

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.M.S.A. No.30 of 2010

JUDGMENT:

This Civil Miscellaneous Second Appeal is filed challenging the Decree and Judgment dated 31.03.2010 in A.S. No.43 of 2008 on the file of V Additional District Judge (Fast Track Court), Guntur, whereby the Order passed by the Additional Senior Civil Judge, Tenali, in I.P. No.2 of 2004, dated 28.11.2007, was confirmed.

02. For convenience of reference, the ranks given to the parties before the Additional Senior Civil Judge, Tenali, will be adopted through out the Judgment.

03. The petitioner filed insolvency petition under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act, 1920') to adjudge respondents 1 to 3 as insolvents and to appoint an Interim Receiver or the Official Receiver to administer the properties of respondents 1 to 3, alleging, that the first respondent is partnership firm, consisting of respondents 2 and 3, carrying on wholesale business in tamarind and other items. Representing the firm - the first respondent, the 2nd respondent borrowed an amount of Rs.95,000/- from the petitioner on 01.01.2002 with the consent of the 3rd respondent for business purpose, executed promissory note with his own handwriting agreeing to repay the same with interest @ 18% per annum (compound interest) either to the petitioner or to her order on demand. Despite the demands made by the petitioner, the respondents 1 to 3 failed to discharge the debt due to the petitioner, though the respondents 2 and 3 jointly and severally liable to discharge the debt due by the first respondent.

04. While the matter stood thus, respondents vacated the shop, discontinued their business and the petitioner came to know on 27.11.2003 that the 3rd respondent with an intention to defraud and delay the creditors, executed registered sale deed dated 06.10.2003 in

favour of the 4th respondent, thus committed an act of insolvency. It is further contended that the property worth Rs.11,00,000/- covered by sale deed dated 06-10-2003 was sold for meager amount of Rs.6,00,000/-. Thus, such suppression of consideration amount to an act of insolvency and prayed for the aforesaid reliefs.

05. During pendency of the petition, the 2nd respondent died intestate on 15.08.2007. His legal heirs were brought on record as respondents 5 and 6, who are jointly and severally liable to discharge the debt due to the petitioner and that the sale deed executed in favour of the 4th respondent by the 3rd respondent is illegal.

06. The 2nd respondent representing the 1st respondent filed counter separately admitting that respondents 2 and 3 are partners of the first respondent firm, including borrowing of Rs.95,000/- for the benefit of the first respondent business, execution of sale deed in favour of the 4th respondent by the 3rd respondent, while contending that the 3rd respondent took responsibility to discharge the debt due to the petitioner as respondents 1 and 2 became insolvent, consequently the firm was closed. But the 3rd respondent did not discharge the debt due to the petitioner.

07. It is further contended that the 2nd respondent is a Cardiac and Diabetic patient. The petitioner with a malafide intention got filed the petition to harass these respondents. Finally, prayed to dismiss the petition against respondents 1 and 2.

08. Respondents 3 and 4 filed separate counter. The main contentions urged in the counter are as follows:

- a) The 3rd respondent did not actively participate in the business, he was only a nominal partner and that he did not borrow any amount on behalf of the firm.
- b) It is further contended that the 2nd respondent with an

intention to cause substantial loss to respondents 3 and 4, got executed promissory notes and that the 3rd respondent never borrowed amount and executed promissory note in favour of the petitioner. Therefore, he has no intention to delay and defeat the claims of the petitioner and the alienation of the schedule property to a tune of Rs.6,00,000/- in favour of the 4th respondent does not amount to an act of insolvency.

- c) It is further contended that the property was already mortgaged with the State Bank of Hyderabad and when the property was brought to sale under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "SARFESI Act",) for realization of the amount, the 3rd respondent having no other alternative sold the property to the 4th respondent, only to discharge the debt due to the Bank. Therefore the sale deed dated 06.10.2003 executed in favour of 4th respondent is not with an intention to avoid and defeat the claims of the petitioner and prayed to dismiss the petition against the 3rd and 4th respondents.

09. The 5th respondent filed an independent counter denying the material allegation including the borrowing amount etc. by his father while acting as its Managing Partner and that respondents 1 to 3 did commit no act of insolvency within the meaning of Section 6 of the Act, 1920 and that they are not liable for alleged act of insolvency.

10. The 5th respondent further contended that her husband - 2nd respondent died due to heart attack, leaving behind herself being the wife and the 6th respondent being the son, to succeed his estate. Therefore, they being the legal heirs cannot be adopted as insolvents.

