

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

C.M.S.A.No. 39 OF 2011

Between:

Tatiparthi Satyanarayana ... Appellant/Petitioner

AND

Palacherla Vijayalakshmi & others ... Respondents/Respondents

Date of Judgment Pronounced: 27-07-2015

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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. 39 OF 2011

JUDGMENT:

The petitioner in I.P.No. 19 of 2001 on the file of the Court of II Additional Senior Civil Judge, Visakhapatnam (for short, 'the trial Court'), and the 1st respondent in A.S.No. 25 of 2009 on the file of the Court of VIII Additional District & Sessions Judge (FTC), Visakhapatnam (for short, 'the Appellate Court'), preferred this appeal challenging the finding of the Appellate Court, whereby the finding of the trial Court was reversed dismissing the petition in I.P.No. 19 of 2001.

2. For convenience of reference, the ranks given to the parties in I.P.No. 19 of 2001 before the trial Court will be adopted throughout the judgment.

3. The petitioner, claiming to be the creditor, filed petition under Section 9 of the Provincial Insolvency Act, 1920 (for brevity, 'the Act of 1920'), to adjudge respondent Nos. 1 and 2 as insolvents and to declare that sale deeds dated 25-07-2001 and 01-09-2001 executed by respondent Nos. 1 and 2 in favour of respondent Nos. 3 and 4 conveying item Nos. 1 and 2 of petition schedule property as void alleging that the petitioner is a dealer in wholesale business of supplying readymade silver articles and gold Jewellery to retailers for the last 15 years. Respondent Nos. 1 and 2, who are permanent residents of Visakhapatnam, having immovable property, carrying on their business in the name and style of Sri Kanaka Mahalakshmi Jewellery Mart in D.No. 26-15-16/B, Main Road, Near Kotha Road, Visakhapatnam, which is 10' x 20' in a plinth area of 200 square feet. The petitioner supplied gold and silver articles to respondent Nos. 1 and 2 and

became indebted to a tune of Rs.2,60,000/- altogether. Out of Rs.2,60,000/-, the 1st respondent has to pay Rs.1,60,000/- and the 2nd respondent has to pay Rs.1,00,000/- by June, 2001, which represents the amount borrowed in cash and value of silver articles and gold Jewellery supplied to them in retail business. Despite requests made by the petitioner, respondent Nos. 1 and 2 did not repay the amount due to the petitioner. Thereafter, the 2nd respondent nominally obtained a lease agreement in respect of schedule property from the 1st respondent, treating the amount due to him as interest free, on monthly rent of Rs.1,700/- giving set off from the amount already lying with the 1st respondent. With the above understanding, the 1st respondent obtained lease agreement dated 28-07-2001 from the 2nd respondent in respect of ground floor of the building bearing D.No. 26-15-16/B for a period of three years.

While the matter stood thus, the petitioner was roaming around the premises bearing D.No. 26-15-16/B awaiting arrival of respondent Nos. 1 and 2 but, to the surprise of the petitioner, the premises was kept under lock guarded by a watchman who prevented the petitioner from approaching the premises. Again to the utter surprise of the petitioner, he received a copy of the caveat petition on 01-08-2001 filed by the 3rd respondent contending that she became owner of entire house having purchased the same under registered sale deed dated 26-07-2001. Thereafter, the petitioner made enquiry in registrar's office and came to know that respondent Nos. 1 and 2 have executed another sale deed on 01-08-2001 in respect of their residential house in Sopdar gully, Town Hall Road. Thus, respondent Nos. 1 and 2 alienated one of their immovable assets even before executing the lease deed in favour of the petitioner but departed from their usual dwelling house and absented therefrom with intention to delay and defeat the claim of genuine creditors. Hence, sale deed dated 26-07-2001 in favour of the 3rd

respondent and the other sale deed dated 01-08-2001 executed in favour of the 4th respondent are sham and nominal and they are in the course of screening the property of the petitioner out of the reach of creditors. Hence, respondent Nos. 1 and 2 are to be adjudged as insolvents and sought for annulling the two sale deeds.

