraph the learned Judge considers that the expression matter arising u/s 36" as not applicable only to cases in which a debt is admitted treats it as taking in even a disputed debt, for he says, ""for the purpose of deciding any matter u/s 36"" is referable to examination of ""persons suspected of being indebted to the insolvent"" and that in all such matters, i.e., in matters where the claim u/s 36 relates to a person who is a stranger to the insolvency and who is suspected of being indebted to the insolvent, the Court according to the learned Judge, has no jurisdiction to deal with them u/s 7 unless there is an admission by all parties. He concludes the paragraph with the observation that if the indebtedness is disputed the only course left open to the Official Assignee is to institute a suit. This decision makes it clear that in a case where the debt is disputed u/s 36, the jurisdiction of the Court to deal with the matter by way of a motion u/s 7 would be barred under the proviso to Section 7.

18. In the light of the foregoing dissuasion it remains now to consider whether the decision, of Mrs. Evelyn Popaly v. Official Assignee, Madras, I.

L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 775 is correctly decided when it says that Sub-section (5) of Section 36 of the Act relates only to

property admittedly belonging to the insolvent and not to property the ownership of which is in dispute, and that therefore a proceeding u/s 7 of the

Act where a title is disputed u/s 36 is not barred by the proviso to Section 7. In that case, as in the present case, the dispute related to property

which, it was claimed by the Official Assignee, was purchased by the insolvent in the name of his wife benami for him. The matter was brought to

the insolvency Court by the Official Assignee by a motion u/s 7. The application was heard by Wadsworth J. before whom a preliminary objection

was raised that the Court had no jurisdiction to try the question. Wadsworth J. pronounced the following judgment:

The preliminary objection raises the same question as was decided by me in Applns. Nos. 330 and 308 of 1936 (I. P. No. 281 of 1936). On the

principle of stare decisions, I must hold that the examination of the respondent 2 u/s 36, Presidency Towns Insolvency Act is not a bar to

proceedings against her u/s 7 for a declaration that properties purchased in her name are the properties of the insolvent,

The learned Judge did not refer to the Pull Bench decision in Official Assignee Vs. E. Narasimha Mudaliar, , in his judgment. The earlier decision

referred to by him in this judgment in Applns. Nos. 330 and 308 of 1936 however refers to the Full Bench decision. That judgment of the learned

Judge is as follows :

A preliminary objection is taken on the basis of the observation of the Pull Bench in Official Assignee Vs. E. Narasimha Mudaliar, , that the

present applications do not He the respondent having been examined u/s 36, Presidency Towns Insolvency Act and that suits must be filed. This

objection seems to me to be based on a misunderstanding of the observations in the case referred to. When a garnishee has been examined u/s 36

and denies liability, the Court cannot order him u/s 7 to pay the debt because this would amount to passing an order on a disputed claim such as is

not contemplated under the amended Section 36 and is consequently not permissible under the amended Section 7. But in the present application

the reliefs sought are not in substance reliefs which could have been got by an order u/s 36(4) or (5), but they fall under Sections 52 and 55 of the

Act, with reference to which sections proceedings are normally taken u/s 7 and the amendment to Section 7 contains nothing to prohibit such

proceedings merely because the Official Assignee has used his general powers u/s 36 to examine the respondent before starting them. I therefore

disallow the preliminary objection.

In an examination u/s 36(1), information regarding transactions even falling under Sections 55 and 56 can be obtained; but they are claims outside

the bankruptcy and no order u/s 36(5) can be passed, even if there is an admission that the transaction is within the mischief of those sections, as

the jurisdiction of the Court under it to order delivery is confined only to property which is admitted to belong to the insolvent and which is in the

possession of the person examined u/s 36. The decision of Wadsworth J. in Appln. Nos. 330 and 308 of 1936 is correct on the facts of that case

and no exception can be taken as it related to matters outside the bankruptcy and does not at all relate to property belonging to the insolvent or

claimed to belong to him. The transactions under Sections 55 and 56, of the Act (I think the reference to Section 52 in the judgment is a mistake)

must necessarily be avoided by the Official Assignee u/s 7 of the Act; but it is difficult to follow the learned Judge when he made the order in the

later judgment that the principle of stare decisis must be applied to a claim by the Official Assignee that property purchased in the name of the

insolvent's wife and claimed to belong to the insolvent. It is a matter outside the bankruptcy and therefore falls u/s 36(5). If the wife admits in the

course of examination that though title stands in her name the property belongs to the insolvent, it is open to the Court to pass a valid order

directing her to deliver possession of the property to the Official Assignee. It would there, fore be a matter falling u/s 36(5), and the applicability of

the proviso must necessarily be given effect to. When the matter came up on appeal before Beasley C. J. and Cornish J., the learned Chief Justice

distinguished the Full Bench case in Official Assignee Vs. E. Narasimha Mudaliar, , to which he was a party and in which he delivered the leading

judgment as a case of simple money claim and that Sub-section (5) of Section 36 applied only to property admittedly belonging to the insolvent at

the time of the examination and that the object of the subsection was to enable the Official Assignee to discover its whereabouts. In other words,

Sub-section (5) of Section 36 is confined only to cases where there is no dispute as regards title and the only question for consideration is whether

the person is in possession of the property or not. To a similar effect is also the opinion of Cornish J. In my view, this view of Sub-section (5),

proceeds on an erroneous interpretation of Section 36.

19. I have attempted in the course of this judgment to discuss the scope of Section 36, in order to establish that a proceeding u/s 36, is not; a

litigation between two contending parties and is a proceeding intended to obtain information about the property of the insolvent. The Official.

Assignee is ignorant of the whereabouts of the properties of the insolvent and wishes to examine persons suspected of being in possession of the

properties by examination under the section. The person so examined may admit title but deny possession, may admit title as well as possession, or

may admit possession but not title. In all these cases, except in the case where he admits title and possession, the Court would have no jurisdiction

to direct delivery of possession. The jurisdiction to direct delivery of possession is confined to cases where title and possession are admitted. What

is this admission? The admission is that he has in his possession property belonging to the insolvent, not merely admission of possession, the title

having been already admitted. The learned Judges who decided the case in Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938)

Mad. 72 : A. I. R. 1937 Mad. 115, do not consider the question when and at what stage the admission could have been made by the person

before he was examined u/s 36. "Admittedly belonging" is the expression used by the learned Judges and it is difficult to see if u/s 36, the Official

Assignee is seeking to obtain information regarding the whereabouts of the property of the insolvent, when and where the person examined could

have admitted the title to property leaving the question of possession alone to be considered in the light of the examination u/s 36. In my opinion,

the mistake arises in mixing up the jurisdiction of the Court to direct delivery of possession on an application by the Official Assignee with "the

matter arising" under Sub-section (5) and treating them as co-extensive. A "matter arising" under Sub-section (5) in my opinion refers to the

dispute relating to ownership and possession of property suspected to belong to the insolvent. If the person admits that he is in possession of the insolvent's property, then the Court has jurisdiction to direct delivery of possession. I do not see any force in the distinction that was made between Sub-section (4) and Sub-section (5) of Section 36, by the learned Judges who decided *Mrs. Evelyn Popaly v. Official Assignee, Madras*, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 776. Even under Sub-section (4), the debt, when there is no written acknowledgment by the person, may be disputed or the person while admitting it may plead that it is not subsisting or that it is discharged in part or in full. In all these cases there is a disputed liability, and under Sub-section (4), it is conceded by the Full Bench in *Official Assignee Vs. E. Narasimha Mudaliar*, by Beasley J. as he then was, that a dispute of this nature would be a "matter arising" within the meaning of the proviso, and that all that is necessary to attract the operation of the proviso is suspicion that the person was indebted. In my opinion, therefore, the distinction drawn by the learned Judges between Sub-sections (4) and (5) is a distinction without difference. If Sub-section (4) does not proceed on the assumption of an admitted debt it is difficult to see why Sub-section (5) should be assumed to proceed on the basis of an admitted title to property. The object of Section 36 is to obtain information regarding the insolvent's property, and after information is obtained if there is an admission in the course of that proceeding, to make a proper order regarding delivery of possession or payment of the debt where there is an admission. But the matter arising under Sub-section (4) is the dispute relating to the debt, and under Sub-section (5) is the dispute relating to title and possession of property. I am unable to see any distinction between the two clauses, and if *Official Assignee Vs. E. Narasimha Mudaliar*, is correctly decided, the decision in *Mrs. Evelyn Popaly v. Official Assignee, Madras*, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 775 is wrong.