11. Basing on the above pleadings, the trial court framed three issues. During enquiry before the trial court, the petitioner herself examined as P.W.1 and marked Exs.P.1 to P.5. On behalf of respondents, R.Ws.1 to 3 were examined and Exs.R.1 to R.7 were

marked.

12. Upon hearing argument of both the counsel, the trial court dismissed the insolvency petition declining to adjudge the respondents 1 to 3 as insolvents by annulling the transaction covered by sale deed dated 06.10.2003.

13. Aggrieved by the decree and order of the Additional Senior Civil Judge in I.P. No.2 of 2004, the petitioner preferred the appeal before the District Judge, Guntur, in A.S. No.43 of 2008 and the appellate court after hearing both the counsel, confirmed the order passed by the trial court while concurring with the opinion of the trial court.

14. Aggrieved by the Decree and Judgment in A.S. 43 of 2008 on the file of the V Additional District Judge (FTC), Guntur, the present CMSA is preferred raising several contentions.

15. Most of the contentions are pertaining to appreciation of evidence that means they are substantial questions of facts, not on questions of law. However, this Court while admitting this appeal by his lordship Justice K.C.Bhanu, by Order dated 26.10.2010 framed the following extracted substantial questions of law:

1. The Courts below erroneously dismissed the I.P. No.2 of 2004 without appreciating the factual and legal aspects that whether the plea raised by the appellant falls under Sections 6(b)(c) and 9 of the Provincial Insolvency Act, 1920, and respondent Nos.1 to 3 failed to discharge the burden that whether they have no intention to defeat or delay the payments of the other creditors and appellant who is one of the creditors.
2. Whether the Courts below have committed wrong and erroneously arrived to a conclusion basing on the recitals in the fraudulent sale deed dated 06.10.2003 executed by third respondent in favour of fourth respondent, that the sale deed is executed to discharge the debts, where the sale deed which is executed at a nominal rate and a couple of creditors alleged to have been benefited and others are fallen under Section 6(b) and (c) of the Insolvency Act, 1920.

16. Substantial questions of law framed by this Court on 26.10.2010 appear to be not framed properly. Therefore, the following substantial questions of law are framed by this Court.

1. *Whether the alleged execution of registered sale deed dated 06.10.2003 by the 3rd respondent in favour of the 4th respondent amounts to an act of insolvency under Section 6(1)(b) and (c) read with Section 9 of the Act, 1920? If so, whether the trial court erroneously placed the initial onus of proof on the petitioner/ creditor?*
2. *Whether the execution of registered sale deed dated 06.10.2003 by the 3rd respondent in favour of the 4th respondent amounts to an act of insolvency? If so, the concurrent finding of both the trial court and appellate court call for any interference of this Court?*

17. Since the questions framed above are interlinked, I find that it is appropriate to decide the questions by common discussion.

Questions 1 & 2:

18. The debtor is a Firm and its Partners and the alleged act of insolvency is transfer of property as defined under Section 2(f) of the Act, 1920 to the 4th respondent by the 3rd respondent. Though the 3rd respondent disputed borrowing an amount of Rs.95,000/- from the petitioner by the firm - first respondent represented by the 2nd respondent, the Managing Partner of the first respondent, the trial court and the appellate court concluded that there is relationship of creditor and debtor between the petitioner and the respondents and such fact finding need not be gone into while deciding the second appeal.

19. Though the relationship of creditor and debtor was accepted by the trial court as well as the appellate court, both the courts dismissed the petition on the ground that the petitioner failed to establish the transfer of property was with an intention to defeat and delay the debt due to the creditors, which is *sine qua non*, for

adjudging a person as insolvent under Section 6(1) (b) of the Act, 1920. The said finding is now under the challenge before this Court on the sole ground that the 2nd respondent admitted the relationship of creditor and debtor between the petitioner and respondents, and in such case the initial onus of proof is on the 3rd respondent and others, who contested the petition before the trial court and appellate court, but instead of placing initial onus of proof on the respondents, the trial court placed initial onus of proof on the petitioner erroneously and that apart when a particular plea set up by the petitioner regarding alienation of the property by the respondents with an intention to defeat and delay the creditors, it is for the 3rd respondent to establish that it was not intended to delay and defeat the claim of the creditor and the 3rd respondent did not even deny the alleged plea of intention to delay and defeat the claims of the creditors. In such case, the court has to accept the plea of the petitioner in the absence of any specific denial by applying Rule 5 of Order VIII of the Code of Civil Procedure, 1908 (for short, 'the Code'). But the trial court did not consider the same in proper perspective, whereas the counsel for respondents supported the concurrent findings of both the courts.

