

that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case; and that if such a suit did lie it would fall under Art. 29 and would be barred. I, therefore, would dismiss this appeal with costs.

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STEPHEN J. I agree.

*Appeal dismissed.*

Attorney for the appellant company: *J. C. Dutt.*

Attorneys for the respondent company: *Pugh & Co.*

J. C.

## INSOLVENCY JURISDICTION.

*Before Chitty . .*

*In re J. M. LUCAS AND ANOTHER.\**

*Insolvency—Practice—Presidency Towns Insolvency Act (III of 1909), s. 36, (4), (5), whether applicable to contentious matters.*

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Section 36 (4) and (5) of the Presidency Towns Insolvency Act, 1909, is intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging to an insolvent, where there is no dispute; it is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment.

### APPLICATION.

These were two applications on behalf of the Official Assignee under s. 36 of the Presidency Towns Insolvency Act, 1909. The first under s. 36 (5) prayed that Mrs. Amy Zemin, the mother-in-law of the insolvent J. M. Lucas, should be ordered to deliver over to the Official Assignee certain immoveable properties,

\* Application in Insolvency Suit No. 50 of 1912.

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namely, Nos. 40, 41, 41-1, 41-2, and 42, Elliott Road, Calcutta, as being the property of the insolvent and now in her possession. These properties had been transferred to Mrs. Zemin by J. M. Lucas by a conveyance bearing date September 26, 1911. The consideration for the transfer was expressed to be a sum of Rs. 50,000.

On February 21, 1912, J. M. Lucas and his brother C. J. Lucas were adjudicated insolvents on their own petition. An order was made for Mrs. Zemin's examination under s. 36, and she was examined on March 8, 1913, and in the course of her examination she stated with regard to the consideration money that a sum of Rs. 30,000 had actually been paid by her to J. M. Lucas, and that to discharge the remaining Rs. 20,000 she had released two debts of 12,000 and Rs. 8,000 respectively, due from J. M. Lucas to her on account of loans advanced by her in 1904.

The second application was under s. 36 (4) of the Act for an order that one George Edmond Pereiro should pay to the Official Assignee four sums of Rs. 460, Rs. 901-12-9, Rs. 5,750 and Rs. 6,750, as money received by him from the insolvents by way of fraudulent preference and also a sum of Rs. 4,000 odd due from him to the insolvents in respect of other transactions. G. E. Pereiro was examined under section 36, but did not admit that these sums, or any of them were owing to the insolvents.

After the examination of Mrs. Zemin and of G. E. Pereiro, charges were framed in accordance with the provisions of s. 103 (b) of the Act against J. M. Lucas, one of such charges being in respect of the transfer of the Elliott Road properties to Mrs. Zemin and another being in respect of the alleged debt of Rs. 5,750 owing from G. E. Pereiro. On these charges J. M. Lucas was convicted and sentenced. He, thereupon preferred an appeal against his conviction, and this

appeal was pending at the time of these applications. Subsequently the appeal was allowed and the conviction quashed by Jenkins C. J. and Woodroffe J.

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*Mr. Avetoom* and *Mr. A. N. Chaudhuri*, for the Official Assignee. It is the practice of the Court to make orders under this section when it is satisfied that any person is indebted to the insolvent's estate, or is in possession of property divisible among the creditors. The powers were exercised under the corresponding s. 26 (1) of the former Act (11 & 12 Vict. c. 12); *In re Dwarkanath Mitter* (1).

*Mr. B. Chakravarti* and *Mr. B. K. Lahiri*, for Mrs. Zemin, and *Mr. Langford James*, for G. E. Pereiro. These applications are misconceived: section 36 was only intended to be employed in cases when possession of the insolvent's property is admitted. s. 36 (4) and (5) corresponds to s. 27 (4) and (5) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the language there is—"If any person on examination before the Court admits," etc. Where the title or indebtedness is disputed, the Official Assignee must either file a suit in the ordinary way or make a substantive application as contemplated by Rule 5 (d) of the Insolvency Rules of the High Court corresponding to Rule 6(e) of the Bankruptcy Rules, 1886.

*Cur. adv. vult.*

CHITTY J. This is an application presented under section 36 (5) of the Presidency Towns Insolvency Act, 1909, by the Official Assignee praying that Mrs. Amy Zemin, who was examined under that section in the matter of C. J. and J. M. Lucas, insolvents; should be ordered to deliver over to the Official Assignee certain immoveable property situate in

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Elliott Road, Calcutta, as being the property of the insolvent J. M. Lucas and now in her possession.

