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QUEEN EMPRESS v. RAKMÁ

WEST, J.:—Assuming that there was dangerous disease and culpable negligence, still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person and himself generally an accomplice. If there was an offence in this case, it was one of cheating punishable under section 417 or 420 of the Indian Penal Code. To establish this, there should be evidence believed by the Magistrate that the intercourse was induced by misrepresentation on the part of the diseased person. We, therefore, reverse the conviction and sentence.

Conviction and sentence reversed.

INSOLVENCY JURISDICTION.

Before Mr. Justice Scott.

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September 8.

IN *RE* ALLA'DINBHOY HUBIBHOY, INSOLVENT.
RAHMUBHOY HUBIBHOY, OPPOSING CREDITOR.

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., Cap. 21, Sec. 36)—Order to examine witnesses under Section 36—Discovery of insolvent's property—Bonâ-fide creditor—Practice—Conduct of examination.

When the Official Assignee makes or supports an application to examine witnesses under section 36 of the Indian Insolvent Act, such application should be readily granted. When it is made by any other person, the grounds of the application should be carefully sifted, and the Court should satisfy itself that the inquiry will probably lead to some benefit to the creditors or estate, and is not merely made to harass and annoy the persons proposed to be examined.

A. became insolvent in 1866, and fled out of the jurisdiction. In July, 1886, Rahmubhoy, alleging himself to be a creditor of the insolvent's estate, obtained an order, under section 36 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21), directing the examination of the insolvent's son and daughter, Rahimbhoy and Lábái, with a view to the discovery of certain property of the insolvent which might be made available for the creditors. Rahimbhoy and Lábái subsequently obtained a rule *nisi* to set aside the order. They filed affidavits, alleging that Rahmubhoy (the applicant) was not a *bonâ-fide* creditor of the estate; that although he had, no doubt, bought a claim upon the estate in his own name, he was merely a nominee of his brother, Ahmedbhoy, who had supplied the purchase-money; and they alleged that this application was the result of a family quarrel; and was made merely from motives of ill-will. The Court held that the applicant was not a *bonâ-fide* creditor of the estate. The order for examination was, however, supported by the Chartered Mercantile Bank, which was admittedly a *bonâ-fide* creditor.

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Held, that the applicant not being a creditor and the Official Assignee not supporting the application, and the affidavits showing feeling and bias, the Court would have hesitated to admit the application for the order, under section 36, if it stood alone. But the fact that the Chartered Mercantile Bank, an admittedly *bonâ-fide* creditor, supported the application, altered the case, and the examination applied for ought to be allowed.

Under the circumstances, however, the Court was of opinion that the applicant, who belonged to the insolvent's family, and was involved in a bitter family quarrel, should not conduct the examination; and ordered that the Chartered Mercantile Bank should apply to the Official Assignee to conduct the inquiry, and, if he declined to do so, the bank should do it.

APPLICATION by Rahmubhoy Hubibhoy, the opposing creditor, under section 36 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21) for the examination of Rahimbhoy Alládinbhoy and Lábái, the son and daughter of the insolvent, with respect to property alleged to belong to the insolvent's estate.

The insolvent, Alládinbhoy Hubibhoy, filed his schedule in 1866, and fled to Daman, out of the jurisdiction of the High Court.

The opposing creditor alleged that he had bought up the claim of one Goculdás Tejpál against the insolvent's estate, and, in virtue of this purchase, became a creditor of the estate. On the 28th July, 1886, he applied for an order, under section 36 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21), for the examination of Rahimbhoy Alládinbhoy and Lábái, the insolvent's son and daughter, alleging that they had a portion of the insolvent's estate in their hands, and could give information which would enable other portions of it to be recovered for the creditors. He further alleged that with moneys belonging to the estate they had bought the claims against the estate, and in respect of these claims they were about to receive dividends from the Official Assignee. He prayed that an injunction might be granted, restraining payment of dividend upon these claims until Rahimbhoy and Lábái had been examined before the Insolvent Court. Upon this application an order for examination, under section 36, was made, and an *interim* injunction, restraining payment of dividends, was granted.

On the 11th August, 1886, Rahimbhoy and Lábái applied for and obtained a rule *nisi*, calling on the opposing creditor to show

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cause why the order made on the 28th July, as above stated, should not be set aside. This rule now came on for hearing.

Starling for the opposing creditor, Rahmubhoy Hubibhoy.

Inverarity, for the Chartered Mercantile Bank, another creditor on the insolvent's estate, supported the case of the opposing creditor.

Lang for Rahimbhoy Alládinbhoy.

