

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.54 OF 2012

JUDGMENT:

The petitioner in I.P.No.2 of 2008 on the file of Senior Civil Judge, Mangalagiri, preferred this appeal aggrieved by the decree and judgment dated 23.08.2010 in A.S.No.82 of 2010 passed by the V additional District and Sessions Judge (Fast Track Court), Guntur, filed by the 2nd respondent before the trial Court, being the purchaser of the property, challenging the order passed by the trial Court adjudging the 1st respondent Syyed Baji Saheb, as insolvent.

For convenience of reference, the parties herein will be referred to as arrayed before the trial Court in I.P.No.2 of 2008, throughout the judgment.

The petitioner, a creditor of the 1st respondent (debtor) filed Insolvency Petition under Section 9 of the Provincial Insolvency Act (for short, 'the Act') to adjudge the 1st respondent as insolvent, vest the schedule property with the Official Receiver to direct the Official Receiver to apply under Sections 5 and 54 of the Act and to set aside the registered sale deed dated 04.08.2003 executed by the 1st respondent in favour of the 2nd respondent declaring the same as sham, nominal, collusive and invalid.

It is the specific case of the petitioner that the 1st respondent for his agriculture borrowed the amount on four occasions. The details are as under:

Sl.No.	Amount	Date	Interest	Purpose
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01.	Rs.28,000/-	15.04.2002	24% p.a.	Agriculture
02.	Rs.25,000/-	17.04.2002	24% p.a.	-do-
03.	Rs.25,000/-	18.04.2002	24% p.a.	-do-
04.	Rs.25,000/-	19.04.2002	24% p.a.	-do-
Total:	Rs.1,03,000/-			

Thus, the total amount borrowed by the 1st respondent from the petitioner is Rs.1,03,000/- under Exs.A1 to A4. As the petitioner came to know that the 1st respondent is trying to alienate his immovable properties and to leave the village, the petitioner filed O.S.No.246 of 2003 on the file of Principal Junior Civil Judge, Mangalagiri on 27.08.2003 for recovery of Rs.71,297/- on the strength of the promissory notes, dated 15.04.2002 and 17.04.2002 and got the property attached under Order XXXVIII Rule 5 C.P.C. After filing the suit for recovery of amount, respondents 1 and 2 colluded together and brought into existence a registered sale deed dated 04.08.2003. The said sale deed is collusive, sham and nominal and the value mentioned therein is far below the prevailing market value and these transactions are entered or aimed to defeat debt due to the genuine creditors. Therefore, the petitioner sought to adjudge the 1st respondent as insolvent and annul the sale deed dated 04.08.2003 bearing document No.4509 and vest the property with the Official Receiver for administration.

The 1st respondent filed counter denying the material allegations, more particularly borrowing amount under four promissory notes, while contending that the 1st respondent hails from agricultural family and resident of Nuthakki. He is eking out his livelihood by doing cultivation since his childhood. He possesses, Ac.0.34½ cents of

agricultural land inherited from his father. He also worked as farm servant under the petitioner and developed acquaintance with the petitioner. Both of them came to an understanding that the petitioner has to give Acs.4.00 of land on lease to the 1st respondent and in view of the lease, the 1st respondent had to work as permanent farm servant in his fields. Accordingly, 1st respondent worked for 20 years and the petitioner used to lend money to the 1st respondent every year, collect usufruct from him, obtained number of signatures on blank promissory notes and utilizing the said promissory note, filed the suit. Therefore, the 1st respondent never indebted to the petitioner/creditor and that he has not created a collusive sale deed, but executed a registered sale deed in favour of the

2nd respondent for Rs.38,000/- and that he did not commit any act of insolvency and prayed for dismissal of the petition.

The 2nd respondent filed counter denying the material allegations *inter alia* contending that the 1st respondent own Ac.0.34½ cents of agricultural land at Nuthakki adjacent to the 2nd respondent's land and when he offered to sell the said property to the 2nd respondent to meet his family expenses, the 2nd respondent expressed his willingness to purchase the same at Rs.38,000/- on a bill contract. Therefore, obtaining sale deed from the 1st respondent by the 2nd respondent is not collusive and in the same process, the 2nd respondent has to clear the loan amount to the Primary Agricultural Cooperative Society, Nuthakki. Accordingly, a certificate, dated 04.08.2003 was obtained. Hence, the alleged collusion and fraud etc., are false and prayed to dismiss the petition.

During the course of enquiry, PWs.1 to 4 were examined and

Exs.A1 to A5 were marked. On behalf of the respondents, RWs.1 to 5 were examined and Exs.B1 to B3 were marked.

