HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.M.S.A.No.52 of 2012

JUDGMENT :

This appeal is filed against the decree and judgment dated 08.08.2011 in A.S.No.171 of 2004 on the file of the Family Court-cum-VII Additional District Court, West Godavari, Eluru, whereunder an order passed by the Senior Civil Judge, Tanuku in I.P.No.31 of 1998 was confirmed.

2. For convenience of reference, the ranks given to the parties before the trial Court in I.P.No.31 of 1998 will be adopted throughout the judgment.

3. Respondent Nos.1 and 2 herein filed I.P.No.31 of 1998 under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge respondent No.1 as insolvent and to set aside the transaction covered by sale deed dated 06.08.1998 executed by respondent No.1-debtor in favour of respondent No.2-transferee of the debtor, contending that respondent No.1 borrowed an amount of Rs.80,000/- from petitioner No.1 and executed a promissory note on 17.12.1996 agreeing to repay the same together with interest at 24% p.a. Respondent No.1 borrowed an amount of Rs.60,000/- from petitioner No.2 and executed a promissory note dated 17.12.1996 agreeing to repay the same with interest at 24% p.a.

4. Despite repeated demands by petitioner Nos.1 and

2, respondent No.1 did not discharge the debts and on the other hand, respondent No.1 transferred the property shown in the schedule by executing sale deed in favour of respondent No.2 with a view to defraud defeat and delay the claims of the creditors, therefore the act of transfer of the property itself shows the intention of respondent No.1 to delay and defeat the claims of the creditors is an act of insolvency under Section 6(1)(b) of the Act and prayed to adjudge him as insolvent.

5. Appellants/Respondent Nos.1 and 2 in the I.P. filed counter denying borrowing and execution of the promissory notes in favour of petitioner Nos.1 and 2 and they never demanded respondent No.1 to repay the amount. It is further contended that respondent No.1 never executed the sale deed with a view to defeat or delay the claim of the creditors.

6. It is further contended that respondent No.1 filed I.P.No.12 of 1998 and when it was pending for enquiry, the creditors formed into a Committee and five members of the Committee verified the genuineness of the debts due to various creditors and paid the amount by sale of the property, distributed the sale proceeds to the various creditors proportionately. In view of the said settlement, I.P.No.12 of 1998 was withdrawn. Gavireddy is one of the creditors in I.P.No.12 of 1998 did not return the blank promissory note available with him even though his debt was settled by the Committee. Taking advantage of the

blank promissory notes, the pronotes were created and filed the present I.P., therefore, there are no bonafides in the petition and prayed for dismissal of the insolvency petition.

7. During enquiry before the trial Court, on behalf of petitioners PWs.1 to 5 were examined and marked Exs.A.1 to A.6. On behalf of respondents, RWs.1 to 4 were examined and marked Exs.B.1 to B.65.

8. Upon hearing argument of both the counsel and considering the oral and documentary evidence on record, the trial Court adjudged respondent No.1 as insolvent.

9. Aggrieved by the order and decretal order passed by the Senior Civil Judge, respondent Nos.1 and 2 before the trial Court preferred the appeal in A.S.No.171 of 2004 and the same was dismissed by Judge, Family Court-cum-VII Additional District Judge, West Godavari, confirming the order passed by the Senior Civil Judge.

10. Respondent Nos.1 and 2 in I.P.No.31 of 1998 preferred this appeal aggrieved by the decree and judgment in A.S.No.171 of 2004 dated 08.08.2011.

11. Respondent Nos.1 and 2/appellants raised several grounds, in Ground No.5 they raised a specific substantial question of law. In ground No.5, respondent Nos. 1 and 2 before the trial Court raised three substantial questions of law, but out of those three questions of law, the 1st question alone is the substantial question of law and the

other two questions are substantial questions of fact. Therefore, this Court need not decide those two questions exercising the power under Section 100 of the C.P.C.

12. Learned counsel for respondent Nos.1 and 2/appellants would contend that unless a decree was obtained by the date of filing of I.P., the petitioners are disentitled to file I.P. Therefore, adjudging respondent No.1 as insolvent and annulling transaction covered by original of Ex.A.1 is contrary to the principle laid down by this Court in **Gunapati Radha Krishna Reddy v. Cheemala Venkata Ramana and others**[1] and prayed to set aside the order.

13. Whereas the learned counsel for the respondents did not advance any argument.

14. Considering contentions, perusing the concurrent findings recorded by both the appellate court and trial Court, the sole point that arises for consideration is as follows:

> Whether the petitioners/respondent Nos.1 and 2 herein are entitled to file I.P. without obtaining a decree basing on the promissory notes marked as Ex.A.2 dated 17.12.1996 and Ex.A.5 dated 17.12.1996?

