ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

IN RE GOOLBAI BOMANJI PETIT. 1933 March 1

THE BANK OF INDIA, LTD. (APPELLANTS AND PETITIONING CREDITORS) *v.* PHEROZSHAH B. PETIT (RESPONDENT AND APPLICANT)

THE BANK OF INDIA LTD. (APPELLANTS AND PETITIONING CREDITORS) *v.* DINBAI FARDUNJI PETIT (RESPONDENT AND APPLICANT).*

Presidency-towns Insolvency Act (III of 1909), section 36—Examination of witnesses—Discovery of insolvent's property and getting information about insolvent's dealing with his estate—Scope of examination.

Section 36 of the Presidency-towns Insolvency Act confers upon a Court a power which is general in its character. An order for examination of witnesses under that section ought not to be refused or the scope of the examination limited merely on the ground that the information to be obtained on such an examination may result in a litigation against the person sought to be examined. One of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not.

Re Haripada Rakshit: Ex parte Binodini Dassee,[1] followed.

In the matter of G. H. Ghanchee and Sons,[2] *In re Mahomed Esmail Fazla*[3] and *Haji Dada Nurmahomed* v. *Ismail Karim*,[4] doubted and distinguished.

If circumstances bring the case within section 36 (*1*) the examination of a witness can be ordered. Such an examination may or may not result in some admission of liability to the estate on the part of the person examined. If there is an admission, then a summary order can be made under sub-section (*4*) or sub-section (*5*) of that section. If there is no such admission, then no summary order can be made. The mere fact that an admission is not likely to be made in the course of such an examination, is no ground for refusing to direct an examination under that section.

The Court ought not to make an order for the examination of a witness under section 36 of the Act unless there is ground for thinking that the order is likely to be of some use.

APPLICATION for examination of witnesses under section 36 of the Presidency-towns Insolvency Act.

*O. C. J. Insolvency Nos. 607 of 1931: Appeals Nos. 39 and 40 of 1932.

(1) (1916) 44 Cal. 374.
(2) (1929) 7 Rang. 675.
(3) (1925) 27 Bom. L. R. 551.
(4) (1928) 31 Bom. L. R. 420.

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One Gulbai Bomanji Petit was adjudicated insolvent on February 16, 1932, on the application of the Bank of India Ltd. who had obtained a decree against her for about Rs. 1,57,000.

On June 13, 1932, on the application of the Bank, Barlee J. passed an order directing that Pherozshaw Bomanji Petit and Bai Dinbai Fardunji Petit, the son and daughter respectively of the insolvent, should be examined under section 36 (*1*) of the Presidency-towns Insolvency Act, as regards the estate and effects and dealings and transactions of the insolvent. Pherozshaw and Dinbai on being served with this order applied to the Court to have the said order rescinded or its operation restricted so as to exclude from the scope of the said examination certain questions relating to some mortgages and other transactions between the applicants and the insolvent. The alternative prayer was based on the ground that one of the objects of the proposed examinations was to fish out information on which the Official Assignee and the Bank might succeed in setting aside the transfers in favour of the applicants. The application was heard by Wadia J., who on July 14, 1932, ordered the examination to be restricted as prayed for by the applicants. He delivered the following Judgment.

WADIA J. Section 36 of the Presidency-towns Insolvency Act provides a summary mode of discovery of the insolvent's property for the purpose of delivering the same to the Official Assignee without recourse to any litigation, if the person examined admits it as being in his possession and belonging to the insolvent. In my opinion the section has to be strictly construed. That is apparent from the amendment of sub-sections (*4*) and (*5*) in which the words formerly were " If on the examination of any such person the Court is satisfied," whereas the words now are " If on his examination any such person admits." That is also apparent from the proviso to section 7 of the Act which lays down that,

unless all parties agree, the power given under that section 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.