Upon hearing argument of both the learned counsel and considering the oral and documentary evidence available on record, the trial Court allowed the petition adjudging the 1st respondent as insolvent, while negating the other part of the relief.

Aggrieved by the same, the 2nd respondent preferred A.S.No.82 of 2010 before the V Additional District and Sessions Judge (Fast Track Court), Guntur, whereby the appellate Court recorded certain findings that the 2nd respondent is a *bona fide* purchaser at the end of the paragraph No.20 of the order, while confirming the other part of the order i.e., adjudging the 1st respondent as insolvent.

Aggrieved by the same, the petitioner before the trial Court preferred the present appeal challenging the adverse findings recorded by the appellate Court on the ground that when the 1st respondent did not file any appeal, the appellate Court is not supposed to record such finding in an enquiry contemplated under Section 9 read with Section 25 of the Act. Therefore, unwarranted finding recorded by the appellate Court is liable to be dismissed and accordingly prayed to set aside the same.

The only substantial question of law before this Court is:

Whether the appellate Court is right in recording a finding that the 2nd respondent before the trial Court is a *bona fide* purchaser while deciding a petition under Section 9 of the Act?

POINT:- Undisputedly, the person who was adjudged as an

insolvent did not prefer any appeal against the order of the Senior Civil Judge, Mangalagiri, in I.P.No.2 of 2008. But the 2nd respondent the transferee of the debtor filed the appeal before the V Additional District and Sessions Judge, (Fast Track Court), Guntur, challenging the said finding. In fact, the 2nd respondent claimed that he is a *bona fide* purchaser for a valuable consideration.

The enquiry contemplated under Section 9 of the Act is limited to the extent of adjudging the 1st respondent as insolvent, if for any reason the trial Court is satisfied that the debtor committed an act of insolvency as contemplated under Section 6 of the Act subject to satisfying the Court about the conditions contemplated under Section 9 of the Act. In the present case, the debt due to the petitioner is more than Rs.500/- and the transaction covered by Ex.A5 took place within three months preceding the date of filing the Insolvency Petition and that the 1st respondent has alienated substantial part of his property and it is an act of insolvency under Section 6 (1)(b) of the Act. Therefore, the trial Court adjudged the 1st respondent as an insolvent while negating the other reliefs.

The 2nd respondent – transferee of the debtor filed the appeal raising one of the grounds that the 2nd respondent is a *bona fide* purchaser. The scope of enquiry under Section 9 of the Act is very limited and when the Court is satisfied with the existence of debt as required under Section 9 of the Act and commission of an act of insolvency under Section 6 of the Act, the Court can adjudge the debtor as insolvent subject to Section 25 of the Act. But in the instant case, the 1st respondent never pleaded that he is able to discharge the debt due to the petitioner/creditor. Therefore, such plea is not open to the 2nd respondent – transferee of the debtor. However, the 2nd

respondent can claim that he is a *bona fide* purchaser for a valuable consideration in an enquiry ordered in a petition filed under Sections 53 and 54 or Section 4 of the Act after adjudging the 1st respondent as insolvent, vesting the property with the Official Receiver and proof of debt under Part III, Sections 45 to 49 of the Act. Before initiating proceedings under Section 53 and 54 of the Act, the creditor has to prove his debt as per Section 49 of the Act. After proof of the debt of the creditor, the Official Receiver may move an application under Sections 53 and 54 of the Act for annulment of Ex.A5. In case the Official Receiver did not come forward to move such an application, the creditor with the leave of the insolvency Court can file an application in view of Section 54-A of the Act. If any such application is moved before the Insolvency Court under Sections 53 and 54 or under Section 4 of the Act, it is open to the alienee of the debtor to raise such a plea that he is a *bona fide* purchaser. But in an enquiry under Section 9 of the Act though the 2nd respondent raised such contention, it is premature to record the same by the appellate Court that the 2nd respondent is a *bona fide* purchaser for a valuable consideration. Therefore, the finding of the trial Court at the end of paragraph No.20 of the order in I.P.No.2 of 2008 is sustainable.

Leaving it open to the 2nd respondent – alienee of the debtor to raise any plea including the plea that he is a *bona fide* purchaser in any application filed under Sections 53 and 54 or Section 4 of the Act, the appeal is allowed setting aside the finding that the transaction covered under Ex.A5 is *bona fide* transaction.

Hence, the Civil Miscellaneous Second Appeal is allowed to the extent indicated above. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in the appeal shall stand

closed.

M.SATYANARAYANA MURTHY, J

22.06.2015
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