POINT :

15. In the present case, the act of insolvency complained by petitioners is that respondent No.1 transferred his property in favour of respondent No.2 with

an intention to defeat and delay the claim petitioners. No doubt, a transfer of property if it is aimed to defeat or delay, the claim itself is an act of insolvency under Section 6(1)(b) of the Act.

16. Section 2(f) of the Act defined the word 'transfer of property' and it includes a transfer of any interest in property or creating of any charge upon property. The definition of transfer under Section 2(f) of the Act is more wider than the transfer of property defined under Section 5 of the Transfer of Property Act, 1882. It is an undisputed fact that the schedule property was transferred under the original of Ex.A.1 by respondent No.1 in favour of respondent No.2. The trial Court and appellate Court concluded that the transfer was with an intention to defeat and delay the claim of the creditors, which is a question of fact based on evidence, therefore, I need not advert to the finding about the intention of debtor in transfer of property recorded by the appellate Court and trial Court or about the intention of respondent No.1 in executing Ex.A.1 in favour of respondent No.2.

17. The only contention before me is that unless the petitioners obtained a decree by filing a suit, they are disentitled to claim. Ofcourse, the leaned counsel for the petitioners relied on a judgment referred supra, wherein this Court held in para 5 as follows:

> *The Act provides facility to a creditor as well as to debtor, to seek declaration that the debtor has become insolvent. Several legal*

consequences ensue, once an individual is declared as insolvent. Essential conditions for institution of the proceedings under the Act are that (a) the individual, sought to be declared as insolvent must be a debtor and that (b) the properties held by him are insufficient in value, to liquidate the debts. A debtor can approach an insolvency Court, normally when he figures as judgment-debtor, in various decrees; the value of which exceeds the value of the properties held by him. In a given situation, a debtor may even approach the insolvency Court to declare him as insolvent, though no decrees, as such, were passed against him. In such cases, an unequivocal declaration made by him, as to his indebtedness, can be taken on its face value.

18. But, in para 6 of the above judgment, it held that 'unless a debt is in the form of decree, the creditor is not competent to institute proceedings under Section 9 of the Act.

19. In view of the judgment relied upon by this Court supra, it is necessary to advert the conditions laid down in Section 9 of the Act which reads as follows:

> **9. Conditions on which creditor may petition:**
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> (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless-
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> (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees and

(b) the debt is a liquidated sum payable either immediately or at some certain future time; and
(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.
(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value as estimated in the same way as if he were an unsecured creditor.

20. In **Dasari Srihari Rao v. Talluri Harinadha Babu**[2]**,** the division bench discussed about the conditions to be fulfilled by the creditor to file an application under Section 9 of the Act and held that application can be filed if debts exceeded Rs.500/- and the application must prima facie show that value of debts of debtor exceeded his assets and as such he is unable to discharge them. Therefore, a bare look at Section 9 of the Act, when the debt due to the creditor or creditors exceeding amount of Rs.500/-, the creditors are entitled to file a petition under Section 9(1)(a) of the Act. Section 9(1)(a) did not specify the specific requirement of obtaining a decree based on promissory note as held by this Court in the judgment referred (1) supra. In the absence of such condition imposed, a condition to obtain a decree for filing

an application under Section 9 of the Act is against the purport of Section 9(1)(a) of the Act. For any reason, the creditor approaches the Court immediately after knowing about the alienation to obtain a decree it may take years together depending upon the contest and workload in the Courts. If the creditors have to wait till obtaining a decree based on promissory notes, three years time prescribed will be expired. In such situation, it is difficult for any of the creditors to institute a petition under Section 9 of the Act, the provision will become redundant and indirectly effecting the right of the creditors to file an insolvency petition under Section 9 of the Act. Therefore, it is difficult to accept the interpretation given by this Court in the above referred judgments.

21. The word creditor is defined under Section 2(1)(a) of the Act and it is as follows:

> "creditor" includes a decree-holder, "debt" includes a judgment debt, and "debtor" includes a judgment-debtor.

22. It did not exclude the ordinary creditor or debtor, therefore, the word creditor is not confined to the decree-holder or judgment-debtor and it covered debtor, creditor, judgment-debtor and decree-holder. Hence, it is difficult to accept the principles laid down in the above judgment since it is against the purport of Section 9(1)(a) of the Act. Therefore, I find no legal infirmity in the findings record by both appellate Court and trial Court while exercising

jurisdiction under Section 100 of C.P.C. in the second appeal. Accordingly, the point is answered against respondent Nos.1 and 2/appellants and in favour of petitioners/respondent Nos.1 and 2 herein.

23. In the result, the appeal is dismissed. No costs.

24. Miscellaneous Petitions pending, if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

3rd September 2015.

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[1] 2010 (3) ALD 721

[2] 2002 (3) ALT 484 (D.B.)