4. Respondent Nos. 1 and 2 remained *ex parte*.

5. The 3rd respondent filed counter denying material allegations *inter alia* contending that the petition is without any basis and filed only to harass respondent Nos. 3 and 4 having hand in glove with respondent Nos. 1 and 2. The petitioner did not approach the Court with clean hands and suppressed material facts. The lease agreement said to have entered into by the petitioner with the 1st respondent dated 01-08-2001 is subsequent to the registered sale deed by the vendor of the 3rd respondent *i.e.* the 2nd respondent. Therefore, the lease is not valid and it is not enforceable. On this ground alone, the petitioner is disentitled to claim any relief.

The 3rd respondent admitted about purchase of item No. 1 of petition schedule property from the 2nd respondent who is owner of the property; unregistered lease agreement is inadmissible in evidence; thus, not entitled to claim any right as tenant in item No. 1 of schedule property; the petitioner created the document only for the purpose of defeating the sale in favour of the 3rd respondent and prayed to dismiss the petition.

6. The 4th respondent filed memo adopting the counter filed by the 3rd respondent.

7. During the course of enquiry, on behalf of the petitioner, P.Ws.1 and 2 were examined and got marked Exs.A1 to A6. On behalf of the respondents, R.Ws.1 to 3 were examined but no documents were marked.

8. Upon hearing argument of both counsel and considering oral and

documentary evidence, the trial Court allowed the petition adjudging respondent Nos. 1 and 2 as insolvents while declaring sale deeds dated 26-07-2001 and 01-08-2001 as null and void permitting the petitioner to proceed against item Nos. 1 and 2 of petition schedule property in pursuance of the lease agreement.

9. Respondent Nos. 3 and 4, being aggrieved by the decree and decretal order of the trial Court, preferred A.S.No. 25 of 2009 before the Appellate court raising several contentions and the same was allowed upon hearing argument of both counsel by decree and judgment dated 26-03-2011 setting aside the decree and decretal order of the trial Court.

10. The petitioner challenging the decree and judgment of the Appellate Court preferred the present appeal raising several contentions, more particularly about validity of Exs.A3 and A4 and intention of respondent Nos. 1 and 2 to defeat and delay payment to the petitioner being the creditor.

It is specifically contended that the Appellate Court did not consider the amount due by respondent Nos. 1 and 2, which represents value of gold and silver articles supplied and also the amount borrowed from time to time from the petitioner, but the Appellate Court, on the sole ground that the petitioner did not establish relationship of debtor and creditor, dismissed the insolvency petition reversing the finding recorded by the trial Court.

11. This Court, being the second appellate Court, admitted the appeal on 01-12-2011 framing the following substantial questions of law:

- (a) *Whether the judgment and decree of the learned VIII Additional District and Sessions Judge are not vitiated by his erroneous approach in deciding the questions involved?*
- (b) *Whether the finding of the learned VIII Additional District and Sessions Judge that the appellant did not prove the relationship of creditor and debtor by not filing cash book, ledger, account books, or voucher, especially when his evidence stands unrebutted by respondent Nos. 1 and 2 not entering the witness box by giving*

evidence to rebut the evidence of the appellant?

- (c) *Whether the judgment of the VIII Additional District and Sessions Judge is not vitiated for not considering the question whether the sale of items 1 and 2 of the petition schedule property does not amount to act of insolvency to delay and defeat the creditor i.e. the appellant as required under Section 6 (1) (b) of the Provincial Insolvency Act?*
- (d) *Whether the creditor according to Section 2 (a) is restricted only to decree holder as held at page-7 in para-20 of the appellate judgment?*

12. During the course of hearing, learned counsel for the petitioner would contend that the evidence on record established relationship of creditor and debtor between the petitioner and respondent Nos. 1 and 2 and dismissal of the petition on the sole ground that the petitioner did not produce business accounts is not sufficient to disbelieve relationship of debtor and creditor. If the amount due to the petitioner represents value of gold and silver articles, non-production of books may be one of the grounds but the amount also represents borrowing from time to time by respondent Nos. 1 and 2. In such case, dismissal of the petition on the sole ground that the petitioner did not produce business accounts is an illegality committed by the Appellate Court. Hence, it is prayed to set aside the decree and judgment of the Appellate Court while restoring the decree and decretal order of the trial Court.

