

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.M.S.A. No.20 of 2000

JUDGMENT:

The unsuccessful petitioners before the Subordinate Judge's Court, Rajahmundry, in I.A. No.39 of 1982 in I.P. No.24 of 1970 filed the appeal, wherein permission for composition was declined and the same was confirmed by the I Additional District Judge's Court, Rajamundry in A.S. No.43 of 1992 by order dated 07.04.2000.

02. The petitioners, aggrieved by the said Decree and Judgment in A.S. No.43 of 1992 on the file of I Additional District Judge, Rajahmundry, preferred the present Civil Miscellaneous Second Appeal raising several contentions in the memorandum of grounds of appeal, mainly contending that the Decree and Judgment of the trial court and appellate court are erroneous, since the findings are not based on the requirement under Section 38 of the Provincial Insolvency Act, 1920 (for short, "the Act") and raised the following substantial questions of law.

- a) Whether the petition filed under Section 38 of the Insolvency Act, for composition scheme before the court is maintainable.
- b) Whether the scheme of composition necessarily be filed before the Official Receiver instead of filing before the insolvency court.
- c) Whether the burden is on the insolvent to furnish entire material in the absence of any report from the Official Receiver inspite of it was called for.
- d) Whether the scheme of composition is deemed to be accepted when 3/4th value of the creditors agreed for the scheme.

03. The appellants, who are the legal heirs of the deceased insolvent Alapati Bhaskara Ramaiah, filed the petition under Section 38 of the Act seeking leave of the Court to enter into composition

scheme, proposed in the petition, as respondents 7 to 74 have proved their debt before the Official Receiver. The trial court dismissed the said petition on the ground that the value of the debts is not more than $3/4^{\text{th}}$ of the total creditors and that there was no evidence to establish that respondents 7 to 74 proved their debts before the Official Receiver.

04. Aggrieved by the finding recorded by the trial court in I.A. No.39 of 1982 in I.P. No.24 of 1970 on the file of Subordinate Judge's Court, Rajamundry, the appeal was preferred before the I Additional District Judge in A.S. No.43 of 1992 which ended in dismissal, affirming the findings recorded by the trial court.

05. During the course of argument, learned counsel for the appellant would contend that the total creditors before the trial court were only 72 and they all entered into composition with the appellants having proved their debt before the Official Receiver. Therefore the requirement under Section 38 of the Act is only to enter into composition with $3/4^{\text{th}}$ value of the debts due to the creditors. Thus, the petitioners could establish the requirement under Section 38 of the Act. Apart from that the petition is required to be filed only before the Court exercising the jurisdiction under the Act, and not before the official receiver, but the trial court as well as the appellate court recorded erroneous findings, and prayed to set aside the order under challenge.

06. *Per contra*, Sri T.S. Anand, learned counsel for respondents would contend that the appeal itself is not maintainable under Section 75 of the Act and apart from that the total creditors allegedly entered into composition are not majority of the total creditors and their value is less than $3/4^{\text{th}}$ of the value of the creditors. In such a case the court cannot exercise the power to permit the petitioners to enter into Composition under Section 38 of the Act, and, prayed to dismiss the appeal on these two grounds.

07. Considering the rival contentions and the grounds urged before this Court in the second appeal, the points for consideration are:

- 1) Whether the second appeal is maintainable against the Order passed in a petition filed under Section 38 of the Act?
- 2) Whether the petition filed under Section 38 of the Act for Composition scheme before the trial court i.e. Subordinate Judge's Court (now Senior Civil Judge's Court) is maintainable?
- 3) Whether the petitioners proposed to enter into composition with majority of creditors whose debts value is 3/4th of creditors. If so, entitled leave to enter into composition?

