

In Re: Pushkar Narayan Brahmwar;

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Court : Mumbai

Decided On : Dec-21-1951

Reported in : AIR1953Bom19; (1952)54BOMLR719

Judge : Shah, J.

Acts : Presidency-towns Insolvency Act, 1909 - Sections 6, 7, 36, 36(1), 36(2), 36(3), 36(4), 36(5), 36(6), 36(7), 37 and 90; [Code of Civil Procedure \(CPC\), 1908](#) - Order 16, Rule 19; Presidency-towns Insolvency (Amendment) Act, 1927; Bankruptcy Act, 1914 - Sections 25, 25(1), 25(2), 25(3), 25(4), 25(5) and 25(6)

Appeal No. : Insolvency No. 31 of 1950

Appellant : In Re: Pushkar Narayan Brahmwar; ;In Re: Harischandra Sharma

Advocate for Pet/Ap. : P.P. Khambatta and ;B.M. Mistree, Advs.

Judgement :

ORDER

[1] This is a notice of motion taken out by one Harischandra Sharma, a proving creditor, in the insolvency of one Pushkar Narayan Brahm-war. The notice of motion is taken out for an order to summon before the Court under Section 36 of the Presidency-towns Insolvency Act, 3 of 1909, the following four persons -- Shri Brijnarayan Brahmwar, Shri Govind Ram Arora, Shri S. S. Kothari and Shri Har Narayan Arora, and to call upon them to produce the documents in their respective custody or power relating to the insolvent, his dealings or property and to call upon

Brijnarayan Brahmwar to produce all the relevant books and documents pertaining to the transactions stated to have taken place between the General Business Corporation and the sister concerns with which the General Business Corporation is stated to have had dealings, and the business carried on by the insolvent, including the books of account and other papers at the head office at Ajmer. All the four persons whose names have been set out have been duly served. Govind Kam Aroni has, however, written to this Court stating that he is unable to remain present in Court on the date fixed for hearing. Therefore, so far as he is concerned; the notice of motion is allowed to stand over.

[2] Out of the three remaining persons, S. S. Kothari is within the limits of the ordinary original jurisdiction of this Court, whereas the other two persons are outside the limits of the ordinary original jurisdiction of this Court and reside at a distance exceeding 200 miles from this Court. The applicant has stated in his petition that the insolvent was adjudicated on 1-3-1950, and in his deficiency statement' he has stated that he was the proprietor of the General Business Corporation, and that due to difficulties he had to borrow from professional moneylenders, and he had incurred debts to the extent of Rs. 2,19,911-14.3. The insolvent was publicly examined, and certain facts relating to his dealings with Brijnarayan Brahmwar, Govind Ram Arora, S. S. Kothari and Har Narayan Arora were disclosed. Those facts have been set out in the petition and extracts from the statements made by the insolvent have also been set out in paras. 6, 7 and 8 of the petition. In paras. 13, 14 and 15 of the petition certain other statements relating to his dealings with Brijnarayan Brahmwar have been set out. On the facts disclosed, the applicant has prayed that all the four persons, whose names I have set out earlier, appear to have been concerned with the transactions of the insolvent and should be examined under Section 36, Presidency-Towns Insolvency Act 'as they are persons who are capable of giving substantial information respecting the insolvent, his dealings or property and in fact they are persons who may rightly be said to have in their possession property belonging to the insolvent.' .

[3] I have no doubt that this is a case in which an order should be passed under Section 36, clause (1), Presidency-Towns Insolvency Act for their examination and

calling them to produce the papers and documents which have been referred to in the notice of motion. But the question arises whether this Court has jurisdiction over the persons, other than S. S. Kothari, (who are admittedly residing outside the jurisdiction of this Court and at a distance exceeding 200 miles) to call upon them to personally remain present before the Court for their examination and for production of the documents and papers set out in the notice of motion.

[4] Mr. Khambatta on behalf of the creditor has contended that this Court has jurisdiction to direct any person who is residing within the territorial limits of the Union of India to remain present before the Court and to be examined under Section 36, Presidency-Towns Insolvency Act and that the provisions of o. 16, E. 19, Civil P. C., have no application to a summons issued to such a person. In support of his contention, he has relied upon the authority of a decision reported in *in re, Dinaram Somani*, 27 Cal. W. N., 370. The Official Assignee has directed my attention to the observations made and opinion expressed by Sir Dinshah Mulla in his treatise on 'The Law of Insolvency in British India' (at pages 211 and 512, 1930 Kdn., under para. 312) that where a person to be examined under Section 36 resides more than 200 miles away from the Court house, the proper course is to issue a commission for his examination, whether he is a mere witness summoned for examination or a person believed to be indebted to the insolvent or to have in his possession property belonging to the insolvent, unless there are special reasons requiring his attendance before the Insolvency Court.