13. Learned counsel for respondent Nos. 3 and 4 argued totally in support of the finding recorded by the Appellate Court while specifically contending that proof of debtor and creditor relationship is an essential condition under Section 9 of the Act of 1920. In the absence of proof of such relationship, the petitioner is disentitled to file petition under Section 9 of the Act of 1920. That apart, respondent Nos. 1 and 2 intentionally remained *ex parte* in collusion with the petitioner with intention to harass respondent Nos. 3 and 4. In such case, the sale deeds executed in favour of respondent Nos. 3 and 4 cannot be annulled in the proceedings filed under Section 9 of the Act of 1920 simultaneously adjudging respondent Nos. 1 and 2 as insolvents. Therefore, the order of the trial Court is totally erroneous, the same cannot be sustained

and prayed to dismiss the appeal.

14. Considering rival contentions, perusing oral and documentary evidence, order and decretal order of the trial Court and decree and judgment of the Appellate Court, the substantial questions of law framed by this Court are re-casted as follows:

- (1) *Whether there exists relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2, if so, sale of item Nos. 1 and 2 of schedule property in favour of respondent Nos. 3 and 4 amounts to an act of insolvency entitling the petitioner to file a petition under Section 9 of the Act of 1920, if not, respondent Nos. 1 and 2 be adjudged as insolvents?*
- (2) *Whether sale deeds dated 26-07-2001 and 01-08-2001 executed by the 2nd respondent and respondent Nos. 1 and 2 respectively be annulled simultaneously adjudging respondent Nos. 1 and 2 as insolvents?*

15. **In Re. Point No. 1:**

The Appellate court reversed the finding recorded by the trial Court on the ground that the petitioner-creditor failed to prove the subsisting relationship of creditor and debtor. The said finding is now challenged before this Court raising a contention that it is for the debtors to deny their liability to pay debt and, in the absence of any evidence rebutting the evidence of P.Ws.1 and 2 and pleading denying liability of respondent Nos. 1 and 2, the Court is bound to accept the contention but the Appellate Court did not consider the same in proper perspective. Therefore, the finding of the Appellate Court is unwarranted.

16. When a creditor filed petition under Section 9 of the Act of 1920, it is for the creditor to prove the conditions on which the creditor may file petition as contemplated under Section 9 (1) of the Act of 1920. For better appreciation, Section 9 (1) of the Act of 1920 is extracted hereunder:

"A creditor shall not be entitled to present an insolvency petition against a debtor unless –

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join 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."*

The first requirement is that the petitioner-creditor has to prove that debt due to the petitioner is exceeding Rs.500/-. Therefore, it is imperative for the petitioner to establish that there is subsisting relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2 and the total debt is more than Rs.500/-. If, for any reason, the petitioner failed to establish relationship of creditor and debtors, the petition is liable for dismissal. To substantiate the contentions of the petitioner, the petitioner himself was examined as P.W.1. As usual, P.W.1 reiterated what he pleaded in the petition mainly contending that respondent Nos. 1 and 2 are husband and wife; they became indebted a sum of Rs.1,60,000/- and Rs.1,00,000/- respectively by June, 2001, towards amount borrowed in cash and in kind from time to time. Thus, a total sum of Rs.2,60,000/- was due to the petitioner by both respondent Nos. 1 and 2. In para No. 4 of examination in chief, P.W.1 further stated that the 1st respondent let out the premises on monthly rent of Rs.1,700/- which was agreed to be set off from Rs.2,60,000/- treating it as consideration of lease towards refundable advance and interest free. Accordingly, lease deed dated 28-07-2001 was obtained from the 1st respondent. So, the basis for claim, more particularly to establish relationship of creditor and debtors is that supply of gold Jewellery by the petitioner, being wholesaler, to respondent Nos. 1 and 2, who are retailers, on credit and amount advanced to respondent Nos. 1 and 2 on different occasions. P.W.1 was cross-examined by learned counsel for respondent