20. In view of the controversy between the parties, it is for this Court to decide whether the transfer of property by executing sale deed in favour of the 4th respondent by the 3rd respondent is aimed to defeat and delay the creditors, based on the evidence. Proof of intention of the parties depends upon the evidence available on record and attending circumstances. In the present case, there is relationship of creditor and debtor and the alleged act of insolvency is transfer of property of the 3rd respondent one of the partners of the Firm - first respondent with an intention to defeat and delay the creditors, which falls within the ambit of Section 6(1) (b) of the Act 1920.

21. When the petitioner approached the Court with a specific

plea that the 3rd respondent committed an act of insolvency by transfer of immovable property to defeat and delay his creditors, the ordinary rule is that the person who approached the Court he has to prove that the transfer of property is aimed to delay and defeat the creditors under Section 102 of the Indian Evidence Act, 1872. Adjudging a person as insolvent, results in bringing about the serious consequences, therefore, it is necessary to take particular care to see that the provision of law is observed strictly and applied correctly. Even if the debtor after selling major portion of his property, still possesses property to meet the claims of creditors, such act cannot be construed as an act of insolvency. But it is a peculiar case, where a Firm is sought to be adjudged as insolvent which consists of two partners i.e. respondents 2 and 3. But adjudication of firm as insolvent depends upon the solvency of its partners.

22. The main endeavour of the counsel for the appellant is that the initial onus of proof is on the 3rd respondent, who alienated the property that the transfer was not intending to defeat and delay the claims of the creditors, he placed reliance on the Judgment of the Apex Court reported in **M/s. Gian Chand & Brothers and another v. Rattan Lal @ Rattan Singh**^[1] to support his contention that unless the respondent denied specifically or by necessary implication or stated to be as not admitted in the written statement, such pleading shall be taken as admitted by the defendant.

23. In the same judgment, the Apex Court discussed about the normal burden of proof of maintenance of books in the course of regular business etc. In any view of the matter, in the above judgment, when the plea of denial of a particular fact is evasive, the same is to be taken as admitted and mere disputing such fact in the evidence is not sufficient. It is further concluded in the Judgment of the Apex Court that Rule 5 of Order 8 of the Code deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied

specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.

24. Undoubtedly, the legal position referred above is not in quarrel, but in view of the law declared by the Apex Court, in normal circumstances the initial onus of proof is on the petitioner, who approached the Court to prove a particular fact.

25. When I adverted to the paragraphs 3 of the counter filed by respondents 3 and 4, they specifically asserted the allegation that the 3rd respondent alienated the property in favour of 4th respondent with an intention to delay and defeat his creditors is false. This denial is sufficient and since it is a question of fact to be proved by adducing evidence and taking into consideration of various attending circumstances of each case. Hence, the Judgment of the Apex Court referred supra is of no assistance to the petitioner. Therefore, the contention of the petitioner that the respondents 3 and 4 admitted about their intention to defeat and delay the claim in transferring the property is without any substance and on the other hand it is for the petitioner to prove the intention of the 3rd respondent to delay and defeat the claim of his creditors by adducing cogent and satisfactory evidence. In paragraph 6 of the petition, the petitioner made a specific assertion that the transfer of property by the 3rd respondent in favour of the 4th respondent is only with an intention to defeat and delay the debt of the petitioner and other genuine creditors. Both the trial court and appellate court concurrently held the act of the 3rd respondent does not amount to act of insolvency as the transfer of property was not intending to defeat and delay the claim of the petitioner. Since there was imminent threat under SARFESI Act, the 3rd respondent sold the property to 4th respondent to discharge the debt due to the Bank. Therefore, it is difficult to accept the contention that the transfer of

property is with an intention to defeat and delay the claims of the creditors. Since the petitioner failed to prove the specific act of insolvency under Section 6(1)(b) of the Act, 1920, discharging his initial onus of proof, both the trial court and appellate court rightly concluded that the transfer of property by the 3rd respondent in favour of the 4th respondent does not amount to insolvency.

26. This court also framed the substantial questions of law whether the act of 3rd respondents amounts to transfer of property falls within the ambit of Section 6(1) (b) and (C) of the Act, 1920. Section 6(1) (b) and (c) of the Act, 1920 deals with transfer of property or any part thereof under the Act, 1920 or any other enactment for the time being in force be void as a fraudulent preference if he were adjudged as insolvent. Such act of transfer amounts to an act of insolvency.

