
(1929) 03 MAD CK 0017
In the Madras High Court

The Official Assignee

APPELLANT

Vs

E. Narasimha Mudaliar, Proprietor of James and Co.

RESPONDENT

Date of Decision : 12-03-1929

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 36

Citation : (1929) ILR (Mad) 717 : (1929) 30 LW 159 : (1929) 57 MLJ 145

Hon'ble Judges : Odgers, J;Murray Coutts Trotter, J;Beasley, J

Bench : Full Bench

Judgement

Murray Coutts Trotter, Kt., C.J.—I have had the advantage in this case of perusing the judgment about to be delivered by Beasley, J. It

sums up the results arrived at after a long discussion between him, Odgers and myself and it may be taken to be the judgment of the Court. I only

add a few words because I feel it is incumbent upon me to do so as for eight years I was in charge of the insolvency Jurisdiction of the Original

Side of the High Court. The procedure which was prohibited by the judgment of the Calcutta High Court in Jnanendra Bala Debi v. The Official

Assignee of Calcutta 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 then and there 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. That is sufficient to uphold the judgment of Waller, J., and to dismiss this appeal.

2. But a much wider question was argued and I think it would be wrong for us not to express our opinion upon it. It was said on the authority of

the English cases cited by my learned brother that, where a debt was not admitted, being a debt as to which the Official Assignee stood in no

higher position by reason of the special provisions of the Bankruptcy Law than the debtor himself, the matter could not be tried within the

jurisdiction of the Insolvency Court. That that is the law in England. I do not question. I do not think it is, or was intended to be, the law in India

under the Presidency Towns Insolvency Act. It is obvious that the Indian Statute aims at relieving the Official Assignee in charge of a Bankrupt

estate in suitable cases from incurring the heavy burdens of institution fees which would necessarily be incurred if he were compelled in all cases to

have recourse to ordinary suits. See Section 115 of the Act. I am quite content to leave it as a matter of discretion to the learned Judge as to

whether in any given case he should deal with such a claim in the Insolvency Court here or refer it to the machinery of an ordinary suit. It must be

remembered that the Court-fees of an ordinary suit in England are very small and that no inconvenience is caused and no obstruction is put in the

way of the Bankrupt estate by confining the jurisdiction of the Bankruptcy Court to claims where the title of the trustee of the Bankrupt estate

stands on a higher footing than would have been the case if the debtor had been suing himself. In India it is quite a different matter and in many

cases it would be quite impossible to obtain a sum out of such estate as is actually in the hands of the Official Assignee sufficient to institute

proceedings for the recovery of outstanding debts though the Official Assignee's claim may be a perfectly good one. I am quite content that it

should be left to the Judge in insolvency to decide on the balance of convenience whether it is best to try such cases himself, or to relegate their

disposal to the ordinary courts; and that is a discretion which, when exercised by him, an Appellate Court would interfere with only on grounds

which are well known and must necessarily be of rare occurrence. It is quite easy for the Judge who tries the summons to insist upon the Official

Assignee giving to the other side what is in effect a pleading, giving detailed particulars of the nature of his claim and to give full discovery of documents if that is sought for. On the other hand there may be cases where the person sought to be made liable to the estate lives at a great distance, or where the estate has ample funds for payment of the necessary institution fees in which it would be just and right for the learned Judge in insolvency to decline to deal with the matter here in Madras. In this case Mr. Waller, J., has exercised his discretion that this was a case which was properly triable by the ordinary courts; and with that exercise of discretion I decline to interfere.

3. I may add in conclusion that, now that our attention has been drawn to it, I think the present form of what is called a garnishee summons is capable of being construed as throwing the burden of proof not on the Official Assignee but on the so-called garnishee. In my experience, the Official Assignee never sought to take that attitude and always proceeded to prove his case as if he were a plaintiff. Though it may not be a practical difficulty I think it is proper that the form of summons should be amended so as to show that the burden of proof does rest on the Official Assignee. This is a matter for the Rules Committee and one of no real difficulty, the only point of importance being to omit the words which call upon the garnishee to show cause why he should not be adjudged to be a debtor to the estate and substitute some other form of words which will make it clear that he is only called upon to meet a claim, the burden of proving which lies upon the Official Assignee.

Odgers, J.

4. In this case, I had prepared a separate judgment, but I agree so entirely with the judgment about to be delivered by my brother Beasley, J., that I do not feel I should be justified in taking up time by trying to express what he has so clearly enunciated. I agree that the appeal should be dismissed.

Beasley, J.

5. This appeal raises a question of the greatest importance in insolvency. It is an appeal from the order of Waller, J., dated the 13th February, 1928. One E. Narasimha Mudaliar is alleged by the Official Assignee of Madras to owe the estate of an insolvent A. Swaminatha Mudaliar Rs.