Nos. 3 and 4. In cross-examination, a suggestion was put to P.W.1 that Ex.A1 lease deed was concocted and the petition was filed in collusion with respondent Nos. 1 and 2 but got denial of it. The petitioner also produced Ex.A6 lease agreement executed by the 2nd respondent in favour of the 1st respondent. The execution of the said lease is also denied contending that it is a collusive one. The petitioner did not produce any piece of evidence to establish sale of gold Jewellery to respondent Nos. 1 and 2 on credit basis, being wholesaler, or any document to prove that respondent Nos. 1 and 2 borrowed any amount from the petitioner. In the entire petition, the petitioner did not disclose any of the details of purchase and borrowing amount except making a bald allegation that he supplied gold and silver articles on credit basis to respondent Nos. 1 and 2, being wholesaler, and borrowing of amount. It is the admitted case of the petitioner that he is carrying on wholesale business in sale of gold and silver articles and, in such case, he is bound to maintain accounts in the business disclosing day to day transactions including credit supply of gold and silver ornaments on credit basis. If the amount is advanced in cash to respondent Nos. 1 and 2 from the business amount, certainly it would have taken place in the books maintained in regular course of business, which is relevant under Section 34 of the Indian Evidence Act, 1872, but, for the reasons best known to the petitioner, he did not produce any piece of evidence to substantiate his contention that he supplied gold and silver articles to respondent Nos. 1 and 2 on credit basis and also to establish lending of any amount to respondent Nos. 1 and 2 disclosing details of such credit supply and borrowings. When the petitioner contended that he supplied gold and silver articles to respondent Nos. 1 and 2 and lent amount from his business, he has to disclose all the details, which is a material fact, which gives rise to cause of action for filing the petition. Non-disclosure of material fact regarding supply of gold and silver articles on credit basis and lending amount to respondent

Nos. 1 and 2 is fatal to the case of the petitioner and, on the basis of a bald allegation about supply of gold and silver articles on credit basis and lending of amount, it is difficult for any Court to accept that there exists creditor and debtors relationship between the petitioner and respondent Nos. 1 and 2. Strangely, the petitioner relied on agreement of lease executed by the 1st respondent in his favour agreeing to let out the premises on monthly rent of Rs.1,700/- and it is a registered lease deed dated 01-08-2001.

17. Clause No. 3 of Ex.A1 is relevant for deciding the controversy regarding lease and it is extracted hereunder for better appreciation:

"The lessee had paid a sum of Rs.1,00,000/- (Rupees one lakh only) as advance to the original owner Smt. V.Kamakshi and a further of Rs.1,65,000/- to the owner in occupation. The owner in occupation and the original owner of the premises Smt. V.Kamakshi agreed to refund the said amount of a total sum of Rs.2,65,000/- to the lessee without any interest at the time of his vacating the demised premises."

Thus, it is clear from the above clause that original owner of the property is the 2nd respondent but not the 1st respondent and another agreement allegedly executed by the 2nd respondent in favour of the 1st respondent is marked as Ex.A6 dated 28-07-2001 executed by the 2nd respondent in favour of the 1st respondent on monthly rent of Rs.1,500/-. Clause No. 3 permits the 1st respondent to sub-lease to anybody in case of necessity or any financial stringency. Taking advantage of this condition, Ex.A1 appears to have been brought into existence but these lease deeds need no examination about rights of the parties thereto except for limited purpose of deciding subsisting relationship of creditor and debtors. If the terms and conditions of Ex.A1 are taken into consideration, it is clear that the petitioner never supplied gold and silver articles on credit basis to respondent Nos. 1 and 2. On the other hand, clause No. 3 extracted above discloses that the petitioner-creditor paid Rs.1,00,000/- as advance to the 2nd

