THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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C.M.S.A.Nos. 17 AND 18 OF 2010

COMMON JUDGMENT:

These two appeals are filed challenging the common judgment dated 31-03-2010 passed in A.S.No. 255 of 2009 and A.S.No. 91 of 2010 on the file of the Court of IV Additional District Judge, Guntur (for short, 'the Appellate Court'), whereunder the two appeals are dismissed confirming the orders passed in I.A.No. 740 of 2007 in I.P.No. 106 of 2004 and I.A.No. 359 of 2009 in I.P.No. 106 of 2004 on the file of the Court of I Additional Senior Civil Judge, Guntur (for short, 'the trial Court').

2. For convenience of reference, the parties will hereinafter be referred as arrayed in C.M.S.A.No. 17 of 2010 throughout this common judgment.

3. The appellant filed I.A.No. 359 of 2009 in I.P.No. 106 of 2004 under Sections 4 and 5 of Provincial Insolvency Act, 1920 (for brevity, 'the Act of 1920'), to discharge B schedule property from insolvency proceedings since title over the said property was transferred by the 4th respondent to her on 20-11-2004 under registered sale deed bearing document No. 15417 of 2004 prior to filing of the insolvency petition by the 2nd respondent on 28-12-2004.

It is alleged that that the appellant purchased B schedule property for a valuable consideration of Rs.1,00,000/- from the 4th respondent under registered sale deed dated 20-11-2004. Since the date of purchase, the appellant is in exclusive possession and enjoyment of the same. The 4th respondent purchased the said property from the 3rd respondent under registered sale agreement-cum-General Power of Attorney on 03-11-2004. While the matter stood thus, the appellant could know that the 2nd respondent filed I.P.No. 104/2004 against respondent Nos. 3 and 4 on 28-12-2004 before the trial Court to adjudge the 3rd respondent as insolvent, entrusting administration of property to Official Receiver for the benefit of general body of creditors and for annulment of GPA-cum- sale agreement dated 03-11-2004 executed by the 3rd respondent in favour of the 4th respondent. The insolvency petition was allowed by the trial Court adjudging the 3rd respondent as insolvent while annulling GPA-cum-sale agreement. Hence, the petition.

4. Respondent Nos. 3 and 4 remained *ex parte*.

5. The 2nd respondent resisted the claim of the appellant raising a specific contention that the petition itself is not maintainable under Sections 4 and 5 of the Act of 1920 and contended that Majeti Prameela, W/o Subrahmanyam, filed I.A.No. 480 of 2009 and I.A.No. 481 of 2009 in A.S.No. 61 of 2009 on the file of the Appellate Court claiming herself as tenant and she has been carrying on jaggery business in B schedule property from 01-04-2005. The appellant herein filed another interlocutory application in A.S.No. 61 of 2009 contending that she has been doing jaggery business in B schedule property with her inmates but Official Receiver put seal to the shop on 09-02-2009 without any notice to her and, therefore, the rival claims made by the appellant and Majeti Prameela in A.S.No. 61 of 2009 *per se* divulge the falsity of facts of the present petition.

It is further contended that the appellant is a close associate of respondent Nos. 3 and 4. No consideration whatsoever was passed under the alleged sale deed dated 20-11-2004 and it was brought into existence only to defraud the creditors in general and the 2nd respondent in particular. Value of B schedule property is about Rs.5,00,000/- at present and it was more than Rs.3,00,000/- in the year 2004. Therefore, sale of the property for meager sale consideration is another strong circumstance to disbelieve the transaction. The 1st respondent is entitled to issue notice to the appellant to surrender the property since the insolvency petition was allowed.

The 1st respondent filed I.A.No. 740 of 2007 under Sections 52 and 53 of the Act of 1920 contending that respondent Nos. 3 and 4 were not cooperating to handover schedule property despite issuance of notice and requested to pass necessary order to take possession of the property.

I.A.No. 740 of 2007 filed by the 1st respondent and an unnumbered petition filed by the appellant herein came up before the trial Court. Ultimately, on 11-11-2008, the unnumbered petition filed by the appellant was dismissed while allowing the application filed by the 1st respondent. Thereby, the claim of the appellant was rejected. Thereupon, the appellant preferred A.S.No. 61 of 2009 against the order passed in the unnumbered petition and also preferred A.S.No. 255 of 2009 against the order passed in I.A.No. 740 of 2007.

