THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.M.S.A.Nos.29 AND 30 OF 2012

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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.

Respondents 3 and 4 in I.P.No.13 of 2002, who are the purchasers of Item Nos.2 and 1 of the schedule property respectively, filed these appeals aggrieved by the judgment and decree, dated 25.01.2012, in A.S.Nos.26 and 138 of 2006 passed by the V Additional District Judge (Fast Track Court), West Godavari, Eluru, whereunder and whereby the order passed by the Additional Senior Civil Judge in I.P.No.13 of 2002 was confirmed adjudging respondents 1 and 2 herein as insolvents.

For convenience of reference, the parties herein will be referred to as arrayed before the trial Court in I.P.No.13 of 2002, throughout the judgment.

The petitioner herein/creditor filed the said I.P. under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge respondents 1 and 2, who are husband and wife, as insolvents and vest the schedule properties on the Official Receiver, alleging that respondent No.1 borrowed a sum of Rs.1,00,000/- from the petitioner on 25.01.2000 under
a promissory note agreeing to repay the same with interest and again on 08.02.2000, he borrowed another sum of Rs.50,000/- and executed a promissory note in favour of the petitioner. The consideration was passed by way of cheque to the petitioner. Respondent No.2

borrowed a sum of Rs.50,000/- on 08.02.2000 and executed a promissory note in favour of the petitioner agreeing to repay the same either to the petitioner or to his order as and when demanded. The consideration under this promissory note was also paid by way of a cheque.

Despite demands made by the petitioner, respondents 1 and 2 did not discharge the debt due under the two promissory notes. Respondent No.1 own and possessed the buildings and is running business in the name and stile of 'Matha Jewels' along with respondent No.2 and also carrying on business in the name of 'Mehar Chits and Finance'. However, in the said business, respondents 1 and 2 heavily indebted to several creditors.

While the matter stood thus, respondents 1 and 2 offered to sell the schedule properties and respondent No.3 purchased Item No.2 and respondent No.4 purchased Item No.1 from respondent No.1 under a registered sale deed, dated 01.12.2001, executed by respondents 1 and 2 in favour of respondents 3 and 4 separately. Thus, respondents 1 and 2 transferred the property in favour of respondents 3 and 4 only with a view to delay and defeat the legitimate claims of the creditors. Hence, the transfer of the properties by respondents 1 and 2 in favour of respondents 3 and 4 is an act of insolvency. Therefore, the petitioner prayed to adjudge, respondents 1 and 2 as insolvents and also prayed for other consequential reliefs.

Respondents 1 and 2 filed counters admitting about the money transactions and executing promissory notes, while contending that respondent No.1 is a big businessman having sufficient properties and because of various debts incurred by him, he intended to settle his disputes with the creditors and in that connection, a Committee was formed, which promised to settle the transactions, and at the instance of the said Committee, the alleged sale deeds were executed without any consideration and they are nominal.

Now, respondents 3 and 4 are trying to trespass into the schedule property without any valid title and finally prayed for dismissal of the petition with costs.

Respondent No.3 filed a separate counter denying the material allegations, while contending that the petitioner and respondents 1 and 2 colluded together and brought into existence the litigation to extract money illegally from him. He stated that the sale transaction is genuine and he is a *bona fide* purchaser for a valuable consideration. It is further contended that respondent No.2 has got movable and immovable properties of her own, worth more than the value of the debt due to the petitioner and thereby the transfer of Item No.2 of the schedule property by respondent No.2 in favour of respondent No.3 does not amount to act of insolvency and prayed for dismissal of the petition.

Respondent No.4 also filed a separate counter almost raising identical contentions, which were raised by respondent No.3 wile contending that she is a *bona fide* purchaser for a valuable consideration and this petition is filed by the petitioner in collusion with respondents 1 and 2 and that respondent No.2 is able to discharge the debts due to the creditor/petitioner and finally prayed to dismiss the petition.

During the course of enquiry, on behalf of the petitioner, PWs.1 to 3 were examined and Exs.A1 to A8 were marked and on behalf of the respondents, RWs.1 to 5 were examined and Ex.B1 was marked.

Upon hearing argument of both the learned counsel and considering oral and documentary evidence available on record, the Additional Senior Civil Judge, Eluru, allowed the petition adjudging respondents 1 and 2 as insolvents, while ordering to vest the property on the Official Receiver for administration.

Aggrieved by the same, respondents 3 and 4 before the trial Court in I.P.No.13 of 2002 preferred two separate appeals, being A.S.Nos.26 and 138 of 2006 respectively, before the V Additional District Judge, West Godavari District, Eluru.