Counsel who appeared for Dinbai Petit and Pherozshah Petit have pointed out to the Court that in the first place there is not even a letter from the petitioning creditors to either of them, asking for any further information which has not been replied to or in which information has been purposely withheld. They have also stated that all the information about the indebtedness of the insolvent to her daughter as well as to her son has also been given to the Official Assignee. They further state that such account books as the insolvent had in her possession have been lodged in the Official Assignee's office. Counsel next referred me to the decision in *In re Mahomed Esmail Fazla*,[1] in which the learned Judge held that the procedure under section 36 was inappropriate where the dispute arose as to a mortgage which it was alleged was obtained by fraud, coercion, undue influence, etc. That decision follows the judgment of Mr. Justice Chitty in *Lucas, In re*.[2] There is also another decision in *Haji Dada Nurmahomed* v. *Ismail Karim*,[3] in which Mr. Justice Davar has stated the principles under which orders should be made under section 36. He held that such orders were purely discretionary, and that they were intended, first, for the benefit of the general body of creditors, and, secondly, to enable the Official Assignee to establish his rights against the creditor or creditors in the insolvency who are brought upon the scene by means of fraudulent preferences or fraudulent tactics resorted to, and who usually are the relatives and friends of the insolvent, prior to the insolvency. He goes on to add at page 422 that all the decided cases point to one conclusion that the provisions of the section "are not to be used as

[1] (1925) 27 Bom. L. R. 551. [2] (1914) 42 Cal. 109.
[3] (1928) 31 Bom. L. R. 420.

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an instrument of torture and annoyance in preparing for litigation, or for extracting information from a genuine claimant, who in law is not bound to give that information." He further adds that the scope and utility of the section has been considerably restricted by the amendment in sub-sections (*4*) and (*5*) thereof. It is true that on the facts of the case he allowed the order made by him at the instance of the Official Assignee for the examination of a mortgagee under section 36 to stand, because he came to the conclusion that if the mortgage that was impeached was genuine, there was nothing to prevent the mortgagee from placing all his books before the Official Assignee, but that had not been done. It has been alleged here by the petitioning creditors that all the books of the insolvent have not been lodged in the Official Assignee's office. But there is no allegation anywhere that there is any relevant book or voucher or paper which has been kept back by Bai Dinbai or by Pherozshah or withheld by any of them from the Official Assignee, or for which the Official Assignee has asked and delivery has been refused. Each case stands upon its own facts and circumstances, but the principles referred to in *Haji Dada Nurmahomed* v. *Ismail Karim*[1] are, in my opinion, correct, and I agree with them. I may also point out in passing that that decision has been followed by the Burma Court in *In the Matter of G. H. Ghanchee and Sons*.[2] Mr. Coltman for the petitioning creditors relied on *Re Haripada Rakshit: Ex parte Binodini Dassee*,[3] which has been approvingly referred to by Sir Dinshah Mulla in his Commentary on the Insolvency Act at page 210. That is also a decision of a single Judge, and it was therein held that it was no ground for refusing an order under section 36, because litigation might ultimately ensue between the Official Assignee and the party to be examined. I do not agree with this statement which is too wide and general

[1] (1928) 31 Bom. L. R. 420. [2] (1929) 7 Rang. 675.
[3] (1916) 44 Cal. 374.

and I prefer to follow the rulings of this Court. The petitioning creditors probably relied upon the case in *Re Haripada Rakshit: Ex parte Binodini Dassee*[1] when their manager Mr. Gray stated in paragraph 5 of his affidavit on the notice of motion of Bai Dinbai as follows :—

"With reference to paragraph 4 of the said affidavit no suit has yet been filed to set aside the transfers made in favour of the applicant. One of the objects of examining her undoubtedly is to elicit information on which the Official Assignee and the Bank can decide whether or not steps should be taken to have the transfers in question set aside, an object which is entirely consistent with the provisions of section 36 of the Act."

In my opinion such an object is inconsistent with the strict interpretation of section 36 of the Act for the reasons which I have already given before. It appears to me that the real object of the proposed examination of the insolvent's son and daughter is to harass them and to get material by means of this kind of examination in order to prepare for future litigation, and thereby indirectly to compel them to disclose their defences in the intended proceedings to their prejudice. Moreover, this application is not made for the benefit of the general body of creditors. No other creditor has joined the petitioning creditors in this application, and the application has not been made by the Official Assignee on behalf of all the creditors, but by one creditor and for his own benefit only. Further, the public examination of the insolvent has also not yet been taken. I am, however, not prepared to hold that the order made by Mr. Justice Barlee should be altogether rescinded, and I, therefore, direct that the examination of Bai Dinbai be so restricted as to exclude from her examination all questions relating to the sale by the insolvent to her of the Garden Reach property at Poona, the second mortgage of the Sheikh Memon Street property and jewellery, and also thirdly the mortgage of Khetwadi property in her favour. I would mention that the petitioning creditors are at liberty to ask any question relating to the alleged management of

[1] (1916) 44 Cal. 374.