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Point No.1:

08. The prime contention of the counsel for the respondents, Sri T.S. Anand, is that the second appeal is not maintainable against the Order passed by the Subordinate Judge in a petition filed under Section 38 of the Act. Sri P. Raghu Ram, learned Senior Counsel for the appellants, refuting the said contention, stated that this is an order passed by the District Judge while exercising the jurisdiction under the Act. Therefore, the second appeal is maintainable in view of proviso to Section 75(1) to the Act.

09. In view of the specific contention, it is appropriate to extract Section 75 of the Act, which reads as under:

75. Appeals.—

(1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final:

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the same and pass such order with respect thereto as it thinks fit;

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under Section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The period of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively.

10. A bare look at Section 75 of the Act, the second proviso to sub-section 1, any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908 (5 of 1908). Therefore, only second appeal is provided against the order passed in an application filed under Section 4 of the Act before the trial court and appeal against the same before the District Court. But sub-section (2) of Section 75 of the Act says that any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.

11. In view of the specific contention, incidentally, I have gone through the Judgment of Kerala High Court in **Supreme Finance Corporation v. George**^[1]

12. Before the Kerala High Court, an appeal under Section 79 of Insolvency Act, 1956 (Central Act 2 of 1956) came up for consideration

and the Kerala High Court held that Insolvency Act provides only for an appeal against an order passed by the District Court under sub-section (1) of Section 79 of the Insolvency Act, 1956 and no revision is provided under the Insolvency Act to the High Court. Further the appeal is provided under second proviso to Section 79 to the High Court only on any of the grounds mentioned in Sub-Section (1) of Section 100 of the Code of Civil Procedure. Sub-section (1) of Section 100 of the Code of Civil Procedure provides that the appeal to the High Court is only on substantial question of law.

13. Section 79 of the Insolvency Act, 1956 (Central Act 2 of 1956) is *in parie materia* with Section 75 of the Act in all respects. Therefore, in view of the principle laid down in the above judgment 2nd appeal is maintainable in the facts of said appeal, a petition was filed for issue of the cheque under Section 151 of the Code of Civil Procedure, 1908 and the same was dismissed and aggrieved by the same, miscellaneous appeal was filed before the Additional District Judge, which ended in dismissal, aggrieved by the same, a revision was preferred before the High Court, but the High Court held that the appeal is maintainable.

14. A contrary view has taken by the Gujarat High Court in **Ghanchi Amthalal Magnalal Others v. Mehta Popatlal Mangalji Others** ^[2]. A similar question about maintainability of the appeal against the order passed in a petition filed under Section 42 read with Section 75 of the Act, came up for consideration, but the High Court held that the appeal is not maintainable.

15. The learned counsel for the respondents raised a contention that the appeal is not maintainable and no legal position is brought to the notice of this Court during argument, the decisions of both the Gujarat and Kerala High Courts are contrary to one another, and they are not binding precedents on this Court. However, those decisions have got persuasive value.

16. A bare look at the second proviso to sub-section 1 of Section 75 of the Act, clearly indicates, only against the decision of the District Court on appeal from a decision of a subordinate Court under section 4 of the Act, the second appeal is maintainable. Even according to sub-section 2 of Section 75 of the Act, appeal is maintainable against the order of a District Court, from the order passed by subordinate court as contemplated in Schedule I, before the High Court. Undisputedly, the petition before the trial court in the present facts was not under Section 4 of the Act, to attract the second proviso to sub-section 1 of Section 75 of the Act. Similarly, it was not an application filed under Sections 25, 26, 27, 33, 35, 37, 41, 50, 53 and 54 as mentioned in Schedule I of the Act to maintain the second appeal under sub-section 2 of section 75 of the Act. When the present petition would not fall within the second proviso to sub-section 1 of Section 75 or sub-section 2 of section 75 of the Act, it is doubtful about maintainability of second appeal.