Macpherson for Lábái.

Starling showed cause. He read affidavits, showing that the opposing creditor was a *bonâ-fide* creditor on the estate, and had bought the claim of Goculdás Tejpál, and also setting forth facts which went to show that a large portion of the insolvent's estate had come into the hands of the insolvent's son and daughter, Rahimbhoy Alládinbhoy and Lábái.

Inverarity, for the Chartered Mercantile Bank, on the same side:—The bank is admittedly a creditor on the estate; and we support the case of the opposing creditor. I submit, however, that it is immaterial whether the applicant is a creditor or not, and that, under sections 4 and 36 of the Insolvent Act (Stat. 11 and 12, Vic., cap. 21,) any person, even though not a creditor at all, may bring such facts, as exist in the present case, to the notice of the Court; and the Court is, thereupon, bound to take measures to protect the estate, and, if necessary, to examine witnesses. It is only necessary that a *primâ-facie* case should be made on the affidavits used in applying for the order, and upon such *primâ-facie* case being shown, the order is made. The reply to those affidavits should be made orally when the examination takes place. The affidavits filed by the other side should be disregarded. The Act does not contemplate a contest on affidavits. The device of obtaining a rule to set aside the order, made under section 36, has resulted merely in a contest on affidavits with respect to the very matters which the Act intended should be inquired into by oral examination. The questions raised and discussed in these affidavits, as to whether Rahmubhoy Hubibhoy is a *bonâ-fide* creditor or not, do not, in any way, affect my clients, who are, unquestionably

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bonâ-fide creditors of the estate. We support his case; but, if necessary, we now apply for a separate order, under section 36, against Rahimbhoy and Lábái. He cited *Ex parte Swift; Re Sir William Russell*(1).

Lang, for Rahimbhoy Hubibhoy, in support of the rule *nisi* to set aside the order:—The affidavits, on which we rely, show that the opposing creditor is not a creditor on the estate at all; that he has bought the claim of Goculdás Tejpál against it merely as nominee for his brother, Ahmedbhoy Hubibhoy, who has supplied the necessary funds for the purchase. Ahmedbhoy could not purchase the claim in his own name, inasmuch as he is precluded, under the terms of an award made in a suit in the High Court, from enforcing any claims against the insolvent's estate. But the claim really belongs to Ahmedbhoy Hubibhoy; and the order under section 36, obtained on the 28th July, was really obtained by him. The Court should have regard to the motives of parties applying for such an order. The order was obtained from motives of ill-will and revenge against the parties who are to be examined —*Ex parte Nicholson*(2).

The cases reported on the analogous section in the English Companies Act, 1862, section 15, apply. Upon that section it has been decided that an individual creditor cannot apply to the Court for such an order, as the one in question, unless the liquidator of the company has refused to apply. So here we contend the creditor cannot apply unless the Official Assignee has refused —*In re Gold Company*(3). Even the Official Assignee, however, would not be entitled to such an order as of right—*Heiron's Case*(4).

Macpherson for Lábái:—Section 36 gives the Court a discretion. The section ought not to be made the instrument of oppression and private malice. The delay is fatal to this application. The insolvency was in 1866. The facts have been known for years. The Chartered Mercantile Bank is not really an independent applicant. It merely comes in at the request of Rahmubhoy Hubibhoy, and is guaranteed all costs by him.

(1) 26 L. T. N. S., 226.
(2) L. R., 14 Ch. Div., 243, 247.
(3) L. R., 12 Ch. Div., 17 at p. 82.
(4) L. R., 15 Ch. Div., 139.

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Starling in reply:—The facts have only recently been ascertained, although the insolvency is an old one. The case has been argued as if it were necessary for the applicant to prove all his allegations beyond doubt before getting an order under section 36. If that were done, there would be no need for the oral examination that is asked. All that is necessary is to make out a *primâ-facie* case; the section does not contemplate that the matter is to be fought out on affidavits. The order is made on the applicant's affidavit, if sufficient; and the persons, against whom it is made, come in and answer the allegations made against them orally in the witness-box if they can. Here the order for examination was made, on the 28th July, on a *primâ-facie* case. Instead of submitting to that order, and replying to the allegations made against them in the witness-box, the parties have resorted to the device of obtaining this rule, on the 11th August, to set aside that order, with this result, that the truth of the allegations have to be tried on affidavit instead of on oral testimony. There can be no cross-examination; and no satisfactory conclusion can be arrived at by the Court. If this is to be a precedent, the whole policy of section 36 will be defeated. This rule is, in effect, an appeal against the order for examination under section 36 made on the 28th July. It has been held, in similar cases under the English Companies Act, that there is no appeal—*In re Gold Company*(1); see also *In re Silkstone and Dodworth Company*(2).