1,445-2-0. A summons was taken out by the Official Assignee in order to obtain that money from Narasimha Mudaliar. This summons has come to be known on the Insolvency Side of this High Court as a garnishee summons and the person summoned is known as the garnishee. When the matter came before Waller, J., who was then sitting in insolvency, the garnishee admitted that he owed the insolvent Rs. 173 and Waller, J., made an order for payment of that amount, but as regards the disputed balance, as the garnishee did not agree to that matter being tried out on that summons, Waller, J., ordered it to be tried elsewhere.

6. The question which arises in this appeal is whether the Insolvency Court has jurisdiction to make an order for payment by a stranger to the insolvency of money in respect of which that person disputes his indebtedness to the insolvent. Waller, J., in his judgment stated that the claim before him was very clearly a case u/s 36 of the Presidency Towns Insolvency Act and I think that it is obvious that it was so from the wording of the summons. Before the Presidency Towns insolvency (Amendment) Act of 1927 the Court could summon before it any person who was supposed to be indebted to the insolvent and examine that person and if on examination the Court was satisfied that he was indebted to the insolvent the Court could forthwith make an order upon him for the payment of the amount in which he was found to be indebted. But the Presidency Towns Insolvency (Amendment) Act of 1927 has brought about an alteration and sub-Sections (4) and (5) of Section 36 of the Presidency Towns Insolvency Act of 1909 have been amended by the substitution of the following words "if on his examination any such person admits" for the words "if on the examination of any such person the Court is satisfied." The result of this amendment is that where after an examination a person admits that he owes a sum of money to the insolvent, the Court can then and there order him to repay that amount to the Official Assignee, whereas before the amendment the Court could make that order even where there had been no such admission. In the case before us the garnishee admitted that he owed a portion of the amount claimed by the Official Assignee but disputed that he owed the balance. Waller, J., was, therefore, perfectly right in making an order upon him for the payment of the admitted amount and in declining to try the question

of the disputed balance. The amendment to Section 36 makes it quite clear that the Court has no jurisdiction whatever on a summons under that

section to make orders for payment of debts disputed by garnishees. This disposes of the appeal but we are asked to decide another important

question arising out of this appeal as it is argued on behalf of the Official Assignee that Section 7 of the Presidency Towns Insolvency Act of 1909

gives the Insolvency Court jurisdiction to try money claims made by the Official Assignee even where those claims are disputed by garnishees.

7. Section 7 is as follows:

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.

8. The Official Assignee invites the Court to put the widest possible construction upon that section and to say that the Insolvency Court has

jurisdiction to collect simple money debts owing to the insolvent's estate. It is argued by Mr. R.N. Aingar on the other side that Section 7 only

entitles the Insolvency Court to deal with matters arising in insolvency such as questions of fraudulent preferences and relation back and so on and

that as regards simple money claims the Official Assignee merely stands in the shoes of the insolvent and has no greater rights conferred upon him

by the Insolvency Law than the insolvent himself had before his insolvency. If that contention is well founded, then it is not necessary to consider

what effect Section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 has upon that section and it is therefore necessary to

consider first of all whether the Insolvency Court before the amendment had jurisdiction to try simple money claims and, if it had, whether the

section as amended has taken away or limited that right. In this connection there are two decisions of the English Courts, namely, *Ex parte Brown*²

and *Ellis v. Silber*, (1872) L.R. 8 Ch. App 83 which are of great importance. In the former case it was held that the Court of Bankruptcy is the

proper Court to try questions in which the trustee in bankruptcy has a higher and better title than the bankrupt, that is to say, in those cases where

the Bankruptcy Act itself gives him that better title, for example, questions of fraudulent preferences; but where a trustee in bankruptcy does not stand in any higher position than the bankrupt himself would have stood, the Bankruptcy Court ought not to assume jurisdiction but should leave the matter to be dealt with by the ordinary courts. In the latter case Lord Selborne, L.C., said that the general proposition that whenever a trustee in bankruptcy has a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy was a proposition entirely without warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority. The position in England seems to be that the Bankruptcy Court does not entertain simple money claims by the trustee or Official Receiver in bankruptcy against strangers to the bankruptcy but that such claims are tried in other Courts unless there is an admission by the stranger to the bankruptcy on an examination that he is indebted to the insolvent, in which cases Sub-section (4) of Section 25 of the English Bankruptcy Act enables the Court to make an order upon him for payment, although Rankin, J., in *Jnanendra Bala Debt v. The Official Assignee of Calcutta* I. L. R.(1925) C. 251 said, ""The power under the English Act has hardly been exercised but it is quite clear that it is exercisable,"" and the English section is the prototype of Section 36 of the Presidency Towns Insolvency Act which before the recent amendment differed from it in that the Court could on the examination of such a person on being satisfied that he was indebted to the insolvent make the order for payment. This distinction has, however, now been removed by the Presidency Towns Insolvency (Amendment) Act of 1927, Sub-section (4). It seems, therefore, that even u/s 25 of the English Bankruptcy Act the Bankruptcy Court rarely exercises the power it has given to it by that section and Ex parte Brown (1879) L.R. 11 Ch.D. 148 and Ellis v. Silber (1872) L.R. 8 Ch. App 83 are authorities for the statement that in England the Bankruptcy Court ought not to entertain simple money claims against strangers to the bankruptcy. But it is a question whether the Bankruptcy Court in England has not a discretion nevertheless to entertain such claims but does not exercise it. Conditions in England are totally different from those in this country and the collection of simple money debts where they are disputed by the debtors is a comparatively simple, speedy and