20. I am supported in the view I have expressed by the opinion of Mullah at page 42. The learned author after referring to Sukhdeodas Ram

Prosad Vs. Jaintilal Jamunadas and Another, says :

Since the amendment of Section 7 the Official Assignee would have to file a suit against the wife unless she consented to the question of her title

being decided by the insolvency Court.

At page 47 he summarised his conclusion after discussing the amendment of Sections 7 and 36 as follows :

The amendment affects only claims not arising out of the insolvency, that is, claims as to which the Official Assignee has no higher title than the

insolvent himself would have had. The effect of the amendment is that where a person who is examined u/s 36 denies any such claim, the Official

Assignee can proceed against him only by way of suit ; but if there has been no such examination, the Official Assignee may proceed against him

by way of motion u/s 7 and it is then a matter of discretion for the Judge sitting in insolvency as to whether he should deal with the claim in the

insolvency Court or refer the Official Assignee to a regular suit in a Civil Court.

And again at page 213 he observes :

Sub-section (5) empowers the Court, if the person examined admits that he had in his possession property belonging to the insolvent, to order him

to deliver the property to the Official Assignee. If the person examined disputes his liability, the Court has no power to make any order u/s 36, but

the question whether such person is indebted to the insolvent or whether he has in his possession any property belonging to the insolvent may be

determined by the Court on an application or a notice of motion u/s 7 if all the parties consent thereto. If the parties do not consent, the only course

left open to the Official Assignee is to enforce his claim by a suit before an Ordinary tribunal. This has been the law since the amendment of Section

36 in 1927.

See also page 215 where he points out that if there is no agreement the only course left open is to enforce the claim in an ordinary way.

21. Our attention was drawn on behalf of the respondent to the fact that Mrs. Evelyn Popaly v. Official Assignee Madras, I. L. R. (1938) Mad. 72

: A. I. R. 1937 Mad 775 was followed in the Rangoon High Court in In the matter of T. S. N. Chettiar Firm, 1939 Rang. L. R. 731: A. I. R. 1940

Rang. 939 and Visalakshi Achi v. The Official Assinee, A. I. R. 1941 Rang. 250 : 1941 Rang. L. R. 268 and by the Sind High Court in Official

Assignee v. Ibrahim Vali and Sons, I. L. R. (1941) Kar. 455 : A. I. R. 1942 sind 21, These decisions do not carry the matter further and do not

add to the reasons given by this Court in Mrs, Evelyn Popaly v. Official Assignee,

Madras, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad, 776.

22. I am therefore of opinion that the decision in *Mrs. Evelyn Popaly v. Official Assignee Madras*, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad.

775, is wrongly decided and must be overruled. The appeal must therefore be allowed with taxed costs here and in the Court below to come out

of the estate.

23. *Panchapagesa Sastri J.*-- I agree with *Satyanarayana Rao J.* in holding that the words ""any matter arising u/s 36"" in the proviso to Section 7 of

the Act would include cases where the person in possession of a property denies the insolvent's ownership of the same. The object of Section 36

is to enable the Official Assignee or any creditor who has proved the debt to gather the necessary information not only as regards the whereabouts

of the proper-ties undisputedly belonging to the insolvent but also to discover what all his properties are. I see no reason why the words ""any

property belonging to the insolvent"" in Section 36, clause (1) should be confined to what may be described as properties admittedly or

undisputedly belonging to him. Such restricted interpretation is not called for either by the language used or by anything in the context. On the other

hand, the wholesome object underlying the section requires and justifies the wider construction which the language permits.

24. Section 36, clause (5) applies to cases where the person examined admits that he has in his possession any property belonging to the insolvent.

If he denies either his possession or the insolvent's ownership, no order can be passed against him under the section or in other words the Court

cannot decide those matters in controversy.

25. True there is a distinction between title and possession in the case of property, but there is nothing in the language or context to indicate that

Section 36 clause (5) is applicable only to cases where there is no dispute as to title. It is argued that prior to the amendment of Section 36, clause

(5) in 1927 the words ""property belonging to the insolvent"" construed as meaning ""property the title to which as that of the insolvent is undisputed

and the same words are retained in the amended section. Reference is made to the decision in *Abdul Khader Sahib v. Official Assignee, Madras*,

25 M. L. J 308 : 20 I. C. 485. In that case (which however was before the amendment of Section 36 and the introduction of the proviso to

Section 7) the question arose as regards property which the insolvent had alienated to his wife some four months prior to his adjudication. It was the case of the Official Assignee that this alienation was void against him u/s 55, Presidency Towns Insolvency Act. It was not his case that it was merely a sham transfer and that the property really continued to belong to the insolvent. If the alienation was real and operative it is good as between the parties though in a proper case it may be void u/s 55 against the Official Assignee, In such cases it is really voidable at the instance of the latter and even where it is set aside it is only to the extent to which the creditors have to be paid. If all the creditors are paid in full and there is a surplus the same will have to be returned to the alienee and not to the insolvent. The property in question there was one "" not belonging to the insolvent"", according to the Official Assignee also, though it belonged to him originally but had been improperly conveyed to his wife under circumstances which as against the Official Assignee might make the transaction voidable by the latter. With reference to that state of affairs, the learned Judge held that an order of the insolvency Court purported to be passed on an examination of the alienee alone, in a summary enquiry u/s 36, without a full trial and without opportunity for the alienee to adduce all her oral and documentary evidence cannot be supported as a valid order under Sections 55 and 36, clause (5). The learned Judges were careful to add that their judgment did not stand in the way of a regular enquiry on a fresh notice of motion for setting aside the transfer u/s 55 of the Act. The decision held that it could not be said that under such circumstances that the Court is satisfied on an examination of the patty that she was in possession of properties belonging to the insolvent as required by Section 36, clause (5).

as it stood before the amendment. This decision is, in my humble judgment, no authority for holding that the expression "" property belonging to the insolvent"" means property admittedly belonging to the insolvent or his title to which is undisputed. Indeed, as I have said already, that case dealt with property not belonging to the insolvent according to the case of both parties, bat in relation to which the transaction of transfer was sought to be set aside as void u/s 55 of the Act. I am, therefore, of opinion that the

reasoning of Beasley J. in Mrs. Evelyn Popaly v. Official Assignee,

Madras, I. L. R. (1938) Mad. 72: I. L. R. 1937 Mad. 775 proceeds upon a misapprehension of what was decided in Abdul Khader Sahib v.

Official Assignee, Madras, 25 M. L. J. 308: 20 I. C. 485, Beasley J. also relied on the observations of White C. J. in that case, viz.,:

that the main object of Section 36 is discovery and on the information gathered proceedings may be taken for the purpose of impeaching

transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preference and cognate matters.

I do not think that the learned Judge meant to say that discovery cannot be sought or used for the purpose of finding out what the insolvent's

properties were and where they were. The reference to "cognate matters" is wide enough to include proceedings for recovery of property claimed

as belonging to the insolvent but in the possession of third persons. In any case, it was not an exhaustive enumeration not intended as such. Indeed

in the later case Sornammal Vs. The Official Assignee, the same learned Judge observed that "the discovery Section 36" enabled the Official

Assignee to get an order which will help him in discovering the existence of property which belongs to the insolvent. In Mrs. Evelyn Popaly's case:

I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad, 775, Cornish J. says that "an enquiry into the title to the property is a different thing from discovery.

The learned Judge is apparently of opinion that the term "discovery" refers in the context only to the place where a person or property is, or in

other words, the whereabouts of the same, The word "discovery" does not occur in the body of any of the clauses of Section 36 but is found in the

marginal note thereto as "discovery of insolvent's property". The word "discovery" there is not used as a term of art. The only means "finding out

what is lost, missing or concealed or unknown till then." It is not necessarily confined to finding out the place where a known thing is. It includes

finding out for the first time the existence of a thing or object till then unknown as also the place where it is or can be found. One of the meanings of

the word "discovery" in Oxford Dictionary is "The finding out or bringing to light that which was previously unknown." Have we not read that

Columbus discovered America", "Newton discovered the Laws of Gravitation", "Galileo discovered that Earth went round the Sun" and "Madam

Curie discovered the properties of Radium ?