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the insolvent's affairs by her daughter Bai Dinbai and her son Pherozshah, or any question relating to any jewellery which they allege has been suppressed by the insolvent, or any question relating to any books of account or papers or vouchers also alleged to have been suppressed by the insolvent. The restriction only applies to the extent which I have indicated above. Similarly with regard to Mr. Pherozshah Petit I also direct that his examination be restricted so as to exclude from it all questions relating to the second mortgage made by him in favour of the insolvent in August 1928 and the reconveyance of the second mortgage made by the insolvent on May 12, 1931. The petitioning creditors are at liberty to ask him any question which does not fall within the scope of this restriction.

THE bank appealed.

Sir Chimanlal Setalvad, for the appellant.

Sir Jamshed Kanga, Advocate General, for the respondents.

BEAUMONT C. J. These are two appeals from orders made by Mr. Justice Wadia sitting in insolvency. The orders were made in the insolvency of one Goolbai for the examination of the respondents on the two appeals, who are respectively the son and daughter of Goolbai. The appellants, the Bank of India, Limited, obtained a decree for Rs. 1,50,000 on January 31, 1931, against Goolbai. They presented a petition on August 31, 1931, for getting her adjudicated insolvent, and on February 16, 1932, Goolbai was adjudicated insolvent. The evidence filed on behalf of the bank discloses various dealings between the insolvent and her son and daughter into which it is not necessary that I should go in detail. It is sufficient to say that the transactions are of such a nature that on the face of them they may be open to attack in the insolvency of Goolbai. That being so, the bank made an application for the examination of the son and daughter, that is to say, the two respondents, under section 36 of Presidency-towns Insolvency

Act, and on June 14, 1932, Mr. Justice Barlee made an order for their examination. On July 14, Mr. Justice Wadia varied that order by excluding from the proposed examinations various specified matters, which in substance included all the particular matters referred to in the bank's evidence. The ground upon which the learned Judge imposed that restriction was, as I understand his judgment, that he thought that an order for examination under section 36 ought not to be made if as a result of the examination litigation between the Official Assignee and the party examined might ensue.

Now, section 36, sub-section (*1*), provides that 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. That section confers upon the Court a power which is general in its character; whenever the circumstances are such as to bring the section into operation the Court can require the person concerned to be examined, and I entirely dissent from the view that it is any ground for refusing or limiting the order that information to be obtained on the examination may result in litigation against the person examined. Indeed I think one of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not. I agree in that matter with the judgment of Mr. Justice Greaves in *Re Haripada Rakshit: Ex parte Binodini Dassee.*[1] Mr. Justice

[1] (1916) 44 Cal. 374.

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Wadia in his judgment has relied on the case of *In the matter of G. H. Chanchee and Sons*,[1] and on two decisions of this Court, one, *In re Mahomed Esmail Fazla*,[2] a decision of Mr. Justice Crump, and the other a decision of Mr. Justice Davar, *Haji Dada Nurmahomed* v. *Ismail Karim*.[3] The view which commended itself to the Courts in those cases appears to have been that the provisions of sub-section (*1*) of section 36 are controlled by sub-sections (*4*) and (*5*) which provide a summary procedure for recovering money or property where there is no dispute. Sub-section (*4*) of section 36 provides that if on his examination the person examined admits that he is indebted to the insolvent, then the Court may make a summary order for payment against him; and sub-section (*5*) provides that if on his examination such person admits that he has in his possession any property belonging to the insolvent, the Court may make upon him a summary order to deliver that property to the Official Assignee. It appears that those two sub-sections were originally not limited to the case of the person under examination making an admission, and in the cases to which I have referred the learned Judges seem to take the view that, because the Act has been amended by providing that summary orders under those two sub-sections can only be made on an admission, that shows that it was intended to limit the operation of the whole section to cases in which an admission was likely to be extracted, that is to say, cases in which there was no serious dispute. I do not see the smallest justification for that construction of the section. The examination can be ordered when the circumstances bring the case within section 36, sub-section (*1*). The examination may or may not result in some admission of liability on the part of the person examined. If there is an admission, then a summary order can be made under sub-section (*4*) or sub-section (*5*); if there is no admission,