[5] The question is of general importance and must be decided with reference to the provisions of Section 36, Presidency-Towns Insolvency Act and the other provisions of that Act.

[6] Section 36, Clause (I), Presidency-Towns. Insolvency Act, provides :

'The Court may, on the application of the official assignee or 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.'

[7] Sub-section (2) of that section provides :

'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.'

[8] Sub-section (3) provides :

'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.'

[9] Under Section 37 of the Act, the Court has the power to issue commissions and letters of request for examination on commission or otherwise of any person liable to examination under Section 36 as it has for the examination of witnesses under the Code of Civil Procedure, 1908.

[10] Section 90, Clause (1) of the Act, provides :

'In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction.'

[11] The Sub-section is followed by a proviso :

'Provided that nothing in this Sub-section shall in any way limit the jurisdiction conferred on the Court under this Act.'

[12] Section 7 of the Act authorises the Court 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. The section is followed by a proviso which was added in the year 1927, and is as follows :

'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.'

[13] Order 16, Rule 19, Civil P. C., provides : 'No one shall be ordered to attend in person to give evidence unless he resides-

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.'

[14] The principal question to be decided is, whether a person summoned under Section 36, Presidency-towns Insolvency Act is in the position of a witness to whom the provisions of Order 16, Rule 19, Civil P. C., apply.

[15] The object of an examination under Section 36 is to obtain information as to the insolvent's property and his dealings therewith. Under the Presidency-towns Insolvency Act, the Official Assignee has the power to investigate into matters relating to the insolvent so as to enable him to collect and effectively to administer the estate. It is evident that for that purpose the Official Assignee must have the power to compel examination of the insolvent as well as of other persons who may assist him voluntarily or otherwise in the investigation of the affairs of the insolvent. The Official Assignee has to make up his mind before proceeding with a claim of the estate of the insolvent against other persons who may appear to be indebted to the estate, or may appear to have property belonging to the estate in their possession, and for that purpose before commencing proceedings he must collect information relating to the estate of the insolvent and his dealings. The examination, therefore, of persons who have had dealings with the insolvent is a

necessary step preceding the litigation which may have to be launched upon by the Official Assignee, For that purpose Section 36 of the Act authorises the Court at the instance of the Official Assignee or the proving creditor to examine persons who may have had dealings with the insolvent and it authorises the Court also to call upon them to produce property or documents in their possession. It is true that under Sub-sections

(4) and (5), after they were amended by Act 19 of 1927, only those persons who admit that they are indebted to the insolvent, or who admit that they have in their possession property belonging to the insolvent, can be called upon either to pay the debt admitted to be due by them, or to hand over the property to the Official Assignee. But it is pertinent to note that Sub-section

(6) of Section 36 makes the order made under Sub-sections

(4) and

(5) executable as a decree for payment of money or delivery of property under the Civil Procedure Code, 1903. Under Sub-section

(7) of Section 36, any payment or delivery made in pursuance of an order made under Sub-sections

(4) and

(5) is treated as a discharge in respect of such debt or property. Again, the examination which is held under Sub-sections

(3) of Section 36 is not of the nature of an examination of a witness in a proceeding between parties who are litigating their dispute before a Court. The examination as stated in Sub-sections

(3) is by the Court, and not by the parties before it. It may be that for facility the Court may allow the parties appearing before it to examine such person and put questions to him, but such questions are really put through the Court, and the examination is for all purposes by the Court. It is also provided in Sub-sections

(3) that a person so summoned is entitled to appear before the Court by counsel, and it follows that he would be entitled to make submissions before the Court. The examination held is in the nature of a secret proceeding. As observed in *In re Scharrer : Ex Parte Tilly*, (1888) 20 Q. B. D. 518 :

'A witness summoned for examination under this section is not, therefore, in the ordinary position of a witness called by a litigant party in order that he may be examined by the two litigant parties before the Court, but he is, so to speak, the witness of the Court. No doubt it has been the common practice, and a convenient practice, to allow the counsel or other representative of the trustee or the official receiver to put the questions, but still the conduct of the examination, rests with the Court.'

