

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE
STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

C.M.S.A.No. 8 OF 2012

Between:

T.Rama Murthy & others

...

Appellants

AND

Chavatapalli Vemlata Subbaiah (died) & others
Respondents

...

Date of Judgment Pronounced: 20-07-2015

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SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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| 1. | Whether Reporters of Local newspapers
may be allowed to see the judgment? | No |
| 2. | Whether the copy of judgment may be
marked to Law Reporters/Journals? | No |
| 3. | Whether Their Lordship wish to see the
fair copy of the judgment? | No |

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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C.M.S.A.No. 8 OF 2012

JUDGMENT:

Respondent Nos. 2 to 5 in I.P.No. 12 of 2003 on the file of the Court of Senior Civil Judge, Penukonda (for short, 'the trial Court'), who are the appellants in A.S.No. 20 of 2006 on the file of the Court of Additional District Judge, Hindupur (for short, 'the Appellate Court'), preferred this appeal challenging the concurrent finding recorded by both the trial Court and the Appellate Court.

2. For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this judgment.

3. The petitioners filed I.P.No. 12 of 2003 before the trial Court under Section 9 of the Provincial Insolvency Act, 1920 ('the Act of 1920' for brevity), to adjudge respondent Nos. 1 to 6 as insolvents; annul partition deed dated 27-12-2002 between respondents 2 and 10 and relinquishment deed dated 28-12-2002 executed by the 1st respondent in favour of respondents 2 to 4; and create first charge over the assets of respondents 1 to 9; alleging that respondents 1, 3 and 4 are sons of the 2nd respondent and the 5th respondent is unmarried daughter of the 2nd respondent. The 6th respondent is wife and respondents 7 to 9 are minor children of the 1st respondent. The 1st respondent, being manager of joint family consisting of respondents 1 to 9, borrowed a sum of Rs.2,10,000/- from the 1st petitioner on 02-05-2000 and executed a promissory note agreeing to repay the same together with interest at 24% *p.a.* Again, on 15-01-2001, the 1st respondent, for the maintenance

of joint family and for the joint family business, borrowed another sum of Rs.1,70,000/- from the 2nd petitioner and executed a promissory note agreeing to repay the same together with interest at 24% *p.a.* Thus, the amount was borrowed for the benefit of joint family and, therefore, all the members of joint family are liable to pay the debt due to the petitioners.

It is the contention of the petitioners that respondents 2 and 10, with intention to defeat or delay the claim of the creditors, fraudulently entered into partition deed dated 27-12-2002, purporting to divide schedule property except item No. 4, as a device to screen the property from the creditors. Later, the 1st respondent, with intention to defeat and delay the claim of the creditors, executed relinquishment deed dated 28-12-2002 in favour of undivided members of joint family. Thereby, the alienations are only intended to defeat and delay the claim of the creditors. The petitioners, therefore, filed the insolvency petition for the aforesaid reliefs.

4. Respondents 1 and 4 to 9 remained *ex parte*.

5. The 2nd respondent filed counter which was duly adopted by respondent Nos. 3 and 10 by filing a memo. The specific contention of the 2nd respondent is that they never borrowed any amount under promissory notes from the petitioners. The 1st respondent was working as an accountant and salesman in Jayalakshmi Hardware being run by Bathalapalli people. The petitioners, with a *mala fide* intention to make unlawful gain, had instigated the 1st respondent to leave that shop and appointed the 1st respondent to work under the petitioners in a newly set up hardware business styled as Bhagyalaxmi Hardware. For the last 10 years, the 1st respondent has been working under the petitioners as salesman and accountant. The members of joint family had no necessity to borrow any amount from the petitioners. The petitioners used to pay Rs.600/- to Rs.700/-

per month to the 1st respondent towards his salary and the alleged borrowing is created for the purpose of filing this petition. It is further contended that division of property by executing original of Ex.A3 partition deed dated 27-12-2002 does not amount to transfer of property and, similarly, relinquishment of property under original of Ex.A4 is also not an act of insolvency. Therefore, none of the respondents be adjudged as insolvents when the petitioners failed to plead that execution of Exs.A3 and A4 is intended or aimed to defeat and delay the claim of the creditors and prayed for dismissal of the petition.

6. During the course of enquiry, on behalf of the petitioners, P.Ws.1 to 3 were examined and got marked Exs.A1 to A4. On behalf of the respondents, R.Ws.1 and 2 were examined and got marked Exs.B1 and B2.

7. Upon hearing argument of both counsel and considering oral and documentary evidence, the trial Court adjudged the 1st respondent as insolvent annulling the transaction covered by original of Ex.A4 to the extent of 1/4th share of the 1st respondent while dismissing the rest of the claim in the petition.

8. Aggrieved by the decree and decretal order passed by the trial Court, respondent Nos. 2 to 5 preferred A.S.No. 20 of 2006 before the Appellate Court.

9. Upon hearing both counsel, the Appellate Court recorded a finding concurring with the finding recorded by the trial Court.

