

APPELLATE CIVIL.

Before Sir Owen Beasley, Chief Justice, and Mr. Justice Cornish.

1937,
April 6.

EVELYN POPALY (SECOND RESPONDENT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (APPELLANT),
RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), sec. 36, sub-sec. (5)—Scope of—Wife of insolvent—Examination of, under sec. 36, sub-sec. (5), to determine the question of insolvent's title to certain immovable property in her possession—Sec. 7—Proceedings under, against insolvent's wife, if barred by such examination.

Sub-section 5 of section 36 of the Presidency-towns Insolvency Act relates only to property admittedly belonging to the insolvent and not to property, the ownership of which is in dispute. Proceedings by the Official Assignee under section 7 of the Act against the wife of an insolvent to determine the question of the insolvent's title to certain immovable property in her possession are not barred by reason of her having been examined under section 36 of the Act.

APPEAL from the order of WADSWORTH J. dated 12th February 1937 and passed in the exercise of the insolvency jurisdiction of the High Court in Application No. 12 of 1937 in Insolvency Petition No. 271 of 1936.

V. Rajagopala Ayyar and K. G. Srinivasa Ayyar for appellant.

K. S. Krishnaswami Ayyangar for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—The Official Assignee applied to the Insolvency Court under section 7 of the

* Original Side Appeal No. 13 of 1937.

Presidency-towns Insolvency Act for a declaration that certain houses are the property of the insolvent purchased in the name of his wife, the second respondent, or in the alternative that the insolvent has a half interest in those houses. At the hearing before WADSWORTH J. the second respondent raised the preliminary objection that, as the second respondent had been examined under section 36 of the Act, the proceedings against her under section 7 were barred. That objection the trial Judge overruled holding that the previous examination under section 36 of the Act was no bar to the proceedings before him. The hearing of the application has been stayed pending this appeal.

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The point before us is, to what extent this case is covered by the Full Bench decision in *Official Assignee, Madras v. Narasimha Mudaliar*(1), and for its determination depends upon whether the subject-matter of the application is one which falls within sub-section 5 of section 36 of the Act.

The summons under section 36 reads as follows :

“ Take notice that you are hereby required to appear before the Master in Chambers on Thursday the 20th day of August 1936 at 3 p.m. and to give evidence touching the insolvent, his dealings and property and regarding the properties standing in your name and suspected to be his properties and to produce any documents in your possession or control relating to the said properties standing in your name and acquired by you since 1928 and the pass books of all the banks in which you have had accounts from the commencement up to date and also all documents relating to the fixed deposit and chit transactions had by you.”

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

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From the questions put in the examination of the second respondent it is perfectly clear that the sole object of the examination was to establish the fact that the houses had been purchased by the insolvent in her name, that is to say, that the purchases were *benami*. The second respondent denied that the property had been purchased with her husband's money, and asserted that she had herself purchased the houses out of her own funds. The appellant's case is that this was an examination to establish that the second respondent had in her possession property belonging to the insolvent and that no admission to that effect having been got from her, proceedings under section 7 of the Act could not be taken against her without her consent by reason of the amendment of section 7 by section 2 of Act XIX of 1927 which adds the following proviso :

“ Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section.”

In *Official Assignee, Madras v. Narasimha Mudaliar*(1), which was a case of a simple money claim, it was held that, when once the Official Assignee has summoned a witness under section 36 of the Act and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit unless the witness agrees to the disposal of the matter in the Insolvency Court. In a later decision, namely, *Chinnappa Mudali v. Official Assignee, Madras*(2), it was held that the amendment of section 7 of the Act by section 2 of the amending Act (XIX of 1927)

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

(2) (1931) I.L.R. 55 Mad. 385.

refers only to such proceedings under section 36 of the Act as come under sub-section 4 which deals with simple money claims and sub-section 5 which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters and that sub-section 5 of section 36 does not touch the case of a person who is examined for the purposes of ascertaining whether the status of joint family is subsisting between the insolvent and the other members of the family and whether a business is a joint family business. The Full Bench case was on the question of simple money claims and was distinguished in *Chinnappa Mudali v. Official Assignee, Madras*(1) on that ground. On page 387 it is stated :

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

The appellant's endeavour, in consequence of these two decisions, has been to show that the matter is one under sub-section 5 of section 36, contending that the sub-section embraces not only cases where the property admittedly belongs to the insolvent but also where the Official Assignee contends that property admittedly in the possession of the person examined belongs to the insolvent and not to the person in whose possession it is and that if the person examined denies that the property belongs to the insolvent and asserts that it belongs to him or herself, it is a denial that that person is in possession of property belonging to the insolvent and therefore the sub-section applies. On the other hand, Mr. K. S. Krishnaswami Ayyangar contends that

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the section has in contemplation only cases where it is conceded that the property belongs to the insolvent and its possession is alleged to be with the person examined and not cases where the title to property is in issue. It is for us to decide which of the two contentions is correct. The matter is singularly bare of authority and the two cases already referred to and the Calcutta decision to which reference is made in the Full Bench case and an earlier decision of this High Court, namely, *Abdul Khadar Sahib v. The Official Assignee of Madras*(1), appear to be the only ones relating to it. In the last-named case the scope of section 36 was discussed and it is stated that the main object of section 36 is discovery. There, the facts were that property had been transferred by the insolvent four months before the order of adjudication though under circumstances which might render the transfer voidable under section 55 of the Presidency-towns Insolvency Act, and it was held not to be "property belonging to the debtor" within the meaning of section 36 (5) of the Act, and that it was not therefore open to the Court under that section on the examination of the transferee to declare the transaction bad under section 55 and direct the delivery of property to the Official Assignee, and that the object of section 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary

(1) (1913) 25 M.L.J. 308.

transfers, fraudulent preferences and cognate matters. On page 310 WHITE C.J. says :

“ Now, I do not think it can be held that the property in question in this case at the time that this examination was held can be said to be property belonging to the insolvent within the meaning of the sub-section. *Prima facie* it belonged to the man in whose name the title deeds stood and who had taken a transfer of property in January 1912, i.e., about four months before the date of adjudication.”

