HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.24 OF 2010

JUDGMENT:

Aggrieved by the order dated 01.04.2010 passed in A.S. No.416 of 2009 by the IV Additional District Judge, Guntur (for short, 'the appellate Court') the petitioner-appellant preferred this Appeal.

For convenience of reference, the ranks given to the parties in I.P. No.3 of 2006 before the IV Additional Senior Civil Judge, Guntur (for short, 'the trial Court') will be adopted through this judgment.

The petitioner, M. Venkata Mohan (creditor), filed petition under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge the 1st respondent as insolvent, appoint Official Receiver, Guntur to administer B-1 schedule property and annulment of transactions covered by originals of Exs.P-3 and P-4 alleging that the 1st respondent borrowed Rs.1,00,000/- and Rs.60,000/- from the petitioner on 05.10.2003, under two promissory notes, marked as Exs.P-1 and P-2, agreeing to repay the same with interest at 24% *p.a.* either to the petitioner or to his order on demand, but in spite of several demands she did not discharge the debt; while the matter stood thus, the 1st respondent, to avoid her debts and with a view to delay and defraud the claim of creditors, executed sale deeds covered by the originals of Exs.P-3 and P-4, conveying B-1 schedule property to the 2nd respondent, without receiving any consideration, and, hence, they are collusive transactions. Thus, the 1s t respondent committed an act of insolvency within the meaning of Section 6(1)(b) of the Act and, hence, filed the petition for the aforesaid reliefs.

The 1st respondent remained *ex parte* before the trial Court.

The 2nd respondent filed counter denying material allegations while pleading ignorance about the creditor and debtor relationship between the petitioner and 1st respondent and that the 2nd respondent is a *bona-fide* purchaser of B-1 schedule property for a valuable consideration of Rs.10,85,000/- by the originals of Exs.P-3 and P-4 and, consequently, those transactions cannot be annulled and prayed for dismissal of the petition.

During course of enquiry, on behalf of the petitioner, PWs.1 to 4 were examined and Exs.P-1 to P-7 were marked. On behalf of the 2nd respondent, as the 1st respondent remained *ex parte*, himself was examined as RW.1 and marked Exs.R-1 to R-3.

Upon hearing argument of both the counsel, considering oral and documentary evidence including the material available on record, the trial Court allowed the Petition adjudging the 1st respondent as insolvent, appointed the Official Receiver, Guntur for administration of B-1 schedule property and accordingly, directed him to take further steps as per the provisions of the Act.

Aggrieved thereby, the 2nd respondent preferred Appeal Suit No.416 of 2009 raising various contentions and the appellate Court dismissed the Appeal in all respects but modified the order to the extent of deleting the words “B-1 schedule property” from Para 21(b) of the order in I.P. No.3 of 2006.

Being aggrieved, the petitioner preferred the instant Second Appeal raising several contentions and the main contention urged before this Court as substantial question of law is that deleting the words “B-1 schedule property” from Para 21(b) of the order is illegal.

The main contention of learned counsel for the petitioner-appellant is that the only source of petitioner-appellant to recover his due amount from the 1st respondent is B-1 schedule property and if the words “B-1 schedule property” from Para 21(b) of the order under challenge are deleted, it would be difficult for him to realize his debt and, hence, prayed to allow the Appeal.

No representation on behalf of the respondents.

Considering the contentions of learned counsel for the petitioner-appellant, perusing the material available on record including the decree and judgment under challenge, the sole point that arises for consideration is:

> Whether a direction be issued to the Official Receiver, Guntur for administration of the estate *i.e.,* B-1 schedule property of the 1st respondent?

POINT: Neither of the parties did question before the appellate Court about adjudging the 1st respondent as insolvent but the 2nd respondent only questioned about inclusion of the words ‘B-1 schedule property” in Para 21(b) of the order of the trial Court. Accepting the said contention, the appellate Court deleted the words contained in Para 21(b) of the order but, as seen from the appellate Court’s order, the appellate Court in Para 11 therein observed that making an observation by the trial Court that the Official Receiver shall take possession of the property covered by the originals of Ex.P-3 and P-4 sale deeds is uncalled for since the Official Receiver has to question the same under Section 55 of the Act. Therefore, the trial Court has pre-concluded that the 2nd respondent is not a *bona-fide* purchaser and deleted the words ‘B-1 schedule property’ from Para 21(b) of the order.

Evidently, from the order of the trial Court, it is clear that the learned Senior Civil Judge, directed the Official Receiver to administer the estate of 1st respondent *i.e.,* B-1 schedule property, which was alleged to have been sold to 2nd respondent by the originals of Exs.P-3 and P-4. Whereas, the contention of the 2nd respondent throughout is that that he is a *bona-fide* purchaser for valuable consideration but at the stage of adjudging the 1st respondent as insolvent the trial Court is not supposed to pass such an order annulling the transactions covered by the originals of Exs.P-3 and P-4; however, the trial Court directed to take steps for annulling the transactions covered by the originals of Exs.P-3 and P-4 simultaneously adjudging the 1st respondent as insolvents but it is impermissible under law. The finding of the trial Court with regards to annulment of Exs.P-3 and P-4 sale deeds is *ex facie* erroneous for the reason that order of annulment of sale deeds cannot be passed simultaneously adjudging the debtor as insolvent.