I submit that our affidavits abundantly justify the order for examination. At all events, it is clear there is strong reason for suspicion that the persons we wish to examine have obtained property belonging to the insolvent's estate, or can give information as to it. They are the son and daughter of the insolvent. In such case a wide net is thrown to obtain evidence—*per* Wickens, V. C., in *Fricker's Case*(3); *Swan's Case*(4). *Heiron's Case*(5) has been referred to. That, however, was a case under the Companies Act and does not apply here. *Ex parte Nicholson* (6) is, no doubt, a bankruptcy case, but it is a decision under section 96 of the English

(1) L. R., 12 Ch. Div., 77, at p. 82.
(2) L. R., 19 Ch. Div., 118.
(3) L. R., 13 Eq., 178, at p. 182.
(4) L. R., 10 Eq., 675.
(5) L. R., 15 Ch. Div., 139.
(6) L. R., 14 Ch. Div., 243.

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Bankruptcy Act, 1869, which materially differs from section 36 of the Indian Insolvent Act. Section 36 corresponds, not with the Act of 1869, but with the previous English Bankruptcy Acts: see English Bankruptcy Act, 1861, (Stat. 24 and 25, Vic., cap. 134), sec. 189; the Bankrupt Law Consolidation Act, 1849, (Stat. 12 and 13, Vic., cap. 106), sec. 120. Upon these sections *Ex parte Alexander*(1) is an authority. There the Court, though unwillingly, felt bound to make the order applied for, and referred (see p. 316) to the case of *Cooper* v. *Harding*(2) as deciding that the order was almost a matter of course. That case was a decision upon section 33 of Stat. 6, Geo. IV, cap. 16, and should be the governing authority in the present case, inasmuch as section 33 of that Statute is similar to section 36 of the Indian Insolvent Act, and section 4 of the latter Act expressly gives this Court the powers in these matters conferred on the English Courts by Stat. 6, Geo. IV, cap. 16. The applicant may apply for an order, although the Official Assignee has not refused to make the application—*Re Penysyflog Mining Company*(3).

September 22. SCOTT, J.:—This is an application, under section 36 of the Indian Insolvency Act, to examine the brother and daughter of an insolvent, Alládinbhoy Hubibhoy. The insolvency is an old one, dating as far back as 1866, but the liabilities were very heavy; and as, quite recently, property has been recovered for the creditors, I do not think the lapse of time is any bar to the application. The section, so far as it applies to the present case, empowers the Court, on the application of any creditor, or on its own motion, to summon any person who may be suspected of having any of the estate of the insolvent in his possession, or who may be capable of giving any information respecting the estate and effects of the insolvent, or his acts, dealings, or conduct. This power of examination of third persons, with a view to the discovery of the insolvent's property, has, I believe, been inherent in Insolvency or Bankruptcy Courts from their first establishment in England —34-35 Hen. VIII, ch. 402; 1 Jac. I, ch. 15, s. 10. As far back

(1) 1 De G. J. & S., 311. (2) 7 Q. B., 928.

(3) 30 L. T. N. S., 861.

as 1747, I find a banker summoned to explain his dealings with the bankrupt, and the Lord Chancellor refused to interfere with the discretion of the Court—*Ex parte Bland*[1]. Each new Act has contained a section somewhat similar to the one now before me. (See Bankruptcy Act, 1849, sec. 120; Bankruptcy Act, 1869, sec. 96; Bankruptcy Act, 1883, sec. 27.) But the order has been generally made on the Court's own motion, or the application has been made on behalf of the body of creditors by the official who corresponds to our Official Assignee. When that officer has made the application on behalf of the creditors as a body it has been readily granted, so much so that, under the English Act of 1869, an affidavit was only required when the application was *not* made by him. (See Rule 171 of that Act.) But when some one, other than that official, has made the application, he has been held bound to show a *primâ-facie* probability that some benefit will result to the creditors or the estate—*Ex parte Nicholson*[2]. I fully endorse the observations, in *Ex parte Alexander*[3], to the effect that this power should be exercised with care, and that such application should not be granted *ex debito justitiæ* as in *Cooper* v. *Harding*[4]. Although the wording of the Indian Act is somewhat wider than the corresponding section of the English Act, I think the following rule a safe one to follow. When the Official Assignee makes or supports the application, it should be readily granted. When it is made by any other person, the grounds of the application should be carefully sifted, and the Court should satisfy itself that the inquiry will probably lead to some benefit to the creditors or estate, and is not merely made to harass and annoy the persons proposed to be examined.