17. In **Ghanchi Amthalal Magnalal and Others** case referred to supra, Single Judge of Gujarat High Court elaborately discussed about sub-section 1 of Section 75 of the Act placing reliance on earlier Judgment of Maharashtra High Court, concluded that the second appeal is not maintainable. Sub-section (1) of [Section 75](#) thus makes the order passed by the District Court in appeal against a decision come to or an order made by a Court subordinate to the District Court in the exercise of insolvency jurisdiction is final. The appeal in the present case is directed against the order passed by the District Court in an appeal from an order made by its subordinate Court in the exercise of insolvency jurisdiction under [Section 42\(1\)](#) of the Act. The order of the District Court is thus rendered final. Second proviso to Sub-section (1) is attracted when the order of the District Court is on an appeal from a decision of a subordinate Court under [Section 4](#) and when any of the grounds mentioned in Sub-section (1) of Section 100 of the Civil Procedure Code, 1908, is made out. A second appeal in insolvency

matters can lie only under this second proviso, and provided the decision appealed from falls under [Section 4](#) of the Act and grounds mentioned in Sub-section (1) of sec, 100, Civil Procedure Code, 1908, exist. The first question to which I must, therefore, address myself is whether the subordinate Court falls under [Section 4](#) of the Act. Now, Sub-section (1) [Section 4](#) which is material for the purpose provides: "Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which 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 powers exercisable by the Court under Sub-section (1) of [Section 4](#) of the Act are subject to the provisions of the Act. The opening words of Sub-section (1) of [Section 4](#) of the Act, viz. "subject to the provisions of this Act," are intended to take out of the purview of that section, cases which are provided by other sections of the Act such as [Sections 53](#), [54](#) and [41](#) and [42](#) of the Act.

18. It is urged before this court by the learned counsel for the respondents that this appeal is not maintainable under the second proviso to sub-section 1 of Section 75 of the Act. There is substance in the contention raised by the learned counsel for the respondents. The second appeal provided only against the order passed under Section 4 of the Act, by the subordinate Judge and appeal thereto before the District Judge.

19. The Gujarat High Court relying on the Division Bench Judgment in Dattatraya Chandraya Bachuwar v. K.L. Bawachekar^[3] wherein the question was whether [Sections 53](#) and [54](#) were intended to be taken out of the purview of [Section 4](#), and the view taken is that Sub-section (1) of [Section 75](#) clearly covers the orders made under

Sections 53 and 54 of the Act by the subordinate Courts and the decision of the District Judge in appeal from such orders is final, and not appealable to the High Court. A Full Bench of the Allahabad High Court has in **L. Kedar Nath and Another v. H. Ali Ahmad and Another**^[4], taken the view that "An order by the trial Court granting conditional discharge to the insolvent does not come within Section 4 and hence no appeal lies from the appellate order of the District Judge passed thereon. The appellate order can be challenged only by way of revision to the High Court under proviso to Section 75(1)." The Lahore High Court expressed similar view in **Gopaldas v. Official Receiver, Sialkot and Others**^[5] and in **Gokal Singh and Another v. Krishnan Lal**^[6]. Based on the principle laid down in the above Judgments while dealing with discharge under Section 42 of the Act, the Gujarat High Court held that the second appeal is not maintainable.

20. In the present facts of the case, a leave is sought for to enter into composition with the creditors. It would not fall within the ambit of Section 4 of the Act. Therefore, the second appeal under the second proviso to sub-section 1 of Section 75 of the Act or under sub-section 2 of Section 75 is not maintainable. On this ground alone, the appeal is liable to be dismissed.

21. In view of my foregoing discussion, it is held that the second appeal is not maintainable against the order passed under Section 38 of the Act. Accordingly, the point is answered.