6. The 1st respondent filed counter contending that; under Sections 52 and 53 of the Act of 1920, he filed I.A.No. 740 of 2007, the same was allowed on 11-11-2008; thereafter, he seized the property; issued proclamation for sale of B schedule property belonging to the 3rd respondent; it was posted to 20-02-2009 for sale; meanwhile, he received an order of stay issued by the Appellate Court dated 19-02-2009; thereafter, the sale proceedings were adjourned and prayed to dismiss the petition.

7. During the course of enquiry, P.Ws.1 and 2 were examined on behalf of the appellant and got marked Ex.A1. On behalf of the respondents, R.Ws.1 and 2 were examined but no documents were marked.

8. Upon hearing argument of both counsel, the trial Court; disbelieving the contentions of the appellant; dismissed I.A.No. 359 of 2009 filed by the appellant while allowing I.A.No. 740 of 2007 filed by the 1st respondent.

9. Aggrieved thereby, the appellant filed A.S.No. 255 of 2009 and A.S.No. 91 of 2010 before the Appellate Court.

10. The Appellate Court, by common judgment dated 31-03-2010, dismissed both the appeals after considering entire material available on record.

11. Being aggrieved by the common judgment dated 31-03-2010, the appellant herein preferred the present two appeals raising several contentions.

12. Upon hearing argument of learned counsel for the appellant, substantial questions of law found by this Court are thus:

> *1. Whether registered agreement of sale-cum-GPA is a transfer within the meaning of Section 2 (f) of the Act of 1920, if so, does it amount to an act of insolvency and whether the same is liable to be annulled?*
>
> *2. Whether non-joinder of the appellant, who purchased the property under Ex.A1 dated 20-11-2004, is fatal to adjudge the 3rd respondent as insolvent, if so, whether the orders under challenge are liable to be set aside?*

13. **In Re. Point No. 1:**

The first and foremost contention of the appellant is that registered agreement of sale-cum-GPA is not a transfer within the definition of Section 2 (f) of the Act of 1920 and its annulment without notice to the appellant is illegal. The trial Court concluded that the very execution of agreement of sale-cum-GPA is a transfer within the definition of Section 2 (f) of the Act of 1920 and annulled the transaction covered by it while directing the 1st respondent to take steps for *interim* administration accepting the contention that the transaction is a transfer of immovable property and it is an act of insolvency within the meaning of Section 6 (1) (b) of the Act of 1920. The orders passed by the trial Court were challenged before the Appellate Court and those two appeals were dismissed by the Appellate Court also. Even now before this Court, it is contended that registered agreement of sale-cum-GPA is an irrevocable agency and, in view of Section 202 of Indian Contract

Act, 1872 (for short, 'the Act of 1872'), the same cannot be cancelled.

14. Section 2 (f) of the Act of 1920 defines transfer of property as follows:

> *"Transfer of property includes a transfer of any interest in property and the creation of any charge upon property."*

The definition of transfer of property under Section 2 (f) of the Act of 1920 is wider than the definition of transfer of property under Section 5 of the Transfer of Property Act, 1882 (for brevity, 'the Act of 1882'). According to Section 2 (f) of the Act of 1920, even creation of any interest in immovable property also amounts to transfer of property. Undoubtedly, GPA-cum-registered agreement of sale creates interest in immovable property and such power of attorney cannot be cancelled unless there is contract to the contrary under Section 202 of the Act of 1872 which reads thus:

> *"Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."*

Therefore, the transaction covered by GPA-cum-registered agreement of sale directly falls within the ambit of Section 2 (f) of the Act of 1920 and it is an act of insolvency within the meaning of Section 6 (1) (b) of the Act of 1920. Even according to Section 202 of the Act of 1872, it is an agency coupled with interest. Therefore, undisputedly, such transaction *i.e.* GPA-cum-registered agreement of sale is a transfer of immovable property.

15. Learned counsel for the appellant, contending that such power of attorney-cum-agreement of sale cannot be cancelled, drawn attention of this Court to ***Seth Loon Karan Sethiya Vs. Ivan E. John and others***[1], wherein the Apex Court ruled that on the strength of the equitable assignment in its favour, the Bank could execute the decree and the executing Court had no jurisdiction to entertain the application and continue proceeding were illegal and finally concluded that it amounts to creation of interest in property and such assignment cannot be cancelled in view of

Section 202 of the Act of 1872 since power of attorney in favour of bank to execute decree is an equitable assignment.

