**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL MISCELLANEOUS SECOND APPEAL No.80 of 2013**

**JUDGMENT**:

The unsuccessful petitioner in I.P.No.68 of 2004 on the file of the II Additional Senior Civil Judge, Vijayawada (for short, 'the trial Court'), preferred this Civil Miscellaneous Second Appeal challenging the concurrent findings recorded on 23.07.2013 in A.S.No.169 of 2012 by the VII Additional District & Sessions Judge (Fast Track Court), Vijayawada (for short, 'the first appellate Court') confirming the decree and order dated 02.03.2012 passed by the trial Court in I.P.No.68 of 2004.

2. For convenience of reference, the ranks given to the parties in I.P.No.68 of 2004 before the trial Court will be adopted throughout the judgment.

3. The petitioner/creditor (appellant herein) filed a petition in I.P.No.68 of 2004 before the trial Court under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge respondent No.1 as an insolvent and vest the petition 'B' schedule property on Official Receiver, Krishna District, for administration, by setting aside the sale and to appoint an Official Receiver for administration of the schedule property.

4. It is alleged that the 1st respondent for his joint family business along with his mother and father jointly borrowed a sum of Rs.5,00,000/- from the petitioner on 15.09.2001 and executed a promissory note agreeing to repay the same with 24% per annum. Subsequently, father of 1st respondent paid Rs.2,00,000/- by cheque towards principal amount. Thereafter, the 1st respondent and his parents did not discharge the debt due to the petitioner/creditor. The 1st respondent purchased an undivided extent of site and building under five separate sale deeds and sold the same to 2nd respondent under original

of Ex.A.2 sale deed for lesser price with an intention to defeat and delay the debts due to the petitioner and other creditors and he was absent continuously from his residence and ordinary place of business. Thus, he committed an act of insolvency under Section 6(1)(b) & (c) of the Act and sought to adjudge the 1$^{st}$ respondent as an insolvent and vest the petition 'B' schedule property on Official Receiver, Krishna District, for administration by setting aside the sale executed by the 1$^{st}$ respondent in favour of the 2$^{nd}$ respondent.

5. Respondent No.1 filed counter denying the material allegations and contended that there is no privity of contract between him and the petitioner and the list of creditors shown in 'A' schedule are not genuine and there is no relationship of creditor and debtor between him and the petitioner and that the sale deed was executed by him in favour of the 2$^{nd}$ respondent alienating petition 'B' schedule property and there is no collusion in between himself and the 2$^{nd}$ respondent while admitting that himself and the petitioner had some monetary transactions and she obtained his signatures on voucher for the purpose of security. However, finally contended that he did not commit any act of insolvency and prayed to dismiss the petition.

6. Respondent No.2 filed counter admitting about obtaining of Ex.A.2 for valuable consideration after due publicity in two Telugu news papers on 04.03.2004, and since no objections were received, he obtained Ex.A.2 sale deed for valuable consideration and it is neither collusive nor fraudulent and the same cannot be annulled in the petition under Section 9 of the Act and prayed to dismiss the petition.

7. During the course of enquiry, on behalf of the petitioner, P.W.1 was examined and Exs.A.1 and A.2 were marked; and on behalf of the respondents, R.Ws.1 and 2 were examined and Exs.B.1 to B.3 were marked.

8. Upon hearing argument of both the learned counsel, the trial

Court dismissed the petition on two grounds. The first ground is that the single creditor cannot maintain a petition under Section 9 of the Act and the second ground is that non-joiner of parents of the $1^{st}$ respondent is fatal and thereby dismissed the petition.

9. Aggrieved by the said decretal order, the unsuccessful petitioner/creditor preferred the appeal in A.S.No.169 of 2012 before the VII Additional District & Sessions Judge (Fast Track Court), Vijayawada. Upon hearing of argument of both the learned counsel, the first appellate Court confirmed the finding of the trial Court on the same grounds.