respondent and Rs.1,65,000/- to the owner in occupation i.e. the 1st respondent. If this contention is taken into consideration as it is, the alleged supply of gold and silver articles to respondent Nos. 1 and 2 on credit basis is false on the face of record and the petitioner appears to have invented the theory of supply of gold and silver articles to respondent Nos. 1 and 2. Even in para No. 3 of examination in chief of P.W.1, a bald statement is made that respondent Nos. 1 and 2 became indebted to a tune of Rs.1,60,000/- and Rs.1,00,000/- respectively by June, 2001, towards amount borrowed in cash and kind from time to time. This bald statement is not sufficient to accept that the petitioner supplied gold and silver articles on credit basis to respondent Nos. 1 and 2.

18. The trial Court, without insisting proof of relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2, concluded that the petitioner had complied with the condition laid down under Section 9 of the Act of 1920 but the Appellate Court, on appreciation of both oral and documentary evidence, concluded that the petitioner failed to establish relationship of creditor and debtors. No doubt it is for the petitioner to prove relationship of creditor and debtors between him and respondent Nos. 1 and 2. For the reasons best known to respondent Nos. 1 and 2, they did not contest the matter. Therefore, the persons, who are competent to deny relationship, did not deny the said relationship. However, respondent Nos. 3 and 4 categorically denied relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2 while contending that the lease deeds are brought into existence in collusion with respondent Nos. 1 and 2 and the petition was filed in collusion with respondent Nos. 1 and 2 denying indebtedness of respondent Nos. 1 and 2. Even in such case, it is for the petitioner to prove *prima facie* that there exists relationship of creditor and debtors and the debt is more than Rs.500/-. In para No. 19 of the judgment, the Appellate court, discussing about lease of item No. 1 of schedule

property, concluded that the petitioner failed to prove subsisting relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2

19. On close analysis of material on record, the reason for reversing the finding of the trial Court by the Appellate Court is that the petitioner failed to prove subsisting relationship of creditor and debtors between him and respondents Nos. 1 and 2. Even after discerning entire material on record, I find no iota of evidence to establish subsisting relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2 which is *sine qua non* to maintain a petition under Section 9 of the Act of 1920. Though learned counsel for the petitioner drawn attention of this Court to the contents of insolvency petition and the contents of Ex.A1 lease agreement, it is difficult for me to conclude that there is subsisting relationship of creditor and debtors and I find that the petitioner appears to have invented the story of debt in connection with supply of gold and silver articles on credit basis and suppressed material evidence *i.e.* books of accounts maintained in the business for the reasons best known to him.

20. The contention of learned counsel for respondent Nos. 3 and 4 is that the petition is a collusive one. If the Court finds that there is no subsisting relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2, though respondent Nos. 1 and 2 did not contest the matter, the Court can exercise its discretion to dismiss the petition exercising power under Section 25 (3) of the Act of 1920. In the instant case, the petitioner-creditor miserably failed to establish subsisting relationship of creditor and debtors between him and respondent Nos. 1 and 2 and respondent Nos. 1 and 2 did not contest the matter which creates any amount of suspicion about collusion pleaded by respondent Nos. 3 and 4 in their counter. When the petition is collusive one and the petitioner failed to establish subsisting relationship of creditor and debtors *prima facie*, the Court can dismiss the petition. In a creditor petition, if the debt alleged is not proved, it is abuse of

process of the Court and such insolvency petition is liable to be dismissed. Here, the petitioner wanted to enforce the lease agreement to deny rights of respondent Nos. 3 and 4 by abuse of process of the Court. Therefore, I am of the clear view that the petition is nothing but abuse of process of law to deny right of respondent Nos. 3 and 4 who are purchasers of the property.

