THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.1 of 2008

JUDGMENT:

The unsuccessful petitioner in I.P.No.3 of 2001 preferred this appeal challenging the concurrent findings of the Senior Civil Judge, Madanapalle and II Additional District Judge, Madanapalle in Appeal Suit No.21 of 2007 whereby the insolvency petition filed under Section 10 of the Provincial Insolvency Act, 1920 (for short, 'the Act') was dismissed.

2. For convenience of preference, the ranks given to the parties in I.P.No.3 of 2001 before the Senior Civil Judge, Madanapalle will be adopted throughout the judgment.

3. The petitioner/debtor filed a petition under Section 10 of the Act to adjudge him as insolvent on two grounds.

1) The liabilities of the petitioner/debtor are far exceeding the value of the assets he possessed as shown in A and B schedule properties, and

(2) The petitioner except possessing Rs.40,000/- as shown in B-schedule, he had no other properties and unable to discharge the debts due to the respondents/creditors.

4. The contentions of the petitioner/debtor are that the first respondent filed I.P.No.20 of 1996 against him on the file of the Senior Civil Judge, Madanapalle, which was dismissed on the ground that the petitioner possessed some properties in view of evidentiary admission. He further contended that the only house he possessed was sold away to meet the marriage expenses of his daughter and thereby, sought to adjudge him as insolvent under Section 10 of the Act.

5. Respondent No.1 filed counter denying material allegations of the petition *inter alia* contending that the petitioner own and possessed property in Survey Nos.360, 361 and other survey numbers of Ramireddigaripalle, H/o. Ponnutipalem Revenue Village and the said fact was admitted by him in his examination in I.P.No.20 of 1996. Therefore, believing the capacity of the petitioner to discharge the debt, I.P. was dismissed. Many debts shown in A-schedule are fictitious and created for the purpose of filing the present petition and they are bogus debts. The petitioner is also working as a document writer and earning Rs.400/- to Rs.500/- per day and thereby, he is able to discharge the debt due to the creditors. The alleged debts due to respondent Nos.3 to 12 are barred by limitation and those debts cannot be taken into consideration to decide the quantum of liabilities of the debtor. The Principal Junior Civil Judge, Madanapalle ordered for arrest of the petitioner in O.E.P.No.188 of 1999 in O.S.No.539 of 1998 and pleaded that he has no means to pay the debt to avoid imprisonment. Thus, the petitioner suppressed the property own and possessed by him, on this ground and the conduct of the petitioner throughout the proceedings including I.P.No.20 of 1996 is blameworthy, and if the conduct of the petitioner is taken into consideration, the petition is liable to be dismissed and accordingly prayed for dismiss of the petition.

6. Respondent No.2 filed counter denying material allegations *inter alia* contending that the petitioner was working as pigmy deposit collector in Syndicate Bank, Madanapalle and Rs.50,000/- is to the credit of his account lying with the Syndicate Bank and the same was got attached by the second respondent. He also possessed a house at Raghavendra Rao Street, Madanapalle and sold the house and secreted the amount. He is also carrying on business and having capacity to discharge his debt due to the second respondent. The present petition is filed with a *mala fide* intention and prayed for

dismiss of the petition.

7. Respondent No.3 filed counter denying material allegations and contended that the petitioner own and possessed a house and landed property apart from that he is having movable property and thereby, he is able to discharge the debt due to the third respondent and prayed for dismiss of the petition.

8. Respondent No.4 filed separate counter contending that the petitioner is a licenced document writer at the Sub-Registrar's Office and earning not less than Rs.200/- per day, and earning not less than Rs.2,000/- per month by selling flowers and plants etc., and the total income of the petitioner is beyond Rs.6,000/- per month. Most of the debts are bogus and created for the purpose of filing the present petition and thereby, the petition is liable to be dismissed and accordingly, prayed for dismiss of the petition.

9. During the course of enquiry, on behalf of the petitioner, the petitioner himself was examined as PW.1 and no documents were marked. On behalf of the respondents, RWs.1 and 2 were examined and no documents were marked.

10. Upon hearing the arguments of both the counsel, the trial Court dismissed the petition holding that the petitioner suppressed the property which he possessed in compliance of Section 13(1)(e) of the Act and the conduct of the petitioner is blameworthy. Therefore, negated the relief to adjudge him as an insolvent.

11. Aggrieved by the same, the unsuccessful petitioner/debtor preferred A.S.No.21 of 2007 before II Additional District Judge, Madanapalle and the same was ended in dismissal by judgment dated 17.10.2007 confirming the finding of the trial Court.

12. Aggrieved by the concurrent findings of both the trial and appellate Courts in I.P.No.3 of 2001 and A.S.No.21 of 2007, the

present Civil Miscellaneous Second Appeal is preferred, raising various contentions, more particularly, with regard to the non-consideration of the evidence in total by both the trial and appellate Courts.