[1] (1929) 7 Rang. 675. [2] (1925) 27 Bom. L. R. 551.
[3] (1928) 31 Bom. L. R. 420.

and the witness may refuse to make an admission however clear are the facts against him, then no summary order can be made. But the mere fact that an admission is not likely to be made is no ground whatever for refusing to direct an examination. Mr. Justice Davar in the case in *Haji Dada Nurmahomed* v. *Ismail Karim*[1] said that the section should not be used for the purpose of instituting a fishing cross-examination for the purpose of eliciting information to be used in a subsequent suit. That no doubt is so; the Court must see that the section is not abused, and *prima facie* the Court ought not to make an order under section 36 unless there is ground for thinking that the order is likely to be of some use. But, as I have said, the mere fact that the result of the examination may be of use to the Official Assignee and may be a subject of inconvenience to the person examined in future litigation is no reason for not making the order.

The learned Advocate General on behalf of the two respondents has also contended that we ought in our discretion to refuse to make an unrestricted order under section 36 because he says that the two respondents have made a full disclosure to the Bank of all material matters. Well, if that is so, the order cannot possibly do them any harm. If the Bank has already in its possession full information, then it is no doubt wasting its money in proceeding with this order. But the Bank are entitled to say that they are not satisfied that full information has been given, and that they think they may acquire further useful information. On the materials which they disclose in their affidavit I am certainly not prepared to say that their view is necessarily wrong. In my opinion, therefore, the restrictions which the learned Judge incorporated into the two orders for the examination of these two respondents were not justified, and the two orders should be converted into

[1] (1928) 31 Bom. L. R. 420.

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the form they originally took when they were made by Mr. Justice Barlee.

The respondents desiring that the examination should take place before the Judge and the appellants not raising any objection we direct that the Judge take the examination himself rather than the Registrar.

Beaumont C. J. Appeals allowed. Respondents must pay the costs here and in the Court below.

RANGNEKAR J. On the question of fact I desire to say very little and agree with the view taken by the learned Chief Justice that on the facts and circumstances disclosed in the affidavits in this case the learned Judge was not justified in varying the order made by Mr. Justice Barlee under section 36 of Presidency-towns Insolvency Act for the examination of the two respondents in these two appeals.

On the question as to the true construction of section 36 of the Presidency-towns Insolvency Act, with the utmost respect to the learned Judge, I am unable to agree with the view which has found favour with him as regards the object and the scope of the section. As I understand the judgment of the learned Judge, he seems to think that section 36 provides a summary mode of discovery of the insolvent's property, for the purpose of delivering the same to the Official Assignee without recourse to any litigation, if the person examined admits it, as being in his possession and belonging to the insolvent. The learned Judge came to this conclusion on the ground that the section was amended in 1927. Before 1927 the words in sub-sections (4) and (5) were "If on the examination of any such person the court is satisfied etc." By the amendment these words were deleted and in their place the following words appear "If on his examination any such person admits etc." In support of his opinion the learned Judge relies on *In re*

Mahomed Esmail Fazla,[1] *Lucas, In re*,[2] *Haji Dada Nurmahomed* v. *Ismail Karim*,[3] and *In the matter of G. H. Ghanchee and Sons*.[4] The other ground on which the learned Judge thought that this case did not fall within the purview of section 36 was, that, as a result of holding the examination, litigation might ensue between the Official Assignee and the respondents.