10. Assailing the concurrent findings of the trial Court as well as the first appellate Court, the present civil miscellaneous second appeal is preferred raising several contentions. However, the substantial questions of law involved in this appeal are as follows:

> "1. Whether a petition by a single creditor to adjudge a debtor as insolvent can be maintained ?
> 2. Whether non-joinder of joint borrower/promissor under Ex.A.1 vitiates the entire claim of the petitioner-creditor ?

**Point No.1**:

11. Both the trial Court and the lower appellate Court dismissed the petition filed by the creditor under Section 9 of the Act on the ground that the single creditor cannot maintain the petition under Section 9 of the Act. This question is no more *res integra* in view of the judgment of a Division Bench of this Court in ***G.Ramachander v. The Collector, Excise, Hyderabad and another***[1], wherein it was held in paragraph No.5 as follows:

> "5. The question of maintainability of an insolvency petition against a single creditor came up for consideration in M. Somiah v. P. Padma Bai (1969-2 Andh WR 274). That was a case arising under the Hyderabad Insolvency Act. But the material provisions of that Act are almost identical with the provisions of the Provincial Insolvency Act. The learned Judge, noticing the words, 'debts; and 'creditors' used in several of the provisions, opined that "as far as the scheme of the Hyderabad Insolvency Act as well as the scheme of the Provincial Insolvency Act, 1920

are concerned, the very purpose of the exercising of the insolvency jurisdiction in any given case, is only for the benefit of the body of the creditors and not for the benefit of any single creditor."

We are unable to endorse the view of the learned single Judge in that case. The object of enacting the insolvency law is to give relief to a debtor, who is unable to discharge the debts and protect him from harassment by his creditors and also to prevent a scramble among creditors to somehow get at the assets of debtor fraudulently or in collusion between creditor and debtor. The Act also provides a machinery by which the claims of genuine creditors could be equitable met. We see no special significance in the Legislature using the words 'creditors' and 'debts'. From the mere use of those words in plural, the object or the underlying policy of the insolvency law cannot be ascertained. The scheme, object the purpose of the Act can be ascertained on a proper construction of the relevant provisions. The expressions 'creditor' and 'debtor' have been defined. 'Creditor' includes a decree-holder, 'debt' includes a judgment-debt. Section 6 details the acts of insolvency. It clearly says that a debtor commits an act of insolvency in each of the cases enumerated in Clauses. (a) to (h). Section 7 entitles a creditor or debtor to make an application for adjudicating a debtor an insolvent. A debtor can file an application if he commits an act of insolvency. Section 10 lays down the conditions to be satisfied to entitle a debtor to present an insolvency petition and this Section, to the extent relevant, reads :-

"Section 10(1): A debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts and-

(a) his debts amount to five hundred rupees or

(b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or

(c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property."

None of the clauses of Sub-section (1) of Section 10 speaks of more than one creditor. All that a debtor has to satisfy is one or other of the conditions specified in the above three clauses. Any single creditor may make an application under Order. 21, Rule. 37, Civil Procedure Code in execution of the decree obtained by him. He can ask for arrest and detention of the judgment-debtors in a civil prison. Any sole creditor can have the property attached in execution of the decree obtained by him against the debtor. Section 51, Civil Procedure Code deals with the powers of Court to enforce execution. The Court may enforce a decree in execution by attachment and sale or by sale without attachment of any property or by arrest and detention in prison. So far as the execution of a money decree is concerned, that is subject to the proviso to Section 51. If we are to agree with the view expressed by the learned single Judge, then no sole creditor can ever as for execution of the decree in the manner specified in Section 51, or Order. 21, Rule. 37, Civil Procedure Code. Section 13(2) of the General Clause Act (10 9f 1897) says that the words in the singular shall include the plural and vice versa. Therefore, no special significance need be attached to the words 'debts' or 'creditors' used in several of the provisions of the Provincial Insolvency Act."

12. Similar question came up before the Division Bench of Madras High Court in ***Sarangapani Chetty v. Perumal Naidu***[2]. The Division Bench of Madras High Court while considering the same issue, held that single creditor can maintain a petition. In the last para of the said judgment, the Division Bench held as follows:

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditor to the benefit of the debtors.