13. This Court admitted the appeal without framing any substantial question of law on 04.01.2008. However, during hearing of this appeal with the consent of both the counsel, the following substantial question of law is framed:

"***Whether non-consideration of evidence by both the trial and appellate Courts while passing order in I.P.No.3 of 2001 and judgment in A.S.No.21 of 2007 vitiates the entire judgment under challenge or not?***"

POINT:

14. Admittedly, the trial Court dismissed I.P.No.3 of 2001 filed under Section 10 of the Act and the appellate Court confirmed the concurrent finding recorded by the trial Court. The trial Court and the appellate Court discussed the oral evidence adduced on record at length and even in the appeal by the appellate Court considered the evidence and concluded that the petitioner suppressed possession of other property and not complied requirements of Section 13(1)(e) of the Act and both the Courts took into consideration the conduct of the petitioner, more particularly, about admission in I.P.No.20 of 1996 and about possessing of property while pleading his ability to discharge the debt and got it dismissed in view of Section 25(1) of the Act. But now, the petitioner pleading his inability to discharge the debts on the ground that his liabilities are far exceeding the value of property he possessed as shown in A and B schedules. The petitioner having

admitted his ability to discharge the debt in I.P.No.20 of 1996 before the same Senior Civil Judge Court in a petition filed by the creditor under Section 6 read with 9 of the Act, he is not entitled to plead that he has no means and his liabilities are far exceeding the value of the property unless he proved that he is not holding the same subsequent to dismissal of I.P.No.20 of 1996. Strangely, both the counsel did not produce the order in I.P.No.20 of 1996 to find out the exact date of dismissal of the petition and to accept that the petitioner sold the house property subsequent to dismissal of I.P.No.20 of 1996.

15. It is also brought to the notice of this Court that the petitioner possessed some landed property, which is the subject matter of another suit, but no details of the suit, more particularly, about the dismissal of the suit were furnished before this Court. When I advert to the evidence of PW.1, the petitioner made a categorical admission in earlier I.P.No.20 of 1996 about his ability to discharge the debts. In page No.2 of cross-examination, PW.1 admitted as follows:

> "It is true that in my counter to creditor's I.P., I have stated that I own properties at Ponnutipalem. The witness says that the said property is in dispute. Creditor's I.P. was dismissed stating that I was having some other properties. I do not remember the case numbers and I have not filed the copies of judgments. As I did not get my share, I could not discharge the debts. It is not true to suggest that I got 1/4th share in the properties and I am having capacity to discharge the debts."

This crucial admission establishes that the petitioner own and possessed other property. For any reason, the result was against the petitioner. He is certainly entitled to claim relief in this petition, but obviously for the reasons best known, the petitioner produced the record, but he lost the claim. In the said suit, the trial Court and in the appeal, the appellate Court concluded that no material was produced before them to substantiate the said contention.

16. Section 13(1)(e) of the Act obligates the petitioner to disclose all the properties he possessed and express his readiness and willingness to produce the same for administration by the Official Receiver and it is mandatory. But here, the petitioner did not disclose the property he possessed in view of the admission made in earlier I.P.No.20 of 1996 and also failed to produce any evidence as to dismissal of his claim in the other suit where he has got a share in the property. Therefore, the petitioner suppressed the property he possessed in compliance of Section 13(1)(e) of the Act. On this ground alone, the petition is liable to be dismissed.

17. Yet, the learned counsel for the respondents would contend that the property was sold by the petitioner subsequent to dismissal of I.P.No.20 of 1996, but either in the pleadings or in the evidence, the petitioner did not disclose the date of dismissal of I.P.No.20 of 1996 and sale of the house property to meet the marriage expenses of his daughter, more particularly, to find out whether the sale was subsequent to dismissal of I.P.No.20 of 1996 or prior to it. In the absence of such material, it is difficult for this court to conclude that the petitioner sold the property subsequent to dismissal of I.P.No.20 of 1996. The petitioner having admitted about possessing means to discharge the debts due to the creditors in I.P.No.20 of 1996, now cannot contend that he has no means to pay the debt and he is estopped to raise such contention in view of Section 115 of Indian Evidence Act.

18. According to Section 24(2) of the Act, the conduct of the petitioner is relevant in a debtor petition to decide his plea that his liabilities are far exceeding the value of property he possessed. According to Section 24(2) of the Act, the Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon. If the conduct of the

petitioner is taken into consideration, there is any amount of doubt about the *bona fides* of the petitioner. The compliance of Section 24(2) of the Act is mandatory. In the instant case, the petitioner failed to produce any material to substantiate his contentions, since, the initial onus is on the petitioner to establish the requirements enabling him to file a petition under Section 10 of the Act.

19. The main contention of the learned counsel for the appellant is that non-consideration of evidence on record by both the Courts is a substantial question of law, but this cannot be accepted in view of the law laid down by the Hon'ble Apex Court in **Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor**[1], where the Supreme Court held that a finding of fact against evidence is not a question of law. The law laid down by the Hon'ble Apex Court consistently in various judgments, made clear that a concurrent finding of fact cannot be interfered by the second appellate Court, unless there is total perversity in the findings recorded by both the Courts. Where finding recorded by the first appellate Court is neither perverse nor based on any evidence, no interference is called for under Section 100 of C.P.C. as per the decision in **Hamida and others v. Md. Khalil**[2] and **Satya Gupta v. Brijesh Kumar**[3]. If the principles laid down in the above decisions of the Apex Court are applied to the present facts of the case in consideration of evidence by both the Courts, they do not give raise to a substantial question of law and this Court need not examine the evidence in detail while deciding an appeal under Section 100 of C.P.C.

20. In view of my foregoing discussion, I find that both the Courts have considered the evidence on record, appreciated the facts and evidence and did not ignore any piece of evidence available on record with reference to Sections 7 and 10 of the Act and Sections 13(1)(e)

and 25 of the Act. Therefore, I find no grounds to upset the concurrent findings recorded by both the Senior Civil Judge, Madanapalle in I.P.No.3 of 2001 and
II Additional District Judge, Madanapalle in A.S.No.21 of 2007.

21. In the result, Civil Miscellaneous Second Appeal is dismissed, but without costs, in the circumstances.

22. Consequently, Miscellaneous Petitions, if any, pending in this Civil Miscellaneous Second Appeal shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 24.06.2015
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[1] (1999) 2 SCC 471

[2] AIR 2001 SC 2282

[3] (1998) 6 SCC 423