After hearing argument of both the counsel and considering the oral and documentary evidence available on record, the appellate Court dismissed both the appeals on 25.01.2012 confirming the order passed by the Additional Senior Civil Judge, Eluru, in I.P.No.13 of 2002.

Challenging the concurrent findings recorded by the trial Court and the appellate Court, the present Civil Miscellaneous Second Appeals are preferred raising several contentions.

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

1) Whether respondent No.3 is able to discharge the debts due to the petitioner/creditor having possessed 200 sovereigns of gold and 5 kgs. of silver worth more than the debt due by her? and if so, whether respondent No.3 be adjudged as an insolvent?

2) Whether respondent No.2 committed any act of insolvency by giving fraudulent preference to any other creditors by sale of property of Item No.2 of the schedule property? and if so, whether respondent No.2 be adjudged as an insolvent?

3) Whether the Insolvency Petition is the outcome of collusion between the petitioner and respondents 1 and 2?

POINT No.(1):- The first and foremost contention raised by the learned counsel for the appellants before this Court is that the respondents cannot be adjudged as insolvents, as respondent No.3 possessed valuable gold of 200 sovereigns and 5 kgs., of silver worth more than the debt due to the petitioner. In fact, in the counter filed by respondents 1 and 2, they raised a specific plea that they are able to discharge the debt due to the creditors under Section 25 (3) of the Act. But, in the counter filed by respondents 3 and 4, they did not raise the specific plea that respondents 1 and 2 are able to discharge the debt due to the petitioner/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 and 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* and 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 concurrent findings of the Courts below cannot be interfered.

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 in 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 view of the law declared by the Division Bench and the Apex Court, the plea that the respondents are able to discharge the debt due to the creditors is not open to respondents 3 and 4, the transferees of the debtors. Hence, on this ground, the judgment under challenge cannot be set aside.

In view of my foregoing discussion, I find that respondents

3 and 4, the transferees of the debtors, are not entitled to raise such plea. Accordingly, the point is answered in favour of the petitioner and against respondents 3 and 4 before the trial Court.

POINT Nos.(2) & (3):- One of the contentions raised by the learned counsel for respondents 3 and 4 before the trial Court is that the petitioner, who is a creditor, advanced Rs.1,00,000/-
to respondent No.1 on 25.01.2000 and Rs.50,000/- on 08.02.2000 under two promissory notes, which were marked as Exs.A1 and A2, and thereafter a further sum of Rs.50,000/- under a promissory note, dated 08.02.2000, which was marked as Ex.A3, to respondent No.2. Therefore, the total amount due to the petitioner/creditor by respondents 1 and 2 is only Rs.2,00,000/-. However, respondent No.1 in his counter contended that he possessed huge properties, but due to loss in his business, he could not repay the debts due to the creditors and therefore a Committee was formed for settlement of various claims. But, no evidence is produced in support of the said contention. However, the petitioner/creditor, as on today, on record, is only one.

A single creditor can maintain a petition under Section 9 of the Act. This question is no more *res integra* in view of the Division Bench judgment of this Court in **G. Ramachander v. The Collector, Excise, Hyderabad and another**[5], wherein it held as under:

> ""decree-holder", 'debtor' includes a judgment-debtor. S.6 or 7 also entitles an individual to launch proceeding under the Act. S.10 of the Act also empowers individual debtor to present insolvency proceeding, if, he satisfied the conditions mentioned therein. None of the clauses of S.10(1) speaks of more than one creditor S.13(2) of the General Clauses Act (10 of 1897) says that the words in the singular shall also include the plural and vice versa. Therefore, no special significance need be attached to the words 'debts' or 'Creditors' used in several provisions of the Act. Therefore it was held that even a single debtor

could file an application u/S. 10 of the Act to get declared insolvent even it there is a single creditor."

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Similar question came up before the Madras High Court in **Sarangapani Chetty v. Perumal Naidu**[6]**.** The Division Bench of Madras High Court, while considering the same issue held that single creditor can maintain a petition. In the last paragraph of the said judgment, the Division Bench held as under:

> ""The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditor to the benefit of the debtors."
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> Consequently, we are of the view that the decisions cited at the Bar, can all of them be distinguished, with reference to the facts and the situation in insolvency law of the present case. This is a case where the facts abundantly and clearly establish the round of adjudication set forth in Sec. 6, Sub-Sec.(d)(i)(ii) and (iii). The fact that the general body of creditors was represented by the sole creditor, is no reason for declining adjudication, for the insolvency law has always recognized that the sole creditor or debtor could obtain an adjudication in insolvency."