Point No.2:

22. The second question is about maintainability of the petition before the Court exercising the jurisdiction under the Act. Section 38 of the Act deals with Compositions and Schemes of arrangement. According to sub-section 1 of Section 38 of the Act where a debtor, after the making of an order of adjudication, submits a proposal for a

composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed and in such proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

23. In the present facts of the case, the total creditors are 92 in number, out of them 7 to 74 were allegedly entered into composition with the petitioners/ appellants and filed scheme composition duly signed by the creditors 7 to 74. No doubt, the majority of the creditors accepted for the composition, but it is for the petitioners to prove that the respondents 7 to 74 proved their debt before the Official Receiver by following the procedure under Section 49 of the Act. In the absence of proof that the majority of creditors, who proved the debt before the Official Receiver and whose debts are three-fourth in its value of the creditors, the petitioners are not entitled to claim any relief under Section 38 of the Act. The trial court held that the petition is to be filed before the Official Receiver seeking leave of composition not before the court exercising the jurisdiction under the Act.

24. A bare look at sub-section 1 of Section 38 of the Act, it clearly indicates that the petition is to be filed only before the Court and the Court after hearing, report of the Receiver being appointed, considering the objections made on their behalf, the Court may accept or refuse the proposal. The word "court" referred in sub-section 1 of Section 38 of the Act is only a court exercising the jurisdiction under the Act. Under Section 2(b) the "District Court" means the Principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns, but under Andhra Pradesh State amendment for clause (b) of sub-section 1 of Section 2 of the principal Act, "(b) "District Court" means the principal Civil Court of

original jurisdiction and includes the City Civil Court at Hyderabad". [Vide Andhra Pradesh Act 23 of 1965). Therefore, the Subordinate Judge, who exercised the power under the Act is the court referred under Section 38 of the Act. A close analysis of Section 38 of the Act, I find that petition under Section 38 of the Act is to be filed only before the court exercising the jurisdiction under the Act but not before the Official Receiver.

25. Therefore, the petition under Section 38 of the Act, is maintainable before the Subordinate Judge Court, Rajamundry, and not before the Official Receiver appointed by the Subordinate Judge court, for administration. Accordingly, the point is held in favour of the appellants and against the respondents.

POINT No.3:

26. According to Section 38 of the Act to approve Scheme of arrangement and Composition, majority of creditors have to accept the Composition and Scheme of arrangement on appearing before the Court either in person or through an advocate and that they must be creditors, who proved their debt before the Official Receiver under Section 49 of the Act and that they must not be less than three-fourth of the value of the creditors. Here before the trial court and before the appellate court, the petitioners failed to prove that the creditors, who were allegedly entered into composition with the petitioners/appellants, are the proved creditors and the value of the debt is three-fourth of the value of the creditors. The burden is always on the petitioners to prove those two requirements in view of Sections 101 and 102 of Indian Evidence Act, 1872. In the absence of any evidence to establish the requirements, the petitioners are not entitled to claim relief under Section 38 of the Act. Therefore, the trial court rightly dismissed the petition on facts and affirmed the same by the appellate court on appeal. In fact, it is purely question of fact, not law. However, in view of substantial question of law raised in grounds of appeal in

paragraph 17 and admission of appeal by this Court long back, I have no alternative, except to decide those grounds.

27. As seen from the purport of Section 38 of the Act, a petition is required to be filed before the Court exercising the jurisdiction under the Act and the same is to be accepted by majority of creditors, who proved their debt before the Official Receiver, and the value of their debt must not be less than three-fourth value of the creditors. The onus of proof of those requirements squarely lies on the petitioners, who approached the Court seeking appropriate relief under Section 38 of the Act, but not on the respondents or the Official Receiver. The petitioners failed to discharge their onus of proof. Hence, the order passed by the trial court and affirmed by the appellate court warrants no interference. Hence, the point is held against the appellants and in favour of the respondents.

28. In view of my findings on points 1 to 3, I find that the appeal is devoid of merit and is deserves to be dismissed.

29. In the result, the appeal is dismissed. No costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Dt. -11-2015

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^[1] ILR 2006(3) Kerala 626

^[2] (1974) 15 GLR 591

^[3] MANU/MH/0104/1939

^[4] AIR 1942 Allahabad 219

^[5] AIR 1931 Lahore 647

[\[6\]](#) AIR 1934 Lahore 198