26. It is also significant that in Section 59A, Provincial Insolvency Act (V [5] of 1920) introduced by the Act XXXIX [39] of 1926 corresponding

to Section 36, clauses (1) to (8), Presidency Towns Insolvency Act the marginal note does not use the word ""discovery"" but reads only as follows:

Power to require information regarding insolvent's property.

27. I do not see any difficulty in holding that the Official Assignee can discover that a certain property ostensibly standing in the name of another is

really that of the insolvent, and belongs to him While I agree with Cornish J., in his view that the expression ""any matter arising u/s 36"" does not

necessarily mean ""every matter which has been the subject of examination under section"", I fail to see how it follows that Section 36, clause (5)

cannot take in a question of disputed title to property.

28. I, therefore, differ from the view of the Bench in *Mrs. Evelyn Popaly v. Official Assignee of Madras*, I. L. R. (1938) Mad. 72 : A. I. R. 1937

Mad. 776.

29. It is next argued that in *Sornammal Vs. The Official Assignee*, , the Bench decided that the jurisdiction given by Section 36 of the Act did not

include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency where prima facie and until the

contrary is proved the title is and must be taken to be in the stranger. That decision was however prior to the amendment of Section 7 in 1927

introducing the proviso. Moreover all that the Court decided there was that in the case of a disputed title to the property the Court cannot really

hold that ""on an examination of the witness it is satisfied that he is in possession of property belonging to the insolvent"", that is, in other words, that

it cannot find that there is an admission or what is practically equivalent to it, that the person examined is in possession of property belonging to the

insolvent and hence the Court cannot properly pass an order for delivery of property u/s 36, clause (5). I may add that there is no real change of

substance in the amendments of Section 36 in 1927 as they were meant to really clarify and remove a possible confusion that the section permitted

a judicial finding contrary to a party's denial that he is in possession of the insolvent's property and to his assertion that he is really in possession of

his own property only. The words ""if the Court is satisfied"" really meant ""If the

Court finds an express admission or what is really tantamount to it, though not in express terms." In this view neither the decision in *Sornammal Vs. The Official Assignee*, , nor the decision of the Calcutta High Court in *Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others*, , (both decided prior to the 1927 amendment) governs the present case.

30. The question still remains whether the proviso to Section 7 of the Act precludes the insolvency Court from trying the present notice of motion

taken out after the disposal of the previous application u/s 36 of the Act. A Bench of three Judges of this Court held in *Official Assignee Vs. E.*

Narasimha Mudaliar, , that on a true interpretation of the proviso, where there has been a prior examination of a witness u/s 36 even a subsequent

and independent application taken out u/s 7 of the Act is barred in so far as it calls for a decision of any matter arising u/s 36. This is the unanimous

view of the full Court. The decision of the Court, as regards the operation of the proviso to Section 7 is on the one hand con-fined to cases where

there has been a prior examination u/s 36, and, on the other hand, is extended to cases where resort to the exercise of powers u/s 7 is sought not

in the pending application u/s 36, but in a new proceeding started afresh on a separate and later notice of motion and providing for a regular and

full enquiry in the manner of an ordinary contested suit. Both the limiting and extending principles are sought to be rested on the somewhat obscure

language of the proviso. I have my doubts about the limiting principle.

31. But this case proceeded upon the express admission of the advocate for the respondent that he did not challenge the correctness of the

decision in the earlier case. He has however explained it as no more than an admission that the proviso governed only cases where in disposing of

a pending application u/s 36 of the Act, the Court is requested to exercise its powers u/s 7 in a summary manner. He argued that the opinion of the

Judges that the trial of a fresh application u/s 7, on proper pleadings and providing for a regular enquiry was also precluded by the proviso was

only obiter and required reconsideration. I am unable to agree with this contention. The opinion of the Pull Court is binding on us. Nor can it be

treated as merely obiter as the Judges were specifically invited to deal with the proper construction of Section 7 including the proviso. Even apart

from these considerations, I agree with that view. The language of the proviso would have been different if the object of the legislature was only to

bring about the result contended for by the respondent's advocate. It would have been quite easy to enact some such proviso as the following:

Provided that powers under this section shall not be exercised in deciding a pending application u/s 36"" , or better still Section 36 could have been

amended by an additional Sub-clause to the effect that ""Section 7 of the Act shall not apply in disposing of applications under this section."" The

Legislature has in my opinion made it clear that the insolvency Court can for the purpose of deciding any matters arising u/s 36, exercise only such

powers as are given u/s 36, in the manner and to the extent provided there-in, and that Section 7 shall not apply to any other extent in such cases,

unless all the parties agree. I am not unaware of the absence of a similar restriction on the exercise of powers by Subordinate Courts administering

the Provincial Insolvency Act. There is no conceivable reason why the discretion of the High Court should have been taken away, while the inferior

Courts are entrusted with it. But this is not the only anomaly we find in the administration of the two systems of insolvency. Whatever be the

reason, the language is clear enough.

32. I have therefore no hesitation in holding that the trial of the present petition is barred under the proviso to Section 7 and that the decision in

Mrs. Evelyn Popaly's case: (I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 775 should be declared to be erroneous. If that decision were correct,

it leads to a somewhat anomalous result) in that a stranger to the insolvency can insist on a regular civil suit for deciding a comparatively minor

dispute as to possession only but has no such rights where the question to be decided is the more important one relating to title to property.

33. The appeal must therefore be allowed with costs payable from and out of the estate of the insolvent as per the order of Satyanarayana Rao J.

34. Raghava Rao J.--I have as a result of the careful consideration that I have bestowed on the matter since reservation of judgment arrived at the

definite conclusion that there is no such irreconcilable inconsistency between Official Assignee Vs. E. Narasimha Mudaliar, , and Mrs. Evelyn

Popaly v. Official Assignee, Madras, I. L. R. 1938 Mad. 72 : A. I. R. 1937 Mad. 775 as to require a reversal of the latter ruling on account of the

former. Although the argument for the Official Assignee attempted a comprehensive conspectus of the entire case law under the relevant sections of the Presidency Towns Insolvency Act there was no suggestion before us that the Full Bench ruling itself required reconsideration. Nor did the learned counsel for the appellant urge that if the case were held to be within the jurisdiction of the insolvency Court u/s 7 as found by Clark J., the learned Judge's view that there were no circumstances such as would render it expedient that the jurisdiction should not be exercised and that the Official Assignee should be referred to the machinery of a regular action was erroneous. All that we have to consider therefore is whether the Division Bench ruling in *Mrs. Evelyn Popaly v. Official Assignee, Madras*, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad 775 can stand side by side with the Full Bench ruling. I may also state one or two other considerations here which I regard as relevant to the determination of the question whether the two decisions can stand together. The leading judgment in the one case as well as in the other was delivered by Beasley J., as he was at the time of the earlier decision who became the Chief Justice of this Court by the time of the later decision. Even if the later decision made no reference to the earlier, I should be highly loath to impute any self-inconsistency to the learned Judge which is not made out in strictissima facto and should in fairness try to make every presumption in favour of self-consistency which can possibly be made. When in fact the later decision distinguishes the earlier on a line of reasoning adopted by the learned Judge who is common to both the decisions and concurred in by his colleague not a party to the earlier decision, I should be satisfied beyond the strictest shadow of a doubt, before I could feel sailed upon to pronounce the later decision to be wrong because of the earlier, that the distinction between the two is a distinction without a difference, which rests on a mere accident of fact and not on an essential of legal principle. I should be satisfied, in other words, that the reasoning on which the earlier decision, the Full Bench ruling, rests, necessarily entails a view contrary to the view taken in the later and consequently invalidates the later decision and that there is such a radical and fundamental incompatibility between the two decisions and that if and so long as the Full Bench ruling stands the Division Bench ruling must of necessity go. Further the ruling in *Mrs. Evelyn Popaly v. Official Assignee, Madras* I. L. R. (1938) Mad.

72 : A. I. R. 1937 Mad. 775 has stood the field without dissent either in this Court or elsewhere though only for just more than a decade and has

in fact evoked the approval of the High Court of Rangoon in two different cases, In re T. S. N. Chettiar Firm, A. I. R. 1940 Rang. 39: 1939 Rang.