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In a later judgment, the Single Judge of this Court reiterated the same principle and held that a single creditor can maintain a petition. In the present cases, in any view of the matter, the debt due to the petitioner/creditor is Rs.2,00,000/-, but respondents 1 and 2 alienated substantial part of the property in favour of respondents 3 and 4 and it is an act of insolvency under Section 6 (1) (b) of the Act.

To maintain a petition under Section 9 of the Act, the creditor is required to establish that the debtor had committed an act of insolvency covered by Section 6 of the Act and that the debt is more than Rs.500/- and that the act of insolvency must have taken place before three months preceding the date of institution of the petition.

In the present cases, the transactions covered by Exs.A4 and A5 took place on 01.12.2001, whereas the petition was presented before the Additional Senior Civil Judge, Eluru, on 28.02.2002. Therefore, the petition is within the time prescribed under Section 9 (1) (c) of the Act.

Section 25 of the Act expressly states the circumstances in which the petition made by the creditor must be dismissed, namely,

> "(1) in the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.
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> (2) In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition."

The discretion to dismiss the petition can only be exercised under very different circumstances. But, what are the different circumstances are not specified no where in the Act. Depending upon the facts and circumstances of the case, the Court can decide whether to dismiss the petition filed by the creditor by exercising power under Section 25 (3) of the Act or not by the Court exercising insolvency jurisdiction. But, in the instant cases, the Additional Senior Civil Judge, Eluru as well as the V Additional District Judge, Eluru, found no different circumstances, which enables the Court to exercise its discretion not to adjudge respondents 1 and 2 as insolvents and it is a purely question of fact, which cannot be gone into by this Court, while exercising power under Section 100 C.P.C.

One of the contentions raised by learned counsel for respondents 3 and 4 is that the petitioner is ready and willing to pay the debt due to the creditor together with interest and respondent No.3 has already deposited Rs.50,000/- as directed by the appellate Court while granting of stay. Even if respondents 3 and 4 are ready to pay the amount, the appeals cannot be dismissed and even they cannot be withdrawn by the petitioner/creditor, except with the leave of the Court. In such circumstances, it is difficult to accept the contention of the counsel for respondents 3 and 4.

Initially, it is contented that the property is ordered to be vested on the Official Receiver by the trial Court and the same was confirmed by the appellate Court and unless the transactions covered by Exs.A4 and A5 are annulled, the property cannot be vested. But, this contention is totally against the purport of Section 28 of the Act. Therefore, vesting of property on the Official Receiver cannot be set aside. The finding of the trial Court is in accordance with Section 28 of the Act.

It is also contended that respondents 3 and 4 are *bona fide* purchasers for valuable considerations and they are entitled to protection under Section 55 of the Act. No doubt, they are entitled to raise such contention in a petition filed under Sections 52, 53 or Section 4 of the Act either by Official Receiver or by the creditor with the leave of the Court to annul the transactions covered by Exs.A4 and A5. If respondents 3 and 4 are able to establish that they are *bona fide* purchasers for valuable considerations, they can claim benefit in the proceedings initiated for annulment i.e., the transactions covered by Exs.A4 and A5. Hence, it is left open to respondents 3 and 4 to raise such a plea before the Court exercising insolvency jurisdiction in a petition filed under Sections 52, 53 or Section 4 of the Act. Thus viewing, it is to be held that the contention of the respondents is without any substance.

On an overall consideration of material available on record, respondents 3 and 4 though contended that the petition is the outcome of the collusion between the petitioner and respondents 1 and 2, miserably failed to establish the collusion between them. Hence, it is not a ground to upset the concurrent findings recorded by both the Additional Senior Civil Judge and the V Additional District Judge adjudging respondents 1 and 2 as insolvents.

In view of my foregoing discussion, I find that both the trial Court and the appellate Court did commit no error warranting interference in the judgments under challenge before this Court. Accordingly, these points are held in favour of the petitioner and against respondents 3 and 4.

In the result, the Civil Miscellaneous Second Appeals are dismissed confirming the judgment and decree, dated 25.01.2012, passed in A.S.Nos.26 and 138 of 2006 on the file of the V Additional District Judge, West Godavari, Eluru. However, liberty is given to respondents 3 and 4 to raise the plea of *bona fide* purchasers for valuable consideration under Section 55 of the Act in the petition filed under Sections 52, 53 or Section 4 of the Act. There shall be no order as to costs.

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

***M.SATYANARAYANA MURTHY,* J**

16.07.2015
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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

[5] AIR 1977 AP 346

[6] AIR 1968 Madras 216