Now, to apply section 36 of the Indian Act to the present case. The first question, which presents itself, is, whether the applicant, Rahmubhoy Ahmedbhoy, is a creditor? On the affidavits I am not satisfied that he is *bonâ-fide* creditor. It is very doubtful whether it was he or his brother Ahmedbhoy Hubibhoy who bought the claim of Goculdás Tejpál on which the applicant founds

(1) 1 Atkyn's Rep., 205.
(2) L. R., 13 Ch. Div., 243.
(3) 1 DeG. J. & S. at p. 317.
(4) 7 Q. B., 928.

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his right to be considered a creditor. The applicant's pecuniary position and his relations generally with Ahmedbhoy Hubibhoy are against his claim. There is a very strong reason why Ahmedbhoy Hubibhoy should put the applicant forward, and the affidavits are so contradictory on the point that it is impossible for me to decide it in the affirmative. As the Official Assignee has refused to admit the alleged right after examination of all the facts, I think it safest to decide in the same sense. The applicant can always establish his claim by a suit.

As the applicant is not a creditor, as the Official Assignee does not support this particular application, and as the affidavits show considerable feeling and a bias which might distort the facts, I should hesitate to admit the application if it stood alone. But a *bonâ-fide* creditor, the Chartered Mercantile Bank, has now come to support it. I think that intervention alters the case. I have consulted the Official Assignee, and he agrees with me that the application now bears another aspect. It is now supported by a *bonâ-fide* creditor, who, in a short affidavit made before his separate application, says that he believes a large number of claims on the estate have been purchased by Rahimbhoy Alládinbhoy, the son of the insolvent, in the names of third parties out of the moneys of the insolvent. It was suggested that the bank was only a sort of puppet in the hands of the first applicant. But I am confident the manager would not have made the above statement merely to assist Mr. Ahmedbhoy Hubibhoy and his brother, the applicant. The support of the bank and its adoption of the charges, in my opinion, give the allegations contained in the affidavits a greater evidentiary value. I still do not think they are fully convincing on any point; but, for instance, on the point of the Rs. 31,754 of moveables I think a case for examination is made out. There is no doubt, too, that the persons have a very intimate knowledge of the insolvent's affairs. This was shown in a recent suit. As the *primâ-facie* probability is much increased by the support now given by the bank to the allegations, I am of opinion I ought to allow the examination of the insolvent's son. As regards Lábái, the point in dispute is a definite one, and she will be easily able to answer it if she is

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in the right. I think she should first be asked to produce her documents of title, and give other information that may be required. If she refuses, then she must be examined, but at her own house, in accordance with the custom of her community and only after the examination of Rahimbhoy Alládinbhoy, the results of which may render her examination unnecessary. At the same time I do not think the applicant, Rahmubhoy Hubibbhoy, who belongs to the insolvent's family and is involved in a bitter family quarrel, should direct the examination. I think it will be more certainly directed to its sole legitimate object—the benefit of creditors and the estate—if it is undertaken by the bank. As the bank has made a separate application of a similar character, I can safely assume its readiness, and I, therefore, order the summonses to issue returnable in a month's time. The bank to apply to the Official Assignee to conduct the inquiry, and if he declines to do so, then the bank to conduct the inquiry. The payment of dividend to Rahimbhoy Alládinbhoy to be postponed till the first Court day, at least one week after the close of the examination.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

LAKSHMIBA'I, (PLAINTIFF), *v.* HIRA'BA'I AND ANOTHER (DEFENDANTS).*

1886. *September* 21.

Will—Hindu will—Construction—Joint tenancy—Tenancy-in-common—"Heirs of my property," effect of these words in Hindu will.

Bhojráj died in 1876, leaving Hirábái, his widow, and Nathu, an adopted son, him surviving; and he directed by his will that Hirábái and Nathu should be "the heirs of his property." Nathu died childless in 1880, leaving the plaintiff, Lakshmibái, his widow, him surviving. Hirábái, thereupon, took possession of all Bhojráj's property, claiming as a joint tenant with Nathu under the will to be entitled by survivorship on Nathu's death.

Held, that, under the will, Hirábái and Nathu had been tenants-in-common, and not joint tenants; and that the plaintiff, therefore, as Nathu's widow, was entitled to Nathu's share.

In the expounding of Hindu wills the Court should presume that the holder did not intend to depart from the general law beyond what he explicitly declares.

* Suit No. 102 of 1886.