Consequently, we are of the view that the decisions cited at the Bar, can all of them be distinguished, with reference to the facts and the situation in insolvency law of the present case. This is a case where the facts abundantly and clearly establish the round of adjudication set forth in Sec. 6, Sub-Sec.(d)(i)(ii) and (iii). The fact that the general body of creditors was represented by the sole creditor, is no reason for declining adjudication, for the insolvency law has always recognized that the sole creditor of debtor could obtain an adjudication in insolvency."

13. Relying on the above two judgments, the Single Judge of this Court in ***K.D.Nagappa v. Sannkka***[3] held that a single creditor can maintain a petition under Section 9 of the Provincial Insolvency Act.

14. In view of the law declared by the Division Bench of this Court and persuaded by decision of Division Bench of Madras High Court, I am of the considered view that the concurrent finding of the trial Court as well as the first appellate Court about maintainability is reversed.

15. In view of my foregoing discussion, I hold that a single creditor can maintain a petition under Section 9 of the Provincial Insolvency Act, and this point is answered accordingly.

**Point No.2**:

16. The trial Court and the lower appellate Court dismissed the creditor petition on the ground that the petition is not maintainable against a single promissor, when the promissory note was executed by three promissors jointly agreeing to repay the same and also observed that the petition was filed in collusion with the 1st respondent. However, collusion is a question of fact, but the only point to be decided by this Court is, whether the petition under Section 9 of the Act is maintainable without impleading the joint promissors, i.e., father and mother of the 1st respondent, who allegedly executed Ex.A.1 promissory note dated 15.09.2001.

17. The learned counsel for the petitioner/creditor (appellant herein) while contending that the liability of joint promissors is co-extensive with that of the other promissors and placed reliance on a judgment of a Division Bench of this Court in ***Andhra Bank, Suryapet, v. Amarnath Goel***[4], wherein the Division Bench of this Court held that one of the promissors of the promissory note is also equally liable for the amounts due thereunder, even though he has not received directly any consideration, even assuming that he is treated as a co-obligant, even then, in view of Sections 127 and 128 of the Contract Act, his liability is co-extensive with that of the principal debtor and therefore, he is also liable on that count. He further contended that according to Section 43 of the Indian Contract Act, when two or more persons make a joint promise, the promissee may, in the absence of express agreement to the contrary, compel any one or more of such joint promissors to perform the whole of the promise. Taking advantage of the law laid down by the Division Bench of this Court and Section 43 of the Indian Contract Act, the learned counsel would contend that the petitioner can proceed against any one of

the debtors, who is joint promissor along with his father and mother under Ex.A.1.

18. Though the 1st respondent initially denied the relationship of creditor and debtor between the petitioner and the 1st respondent, while contending that the petitioner/creditor obtained his signatures on vouchers for the purpose of security during monetary transactions between them, in the cross-examination, he admitted indirectly about the execution of Ex.A.1. However, this Court, being the Court of Second Appellate Court, dealing with the appeal, has to confine the finding only to decide the appeal within the parameter under Section 100 of C.P.C. Therefore, this Court need not advert to the evidence on record, and at best, this Court can record its finding as to the maintainability of the application under Section 9 of the Act, when the joint promissors are not impleaded as parties to the insolvency petition.

19. In view of the law declared by the Division Bench of this Court and Section 43 of the Indian Contract Act, the petitioner/ creditor, being the promissee under Ex.A.1, is entitled to compel the 1st respondent/debtor to pay the debt due under promissory note Ex.A.1. But the liability of 1st respondent is not the question now to decide the act of insolvency. Admittedly, the 1st respondent alienated his property under Ex.A.2, moreover it is contended by the petitioner/creditor that it was a fraudulent transaction and sold for a nominal amount and the Registrar collected stamp duty from the 1st respondent. Therefore, the property was sold, price below the market rate, and with an intent to delay and defeat the claim of creditor and such act amounts to an act of insolvency.