16. In ***Prahlad Pd. Modi and another Vs. Tikaitni Faldani Kumari and another***[2], a Division Bench of Patna High Court held that

> *"On the very day when document was executed, agency coupled with interest came into existence."*

17. In ***M. John Kotaiah Vs. A. Divakar and others***[3], this Court held that

> *"If the interest created in the agent is in the result or the proceeds arising after the exercise of the power, then the Agency is revocable and cannot be said to be an irrevocable Agency. However, if the interest in the subject matter say a debt payable to the principal is assigned to the agent as security simultaneously with the creation of the power and thereafter the agent exercises the power to collect the debt for discharge of an obligation owed by the principal in favour of the agent or owed by the principal in favour of a third party, then the agency becomes irrevocable.*
>
> *If on a construction of the power of attorney and in the light of the facts and circumstances obtaining in the case, the document does not prima facie satisfy the requirements for the creation of a power coupled with interest, then merely because the document itself describes the Agency to be an irrevocable one, it does not become an irrevocable Agency."*

In the facts of the above judgment, agency pleaded by the parties is an irrevocable agency basing on nomenclature of the document but, after verifying terms and conditions of the agency, the Court concluded that it is not an irrevocable agency. Therefore, the above judgment has no direct application to the present facts of the case.

18. Learned counsel for the appellant further drawn attention of this Court to ***Mutharasu Thevar Vs. Mayandi Thevar and others***[4], wherein it was held as follows:

> *"An agency to be irrevocable should create in the agent an interest in the subject-matter contemporaneously with the document wherein such agency is created and it cannot be left to chance or guess or inference. Unless such a thing is available in the document itself, all such other powers given t*

the agent mainly for purpose of reimbursement of moneys spent by him for and on behalf of the principals, even if such reimbursement should be by way of mortgage or sale of the properties, would create only a right of incident to such agency and would not amount to the creation of any interest in the agent over the subject-matter of the litigation or the subject concerned. No doubt, an alleged irrational attempt on the part of the principals to divest a right conferred on the agent incidentally for the purpose of reimbursement may give rise to a cause of action to the agent to sue the principals for damages and safeguard and secure his right of recoupment by setting the process of law into motion expeditiously. But this is entirely a different legal incident which has no bearing on the issue whether the power of attorney is by itself an irrevocable power within the meaning of Section 202 of the Indian Contract Act on the ground that it is coupled with interest."

19. In ***Smt. Nagar Susheela Nayak Vs. The Headquarters Sub-Registrar and Deputy Commissioner of Stamps, Tumkur and another***[5], a Special Bench of Karnataka High Court had an occasion to deal with a similar issue. In the facts of the above judgment, the petitioner, a hotel owner, applied for a loan of Rs.1,50,000/- to the Canara Bank against the security of the schedule property. The said bank required the petitioner to execute an irrevocable general power of attorney in favour of the bank, in addition to any other security which might have been taken from the petitioner. The power of attorney authorized the attorney (the bank) to alienate the property set out in the document in question at its sole discretion and appropriate the proceeds first towards interest and balance towards reduction of liability due to the attorney, including the loan. When the document was presented for registration, it was impounded for not being duly stamped under Section 33 of the Act. The question arose whether the instrument of general power of attorney executed by the petitioner, constituting Canara Bank, as her attorney in respect of matters specified in the document was one falling under Entry 41 (c) or (e). Finally, it was held that the recital in the power of attorney made it abundantly clear that it was in consideration of the bank advancing the loan that the petitioner was called upon to execute the power of attorney. It was clear that an interest in the

property was created in favour of the bank. Therefore, the petitioner had no power to revoke the deed unilaterally. Thus, it clearly falls under Entry 41 (e) of the Schedule to the Act.