10. Aggrieved by the concurrent finding recorded by both the Courts, the present appeal is preferred under Section 100 of the Code of Civil Procedure (for brevity, 'C.P.C.') raising several contentions. The only contention of respondent Nos. 2 to 5 is that the trial Court did not record any specific finding that Ex.A4 was executed only with intent to delay and defeat the claim of the creditors and, in the absence of any finding, the decree and judgment cannot be sustained. Learned counsel for respondent Nos. 2 to 5, in support

of his contention, placed reliance on ***Bachu Srinivasa Rao Vs. Yerramsetti Saraswatamma and others***^[1]; ***Pirithi Vs. Budh Singh***^[2]; ***Gutta Nirmala Vs. Gutta Nageswara Rao and others***^[3]; and ***Rangappa Vs. Mohan***^[4].

11. *Per contra*, learned counsel for the petitioners would submit that the contentions raised in the grounds of appeal are not substantial questions of law and they are only substantial questions of fact and placed reliance on ***Vishwanath Agrawal, S/o Sitaram Agrawal Vs. Sarla Vishwanath Agrawal***^[5].

It is further contended that Exs.A1 and A2 are supported by consideration as the respondents failed to rebut the legal presumption under Section 118 of the Negotiable Instruments Act, 1881 (for short, 'the Act of 1881'), and prayed for dismissal of the appeal.

12. Considering rival contentions and perusing material available on record, the sole point that arises for consideration is thus:

"Whether the trial Court and the Appellate Court did not record a finding that execution of original of Ex.A4 is intended to delay and defeat the claim of the creditors, if so, whether the decree and judgment under challenge are liable to be set aside?"

13. **In Re. Point:**

The main endeavour of learned counsel for respondent Nos. 2 to 5 is with regards to recording of a finding that transfer of whole or substantial part of the property is only with intent to delay and defeat the claim of the creditors. A perusal of Section 6 (1) (b) of the Act of 1920, it is for creditors to plead and prove that transfer of whole or part of property of debtors is to defeat and delay the claim of the creditors, otherwise the petition is not maintainable since such transfer does not amount to an act of insolvency within the meaning of Section 6 (1) (b) of the Act of 1920. In the present case, the petitioners specifically pleaded that execution of originals of Exs.A3 and A4 is intended to delay and defeat their claim; in support of their

contention, they adduced evidence and substantiated their contention that execution of original of Ex.A4 is aimed or intended to defeat and delay their claim. The said finding though challenged before the Appellate Court, respondent Nos. 2 to 5 were unsuccessful since the Appellate Court concurred with the finding recorded by the trial Court.

14. The intention to delay and defeat the claim of the petitioners is based on attending circumstances and it is difficult to prove by adducing any direct evidence. While deciding intention on the part of a debtor, Courts shall take into consideration various attending circumstances. Thereby, such question is purely a substantial question of fact but not question of law. .

15. Learned counsel for the petitioners placed reliance on ***Vishwanath Agrawal, S/o Sitaram Agrawal Vs. Sarla Vishwanath Agrawal*** (5th *supra*), wherein the Supreme Court held as follows:

"When the Courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the Courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure. The High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the Courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion."

If the principle laid down in the above judgment is applied to the present facts of the case, certainly the concurrent findings recorded by the trial Court and the Appellate Court cannot be interfered with since the alleged recording of finding with regards to intention of the respondents as to defeat and delay the claim of the petitioners is purely a substantial question of fact. On this ground alone, the plea of respondent Nos. 2 to 5 cannot be sustained. Learned counsel for respondent Nos. 2 to 5 drawn attention of this Court to several judgments referred *supra* with regards to recording of finding as to intention of debtor to delay and defeat the claim of creditor but

here the trial Court and the Appellate Court recorded a finding that the 1st respondent transferred whole or substantial part of the property with intent to delay and defeat the claim of the petitioners and, therefore, such concurrent findings cannot be interfered with in view of the law declared by the Apex Court in the decision referred *supra*.

16. One of the contentions of learned counsel for the petitioners is that there is a presumption under Section 118 of the Act of 1881 that Exs.A1 and A2 are supported by consideration but this contention needs no consideration since concurrent findings cannot be interfered with while exercising power under Section 100 of C.P.C. Therefore, the decisions, relied upon by learned counsel for respondent Nos. 2 to 5, need no examination.

17. On overall consideration entire facts and circumstances of case, I find no substantial question of law; even otherwise, the concurrent findings recorded by the trial Court and the Appellate Court are supported by legal reasoning and oral and documentary evidence and, consequently, the appeal deserves to be dismissed.

18. The appeal is, accordingly, dismissed. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 20th July, 2015.

JSK

[\[1\]](#) 2011 (4) ALT 740

[\[2\]](#) AIR 1982 ALLAHABAD 179

[\[3\]](#) 2011 (4) ALT 171

[\[4\]](#) AIR 2010 SC 1898

[\[5\]](#) (2012) 7 SCC 288