To decide the real controversy between the parties, without going into the evidence on record, I feel that it is better to advert to the provisions of the Act, more particularly, to the provisions of Sections 53, 54 and 54-A of the Act. According to Section 53 of the Act, any voluntary transfer made by a debtor, if the transferor is adjudged as insolvent, can be avoided. Section 54 of the Act says that every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and *void* as against the Receiver, and shall be annulled by the Court saving transactions entered into in good faith and for valuable consideration.

A fraudulent transfer under Section 53 of the Act and transaction to give fraudulent preference under Section 54 of the Act are *void* against receiver and they shall be annulled on a petition filed within the specified time. Section 54-A of the Act specified procedure for annulment of any transfer under Sections 53 or 54 of the Act. According to it, for annulment of any transfer under Sections 53 or 54 of the Act, a petition may be presented by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition.

In view of the language used in Sections 53 and 54 of the Act, more particularly, the words 'if the transferor is adjudged insolvent' under Section 53 of the Act and 'if such person is adjudged insolvent' under Section 54 of the Act, indicates that for annulling transaction of transfer, the debtor must be an adjudged insolvent. So, to annul a transaction of transfer, the pre-condition is adjudging the debtor as insolvent but, here, the petition was filed by the creditor seeking two reliefs both under Sections 9 and 53 and 54 of the Act avoiding a fraudulent preference and annul the transactions covered by sale deeds Exs.P-3 and P-4. Thus, the petitioner-creditor sought for two reliefs simultaneously but the reliefs claimed by the petitioner are against the spirit of language used under Sections 53, 54 and 54-A of the Act.

According to Section 54-A of the Act, it is clear that, before moving Court for annulment of transfer, more particularly, covered by two sale deeds dated 29-11-2005, it is the duty of the petitioner to prove his debt before Official Receiver, as required under Section 49 of the Act, and then move the Court exercising insolvency jurisdiction for annulling transfer after receiver refuses to make such petition for annulment on the request made by the creditor. So, even according to Section 54-A of the Act, it is the duty of the creditor to prove the debt before Official Receiver.

Section 49 of the Act specified procedure to be followed for proof of debt. According to it, (1) a debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt; (2) the affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for production of the vouchers. Therefore, the debt shall be proved by following necessary procedure contemplated under Section 49 of the Act after entrusting the matter to Official Receiver duly adjudging the debtor as insolvent.

Part-III of the Act from Sections 45 to 50 laid down procedure for proof of debts. Adherence of such procedure under Sections 45 to 50 of the Act would arise only after adjudging the debtor as insolvent but here the relief under Sections 53 and 54 of the Act was claimed simultaneously with the relief of adjudging the debtor as insolvent. The conditions laid down under Section 54-A of the Act were not complied with by the petitioner to get the transactions covered by Exs.P-3 and P-4 annulled. From a perusal of language used under Sections 53, 54 and 54-A of the Act and the mode of proof of debt under Part-III of the Act (from Sections 45 to 50), it is clear that before moving an insolvency Court to annul transfer of property, a creditor has to satisfy the following conditions:

(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; and

(3) He should have made a request to Official Receiver for moving insolvency Court for annulling fraudulent transaction and that the Official Receiver refused to move such petition for annulment.

In the instant case, by the date of filing petition seeking annulment under Section 53 or 54 of the Act, 1st respondent was not even adjudged as insolvent. So, the first condition was not satisfied. The petitioner did not approach Official Receiver and proved his debt as contemplated under Part-III of the Act and did not comply with Section 54-A of the Act. Therefore, the order of annulling transactions covered by the original of Exs.P-3 and P-4, sale deeds dated 29-11-2005 by the trial Court is erroneous *ex facie* and contrary to the provisions of the Act. Hence, the order of the trial Court annulling the transactions covered by the originals of Exs.P-3 and P-4 in respect of B-1 schedule property is illegal and accordingly the appellate Court, by its well reasoned order dismissed the Appeal by deleting the words 'B-1 schedule property' from Para 21(b) of the order. Therefore, I find that the Appellate Court did commit no error in dismissing the Appeal. Hence, I find no ground to interfere with the finding recorded by the Appellate Court. Accordingly, the finding of the Appellate Court is hereby confirmed holding this point in favour of respondents and against the appellant.

In the result, the Civil Miscellaneous Second Appeal is dismissed. However, it is left open to the parties to raise any legal contentions in a petition filed under Sections 53 to 55 of the Provincial Insolvency Act, for annulment of the transactions covered by the originals of Exs.P-3 and P-4, if advised.

In consequence, miscellaneous petitions, if any, pending in this Appeal, shall stand closed. No order as to costs.

JUSTICE M. SATYANARAYANA MURTHY

Date.18.08.2015.
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