20. According to Section 6(1)(b) of the Provincial Insolvency Act, when a debtor transfers his whole property or of substantial part thereof to a third party, with an intention to delay or defeat the claim of the creditor, it is an act of insolvency, which enables the petitioner/creditor to file a petition under Section 9 of the Act. In the last two lines of page No.2 of

the petition, the petitioner made clear assertion of an allegation that alienation is only with an intention to delay and defeat the claim of the petitioner/creditor and the same is supported by the evidence of the petitioner. Though respondent Nos.1 and 2 raised several contentions denying the liability under Ex.A.1, this Court need not go into those details as the scope of this appeal is limited. In any view of the matter, it is evident that the petitioner/creditor can proceed against any one of the joint promissor under Ex.A.1 and the transfer of property by a debtor (joint promissor) a substantial part or whole property, is an act of insolvency under Section 6(1)(b) of the Provincial Insolvency Act. Therefore, the alienation made by the 1st respondent under Ex.A.2 is with an intention to defeat and delay the claim of the petitioner/creditor, which is an act of insolvency, thereby the question of impleading the joint promissors, i.e., father and mother of the 1st respondent, is not a ground to dismiss the petition. In that view of the matter, the order and decretal order passed by the trial Court, confirmed by the first appellate Court, is illegal and liable to be set aside.

21. Strangely, in paragraph No.8 of the petition, the petitioner prayed to adjudge the 1st respondent as an insolvent and pass order vesting the petition 'B' schedule property of the 1st respondent on the Official Receiver, Krishna District, for administration by setting aside the sale. This part of relief of annulment of sale cannot be granted while deciding the petition under Section 9 of the Provincial Insolvency Act and the question of annulment would arise only when the debtor was adjudged as insolvent and no simultaneous orders under Sections 53 and 54 r/w Section 4 of the Provincial Insolvency Act, can be passed. According to Sections 53 and 54 of the Act, any alienation is void against the Official Receiver, if it is fraudulent. Section 54-A of the Act deals with the procedure for filing the petition for annulment. According to it, an Official Receiver, on adjudging the debtor as an insolvent, can file a petition for annulment under Sections 53 and 54 of the Act, and in case, the Official Receiver did not come forward to file such an application, the

creditor with the leave of the Insolvency Court, can move petition under Sections 53 or 54 r/w Section 4 of the Act. Therefore, pre-requisites to annul the transaction covered by Ex.A.2 are that:

> **(1) The debtor must be adjudged as insolvent;**
> **(2) The creditor should prove his debt by following the procedure contemplated under Part-III of the Act;**
> **(3) He should have made a request to the Official Receiver for moving insolvency Court for annulling fraudulent transaction and that the Official Receiver refused to move such petition for annulment.**

22. But here, the petitioner sought relief of annulment of the transaction covered by Ex.A.2 simultaneously along with adjudging the debtor as an insolvent.

23. Even to file an application under Sections 53 and 54 or Section 4 of the Act, the creditor has to prove his debt under Part-III of the Provincial Insolvency Act (Sections 42 to 49 of the Act). Unless the debtor proved his debt, as required under Section 43 of the Act, he cannot even seek leave of the Court, though the Official Receiver declined to move the application under Sections 53 and 54 of the Act. Hence, the relief of annulment cannot be granted and the same is hereby declined.

24. In the result, this civil miscellaneous second appeal is allowed in part setting aside the order and decretal order of the trial Court as well as the first appellate Court, and consequently, the 1$^{st}$ respondent is adjudged as an insolvent vesting the petition 'B' schedule property of the 1$^{st}$ respondent on the Official Receiver for general administration and the relief of annulment of sale transaction is hereby rejected. Time for discharge is six months. There shall be no order as to costs.

25. As a sequel thereto, miscellaneous petitions, if any pending in this appeal, shall stand closed.

**M.SATYANARAYANA MURTHY, J.**

Date: 01-07-2015

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[1] AIR 1977 AP 346

[2] AIR 1968 Madras 216

[3] AIR 1983 AP 13

[4] 1990(1) Summary of Recent Cases 49 (AP)