This case, in my opinion, strongly supports the contention of the respondent. It shows that the sub-section has in view only the case of property admittedly belonging to the insolvent at the time of the examination. The object of the sub-section is to enable the Official Assignee to discover its whereabouts. The procedure in sub-sections 4 and 5 of section 36 is of the most summary nature ; and before the amendment of those sub-sections, if the Court, on the examination of the person, was satisfied under sub-section 4 that he was indebted to the insolvent and under sub-section 5 that he had in his possession any property belonging to the insolvent, the Court could at once order the payment of the amount owing or the delivery up of the property to the Official Assignee. Clearly sub-section 5 at that date did not enable the Court to pass any such drastic order under this very summary procedure in cases where the title to property was in issue. The amendment substituted for “ if on the examination of any such person the Court is satisfied ” the words “ if on his examination any such person admits ”. The amendment does not touch the words “ property belonging to the insolvent ”. “ Property belonging to the insolvent ” both before and after the amendment has the same meaning.

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I am satisfied that sub-section 5 to section 36 relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under section 7 of the Act are therefore not barred by reason of the examination of the second respondent under section 36 of the Act and this appeal fails and must be dismissed with taxed costs.

CORNISH J.

CORNISH J.—I agree. In his application to have Mrs. Popaly examined the Official Assignee stated that she had considerable properties in her name and that his information was that these properties were purchased with moneys belonging to her husband, the insolvent. Neither the application nor the summons indicates the character of these properties, but it appears from the examination of Mrs. Popaly that they are houses. The purpose of the examination was, therefore, to discover whether Mrs. Popaly or the insolvent was the owner of this immovable property. This involved enquiry into the title to the property, which is a different thing from discovery whether Mrs. Popaly was in possession of property belonging to her husband. Indeed, property which *prima facie* belongs to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within the meaning of section 36 (5); *Abdul Khadar Sahib v. The Official Assignee of Madras*(1). There is nothing in the amended section 7 of the Act to prevent the Insolvency Court from deciding a disputed question of title between the Official Assignee and some other person. It is open to the Court if it thinks fit to refer the question for determination

(1) (1913) 25 M.L.J. 308.

in a suit. That is a matter within the Court's discretion. But whether the Official Assignee proceeds under section 7 or by suit, he can only recover by the strength of the insolvent's title to the property which he is asserting, and which he must establish. The jurisdiction given to the Insolvency Court by section 7 to decide all questions arising in any case of insolvency is qualified only to the extent laid down in the proviso to the section. What exactly is intended by the words in the proviso "any matter arising under section 36" is not at all clear, but I do not think they necessarily mean any matter which has been the subject of examination under section 36. If that had been the intention the Act could easily have said so. The result of the Full Bench ruling in *Official Assignee, Madras v. Narasimha Mudaliar*(1) and the later Bench decision in *Chinnappa Mudali v. Official Assignee, Madras*(2) is that there are two matters arising under section 36 which are subject to the special provision, namely, the question under sub-section 4 whether the person examined is indebted to the insolvent, and under sub-section 5, whether he is in possession of property belonging to the insolvent. If he admits indebtedness or possession there is nothing for the Court to decide; an order for payment or delivery may be made on the application of the Official Assignee. But if he denies indebtedness to the insolvent or possession of the insolvent's property, then, unless the parties otherwise agree, the jurisdiction of the Insolvency Court to decide the matter is excluded and the Official Assignee must proceed

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

(2) (1931) I.L.R. 55 Mad. 385.

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by suit to enforce his claim. The subject-matter of Mrs. Popaly's examination, however, is not a matter arising under section 36, sub-section 4 or sub-section 5. It is a question of title which falls outside the scope of these sub-sections. I am accordingly of opinion that the objection raised to the Insolvency Court's power to decide it is ill-founded and that the appeal fails.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice King.

IN RE VELAYUDHAM PILLAI AND ANOTHER
(ACCUSED), APPELLANTS.*

1937,
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*Indian Penal Code (Act XLV of 1860), ss. 28, 232, 235 and 243
—Coins made to resemble genuine coins—Maker's intention to foist a false case—Counterfeit coins, if, within the definition of the Indian Penal Code.*

If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of counterfeit coins given in the Indian Penal Code.

APPEAL against the judgment dated 11th November 1936 of the Additional Sessions Judge of the Court of Session of the Coimbatore Division in Case No. 130 of the Calendar for 1936.

V. L. Ethiraj (with him *A. S. Sivakaminathan*) for appellants.
—The conviction of the appellants is illegal. Section 28 of the Indian Penal Code defines "counterfeit coins". The intention required thereunder is "to practise deception or knowing it to be likely that deception will thereby be practised". According to the prosecution case, the coins here were made with the

* Criminal Appeal No. 666 of 1936.