20. No doubt, the legal principles laid down by various Courts in the judgments referred *supra* are not in quarrel but the question is whether or not the Court exercising jurisdiction under the Act of 1920 is denuded with the power of annulment when such transfer amounts to an act of insolvency within Section 6 (1) (b) read with Section 2 (f) of the Act of 1920. When the transaction covered by registered agreement of sale-cum-GPA is a transfer within the meaning of Section 2 (f) of the Act of 1920 and when it amounts to an act of insolvency under Section 6 (1) (b) of the Act of 1920, the Court exercising jurisdiction under the Act of 1920 is competent to annul such transaction and the interdict contained in Section 202 of the Act of 1872 will not come in the way of the Court to annul such transaction. Therefore, the contention of the appellant that GPA-cum-registered sale agreement cannot be cancelled or annulled in view of the interdict contained under Section 202 of the Act of 1872 is wholly unsustainable. Hence, I have no hesitation to hold that the transaction covered by GPA-cum-registered sale agreement is a transfer within the definition of Section 2 (f) of the Act of 1920 and it is an act of insolvency under Section 6 (1) (b) of the Act of 1920. The trial Court and the Appellate Court, therefore, concurrently concluded that it is an act of insolvency and such finding does not call for interference of this Court as I find no legal infirmity warranting interference of this Court. Consequently, B schedule property purchased by the appellant cannot be discharged from administration of insolvent's property by the 1st respondent. Accordingly, the point is answered in favour of the respondents and against the appellant.

21. **<u>In Re. Point No. 2:</u>**

One of the major contentions of learned counsel for the appellant is that the appellant purchased the property prior to filing of I.P.No. 106 of 2004 under the original of Ex.A1 and, therefore, without impleading her as a party, annulment of GPA-cum-registered agreement of sale is illegal. No doubt, as per Ex.A1, sale took place prior to filing of I.P.No. 106 of 2004 but she was not impleaded as a party to the insolvency petition since she is a transferee of transferee of the debtor *i.e.* GPA-cum-registered agreement of sale holder. In a petition to adjudge a debtor as an insolvent, proper and necessary parties are only debtor and his/her transferee but not transferee of transferee. When the transfer of property made in favour of the 4th respondent by the 3rd respondent itself is an act of insolvency, question of impleading the appellant, being transferee of the transferee of the 3rd respondent, does not arise for the reason that the very act of transfer of property by executing GPA-cum-registered agreement of sale is an act of insolvency. Therefore, the appellant, though acquired interest in the property under the original of Ex.A1, cannot be said to be a proper and necessary party. That apart, the evidence on record conclusively established that the appellant is closely associated with the debtor-the 3rd respondent and his transferee-the 4th respondent and, therefore, she is supposed to know the proceedings before the Court exercising jurisdiction under the Act of 1920 but she did not raise any objection. Hence, it is a clear case of fraudulent transaction as held by the trial Court and confirmed by the Appellate Court. When the transaction is itself fraudulent, failure to implead the appellant as a party to the insolvency proceedings by itself would not vitiate the order of annulling GPA-cum-registered agreement of sale in the insolvency petition. Hence, I find no substance in the contentions of learned counsel for the appellant to upset the concurrent finding recorded by both Courts below. Therefore, the concurrent finding of the Courts below is hereby confirmed holding this point in favour of the respondents and against the appellant.

22. C.M.S.A.No. 17 of 2010 is preferred against the order passed in

I.A.No. 740 of 2007 filed by the 1st respondent seeking direction to take possession of the property. The trial Court, having considered the evidence on record, rightly concluded that the transaction is a void transaction to defraud the general body of creditors. Section 55 of the Act of 1920 permits the 1st respondent to seek relief of setting aside fraudulent transaction that took place within three years prior to filing of petition. Thereby, the 1st respondent is competent to seek such relief, when the transaction is to defeat and delay the claim of general body of creditors, and administration to distribute dividend to creditors. The trial Court and the Appellate Court rightly concluded that the transaction is a collusive fraudulent transaction and, therefore, ordered the 1st respondent to take possession of B schedule property. The main contention before the trial Court and the Appellate Court is that the appellant is a *bona fide* purchaser for valuable consideration. No doubt, *bona fide* transactions for valuable consideration are to be safeguarded but proof of the same is purely a question of fact which can be decided basing on the evidence available on record. Therefore, this Court, while exercising power under Section 100 of the Code of Civil Procedure, cannot go into a fact finding concurrently recorded by both the Courts below since it is not a substantial question of law. Hence, the fact finding recorded by both the Courts below, that the appellant is not a *bona fide* purchaser for valuable consideration, does not call for interference of this Court.

23. In view of my foregoing discussion, I find no merits in both the appeals and, therefore, both the appeals deserve to be dismissed.

24. In the result, both the appeals are dismissed. Pending miscellaneous petitions in these appeals, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 08th September, 2015.

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[1] AIR 1969 SC 73

[2] AIR 1956 PATNA 233

[3] AIR 1985 AP 30

[4] AIR 1968 MADRAS 333

[5] AIR 1979 KARNATAKA 126