THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.M.S.A.Nos.37 OF 2008 AND 10 OF 2010

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COMMON JUDGMENT:

As both the appeals arise out of a common judgment, I find that it is expedient to decide both the appeals by a common judgment.

The respondents 3 and 2 in I.P.No.15 of 2002, who are the purchasers of Item No.2 of the schedule property, filed these appeals aggrieved by the judgment and decree, dated 01.03.2006 in A.S.No.8 of 2004 passed by the VII Additional District Judge (Fast Track Court), Vijayawada, whereunder and whereby the appeal filed by the creditor/1st respondent herein was allowed adjudging the 2nd respondent herein as insolvent.

The creditor/1st respondent herein filed the said I.P. under Section 9 of Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge the 2nd respondent herein as insolvent alleging that he borrowed an amount of Rs.30,000/- from one Ketapalli Neeleswara Rao on 11.08.1998 under a promissory note and the same was transferred in favour of the creditor/1st respondent for consideration of Rs.35,000/- on 14.09.2001 and thereby he became the holder for the value and filed suit in O.S.No.222 of 2002 for recovery of the debt due under the promissory note on the file of the Junior Civil Judge, Nandigama. He also filed I.A.No.466 of 2002 under Order XXXVIII, Rule 5 C.P.C. for attachment of Item No.3 of the schedule property obtained an order of attachment before judgment. While the matter stood thus, even before filing of the suit, the 2nd respondent sold Item Nos.1 and 2 in favour of the appellants/respondents 2 and 3 before the trial Court and that he has no other property except the property transferred. Thus, the 2nd respondent committed an act of insolvency under Section

6 (1) (b) of the Act with an intention to defeat and delay the payment of debt due to the creditor/1st respondent and hence, prayed to adjudge the 2nd respondent herein as insolvent and vest the property to the official receiver.

Respondents 1 and 4, the debtor and the purchaser of Item No.3 before the trial Court remained *ex* parte and the appellants herein alone contested the Insolvency Petition filed counter denying the material allegations made in the petition. While contending that the appellants herein are the *bona fide* purchasers for valuable consideration of Item No.1 of schedule property, under registered sale deed dated 28.05.2002, he paid the entire sale consideration by way of discharging the debt to P.A.C.S., Raghavapuram. The 2nd respondent own and possessed two houses at Raghavapuram and vacant plots of about Ac.0.20 cents and Ac.0.25 cents, worth Rs.50,000/-, carrying on business at Nandigama and possessing movable property worth more than Rs.1,00,000/-. Thus, the 2nd respondent herein possessed sufficient means to discharge the debt due to the 1st respondent/ creditor and prayed to dismiss the I.P.

The appellants/2nd and 3rd respondents before the trial Court filed counters reiterating the same contentions that they are *bona fide* purchasers of Item No.2 of the schedule property for a valuable consideration under registered sale deed, dated 17.06.2002, and prayed for dismissal of the petition.

During the course of enquiry, the 1st respondent/petitioner was examined as PW.1, marked Exs.A1 to A6 and on behalf of the contesting respondents, RWs.1 and 2 were examined but no documents were marked.

Upon hearing the argument of both the learned counsel and considering oral and documentary evidence available on record, the Senior Civil Judge, Nandigama, dismissed the petition on 09.12.2003, on two grounds, namely, (i) the debtor/2nd respondent herein possessed sufficient means to discharge the debt due to the creditor/1st respondent and (ii) there is no collusion between the debtor and other respondents including the appellants and respondents 1 and 4 herein in execution of Exs.A3 and A4.

Aggrieved by the same, the creditor/1st respondent herein preferred A.S.No.8 of 2004 before the VII Additional District Judge, (Fast Track Court) , Vijayawada. After hearing the argument of both the counsel and considering the oral and documentary evidence available on record, the appellate Court allowed the appeal setting aside the order passed in I.P.No.15 of 2002 holding that it is not open to transferee of the debtor to contend that the debtor/2nd respondent herein possessed means to pay the debt and not entitled to claim benefit under Section 25 of the Act.

Aggrieved by the judgment and decree of the VII Additional District Judge (Fast Track Court), Vijayawada, passed in Appeal No.8 of 2004, the 3rd and 2nd respondents/transferees of Item No.2 of the schedule property preferred these appeals, raising several contentions.