inexpensive matter, whereas in India if the Official Assignee is to be compelled to file suits in every case against a stranger who contests the claim,

his position will be an impossible one. He will have to incur heavy expenses in order to file those suits and will be obstructed by those who are

indebted to the insolvent at every turn and there is no question that, if there is a discretion in the Insolvency Court to decide such claims in that

Court and it is properly exercised, the collection of the assets of the insolvent must be a much simpler and less expensive matter. The question is

whether Section 7 does give the Insolvency Court such a discretion and the views expressed by Rankin, J., in *Jnanendra Bala Debi v. The Official*

Assignee of Calcutta I.L.R.(1925) C. 251 are of great assistance on this point. The facts in that case were that a lady was alleged by the Official

Assignee to be a mere benamidar for the insolvent and she was summoned u/s 36 of the Presidency Towns Insolvency Act and as a result of the

examination of the lady the Official Assignee moved the Court for a declaration that she was merely a benamidar for the insolvent. On page 258,

Rankin)., stated as follows:

The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have

been to commence a suit against the lady for a declaration that she was a benamidar for the insolvent. But u/s 7 of the Presidency Towns

Insolvency Act this Court in its insolvency jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person

who carries on a retail business, becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due

to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against

whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction, and in any ordinary case any such

motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the insolvency

jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases

within Section 55 or 56 of the Presidency Towns Insolvency Act. There are many other cases. There may be cases, for example, where a

property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully

claimed if the opposite party cannot bring himself within the protective Sections. There may be cases where a transfer can be set aside if it is after

an adjudication order. There are cases which come u/s 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right

which belongs to creditors us such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to

this jurisdiction only when he has a higher title than the "insolvent"s, is not a rule of law in the sense that the Insolvency Court has not the

jurisdiction to entertain such a case and, secondly, that it is not restricted only to Sections 55 and 56. But the rule is well established if it is not rigid

and it is necessary in fairness to third parties who cannot help their creditors, debtors or cestuis qui trustent going insolvent, who may live far from

Calcutta, and whose right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot

undertake in its Insolvency Jurisdiction to collect debts all over India or to decide on motion all classes of disputes merely because an insolvent or

his estate is a party.

9. It is, I think, clear from this that Rankin, J., considered that the Insolvency Court had discretion u/s 7 to deal with simple money demands and

that right apparently has been exercised in the Calcutta High Court on its Insolvency Side. But I also gather from his observations that the usual

procedure is not to proceed by way of motion but by regular suit. On page 263 after dealing with the examination u/s 36, Rankin, J., says:

It is quite true there is power to order the examination to be done by a Commissioner, but in that case I think it tolerably clear that sub-Sections

(4) and (5) are out of action altogether although the same result can be obtained by proceeding u/s 7 and using the deposition as evidence against

the respondent. What is contemplated under these sub-Sections is the most summary of all proceedings, namely, an order made upon the witness

there and then and without previous notice and it would be absolutely wrong ever to act under Sub-section (4) or (5) unless there was a case so

free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu*. It is quite extravagant to suppose that in this case

and under this section any order could have been made. A question of this sort whether a purchase ten years ago in the name of a lady was a

purchase benami is a long way from being within anything that Section 36 contemplates. The correct course in these cases where there is any real

conflict is either to proceed by way of a motion before the Judge in Insolvency or to proceed by way of suit.

10. I see no reason for differing from the view expressed by Rankin, J., but the question is whether the amendment to Section 7 and Section 36

has altered the position as it then was in 1925 when that case was decided. The amendment to Section 36 I have already referred to and I now

propose to deal with Section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 which amends Section 7 of the Act of 1909. The

amendment is contained in a proviso which is as follows:

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.

11. 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. 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.

12. In the result. I agree with the learned Chief Justice and my brother Odgers, J., that the judgment of brother Waller, J., should be confirmed and the appeal of the Official Assignee dismissed.