L. R. 731 and Vissalakshi Achi. v. Official Assignee, A. I. R. 1941 Rang. 250 : 1941 Rang. L. R. 268, the former of which is no doubt a decision

of a single Judge (Dunkley J.) but the latter is that of a Divisional Bench consisting of that Judge and Roberts C. J., both of whom delivered

separate but concurrent judgments accepting the reasoning employed in Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad.

72 : A. I. R. 1937 Mad. 775.

35. 2. Before dealing with the question of conflict which has necessitated the posting of this case before this Full Bench in the light of the

perspective afforded by the considerations just adverted to, I propose to define my conclusions of the language of the relevant sections of the

relevant statute which are as follows :

Presidency Towns Insolvency Act :

S. 7. Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities and all other questions whatsoever,

whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it

expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case;

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.

36. (1) 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.

(2) If any person so summoned, after having been tendered a reasonable sum refuses to come before the Court at the time appointed, or refuses to

produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by

warrant, cause him to be apprehended and brought up for examination.

(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be

represented by a legal practitioner.

(4) If on his examination any such person admits that he is indebted to the insolvent, the Court may, on the application of the Official Assignee,

order him to pay to the Official Assignee, at such time and in such manner as to the Court seems expedient, the amount in which he is indebted, or

any part, thereof, either in full discharge of the whole amount or not, as the Court thinks fit, with or without costs of the examination.

(5) If on his examination any such person admits that he has in his possession any property belonging to the insolvent, the Court may, on the

application of the Official Assignee, order him to deliver to the Official Assignee that property, or any part thereof, at such time, in such manner

and on such terms as to the Court may seem just.

It must be mentioned here that in the sections as reproduced are embodied two legislative enactments simultaneously introduced into the statute in

1927 the addition of the proviso to Section 7, and the substitution in Sub-sections (4) and (5) of Section 36 of the words ""if on his examination any

such person admits"" for the words ""if on the examination of any such person the Court is satisfied."" More oases than one decided under the statute

before 1927 were referred to, and in particular the decision in Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others, , in the course of

the argument before us as bearing on the history of the legislation embodied in the proviso to Section 7 of the Act and in the amended language of

sub-section (4) and (5) of Section 36. I need only say with reference to the cases so cited that I find myself in respectful concurrence with all that

has been said on the question by Coutts-Trotter C. J., and a good part of what has been said by Beasley J. as he then was in Official Assignee Vs.

E. Narasimha Mudaliar, , Says the learned Chief Justice at p. 720:

The procedure which was prohibited by the judgment of the Calcutta High Court

in Jnanendra Bala Debi Vs. Official Assignee of Calcutta and

Others, was, that persons alleged to be indebted to the bankrupt estate known in our Court for some reason I never quite understood as

garnishees"" should be examined, which of course in effect means cross-examined, by the Official Assignee under the powers of Section 36, and

that statements made by them not amounting to a definite admission of indebtedness to the estate should be used u/s 7 to ask the Court there and

then to pass a decree against the garnishees, on the ground that, though they are not tantamount to direct admissions, they were available as

evidence to show that their answer to the claim put forward by the Official Assignee was untrue. That procedure in my opinion was not only rightly

denounced by the Calcutta High Court but is definitely prohibited by the statute as amended.

The object of the legislative changes, to adopt the language of Beasley J. was to prevent a summary trial and a contested enquiry being had in the

guise of an examination u/s 36 and orders being passed against strangers to the insolvency except upon the admission of those persons. So far in

my opinion, the learned Judge is right; but in discussing the question the learned Judge further observes that it is only when the garnishee has been

previously examined u/s 36 that any limitation is placed upon the jurisdiction of the Court u/s 7. It seems to me, however, that such limitation as

there is under the proviso to Section 7 is there, not because of any prior examination of the person to whom summons is taken out u/s 36 but

because of considerations implicit in the nature of the questions raised which is of the character falling within the purview of Section 36 must be

disposed of only in the manner and to the extent provided in that section. I shall in the sequel refer to this aspect of the matter and deal with it more

fully.

36. 3. Now to turn to an enunciation of the points emerging from my reading together of the . two sections of the statute, I may state them as

follows:

(i) Section 7 takes in all questions which may arise in any case of insolvency as well as all questions which the Court may deem it expedient or

necessary to decide for the purpose of doing complete justice or making complete distribution of property in any such case. The section is not

limited in its scope to matters in which the Official Assignee by the operation of the law of insolvency claims a title superior or paramount to that of

the insolvent, such as questions of fraudulent preference and relation back and so on. It applies as well to cases in which the Official Assignee

standing in the place of the insolvent himself seeks to recover debts due from the third parties to the insolvent or properties standing in the names of

others but belonging to the insolvent.

(ii) The proviso to the section presupposes that but for its enactment any matter arising u/s 36 would be within the body of the section as much as

any other matter arising. in any case of insolvency.

(iii) The matter arising u/s 36 which is contemplated by the proviso to Section 7 is a matter arising for decision u/s 36. The juxtaposition of the

words ""for the purpose of deciding"" and of the words ""any matter arising u/s 36"" suggests that the matter arising u/s 36 must be matter arising for

decision under that section.

(iv) The matter arising for decision u/s 36 means, to my mind, the matter arising for an order to be made of the kind contemplated by Sub-sections

(4) and (5) of Section 36 which is nonetheless a decision because made on an admission of the kind contemplated by these Sub-sections, in a

secret"" and not a ""litigious"" proceeding. Section 36 which starts in Sub-section (1) with an application by the Official Assignee or by any creditor

who has proved his debt purely for the purpose of discovery of the insolvent's property, according to the language of the marginal note, proceeds

in Sub-sections (4) and (5) to empower the Court on an admission by the party summoned and examined, of the kind referred to in those Sub-

sections, to make an order of the kind contemplated by them, on the application of the Official Assignee for such an order. The application

referred to in Sub-section (1) and the application referred to in Sub-sections (4) and (5) are distinct and different in their objects and purposes.

The one serves an inquisitorial purpose; but the other seeks a judicial order, however summary it may seem, on an admission made by the person

examined on the summons taken out in the manner prescribed. Where there is no such admission and the situation after the examination of such

person is one of controversy, there can be no question of any further application by the Official Assignee or of any order of Court thereupon such

as is contemplated by Sub-sections (4) and (5) of Section 36.

(v) (a) The matter arising for such a decision u/s 36 is, firstly, the matter of the undisclosed possession by the insolvent of his own property or by

any other person who is known or suspected to have in his possession such property; and, secondly, the matter of the actual but undisclosed

indebtedness to the insolvent of a person supposed to be indebted to him. The only other matter referred to in Sub-section (1) is the information

which may be elicited from the person proposed to be examined under the section whom the Court may deem capable of giving information

respecting the insolvent, his dealings or property. The collection of such information by itself is not in the nature of a decision, although it may well

serve as a step-in-aid of a decision on questions which may arise in any case of insolvency, in the language of the Section 7 of the Act.

(b) The matter arising for decision u/s 36 is therefore a question either of possession of property belonging to the insolvent or of the existence of a

debt due by the insolvent, so that when in the former case the title of the insolvent to the property is not admitted there is no order to be made under

Sub-section (5) of the kind which is within its purview or its intendment. In the latter case there is in rerum naturae no question of title as apart from

the question of possession which can arise for consideration. "Belonging to the insolvent" occurring in Sub-section (5) of Section 36 can, in my

opinion, only mean "belonging on admission" by the party summoned and examined.

(c) The factum of disputed title to property admittedly in the possession of the person examined u/s 36 puts the case outside the pale of the section

and excludes it altogether from the range of any decision or order there under. Supposing the matter of possession were disputed title being

admitted equally would the provision for the kind of order contemplated by Sub-sections (4) and (5) stand excluded from operation. A fortiori so

if both possession and title were disputed.