The insolvents were so adjudged on their own petition on February 21, 1912. Admittedly the property in question was conveyed to the witness, who is the mother-in-law of J. M. Lucas, by deed dated September 26, 1911, less than five months before the adjudication. The conveyance purports to have been made (subject to a mortgage and further charge of the Phoenix Assurance Co. Ltd.), for a consideration of Rs. 50,000 paid by Mrs. Zemin to J. M. Lucas. The story of the witness, as disclosed on her examination, was that Rs. 30,000 was actually paid, the other Rs. 20,000 being a debt due to her by her son-in-law for two loans of Rs. 12,000 and Rs. 8,000 made by her to him in 1904.

Mrs. Zemin was examined on March 8, 1913. Subsequently J. M. Lucas was proceeded against under section 103 of the Act, one of the charges relating to this transfer. He was tried before me and found guilty. He has appealed, and the hearing of the appeal has been postponed until orders have been passed on this application. In my opinion, the two matters are in no way dependent one upon the other. An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. A charge under section 103 may be substantiated by oral and documentary evidence and the notes of the examination of the insolvent may be used against him. In this particular case, Mrs. Zemin was not examined in the proceedings under section 103 either for or against the insolvent. This application must be decided on her statement and her statement alone. The criminal charge depended upon altogether separate evidence.

Section 36 is copied from section 27 of the Bankruptcy Act, 1883, with this difference. The English Act says :—“ If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may on the application of the Official Receiver or Trustee order him to deliver ” etc. Here the words are :—“ If on the examination of any such person the Court is satisfied that he has in his possession ” etc. In my opinion, there is very little distinction to be drawn between, the two modes of expression. Under the Indian Act, it may not be necessary to have an express admission from the witness as it is in England, but the fact of possession must appear from his examination, which amounts to very much the same thing, because the Court can only proceed on the witness’ statements and no evidence can be called to contradict them.

In this case it was argued that Mrs. Zemin’s statements could not be accepted as true, that what she said was so improbable that no Court could believe her. I agree, but even assuming that she is not worthy of credit, it does not follow that the converse of what she has stated can be held to be proved *on her examination*, and that is what is necessary for an order under this section. It is not suggested that Mrs. Zemin has made any statement which could be construed into an admission or be taken as satisfactory proof that this was a bogus transaction. It may well have been that, and in the criminal proceedings on other evidence I have held that it was. It cannot, however, be said to be satisfactorily established on her examination.

I regret this result, but in my opinion the Official Assignee has adopted the wrong procedure. What he should have done was to make such an application as is provided for by rule 5 (d), on which evidence could

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have been taken for and against, and the question of title properly decided. In my opinion, section 36 (4) and (5) was intended to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent when there was no dispute. It was never intended for contentious matters such as the present, or for following property the subject of fraudulent preference or dishonest concealment. It appears to me unnecessary to refer to section 26 of the Indian Insolvency Act, 1848, or to cases decided upon it. The procedure now introduced is not the same, and is manifestly taken from the English Act of 1883. The application must be refused, but in the view that I take of Mrs. Zemin's evidence I make no order in her favour for costs.

The application for an order under section 36 (4) against George Edmond Pereira must fail for the same reasons. In this case it is asked that he be ordered to pay to the Official Assignee four sums Rs. 640, Rs. 901-12-9, Rs. 5,750 and Rs. 6,750 aggregating Rs. 14,041-12-9 received by him from the insolvents and also Rs. 4,000 being the amount advanced to him by the insolvents for the purchase of their respective shares in their father's estate. I am of opinion that this application must fail for the reasons given above in Mrs. Zemin's matter. The first four sums are said to be payments made by way of fraudulent preference to Pereira who is entered in the insolvents schedule as a creditor for Rs. 10,991-1. One of these sums Rs. 5,750 or the shellac representing it, has been made the subject of a charge in the criminal case, and J. M. Lucas has been convicted on that charge. It is true that Pereira has mentioned these four sums, but there is nothing in his answers amounting to an admission or satisfactory proof that these sums or any of them belong to the insolvent. As regards the Rs. 901-12-9

he did say that if the Court ordered, he would pay it but that is all.

As I have said above, in my opinion the procedure laid down by section 36 is inappropriate in dealing with cases of fraudulent preference. I must not be regarded as accepting Pereiro's statements as correct. I have little doubt that they are false.

As to the Rs. 4,000, I do not think that the Official Assignee could claim this in any case. Subsequently to the examination, which closed in April 1913, *viz.*, on June 5, 1913, the Official Assignee has executed a conveyance in favour of Pereiro of the shares of the insolvents in their father's estate. He cannot now be allowed to say that the insolvents and not Pereiro were the purchasers.

This application also fails but, as in Mrs. Zemin's case, I make no order as to costs.

H. R. P.

*Applications refused.*

Attorneys for the Official Assignee : *Gregory & Co.*

Attorneys for Mrs. Zemin & G. E. Pereiro : *R. M. Chatterjee.*

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