The first two cases can be distinguished, and, in my opinion, do not support the view which the learned Judge has taken. In *In re Mahomed Esmail Fazla*[1] the real point was whether an order for delivery of property should be made summarily under the provisions of sub-section (*4*) or (*5*), and it was with reference to that point that Mr. Justice Crump made the observations on which Mr. Justice Wadia has apparently relied. The observations are as follows (p. 553) :—

"If it is correct to say, as I think it is, that section 36 (*4*) and (*5*) was intended to provide a summary procedure for ordering payments of debts due and delivery of property where there was no dispute...., it is obvious that the procedure under that section is inappropriate in the case of such disputes as we have here."

Lucas, In re.[2] The head-note in that case seems to me to be worded broadly and without reference to the actual point which arose for decision in the case. In that case an order was already made for examination of a lady under section 36 and as a result of such examination an application was made that she should be ordered to deliver over to the Official Assignee certain immoveable property as being the property of the insolvent. Dealing with that point the learned Judge at p. 112 observed :—

"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,"

and on the facts came to the conclusion that no such order could be made. In the last two cases referred to by

[1] (1925) 27 Bom. L. R. 551.
[2] (1914) 42 Cal. 109.
[3] (1928) 31 Bom. L. R. 420.
[4] (1929) 7 Rang. 675.

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Mr. Justice Wadia it was undoubtedly held that the amendment introduced in 1927 in sub-sections (*4*) and (*5*) of section 36 restricted the scope of the inquiry under the section. With all respect I am unable to agree with this view.

Under sub-section (*1*) of the section the Court has the power to summon any person known or suspected to have in his possession any property belonging to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property. Then, before the amendment of 1927, sub-sections (*4*) and (*5*) provided that if on examination the Court was satisfied that the witness was indebted to the insolvent or possessed property belonging to the insolvent, the Court had the power to order him to pay the debt or deliver the property to the Official Assignee, and it is only this latter power that the amendment of 1927 has curtailed. The wording of the amendment itself, in my opinion, shows that the legislature never intended to curtail in any manner the very wide power which it had conferred on the Court under section 36 (*1*) *for the purpose of inquiring into the dealings and* affairs of the insolvent.

With regard to the second ground I think the very object of such an examination is to obtain information as regards the affairs and the dealings of the insolvent and to see if proceedings should not be taken in the interests of the creditors as a whole for the purpose of challenging the transactions entered into by the insolvent, and to say that litigation might ensue as the result of such an examination would, in my opinion, defeat the very object with which this section has been enacted. In this respect I agree with the view which Mr. Justice Greaves has taken in *Re Haripada Rakshit : Ex parte Binodini Dassee.*[1] The same view has been taken by this Court in *In re Bhagwandas Narotamdas,*[2]

[1] (1916) 44 Cal. 374.

[2] (1897) 22 Bom. 447.

where though an order for examination of the two defendants who had filed their written statements was not made, the third defendant who had not filed his written statement was ordered to be examined under section 36. The only case in which, as far as I can see, any such order should not be made is where litigation has actually commenced and is pending between the parties with reference to the very question information about which is sought to be elicited by means of such an examination. The Courts in England have taken the same view. It is unnecessary to refer to the cases cited by Sir Chimanlal Setalvad, but I think I may refer to *Learoyd* v. *Halifax Joint Stock Banking Company*,[1] and at pages 692 and 693 the Court observed that the whole object was to get information in order to see what course ought to be followed by the Official Assignee with reference to some matter or claim in the insolvency. I think the true principle on which section 36 (*1*) is based is as stated by Wace on Bankruptcy at page 84 :—

"It is of the utmost importance that a trustee [in bankruptcy] should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors, if he were compelled to rely only upon such information as the bankrupt may be able or willing to give, or as he can ascertain from persons ready to assist him voluntarily. Without it, he would frequently be compelled to choose between abstaining from insisting upon a claim to property which he is probably entitled and commencing proceedings without knowing whether they are justified by the facts."

I agree that the order made by the learned Judge should be set aside and that made by Mr. Justice Barlee restored.

Attorneys for Bank of India : Messrs. *Craigie, Blunt & Caroe.*

Attorneys for P. B. Petit : Messrs. *Lam & Co.*

Attorneys for Dinbai Petit : Messrs. *Madhavji & Co.*

Appeal allowed.

B. K. D.

[1] [1893] 1 Ch. 686.