(vi) The matter arising for decision u/s 36 with reference to which the plenary power to decide given by Section 7 to the insolvency Court stands

limited by the proviso to the latter section does not mean that necessarily an application should actually be pending u/s 36 for the bar of the proviso

to operate. Even, if without any application u/s 36 being filed at all, a notice of

motion is taken out by the Official Assignee u/s 7 for the decision of
 a question falling within the purview of Section 36, i. e. a question of delivery of
 property or of payment of debt as referred to in Section 36 the bar
 of the proviso to Section 7 does, in my opinion, still operate in the sense that the
 insolvency Court will be precluded from exercising the power
 given by Section 7 to decide such a question except in the manner and to the
 extent provided in Section 36. The filing of the petition as u/s 7 in
 such a case does not mean dispensing with the procedure prescribed by Section
 36 or enlarging the scope of the restricted enquiry under the latter
 section. So also, when an application is actually taken out by the Official
 Assignee u/s 36 for the determination of a question arising there under its
 scope cannot be widened by resort to Section 7. That of course is because as put
 for the Official Assignee before us in the language of Mr.
 Nugent Grant's argument in the case in Official Assignee Vs. E. Narasimha
 Mudaliar, , the intention of the legislature was that one must not begin
 with Section 36 and end in Section 7. That does not however mean that the
 operation of the proviso can be limited only to a case of that kind. The
 language must be understood according to its ordinary meaning as of sufficient
 width to cover also cases in which without any preliminary
 application u/s 36 a motion is taken out u/s 7, for the determination of any
 question which would arise if there was a petition, u/s 36. If the contrary
 were the intention of the legislature, the proviso should contain, in place of the
 words ""for the purpose of deciding any matter arising u/s 36"" words
 to the effect ""for the purpose of deciding any matter arising on an application
 filed u/s 36"" or ""for the purpose of deciding on a petition u/s 36, any
 of the matters referred to therein.

(vii) Nor does it appear from the language of the proviso to Section 7, that there
 should be a prior examination of the person summoned u/s 36, for

the bar of the proviso to operate, although that is the view of Beasley J. in
 Official Assignee Vs. E. Narasimha Mudaliar, , expressed at p. 730,

with which I shall more fully deal in the sequel.

(viii) In effect the proviso to Section 7, interpreted in the manner in which I am
 interpreting it limits the operation of Section 7, to the determination

of questions other than those falling within the ambit of Section 36, unless the
 parties otherwise agree, If the parties otherwise agree, the jurisdiction

u/s 7, of course comes into play, and there will then be a full dressed enquiry under that section in a manner more general and to an extent more

spacious than provided by Section 36, even in respect of matters arising u/s 36. In the absence of agreement of parties such matters must be

decided only in the manner and to the extent provided in Section 36. Matters not arising under that section can, on the other hand, be dealt with u/s

7, although in the exercise of its discretion the insolvency Court may relegate their disposal to the ordinary Courts, if it thinks, having regard to the

difficulty of the questions raised or the largeness of the claims involved, that the machinery of a regular action affords the more expedient remedy.

The question of the parties agreeing otherwise comes in, as I think for bringing even matters arising u/s 36, within the fuller ambit of Section 7, and

not for necessarily throwing matters arising in insolvency as contemplated by Section 7, but not capable of decision u/s 36, for want of an

admission, away from the insolvency Court u/s 7, into the ordinary civil Court as the only forum which ought to try them.

37. 4. A proviso excepts out of a previous section or out of the earlier part of the section which contains it something which but for it would have

been within the enactment and as such it must be strictly construed: Vide Halsbury's Laws of England on Statutes, vol. 31, 2nd Edn. paragraphs

605 and 607 at pages 484 and 485. The expression "any matter arising u/s 36" in the proviso to Section 7, Presidency Towns Insolvency Act

must, in my opinion, be interpreted in the context of the statute in which it occurs in the manner indicated above, which involves no strain, either by

way of undue stretch or by way of undue construction, on the meaning of the words whether in legal or popular parlance. In this view of the

relevant provisions of the Presidency Towns Insolvency Act which I am taking on their language in relation to their setting in the statute, I am of

opinion that the two decisions of this Court in Official Assignee Vs. E. Narasimha Mudaliar, , and Mrs. Evelyn Popaly v. Official Assignee,

Madras, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 775, can well stand together.

38. 5. It was asked for the appellant whether it is not anomalous that the rule of exclusion from the jurisdiction of the insolvency Court which

applies to a case of disputed debt as ruled in the former case does not, as ruled in the latter case, govern the case of possession of property

disputed to belong to the insolvent. It indeed does seem so. The explanation for the apparent anomaly is however to be found in the considerations

adverted to in the closely reasoned judgments in *Mrs. Evelyn Popaly v. Official Assignee, Madras*, I. L. R. (1938) Mad. 72:A.I.R. 1937 Mad.

775, which are founded on the principle of an earlier ruling of this Court reported in *Abdul Khader Sahib v. Official Assignee, Madras*, 25 M. L. J.

308 : 20 I. C. 485, and also on the circumstance which I consider to be of undeniable force that the amendment of Section 36 in 1927 by the

legislature which at the same time enacted the proviso to Section 7, does not touch the words ""property belonging to the insolvent"" which after the

amendment must have the same meaning as they had before. A distinction between the case of a debt due to the insolvent which may be ordered

to be paid up on admission and the case of possession of property belonging to the insolvent which may be directed to be delivered up, if

possession and title are both admitted and not if possession only is admitted but title disputed, is not by any means unintelligible so far as the

applicability of the rule of exclusion from the cognizance of the in. solvency Court is concerned, especially if regard is had to the language of Sub-

section (5) of Section 36. I am not prepared to say that the ruling in *Mrs. Evelyn Popaly v. Official Assignee, Madras*, I. L. R. (1938) Mad. 72 :

A. I. R. 1937 Mad. 775, which relates to Sub-section (5) must be overruled as being inconsistent with *Official Assignee Vs. E. Narasimha*

Mudaliar, , which relates to Sub-section (4). I am glad to find that in holding as I do I am not forced to console myself with the thought that law is

not always logical as once observed by Lord Halsbury, because I consider the distinction above adverted to, to be sufficiently well-founded in the

language of the statute to render the analogy of a decision under Sub-section (4) inapplicable to a case under Sub-section (5) of Section 36. This is

sufficient to dismiss the appeal.

39. 6. Besides urging for our acceptance the differentiation of the earlier decision by the later which I have upheld for the reasons given in the

foregoing, Mr. Sivaramakrishnayya also contended that the proviso to Section 7 must be understood as inspired by the only object and producing

the only result that there should be no resort to Section 7 permitted to the Official Assignee in the course of a proceeding u/s 36 on a summons

taken out there under, that, in other words, while ""a party who begins with Section 36 ought not to be allowed to end in Section 7"" there is no legal

obstacle in the way of a separate proceeding u/s 7 after the disposal of the petition u/s 36 as is the case before us. This contention may seem to

stand hit at by the terms of the Full Bench ruling in Official Assignee Vs. E. Narasimha Mudaliar, , to be found in Beasley J.'s judgment at page

731 of the report, that when once the Official Assignee has summoned a witness u/s 36 of the Act, if that witness disputes his indebtedness the

Official Assignee has no option but to proceed by way of suit. It is also true that it was intimated to us by the Official Assignee more or less at the

very commencement of the arguments in this case in answer to a question put by the Bench that he was not prepared to question the correctness of

the Pull Bench ruling in Official Assignee Vs. E. Narasimha Mudaliar, , Mr. Sivaramakrishnayya is however entitled, in my opinion, to contend, as

he does, in view of the restriction of the operation of the ruling in Official Assignee Vs. E. Narasimha Mudaliar, , to cases of money claims only by

the ratings in Chinnappa Mudali v. Official Assignee, Madras, 55 Mad. 385 : A. I. R. 1932 Mad. 167 and Mrs. Evelyn Popaly v. Official

Assignee, Madras, I. L. R (1938) Mad. 72 : A. I. R. 1937 Mad. 775. Whether given in the case of a money claim not admitted, the examination

of a person u/s 36 necessarily ousts the jurisdiction of the insolvency Court is a larger question on which I should own to considerable hesitation in

subscribing to the view taken--by the majority only, as I shall show hereafter--in Official Assignee Vs. E. Narasimha Mudaliar, , If at all, it is that

ruling and not Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad. 775 as supposed by the Divisional

Bench before which this appeal originally came on for hearing which with all respect in my opinion, requires reconsideration. The present case is

not anyhow hit at by the Full Bench ruling understood in the narrower sense in which it has been in Chinnapa Mudali v. Official Assignee, Madras,

55 Mad. 385 : A. I. R. 1932 Mad 167 and Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad. 72: A. I. R. 1937 Mad. 775

and this Bench is, if that view of the Full Bench ruling is correct, not called upon to deal with the larger question I have referred to.