21. According to Section 25 (1) of the Act of 1920, 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. In the instant case, the first condition that the petitioner-creditor failed to establish his right to present the petition as he failed to prove existence of relationship of creditor and debtors between him and respondent Nos. 1 and 2 by producing *prima facie* material. On this ground, the petition deserves to be dismissed. Even for any other sufficient cause, the Court can dismiss the petition under Section 25 (1) of the Act of 1920. In ***Vemula Rosaiah and another Vs. P.Subrahmanyam and another***^[1], this Court relied on ***Y.Malludora Vs. P.Seetharathnam***^[2] to consider the scope of Section 25 (1) of the Act of 1920, wherein it is observed thus:

"In addition, the Court has been given a discretion to dismiss the petition if it is satisfied that there other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read ejusdem generic 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 from some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him, or where the petitioning creditor having refused tender of money, fraudulently and maliciously filed the

application. An order is some times 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 Apex Court, when creditor filed petition to harass purchasers or debtors *etc.*, the petition is liable to be dismissed. The present petition was filed only to defeat rights of respondent Nos. 3 and 4, who purchased the property under Exs.A3 and A4 dated 26-07-2001 and 01-08-2001 respectively, and enforce the terms of Ex.A1 lease agreement but not otherwise. Therefore, the attempt made by the petitioner is nothing but a clear abuse of process of the court and the present petition is nothing but outcome of collusion between the petitioner and respondent Nos. 1 and 2 to defeat rights of respondent Nos. 3 and 4. Hence, by applying the law declared by Apex Court and this Court in the judgments referred *supra*, I find that the Appellate Court did commit no error in arriving at such conclusion and in reversing the finding of the trial Court. The trial Court did not consider the requirements under Section 9 of the Act of 1920 to maintain the petition by the petitioner-creditor; did not take into consideration totality of the attending circumstances; and, without insisting the petitioner to prove *prima facie* existence of relationship of creditor and debtors between the petitioner and respondent Nos. 1 and 2 as required under Section 9 of the Act of 1920, passed the order adjudging respondent Nos. 1 and 2 as insolvents. Thereby, the order of the trial Court is erroneous apparently and the decree and judgment of the Appellate Court is well reasoned and supported by law declared by Apex Court and this Court. Therefore, I find no ground to interfere with the finding recorded by the Appellate Court. Accordingly, the finding of the Appellate Court is hereby confirmed holding this point in favour

of respondent Nos. 3 and 4 and against the petitioner.

22. **In Re. Point No. 2:**

The trial Court annulled Exs.A3 and A4 simultaneously adjudging respondent Nos. 1 and 2 as insolvents but it is impermissible under law. The finding of the trial Court with regards to annulment of Exs.A3 and A4 sale deeds is erroneous *ex facie* for the reason that order of annulment of sale deeds cannot be passed simultaneously adjudging the debtors as insolvents.

23. To decide the real controversy between the parties, I feel that it is relevant to advert to the provisions of the Act of 1920, more particularly to the provisions of Sections 53, 54 and 54-A of the Act of 1920. According to Section 53 of the Act of 1920, any voluntary transfer made by a debtor, if the transferor is adjudged as insolvent, can be avoided. Section 54 of the Act of 1920 says that every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition prescribed within three months after the date thereof, be deemed fraudulent and void as against the Receiver, and shall be annulled by the Court saving transactions entered into in good faith and for valuable consideration.

24. A fraudulent transfer under Section 53 of the Act of 1920 and transaction to give fraudulent preference under Section 54 of the Act of 1920 are void against receiver and they shall be annulled on a petition filed within the specified time. Section 54-A of the Act of 1920 specified procedure for annulment of any transfer under Sections 53 or 54 of the Act of 1920. According to it, for annulment of any transfer under Sections 53 or 54 of the Act of 1920, a petition may be presented by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfied the

Court that the Receiver has been requested and his refused to make such petition.