Again, as stated in *Learoyd v. Halifax Joint Stock Banking Co.*, (1893) 1 Ch. 686 :

'To talk of examination-in-chief, or cross-examination or re-examination in cases of this kind, is to use terms that are really not applicable' The whole object is 'to get information in order to see what course ought to be followed [by the Official Assignee] with reference to some matter or some claim in the insolvency.'

[16] It is evident from Section 36 that the order to summon a person who may appear to be concerned with the estate of the insolvent either for production of property or documents or to pay debts is a discretionary order and is passed only when the person applying establishes a prima facie probability that some benefit will result from the proposed examination. An order for examination is passed for the general body of creditors and not for any individual creditor.

[17] Section 36(1) refers to three classes of persons besides the insolvent who may be summoned to give evidence, and to produce documents in their possession: (a) persons known or supposed to have in their possession any property belonging to the insolvent, (b) persons supposed to be indebted to the estate of the insolvent, and (c) persons whom the Court deems capable of giving information respecting the insolvent and his property. The examination of persons known or supposed to be in possession of property or indebted to the estate is a step towards a contemplated proceeding against him. The person so summoned

does not come to support any case of a party, but has primarily to answer a case against him. The proviso to Section 7 indicates that the Court when holding an examination under Section 36 is really seeking to decide some case which the person who has been summoned is called upon to answer. It is an error therefore to assume that a person who is summoned under Section 36 as a person known or suspected to have in his possession any property belonging to an insolvent, or a person supposed to be indebted to the insolvent is in the position of an ordinary witness to whom a summons is issued under Order 16, Rule 19, Civil P. C. The summons to be issued under Section 36(1) is not a summons addressed to a witness in a suit or other civil proceeding, but is to be 'in such manner as may be prescribed.' Rule 53A framed by this Court under the Presidency-towns Insolvency Act requires that the summons shall be in the form No. 93 to Appendix with such variations as circumstances may require.

[18] Before the amendment of the Presidency-towns Insolvency Act by Act 19 of 1927, it was open to the Court to pass an order even if the person summoned objected to the delivery of property or denied his indebtedness. It was then open to the Court to investigate and adjudicate upon disputed questions relating to indebtedness of any person to the insolvent or his denial that he was holding any property of the insolvent. It is true that since the amendment of the Presidency-towns Insolvency Act in the year 1927, it is only where there is an admission of liability that the Court is entitled to call upon a person who is summoned to produce property or to pay the debt, but with the consent of the person so summoned, it is open by reason of the proviso to Section 7 to the Court to decide even disputed questions relating to the estate of the insolvent. All these are indications, in my view, that a person summoned for examination as being in possession of the property of the insolvent or indebted to the insolvent is a person against whom a proceeding is contemplated to be taken. Such a person does not occupy the position of a mere witness to be summoned under the provisions of Order 16, Rule 19, Civil P. C. In my view, therefore, the provisions of Order 16, Rule 19, Civil P. C., do not apply to persons summoned under Section 36, Presidency-towns Insolvency Act when they are known or suspected to have in their possession property of the insolvent, or are supposed to be indebted to the estate.

[19] The argument that Section 37 enables the Court to issue a commission for the examination of persons who may be summoned to give evidence before the Court under Section 36 is an argument which negatives the suggestion that the person so summoned is in the position of an ordinary witness. Section 90, Clause (1), makes the provisions of the Civil Procedure Code applicable to the proceedings under the Presidency-towns Insolvency Act, except where there is an express provision made on behalf of any particular matter. The power to issue commissions must, therefore, be regarded as duly conferred by Section 90, Clause (i), if the persons to be summoned under Section 36 were to be regarded as mere witnesses. Why then should the Legislature make an express provision for the examination of persons liable to be examined under Section 36 on commission when the power has already been conferred under Section 90, Clause (1), by reason of the application of the rules of procedure applicable to trial of suits? The inference that the Legislature regarded the proceeding for examination under Section 36 not merely as proceedings for examination of witnesses in support or against the contentions of parties to a litigious proceeding, can, therefore, be really made. From the nature of the proceeding it is clear that the examination must normally be held before the Court or the officer to whom the powers may be delegated under Section 6 of the Act. In order to avoid undue hardship and unnecessary inconvenience power is reserved in the Court by Section 37 to issue commissions and letters of request for examination of persons liable to examination under Section 36. The provision of Section 37 is, in my view, an enabling provision authorizing the Court in proper cases to order that persons summoned may be examined on commission, but there is nothing in that section which casts any obligation upon the Court to issue a commission or a letter of request.