40. 7. Otherwise, it seems to me that there is still another ground also on which this appeal might possibly be dismissed, arising out of my own view

of the effect of the judgments in Official Assignee Vs. E. Narasimha Mudaliar, , which I may next state. And that is that that case has not in fact

gone so far as to rule by a unanimous decision of all the learned Judges who took part in it that the case of a debt not admitted under Sub-section

(4) of Section 36 must needs go before the ordinary Court and can in no event go on before the insolvency Court. I understand the learned Chief

Justice in that case to have made it perfectly clear in his judgment that in such a case the matter may well go on in the insolvency Court itself, when

raised on a petition u/s 7 after the disposal of the petition u/s 36 subject of course to the consideration that it should be left to the discretion of

Judge sitting in insolvency to decide whether it should be dealt with by him or referred to the machinery of an ordinary Court. Beasley J. seems, on

the other hand, to be definite in his opinion that while matters ordinarily arising u/s 7 which are not confined to matters in which the Official

Assignee claims a title superior to that of the insolvent may in the discretion of the insolvency Judge be sometimes referred to a regular action as

where the questions are difficult or claims large, the Official Assignee has no option but to proceed by way of suit where he has summoned a

witness u/s 36 who on being examined disputes his indebtedness. The learned Chief Justice while expressing his own , view of the matter in terms

which cannot be mistaken said at the same time that the judgment prepared by his learned brother, Beasley J. with which Odgers J. entirely agreed

should be regarded as the judgment of the Court. What exactly is the effect of this last observation of the learned Chief Justice I shall show

presently. On the facts of the case before them all the learned Judges were agreed that Waller J. whose judgment was under appeal before them

had made the right order in directing the admitted amount of the debt to be paid up to the Official Assignee and the question of the disputed liability

for the balance to be tried in an ordinary suit. The learned Chief Justice so held because it was supposed by him, as would appear from what is

said by him at page 722 of the Report that a discretion had been exercised by Waller J. and that could only be on the assumption that the case

otherwise well fell within Section 7 with whose exercise of discretion in holding that the case was properly triable by the ordinary Courts he

declined to interfere as the appellate Court ought not to interfere in such a case except ""on grounds which are well-known and must necessarily be

of rare occurrence." The other two Judges, by the judgment of Beasley J. of them, upheld the order of Waller J on the ground that the examination which had taken place u/s 36 left no option to the Official Assignee but to proceed by way of suit under the proviso to Section 7, which taken in conjunction with the simultaneous amendment of Sub-sections (4) and (5) of Section 36 not only prohibited the procedure denounced by Ran-kin J. in Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others, , as pointed out by the learned Chief Justice but also involved the ouster of the jurisdiction conferred on the insolvency Court by Section 7 as held by Beasley J. ALL the learned Judges held that on the application as filed u/s 36 when on examination of the party to whom summons was taken out under that section there was only a partial admission of the debt the summary order u/s 36, Sub-section (4) could only be made to the extent admitted. Both the learned Chief Justice and Beasley J. said in their judgments that this was sufficient to dispose of the appeal. This was the concurrent attitude of the three Judges in regard to the primary argument of Mr. Nugent Grant for the Official Assignee that the intention of the legislature that a party should begin with Section 36 could not be allowed to end in Section 7 had not been effectively carried out by the proviso, and that in the very proceeding before the Court u/s 36 his client might be permitted resort to Section 7. There was, as I gather, also an alternative argument addressed by the learned counsel and that is. the only way in which I find myself able to follow the judgments that Waller J. ought not to have referred the matter to an ordinary suit as though the jurisdiction of the insolvency Court u/s 7 stood ousted. This apparently raised the wider question argued before the Court on which as I read the judgments of the learned Judges although there was unanimity in regard to the answer there was no unanimity in regard to the application of the answer to the case before them on account of the differing views taken by the learned Judges on the question of the construction of the proviso to Section 7. Mr. R. N. Aiyangar as amicus curiae seems to have raised that wider question in answer to the alternative contention of Mr. Grant: That wider question being whether Section 7 should not be understood as bringing within the cognisance of the insolvency Court only claims based on a title higher than that of the insolvent and excluding claims based on the insolvent's own title. While answering the question in concurrence with Beasley J. by saying

that the section could not be so understood, Coutts-Trotter C. J. unlike Beasley J. held, in my opinion, that although a proceeding u/s 7 may be valid with reference to the disputed part of the claim of the Official Assignee, Waller J. had in referring the matter to the machinery of a suit in the ordinary Court exercised a discretion which ought not to be interfered with on appeal. Beasley J. on the other hand held that the matter was not; one within Section 7 at all, and that the question was not therefore one of discretion. There was a bar according to that learned Judge created by the proviso to the entertainment of the question u/s 7 which entailed a compulsory resort by the Official Assignee to the ordinary civil Court's adjudication. On the understanding of the precise scope and ambit of the newly introduced proviso to Section 7, there is in my opinion a difference of view between the learned Chief Justice and Beasley J. thus revealed by a close and careful reading of their judgments which may not be apparent at first sight. I should of course be very unwilling--and there I agree with the-learned counsel for the appellant--to regard what is declared as the judgment of the Court as the judgment of two only of the three learned Judges who composed the Court and not of the third on any matter dealt with by that judgment. I should hesitate to find any difference of opinion between the learned Judges on such a matter which is not strictly made out. Even so, I cannot on a careful scrutiny of the judgments in the case escape the conclusion that there is difference of opinion on the point under consideration, such as I have indicated It is in view of this difference of opinion that I venture to state that the learned Chief Justice by saying that the judgment of Beasley J. which summed up the-results of a long discussion between the three members of a Bench should be regarded as the judgment of the Court meant nothing more than that it should be so regarded with reference to the points on which they all agreed by reason of such unanimity and with reference to the points on which they differed on account of the rule of majority. Except on this hypothesis it is impossible to understand the learned Chief Justice's judgment to the extent to which it discloses--as in my opinion it does doubtless disclose, though not expressly --dissent from one part of the judgment of Beasley J. This conflict of opinion between the learned Judges it might not be necessary for this Bench to resolve if the view should be accepted that the present case is not in any way hit at even by the view of Beasley J which has been

restricted in later decisions only to cases of disputed money claims and cannot therefore be treated as covering a case like the present which is one

of disputed title to property alleged to belong to the insolvent. Otherwise, I would say that in this conflict, I do not feel myself precluded, sitting, as

a member of this Pull Bench, from preferring the view of Coutts-Trotter C. J., and dismissing the appeal on that ground as well. I may notice here

in passing what I consider, if my view as to the existence of this conflict is correct, to be the misleading anomaly about the head note to Official

Assignee Vs. E. Narasimha Mudaliar, , , relied upon for the appellant which without bringing the conflict statedly and pointedly puts in juxtaposition

the latter part of the first paragraph embodying the limitation on the insolvency Court's jurisdiction arising from the proviso to Section 7 as ruled by

Beasley J.'s judgment and the second paragraph embodying the rule of discretion enunciated by Courts-Trotter C. J., in his judgment as in no way

affected by the proviso, as though the two portions of the headnote could well stand together as mutually harmonious parts of a unanimous decision

which, in my opinion, the ruling in Official Assignee Vs. E. Narasimha Mudaliar, , is not, except in so far as the law embodied in the earlier part of

the first paragraph is concerned. I must make it clear, however, that I mean no reflection on the headnote who certainly did his best in a situation in

no small degree confused and conflicting.

41. 8. Nor does it seem to me that Beasley J., is right in the observations that he has made at page 730 of Official Assignee Vs. E. Narasimha

Mudaliar, , that it is only when the garnishee has been previously examined that any limitation is placed upon the jurisdiction of the Court. That to

my mind is a rather narrow reading of the proviso for which there is no warrant in its language. The operation of the proviso ought, in my opinion,

to be neither unduly enlarged nor unduly restricted but must be ascertained and defined with reference to the language used in it, understood in the

normal sense Referring to the limiting aspect, this, is what Dunkley J., who decided the Rangoon case reported in In re T. S. N. Chettiar Firm, A.

