

**In Re: Binjraj Harnandrai**

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**SooperKanoon Citation :** [sooperkanoon.com/876490](http://sooperkanoon.com/876490)

**Court :** Kolkata

**Decided On :** Jun-21-1933

**Reported in :** AIR1934Cal232

**Appellant :** In Re: Binjraj Harnandrai

**Judgement :**

ORDER

**Panckridge, J.**

1. Notice of this application was taken out by Messrs. Hoare, Miller & Co., Ltd., on 7th December 1932. It is sought by the application to impeach certain transactions entered into by the insolvents and to have them declared void as against the Official Assignee under Sections 55 and 56, Presidency-towns Insolvency Act. The application is supported by an affidavit of a principal officer of the company, who states that the company are creditors of the insolvents to the extent of Rs. 38,000. The deponent also states that he has requested the Official Assignee to make this application, but the Official Assignee has declined, although the company was willing to accept responsibility for the costs incurred by him. Certain preliminary points are taken. It is said that the company has no locus standi in the matter, and that their proper remedy is an appeal to the Court under Section 86 of the Act against the decision of the Official Assignee refusing to make the application. I am unable to accept this argument. The Act does not specifically prohibit an application by a creditor on behalf of himself and the general body of creditors. It is

true that In re Surajmull Munglechand AIR 1921 Cal 403 Greaves, J., held that it was not permissible for a creditor to apply to set aside an alleged fraudulent transfer without reference to the Official Assignee. However, the language used shows that the learned Judge contemplated the possibility of a creditor properly making such an application if he had first applied to the Official Assignee to move in the matter and the Official Assignee had declined to do so. I do not think that the observations of Sanderson, G. J., and Rankin, J. in Tiyeb Ali Mullick v. Purna Chandra Pal AIR 1926 Cal 618 contain anything which is contrary to Greaves, J.'s opinion as expressed in the former case. Moreover, Sir Dinshaw Mulla states in his Law of Insolvency at p. 432 that it is the practice, both in Bombay and in Calcutta, to give leave to the creditor to make the application in circumstances like the present.

2. I therefore hold that I am entitled to entertain this application at the instance of the creditor. Mr. Banerjee's second objection is that the proviso to Section 7 of the Act is a bar to this application. Again I do not agree, because the matters with which the application is concerned cannot, in my opinion, be properly described as 'arising under Section 36.' It is when we come to the substance of the application that the difficulties of the applicant arise. Para. 1 of the notice asks for an order for the payment of eight several sums to the Official Assignee by nine different persons. Para. 2 of the notice asks that the claim of certain creditors be declared void and that the names of the alleged creditors be expunged from the schedule. Para. 3 asks for a declaration that certain property alleged to be mortgaged to one Ramgopal Arjundas belongs to the Official Assignee as part of the property of the insolvents. It is true that the creditors do not press their claims in respect of certain of the sums mentioned in para. 1. Even so however it is obvious that serious difficulties are likely to arise if the Court is required to investigate in one application a number of different transactions between the insolvents and different persons. There are no specific rules prescribing the form in which an application should be made when it is sought to impugn a transaction by an insolvent on the grounds mentioned in Sections 55 and 56. However I consider that the Court is bound in some measure to observe the ordinary principles as to framing suits laid down by the Civil Procedure Code. What the applicants have done here is analogous to joining different causes of: action against different defendants in the same suit. I

think that, on grounds of practical convenience, this cannot be permitted. I cannot believe that it was the intention of the legislature to permit a comprehensive inquiry such as is now asked for to be raised by an application under Section 7.

3. The situation is aggravated by the nature of the evidence upon which the applicants base their claims. The affidavit in support states that, from the inspection of the insolvents' books and from the public examination of one of the insolvents, as well as from the examination under Section 36 of three other persons, it has been found that the insolvents have dealt with their property and made payments with a view to fraudulently preferring certain creditors and have made fictitious transfers. The affidavit later states that, as a result of the examinations mentioned in the foregoing paragraphs, the following acts of fraudulent transfer and preference have been found. It is obvious that the whole-body of evidence referred to cannot be admissible in respect of everyone of the transactions, and, in fact, it has been suggested, in my opinion plausibly, that much of the evidence is not admissible with regard to any of the transactions. Apart however from the latter aspect of the matter, the affidavit gives no indication what particular pieces of evidence are relied upon with regard to particular transactions. In my opinion, the Court cannot be called upon to spend its time collecting the evidence with regard to particular transactions. Counsel for the applicants has suggested that the difficulties occasioned by the affidavit will be solved if he is permitted to call oral evidence. I do not think that this can be allowed.

4. In my opinion, the Insolvency Act primarily contemplates evidence on affidavit. It is open to the Court to permit oral evidence to be given either because it thinks it right that persons who have sworn affidavits should have their evidence tested by cross-examination, or in order that witnesses who have not sworn affidavits may give evidence in corroboration of witnesses who have sworn them it is however in my opinion essential that the affidavits should apart from any oral evidence, make out a case by admissible evidence which, if believed, will justify the order asked for. I am not satisfied that such a case is made by the affidavits with regard to any of the transactions which are called in question. In these circumstances, it appears to me that the situation is not one that can be remedied by the production of oral

evidence. For the reasons I have given, I think the application must be dismissed with costs. At the same time I wish to say that my decision is not to be regarded as a decision on the merits. In other words it will still be open to the creditors to take steps to have the insolvent's transactions set aside either by means of a suit, or, if so advised, by an application under Section 7 which does not suffer from the defects which I have mentioned and which are, in my opinion, fatal to the present application.

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