[20] The provisions of Section 36, Presidency-towns Insolvency Act, are substantially the same as those of Section 25, sub.ss. (1) to (5), Bankruptcy Act, in England. Sub-section (6) of Section 25, Bankruptcy Act of 1914 provides :

'The Court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.'

The rules framed under the Bankruptcy Act by the Supreme Court in England provide for discovery and inspection of documents from the persons so summoned. It appears, therefore, that in England persons who are summoned under Section 23, Bankruptcy Act are not regarded as ordinary witnesses, but are regarded as persons against whom proceedings may be taken and commission is issued for their examination only when they are out of England.

[21] it has been suggested, though not expressly decided, in a case reported in Ex-parte Waddell: 'In re Lutscher, (1877) 6 ch. D. 328 that a person summoned under the Bankruptcy Act, Section 23, and under similar provisions in earlier statutes is not a mere witness. It was observed in that case (p. 331) :

' . . . this is not the case of a man who is charged with having property in his possession belonging to a bankrupt and is summoned to give evidence respecting it. In such a Case it might possibly be said that there was a litigation between him and the trustee, and that he was entitled to be protected by counsel.'

[22] The view that I am taking is the view which has been taken by decisions of the Calcutta and Madras High Courts. In re Dinaram Somani, 27 Cal. W. N. 370, Greaves J. took the view that (p. 372) :

' . . . the [High] Court has power under Section 36 to summon before it persons who reside at a greater distance than 200 miles Proper travelling and other expenses should be tendered and that so far as possible the convenience of persons required to attend should be considered.'

Greaves J. pointed out that (p. 371) :

'A perusal of the Sub-section [Sub-sections (1) of Section 30] makes it clear that the person to be summoned does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of Order 16 relate. It deals rather with the discovery and recovery of property than with the ordinary testimony which a witness can give, and the proviso to Section 9(1), Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under Rule 36 by any limitation imposed by the Code of Civil Procedure.'

[23] A similar view has been taken in *Official Assignee, Madras v. G. Ramanujayya*, : AIR1928 Mad856 . That was a case decided by Waller J. to whom the Master in Insolvency of the Madras High Court had submitted his report. The Master was of the view, following a previous unreported decision of the Madras High Court, that the persons to be summoned under Section 36, Presidency-towns Insolvency Act, were in the position of witnesses, and could not be summoned when they resided at a distance exceeding 200 miles from the court house. Waller J., however, held that the Court had jurisdiction to summon all persons for their examination before the Court, even though they were residing at a distance exceeding 200 miles, when such persons were sought to be summoned as debtors of the insolvent's estate. It is true that in a later decision of the Madras High Court, in the matter of *Viswanathan Chettiar, A. i. k. 1918 uad. 406*, where the Court was requested to examine persons as witnesses 'capable of giving evidence of the insolvent's dealing with his property' and not for the production of any property or payment of any debts or production of documents, Waller J. took the view that the High Court was governed by the provisions of Order 16, Rule 19, Civil P. C. In taking that view the learned Judge held that he was bound by an unreported judgment of the Division Bench of the Madras High Court in O. Section Appeal NO. 30 of 1917. The learned Judge also indicated that he was not impressed by the reasoning of the case reported in *in re Dinaram Somani, 27 Cal. W. N. 370*. On a consideration of [the provisions referred to by me and the authorities, I am of the view that a person summoned under Section 36, Clause (1), for his examination as known or suspected to be in possession of property belonging to the insolvent, or as supposed to be indebted to the insolvent, is not in the position of an ordinary witness to whom the provisions of O. 16, Rule 19, would apply, and therefore it is open to the Court consistently with considerations of convenience of the person to be summoned to order him to appear before the Court notwithstanding the fact that he resides at a place beyond 200 miles from the place where the Court sits, and he is outside the jurisdiction of that Court.

[24] in the circumstances of the case the persons who have been summoned have been all served. Three of them have not chosen to appear before the Court, and they have not shown any reason why they should not be asked to appear before the Court personally. From the public examination of the insolvent, there is no reason

to suppose that they are in possession of the property of the insolvent or are indebted to him. Therefore, I direct that S. S. Kothari, Brijnarayan Brahmwar and Har Narayan Brahmwar be directed to appeal-before the Insolvency Registrar of this Court for their examination under Section 36, Presidency-towns Insolvency Act.

[25] Order accordingly.

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