27. In paragraph 6 of the petition, the petitioner contended that the transfer of property was for meager consideration, though it worth Rs.11,00,000/-. But this fact was not substantiated. In any view, the plea raised in paragraph 6 of the petition would attract only Section 6(1) (b) of the Act, 1920. In paragraph 7 of the petition also the petitioner contended that the 3rd respondent executed the sale deed for nominal price. Hence, the petitioner did not raise any specific plea to attract Section 6(1)(c) of the Act, 1920. Therefore, the pleadings in the petition would not attract Section 6(1) (c) of the Act, 1920. It is necessary for me to decide the alleged fraudulent preference. In fact, the property was sold to the 4th respondent when there was imminent threat to sell the same under the provisions of SARFESI Act, which has got overriding effect of other laws, that discharge of debt due to the Bank does not amount to fraudulent preference. Even otherwise there is no specific plea that the discharge of mortgage debt due to the Bank amounts to fraudulent preference. Hence, the petitioner failed to make out any case that the transfer of property in favour of the 4th respondent

by the 3rd respondent to discharge the debt due to the Bank amounts to fraudulent preference within Section 6(1)(c) of the Act, 1920. In the absence of any pleading and proof, it is difficult to accept the contention of the petitioner.

28. The petition was filed under Section 9 of the Act, 1920 alleged that the first respondent being the Firm represented by the 2nd respondent, the Managing Partner of the Firm borrowed an amount of Rs.95,000/- and the 3rd respondent one of the Partners of the Firm transferred the property and sought to adjudge the Firm and its Partners as insolvents. The Firm can be adjudged as insolvent, but it requires proof that each of the Partners has committed some act of insolvency.

29. A similar question came up before the Apex Court in **Firm Mukand Lal Veer Kumar & Another v. Sri Purushottam Singh & others** [\[2\]](#) wherein the Apex Court is of the view that in order to support an adjudication against a Firm there must be proof that each of the partners has committed some act of insolvency. If however, a joint act of insolvency is relied upon it must be shown to be the act of all the partners. An order for adjudication can also be made against a firm if there was an act of insolvency by an agent of the firm which was such as must necessarily be imputed to the firm.

30. The question whether the act of insolvency by one or more of the Partners can be regarded as an act of all the Partners, question of fact to be determined on the facts and circumstances of the case. If the principle lay down in the above judgment is applied to the present facts of the case, the petitioner did not make any allegation that the act of 3rd respondent, who transferred the property in favour of the 4th respondent is an act of all Partners of the Firm in question, apart from that there is no allegation in the entire pleadings that the act of the 3rd respondent is attributable to the first respondent Firm, the 3rd

respondent is not even a Managing Partner. Therefore, in such circumstances when the other partner and the Firm did commit no act of insolvency, the alleged act of insolvency committed by the 3rd respondent is not sufficient to adjudge the first respondent as insolvent. On the strength of the principle laid down in the above judgment, it is difficult to hold that the first respondent - Firm and its Managing Partner - the 2nd respondent and the 3rd respondent did commit the act of insolvency to attract Section 6(1) (b) and (c) of the Act, 1920.

31. Therefore, I am of the considered view that both the trial court and appellate court, after appreciation of entire evidence on record, rightly concluded that the petitioner miserably failed to prove that the transfer of property is intended to defeat and delay the claims of the creditors of the first respondent. Even otherwise in the absence of pleading and proof that the act committed by the 3rd respondent is an act of insolvency of the first respondent – Firm, by applying the principle laid down in the above judgment, the dismissal of the petition by the trial court cannot be found fault, since such adjudging a Person or a Firm will have its own serious consequences. This Court, while deciding the second appeal has to decide the illegality committed by the trial court as well as the appellate court and decide only substantial questions of law, without touching the findings based on the evidence. The finding with regard to the intention of the parties is only a fact finding. Therefore, I am unable to accept the contention of the petitioner that the transfer of property by the 3rd respondent in favour of the 4th respondent amounts to act of insolvency.

32. The trial court and appellate court though assigned other reasons for dismissal that is filing of the Suit etc, placing reliance on the Judgment of the Apex Court in **Dasari Siva Prasada Rao And Another vs Pasupuleti Satyanarayana And another**^[3]. Since the appellate court specifically recorded a finding in paragraph 16 that the

petitioner failed to prove that the 3rd respondent committed an act of insolvency, the facts findings do not call for interference.

33. Hence, in view of my finding foregoing discussion, I find no ground to set aside the concurrent finding recorded by the trial court based on the pleadings and evidence adduced by both the parties and the appeal is deserves to be dismissed.

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

M. SATYANARAYANA MURTHY, J

04-12-2015

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[\[1\]](#) 2013 SAR (Civil) 141

[\[2\]](#) AIR 1968 SC 1182

[\[3\]](#) (2005) 4 ALT 798