I. R 1940 Rang. 39 : 1939 Rang L. R. 781 says: ""This proviso was considered by a Full Bench of the Madras High Court in Official Assignee Vs.

E. Narasimha Mudaliar, , and it was held that the proviso applied only when the respondent third party had been summoned and examined under

the provisions of Section 26 of the Act. With the greatest respect I find myself unable to accept such a narrow interpretation of the proviso. The

provisions of the proviso have again been considered by the Madras High Court in Chinnappa Mudali v. Official Assignee, Madras, 55 Mad. 385

: A.I.R 1932 Mad. 167, and very recently in Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad. 72 : A. I. R. 1937 Mad.

775, and the original decision in Official Assignee Vs. E. Narasimha Mudaliar, , appears to have been considerably modified. With the greatest

respect I am unable to agree that the proviso applies only when the third party has been actually examined u/s 36 for I can find nothing in the

proviso limiting its application in this manner." Examination or no examination, the real and on y question, in my opinion, is whether (he matter

raised is such as to attract the limited jurisdiction enacted by Section 36 or the larger jurisdiction normally available u/s 7 subject of course in the

latter case to the exercise of the discretion which it is always open to the insolvency Court to exercise by way of referring the Official Assignee to a

regular action in cases raising complicated questions or involving large stakes. Referring to the enlarging aspect the same learned Judge in the same

ruling says:

But I agree with the decision in Chinnappa Mudaliar v. Official Assignee, Madras 55 Mad. 385 : A. I. R. 1932 Mad. 167, that the application of

the proviso is restricted to the two matters arising under Sub-sections (4) and (5) of Section 36. i. e., under Sub-section (4) the question whether

the third party is Indebted to the insolvent, or under Sub-section (5) the question whether the third party is in possession of property belonging to

the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the insolvency Court

to try the matter, is, in my opinion, wholly excluded, and it does not matter whether the denial has been made in the course of examination u/s 36

or at any other time. But Sub-section (5) of Section 36 has in view only the case of property admittedly belonging to the insolvent, and the object

out of the Sub-section is to enable the official Assignee to discover its whereabouts; it relates to possession only and not to title. Where the

ownership of or title to property is in dispute this Sub-section has no application and consequently the jurisdiction of the Insolvency Court u/s 7 is

not barred in such cases by the proviso to the section.

The statement of law contained in the two passages just quoted from the Rangoon case I have no hesitation in subscribing to as correct except that

the sentence in the passage quoted later which is in these words :

Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the insolvency Court to try the

matter is, in my opinion, wholly excluded

seems to me to be wrong for the reasons that I have given in para. 3 (VIII) supra. It is in this connection that as will be seen from what I have said

in para. 7 supra that the relevancy of the view of Coutts-Trotter C. J. as I understand it which I should be prepared to accept, in preference to

that of the other two Judges in Official Assignee Vs. E. Narasimha Mudaliar, , comes in.

42. 9. The statement of law to be found in the Rangoon case which I have referred to is also the statement of law by Cornish J. in Chinnappa

Mudali v. Official Assignee, Madras, 55 Mad. 385 : A. I. R. 1932 Mad. 167 which I accept with the same reservation as I have adverted to in

connection with my discussion of the statement of the law in the Rangoon case. Cornish J. at page 390 says with reference to the limiting aspect :

The appellant's argument seems to go to this length that whenever the Official Assignee has held an examination u/s 36 he can have no recourse to

the provisions of Section 7 but must have the matter which is to be determined decided in a suit. That startling result which could never have been

contemplated by the Legislature can, I think, be avoided by giving what seems to me the natural construction to Section 7. The section as amended

provides that the insolvency Court can decide all questions arising in any case of insolvency provided that, unless all the parties otherwise agree,

the power shall be exercised in the manner and to the extent provided by Section 36 for the purpose of deciding any matter arising u/s 36.

So far my own view agrees entirely with the learned Judge's. The learned Judge proceeds to observe next in the same passage as follows :

"What are the matters arising for decision u/s 36 ? They are contained in Sub-sections (4) and (5), namely, whether a person supposed to be

indebted to the insolvent is so indebted, and whether a person suspected of having in his possession property belonging to the Insolvent has in fact

any such property in his possession. if the person supposed to be a debtor to the insolvent or to have the insolvent's property in his possession

does not admit the fact, then unless all the parties otherwise agree, the insolvency Court cannot determine the matter u/s 7. But, questions whether

the Insolvent is a member of a joint family or whether the business carried on by the Insolvent is a business of the joint family are not, in my

opinion, matters falling within Sub-section (4) or (5) of Section 36, and they can be decided by the insolvency Court in the exercise of its powers

u/s 7.

I have no quarrel with this passage either except in regard to the sentence underlined (here italicised) which corresponds to the sentence of the

passage in the Rangoon decision which I have already adverted to and criticised in the light of my own concurrence with Coutts-Trotter C. J". s

view in Official Assignee Vs. E. Narasimha Mudaliar, , as I apprehend it as well as in the light of the reasons which I"" have given in para. 3 (viii)

supra.

43. 10. The word ""fact"" occurring in the under-lined (here italicised) sentence of the passage cited from Cornish J.'s judgment in Chinnappa

Mudali v. Official Assignee, Madras, 55 Mad. 385: AIR 1932 Mad. 167 means as the learned Chief Justice of the Rangoon High Court in

Vissalakshi-Achi v. Official Assignee, A. I. R. 1941 Rang. 250 : 1941 Rang. L. R. 268 at page 250 points out, ""the fact of possession"". Referring

to the case before him the learned Chief Justice proceeds next to observe :

But the question raised here does not relate to possession. It does not ask where the admitted property of the insolvent may be. It asks whether

property admittedly in his wife's hands belongs to him or not ; and it is therefore a question of title. Section 36(5) affords a summary means of

enabling the Official Assignee to obtain an order of the Court, when the admitted property of the insolvent has been traced to the possession of a

third party, for its delivery to him. It has no reference to oases in which there is a dispute as to whether certain property belongs to the insolvent or

not Such a question of title is not within the scope of Section 36 at all. This was pointed out in In re T S. N. Chettiar Firm, A. I. R. 1940 Rang. 39

: 1939 Rang. L. R. 731 and indeed had already been made clear in Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad. 72 : A. I. R. 1937

Mad 775. The power given to the Court u/s 7 was not therefore affected by the proviso in this case; and the learned Judge was entitled to exercise

jurisdiction in the way he did. As was pointed out by Rankin J. in Jnanendra Bala Debi Vs. Official Assignee of Calcutta and Others, the rule that

the Official Assignee should have recourse to the jurisdiction in insolvency only when he has a higher title than that of the insolvent is not a rule of

law in the sense that the insolvency Court cannot entertain such a case in proper circumstances ; but care must be taken to see that the rights of

.third parties are not prejudiced by the omission to proceed by way of a regular suit. That decision was before the enactment of the proviso to

Section 7. Since its enactment, a Full Bench of the Madras High Court in, Official Assignee Vs. E. Narasimha Mudaliar, , has re-stated the first

proposition enunciated by Rankin J. but does not appear to have uttered the caution which followed it. The circumstances of the present case are

such as bring it well within the limits of the Calcutta decision which appears to me, with great respect, to lay down a salutary rule of practice which

should guide the Court In the exercise of its discretion whether to assume jurisdiction or not.

To this statement of the law by the learned Chief Justice of Rangoon I would unhesitatingly subscribe. For, this mode of putting the matter does not

suffer from the infirmity that underlies-the reasoning of Beasley J in Official Assignee Vs. E. Narasimha Mudaliar, , the reasoning of Cornish J., in

Chinnappa Mudali v. Official Assignee, Madras, 55 Mad. 385 : A. I. R. 1932 Mad. 167 and the reasoning of Dunkley J. in In re T. S. N. Chittiar

firm, A. I. R. 1940 Rang. 39 : 1989 Rang. L. R. 731 so far as the construction of the words ""unless all the parties otherwise agree"" is concerned.