The main contentions urged before this Court are that since the sale of Item No.2 of the schedule property took place after filing of the suit, the 2nd respondent cannot be adjudged as an insolvent, since he is not a transferor of the property with an intention to defeat and delay the claim of the creditors.

During the course of argument, learned counsel for the appellants/3rd and 2nd respondents supported the judgment of trial Court contending that the finding of the appellate Court that it is not open to the transferee of the debtor to claim benefit under Section 25 of the Act which is erroneous and the said fact was considered by the trial Court and rightly dismissed the petition. Finally, it is contended that Item No.3

of the schedule property, which was attached in I.A.No.466 of 2002 in O.S.No.222 of 2002 on the file of Principal Junior Civil Judge, Nandigama, is sufficient to meet the debt of the 1st respondent/creditor, but these aspects were not taken into consideration by the appellate Court and erroneously passed the judgment of the appeal and the same is unsustainable and prayed to dismiss the same.

Smt. Ch. Laxmi Chaya, learned counsel for the respondents, argued totally in support of the finding of the appellate Court and specifically contended that the appellants/3rd and 2nd respondents are incompetent to raise a plea under Section 25 (1) of the Act and thereby the appeals are liable to be dismissed and, therefore, prayed to dismiss the appeals.

Considering the contentions of both the counsel and after perusing the material available on record, the points that arise for consideration are:

i) Whether the appellants/3rd and 2nd respondents are competent to raise a contention that the 2nd respondent/debtor is able to discharge the debt and the petition is liable to be dismissed under Section 25 (1) of the Act?

ii) Whether the 2nd respondent/debtor be adjudged as insolvent in the absence of proof of collusion between the 2nd respondent/debtor, respondents 1 and 4 and the appellants herein?

POINT No.(i):- The 2nd respondent/debtor and respondents 1 and 4, alienees of Item No.3, remained *ex* parte before the trial Court and there is no pleading that the 2nd respondent/debtor own and possessed property and is able to discharge the debt, but such plea was raised by the appellants/3rd and 2nd respondents and the 3rd respondent in the appeals alleging that the 2nd respondent/debtor own and possessed two houses, two house plots, carrying on business at Nandigama and possessed movables worth Rs.1,00,000/-, the 2nd respondent/debtor is able to discharge the debt due to the 1st respondent/creditor.

Similar question came up before this Court in **Vemulla Rosaiah and another vs. P. Subramanyam and another**[1].

This Court relying on the judgment in **Harnam Singh vs. Gopal Das**[2] held that, the ground that the debtor is able to pay the debt is not open to the debtor's transferee, such contention can be raised by the debtor alone. Likewise, in the judgment in **Gadi Bhikaji vs. Govindrao Bapuji**[3], the same issue came up before the Nagpur High Court, wherein it held that the petition cannot be dismissed, when the debtor did not contest the matter under Section 25 of

the Act. In the first judgment of the our High Court, the 2nd respondent-debtor remained ex-parte, the creditor - 1st respondent alone contested the matter and raised a ground that the debtor is able to discharge the debt due to the 1st respondent -creditor, but this Court declined to set aside the order, holding that it is not open to the debtor's transferee to raise such a plea. Therefore, on this ground alone, the reversal of order passed by the trial Court can be sustained.

Under Section 25 of the Act, the Court can dismiss a petition for any other sufficient reason. What is "sufficient reason" is not explained under Section 25 of the Act, but a judgment of the Supreme Court in **Y. Malludore vs. P. Seetharathnam**[4] similar question came up for consideration and the apex Court held as under:

> "In addition, the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read ejusdem generis with the previous ones, but even so there can be no sufficient cause if after an act of insolvency is established, the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different

> circumstances. What those cases would be, it is neither easy nor necessary to specify, but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose, or where the petitioning creditor having refused tender of money, such as putting pressure upon the debtor or for extorting money from him fraudulently and maliciously filed the application. An order is sometimes not made when by the receiving order the only asset of the debtor would be destroyed such as a life interest, which would cease on his bankruptcy. Cases have also occurred where a receiving order was not made because there were no assets and it would have been a waste of time and money to make a receiving order against the debtor. These examples merely illustrate the grounds on which orders are generally made in the exercise of the discretion conferred by the last clause of Section 25."