25. In view of the language used in Sections 53 and 54 of the Act of 1920, more particularly the words 'if the transferor is adjudged insolvent' under Section 53 of the Act of 1920 and 'if the person is adjudged insolvent' under Section 54 of the Act of 1920, indicates that for annulling transaction of transfer, the debtor must be an adjudged insolvent. So, to annul a transaction of transfer, the pre-condition is adjudging the debtor as insolvent but, here, the petition was filed by the creditor seeking two reliefs both under Sections 9 and 53 and 54 of the Act of 1920 avoiding a fraudulent preference and annul the transactions covered by sale deeds Exs.A3 and A4. Thus, the petitioner-creditor sought for two reliefs simultaneously but the relief claimed by the petitioner is against the spirit of language used under Sections 53, 54 and 54-A of the Act of 1920.

26. According to Section 54-A of the Act of 1920, it is clear that, before moving Court for annulment of transfer, more particularly covered by sale deeds dated 26-07-2001 and 01-08-2001, it is the duty of the petitioner to prove his debts before Official Receiver as required under Section 49 of the Act of 1920 and then move Court exercising insolvency jurisdiction for annulling transfer if receiver refuses to make such petition for annulment on the request made by the creditor. So, even according to Section 54-A of the Act of 1920, it is the duty of the creditors to prove the debt before Official Receiver.

27. Section 49 of the Act of 1920 specified procedure to be followed for proof of debt. According to it, a debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if

any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers. Therefore, the debt shall be proved by following necessary procedure contemplated under Section 49 of the Act of 1920 after entrusting the matter to Official Receiver duly adjudging the debtor as insolvent.

28. Part-III of the Act of 1920 from Sections 45 to 50 of the Act of 1920 laid down procedure for proof of debts. Adherence of such procedure under Sections 45 to 50 of the Act of 1920 would arise only after adjudging the debtor as insolvent but here the relief under Sections 53 and 54 of the Act of 1920 was claimed simultaneously with the relief of adjudging the debtors as insolvents. The conditions lay down under Section 54-A of the Act of 1920 were not complied with by the petitioner to get the transactions covered by Exs.A3 and A4 annulled. A perusal of language used under Sections 53, 54 and 54-A of the Act of 1920 and the mode of proof of debt under Part-III of the Act of 1920 (from Sections 45 to 50), it is clear that before moving an insolvency Court to annul transfer of property, a creditor has to satisfy the following conditions:

- (1) *The debtor must be adjudged as insolvent;*
- (2) *The creditor should prove his debt by following the procedure contemplated under Part-III of the Act; and*
- (3) *He should have made a request to Official Receiver for moving insolvency Court for annulling fraudulent transaction and that the Official Receiver refused to move such petition for annulment.*

29. In the instant case, by the date of filing petition seeking annulment under Section 53 or 54 of the Act of 1920, respondent Nos. 1 and 2 were not even adjudged as insolvents. So, the first condition was not satisfied. The petitioner did not approach Official Receiver and proved his debt as contemplated under Part-III of the Act of 1920 and did not comply with Section 54-A of the Act of 1920. Therefore, the order of annulling Ex.A3 sale deed dated 26-07-2001 and Ex.A4 sale deed dated 01-08-2001 passed by

the trial Court is erroneous *ex facie* and contrary to the provisions of the Act of 1920. Hence, the order of the trial Court annulling Exs.A3 and A4 is illegal and the same is liable to be set aside. Therefore, I find that the Appellate Court did commit no error in reversing the finding of the trial Court. Hence, I find no ground to interfere with the finding recorded by the Appellate Court. Accordingly, the finding of the Appellate Court is hereby confirmed holding this point in favour of respondent Nos. 3 and 4 and against the petitioner.

30. In view of my foregoing discussion, I find no grounds to interfere with the findings of the Appellate court and, therefore, the appeal deserves to be dismissed.

31. The appeal is, accordingly, dismissed confirming the decree and judgment dated 26-03-2011 passed in A.S.No. 25 of 2009 on the file of the Court of VIII Additional District & Sessions Judge (FTC), Visakhapatnam. Miscellaneous petitions pending in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 27th July, 2015.

JSK

[\[1\]](#) 1989 (1) APLJ 291

[\[2\]](#) AIR 1966 SC 918