The view taken by these learned Judges seems to involve that unless all the parties otherwise agree, the insolvency Court cannot determine u/s 7

the matter already disputed in the proceeding u/s 36 which, in my opinion, is not the proper view to take, for the reasons that I have already given

in para. 8 (viii) supra and consistently with my reading of Coutts-Trotter C. J.'s judgment in Official Assignee Vs. E. Narasimha Mudaliar, , as

expounded by me in para. 7 supra.

43a. 11. I do not consider it necessary to en-large this judgment by any discussion of the proviso to the section of the English Statute

corresponding to the proviso to Section 7, Presidency Towns Insolvency Act, because what after all essentially matters is the construction of our own statute on the language that it contains.

44. 12, Since preparing the foregoing as my judgment in the case I have had the opportunity to look into the judgments of my learned brethren,

Satyanarayana Rao and Panchapagesa Sastri JJ. I regret that I have been unable to find any sufficient ground for a change of opinion on my part.

45. 13. I too during the course of the arguments felt impressed to some extent with the consideration adverted to by Satyanarayana Rao J, that if

Sub-section (4) of Section 36, Presidency Towns Insolvency Act, does not proceed on the assumption of an admitted debt it is difficult to see why

Sub-section (5) should be assumed to proceed on the basis of an admitted title to property. I have however felt satisfied on further consideration

about the soundness of the distinction made by Beasley J. himself between the earlier decision and the later to both of which he was a party, a

distinction in which Cornish J. in the later decision concurred, I have felt so satisfied for the reasons given by me in para. 5 supra, which have been

accepted by the Rangoon High Court in the two decisions referred to by me not as a matter of course but as the result of an independent

consideration of their own. It may be that as my learned brother points out the jurisdiction u/s 36 to direct delivery of possession on an application

by the Official Assignee under Sub-section (5) should not be mixed up with the matter arising under Sub-section (5), but if the matter arising under

Sub-section (5) means, as I think, matter arising for decision in the sense of an order to be made under that sub-section, the jurisdiction necessarily

becomes confined to such matter and cannot be extended in a manner not warranted by the language of the proviso. The scope and object of the

application under Sub-section (1) and of the application under Sub-sections (4) and (5) are distinct and different as pointed out by me in para. 3

(iv) supra. The words in Sub-section (5) of Section 36 relating to an admission by the person examined under that section that he has in his

possession property belonging to the insolvent cannot, in my judgment, be read as equivalent to words relating to an admission by such a person

that he has in his possession property suspected to belong to the insolvent. The two sets of words are used in the two different portions of the

section and cannot be confused with each other and read as equivalent to each other. If the person examined under the section does not admit the

title there is no room for an order of the kind contemplated by Sub-section (5), and the matter arising is not a matter arising for decision u/s 36.

Not being such a matter it is not within the proviso and is consequently within the body of Section 7. Nor am I much impressed with the view of

Mulla relied upon by my learned brother, as that is a view taken on the basis of the only decision then in existence. Official Assignee Vs. E.

Narasimha Mudaliar, , according to his understanding of it which I do not consider to be correct and as since that decision others have come into

the field in the light of which the soundness of the view of Beasley J. in that decision has to be ascertained and estimated.

46. 14. With reference to the judgment of my learned brother, Panchapagesa Sastri J., I have no quarrel at all with the meaning of the word

discovery"" which he refers to and elaborates in great detail as indicating the object and purpose of the proceeding u/s 36, which is undoubtedly

wider than that of the corresponding section of the Provincial Insolvency Act or for the matter of that, as I may add, of the similar provision of the

Indian Companies Act in so far as the Presidency Towns Insolvency Act unlike the other two enactments provides for a summary decision or

order on an admission under Sub-sections (4) and (5) of Section 36 on a further application by the Official Assignee. It is for that reason that if the

words of the proviso, namely, ""any matter arising u/s 36"" are to be taken. as meaning any matter arising for decision, u/s 36, Sub-sections (4) and

(5), a matter of disputed title or possession or both would be outside the purview of Section 36 and fall within the range of Section 7 subject of

course to the discretion of the insolvency Court to refer such a matter to the machinery of an ordinary suit, I may also say that while I have no

doubt but that the ruling in Sornammal Vs. The Official Assignee, cited by the Deputy Official Assignee throws little or no light upon the point in

controversy as held by my learned brother, I very distinctly am of the opinion that it would be to miss very much, if not altogether the force of the

decision in Abdul Khader Sahib v. Official Assignee, Madras, 25 M. L. J. 308 : 20 I. C. 485, which is obviously in favour of the view of the

Bench which decided Mrs. Evelyn Popaly v. Official Assignee, Madras, ILR (1938) Mad. 72:A. I. R. 1937 Mad. 775, if one were to seek to

distinguish the former case from the latter on the mere facts in order to escape the obvious relevancy of that ruling to the decision of the point now

in controversy before us.

47. It is somewhat difficult to see how if property is to be regarded as not belonging to the insolvent when such is the case of the official Assignee

as well as of the person examined u/s 36--which was the position of fact in Abdul Khader Sahib v. Official Assignee, Madras, 25 M. L. J. 308 :

20 I. C. 485, as pointed out by my learned brother -- it follows that property cannot reasonably be regarded as not "belonging to the insolvent

where there is a dispute raised by the person examined u/s 36, as to the title of the insolvent. In any case are we to equate the words ""belonging to

the insolvent"" in Sub-section (5), with the words ""suspected to belong to the insolvent"" in Sub-section (1) I quite agree that there is a wholesome

object underlying Section 36, but I fail to see how that will in any way be hampered or frustrated if the words ""any matter arising u/s 36"" are

interpreted in the way suggested by me or if instead of a suit a proceeding u/s 7 is recognised as proper subject to the discretion of the insolvency

Court in any given ease to refer the Official Assignee to a suit. In any case, it is not easy, in my opinion, to accept an interpretation of the proviso

which destroys the distinction between the words ""suspected to belong to the insolvent"" and ""belonging to the insolvent"" which occur in the two

different portions of Section 36, and enlarges the meaning of the words ""any matter arising u/s 36"" in a manner not warranted by the context in

which they occur in the proviso taken along with the obvious limits within which discovery is permitted u/s 36. Considerations of policy and object

underlying the statute ought not, in my opinion, to be pressed so far as to justify a rewriting of the words ""belonging to the insolvent"" occurring in

Sub-section (1) especially if the distinction to be found in the statute itself between the application under sub-section (1), and the application under

Sub-section (5) of Section 36 in point of the purpose and the result of the applications is to be sufficiently borne in mind.

48. 15. I quite agree that there is to some extent the anomaly referred to by my learned brother in the last paragraph of his judgment which results

from the restricted interpretation put upon the language of the proviso by Mrs. Evelyn Popaly v. Official Assignee, Madras, I. L. R. (1938) Mad.

72 : A. I. R. 1937 Mad. 775, in that a stranger to the insolvency can insist on a regular civil suit for deciding a comparatively minor dispute as to

possession only but has no such right when the question to be decided is the more important one relating to title to property. At the same time, one

cannot overlook the possibility that a case of disputed possession sometimes involves a lengthier enquiry than a case of disputed title. It is also not

impossible that a trial by suit is in a given case after all not better than a trial in a proceeding u/s 7. In any case the anomaly such as it exists does

not result, I need hardly add, if one is to accept the interpretation of Coutts-Trotter C. J. in Official Assignee Vs. E. Narasimha Mudaliar, , as I

understand his judgment, which I respectfully do in preference to what I consider to be the different view of Beasley J. with whom Odgers J.

concurred. I am of course perfectly in agreement with my learned brother in thinking that there is difficulty in appreciating why the legislature should

be assumed to have taken away from the insolvency side of the High Court a discretion either to try in exercise of the insolvency jurisdiction itself a

matter like the one arising in the present case or to refer it to trial in the ordinary Court which is available to an insolvency Court under the

Provincial Insolvency Act. This, of course, as my learned brother has observed, is a consideration which is to be borne in mind if and when a

reconsideration of Official Assignee Vs. E. Narasimha Mudaliar, , is called for.

49. With these observations which I have chosen to make out of deference for my learned brethren I would adhere to the opinion expressed in the

judgment originally prepared and consequently dismiss the appeal with costs.

50. In accordance with the opinion of the majority, the appeal is allowed with taxed costs throughout. Costs to come out of the estate.