In the present appeal, the appellants (transferees of the debtor) did not raise any plea that the petition is malicious and has been made for some collateral or inequitable purpose, or where the petitioning creditor having refused tender of money, such as putting pressure upon the debtor or for extorting money from him fraudulently and maliciously filed the application. In the absence of any such plea, the Court cannot dismiss the petition under Section 25 (3) of the Act.

The trial Court dismissed the petition only on the ground that the 2nd respondent/debtor is able to discharge the debt due to the 1st respondent/creditor. But, in view of the principle laid down by this Court in **Vemulla Rosaiah** (1 supra), the judgment of the trial Court is unsustainable. Therefore, the appellate Court rightly reversed the judgment of the trial Court by placing reliance on the judgment of **Vemulla Rosaiah** (1 supra).

In view of my foregoing discussion, I find no ground to set aside the finding of the appellate Court.

One of the contentions raised before this Court by the learned counsel for the appellants is that when an attachment before a judgment against Item No.3 of the schedule property was ordered, the 1st respondent/creditor can proceed against Item No.3 of the schedule property and realize the debt. But, this contention cannot be accepted for the reason that when the 2nd respondent is adjudged as insolvent, the property would vest automatically on the official receiver for general administration, though he is a secured creditor, only having preference over unsecured creditors. Therefore, it is not a ground to reverse the judgment of the appellate Court.

In view of my foregoing discussion, I find no merit in the contention of the learned counsel for the appellants and the point is answered against the appellants and in favour of the 1st respondent.

POINT No.(ii):- One of the contentions raised by the learned counsel for the appellants is that the appellate Court did not record any finding that the transaction covered by Exs.A3 to A5 are collusive or nominal. No doubt, if the transaction is nominal, it is not a ground to adjudge the debtor as insolvent, but it is not a precondition to record a finding that the transfer of property as defined under Section 2 (f) of the Act is not collusive or nominal. Mere alienation of all or substantial part of property with an intention to defeat and delay the debt of creditor is sufficient under Section 6 (1) (b) of the Act.

In the present facts of the case, the 2nd respondent/debtor alienated Item Nos.1 to 3 by executing Exs.A3 to A5 on different dates. However, the appellants contention is that the 2nd respondent owned and possessed two residential houses, two residential plots and carrying on business besides his possessing movables worth more than Rs.1,00,000/-. However, no piece of evidence is produced, but has drawn the attention of this Court to an admission of PW.1 regarding the business being carrying on by the 2nd respondent/debtor. No doubt, the 2nd respondent is carrying on business and assuming that the admission of PW.1 is true, but it is not known, whether the income derived from the business is sufficient to meet the debts due to the 1st respondent/creditor herein. Moreover, such plea under Section 25 (1) of the Act is not available to the transferee of the debtor i.e., the appellants/3rd and 2nd respondents before the trial Court in view of the law declared by this Court. Hence, the contention of the learned counsel for the appellants holds no substance.

To adjudge the debtor as an insolvent, proof of transfer of his whole or substantial part of property with an intent to delay and defeat the debt of the creditor is sufficient. Admittedly, the 2nd respondent/debtor alienated Item Nos.1 to 3 of the schedule property by executing Exs.A3 to A5 in favour of respondents 1 and 4 and appellants herein. The debt of 1st respondent/creditor is still remained unpaid. Considering the circumstances of the case and conduct of the parties, the Court can infer the intention of the debtor/the 2nd respondent herein and come to the conclusion that such alienation is intended or aimed to defeat the payment of debt due to the 1st respondent/creditor.

In the instant case, there is cogent and satisfactory evidence to establish that the alienation covered by Exs.A3 to A5 is aimed or intended to defeat the debt of PW.1 due to the creditor/the 1st respondent herein. Hence, the appellate Court rightly, on appreciation of entire evidence, reversed the order passed by the Senior Civil Judge, Nandigama, in I.P.No.15 of 2002. Even after appraisal of the entire evidence with reference to law, I find no merit in these appeals and the appeals are deserved to be dismissed.

In the result, the appeals are dismissed confirming the judgment and decree, dated 01.03.2006 in A.S.No.8 of 2004 passed by the VII Additional District Judge, Fast Track Court, Vijayawada. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in the appeals shall stand closed.

M.SATYANARAYANA MURTHY, J

11.06.2015

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[1] AIR 1989 Andhra Pradesh 204

[2] AIR 1929 Lahore 79 (Ref.)

[3] AIR 1937 Nagpur 127

[4] AIR 1966 SC 918