

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

C.M.S.A.No.32 of 2010

JUDGMENT:

This C.M.S.A is filed by the appellant aggrieved by the judgment dt:31.08.2010 in A.S.No.81 of 2010 whereby and whereunder learned District Judge, Guntur allowed the appeal by setting aside the order dt: 30.11.2009 passed by learned I Additional Senior Civil Judge, Guntur allowing the Insolvency Petition No.45/2008 filed by the petitioner/ appellant.

2) The parties in this appeal are referred as stood before the lower Court.

3) The brief facts are thus:

a) The petitioner filed Insolvency Petition under Section 10 of Provincial Insolvency Act pleading that he borrowed money from respondents 1 to 4 and he was unable to discharge the debts owing to his poverty as he is having the big family consisting of himself, three children and his aged father and while so, 1st respondent filed O.S.No.1650 of 2006 on the file of I Additional Junior Civil Judge, Guntur against him and obtained decree and also filed E.P.No.170 of 2008 for arrest of the petitioner and as the petitioner is having no assets and his liabilities are more than his properties, he may be declared as Insolvent.

b) Respondent Nos.2 to 4 in the I.P remained *exparte*.

c) Respondent No.1 filed counter and opposed the I.P alleging that the petitioner is not poor and that he got house property in the family partition and he has been carrying on business besides supplying confectionary items on order to the functions in and around of Gottipadu village and he borrowed money from R.1 for the purpose of hotel business and failed to discharge the same and he suffered decree and the I.P is filed to evade payment of decreetal amount. Respondents 2 to 4 were setup by the petitioner. He thus prayed to dismiss the I.P.

d) During trial, the petitioner examined himself as PW.1. Respondent No.1 examined himself as RW.1 and the father of petitioner was examined as RW.2 and Exs.X.1 and X.2 were marked.

e) The trial Court having regard to the evidence on record observed that the petitioner ekes-out his livelihood by vending idlies on a pushcart and he has no properties and the property gifted by RW.2 in favour of wife of petitioner under Ex.X.2—gift deed was his self-acquired property and accordingly, declared petitioner as insolvent.

f) Aggrieved, 1st respondent preferred A.S.No.81 of 2010 before the District Court, Guntur. The learned District Judge while appraising the evidence of RW.2 observed that even assuming from the admissions in the cross-examination of RW.2 that the house property belonged to RW.2 and his two

brothers, of which RW.2 got 1/3rd i.e, one room, still the property being ancestral property, the petitioner got a share in the said property but he has not disclosed the same and in view of Section 13 of Provincial Insolvency Act, the claim petition can be rejected on that ground. Accordingly, the learned District Judge allowed the appeal by setting aside the order of the lower court.

Hence the instant C.M.S.A.

4) Heard arguments of Sri Syed Khader Mastan, learned counsel for appellant and Smt. G. Jhansi, learned counsel for respondent No.1. Notice sent to respondents 2 to 4 was not yet returned.

5) The point for determination in this appeal is:

“Whether the petitioner can be declared as insolvent or whether his petition deserves to be rejected for willfully concealing the property owned by him?”

6) **POINT:** The petitioner’s case is that he has been eking out his livelihood by vending idlies and other confectionary items on a pushcart and he was heavily indebted to respondents 1 to 4 and he has no assets worth the name as he is unable to make the both ends meet. Per contra, the contention of 1st respondent is that the petitioner sells confectionaries in his shop at Gottipadu and he also supplies the sweets and other confectionaries on order on the occasion of marriages and

other functions in and around Gottipadu and he has been earning Rs.6,000/- p.m. Besides, he is having share in the ancestral house property but he got the same gifted to his wife under Ex.X.2—gift deed through his father to evade the payment of decretal amount. The respondents 2 to 4 are setup by the petitioner.

7) In the light of above rival contentions, a perusal of the facts would show that respondents 2 to 4 remained *exparte* and they did not contest the I.P. If really they lent amounts to the petitioner, they would not have remained silent. So it gives strength to the contention of R.1 that respondents 2 to 4 were setup by the petitioner to get himself declared as insolvent.

8) Be that as it may, coming to the property owned by the petitioner, according to the contention of R.1, the petitioner has share in the ancestral house property but he got it gifted to his wife Lalitha Kumari under Ex.X.2—gift deed through his father. Surprisingly enough, 1st respondent somehow managed to examine the father of petitioner on his behalf as RW.2 and through him got filed Ex.X.1—partition list and Ex.X.2—gift deed. Considering the anomaly of R.1 examining the father of petitioner, the trial Court did not give much weight to his evidence and on the other hand, held that the property is his self-acquired property. Whereas the first appellate court taking the facts from the admission of RW.1 has observed that even if it is believed that RW.2 and his brothers have shares in the property and RW.2 got only one room to his share, still the

petitioner will get half share in the said property which he concealed in the I.P and hence he does not deserve to be declared as insolvent. So in the light of divergent findings by the Courts below it has to be seen whether the property covered by Ex.X.2 is an ancestral or self-acquired property of RW.2. It is needless to emphasize that if it is ancestral property, the gift which he made can be held as a pretext to evade payment of decretal amount to R.1 and to see that petitioner is somehow declared as insolvent. On the other hand, if the property is the self-acquired property of RW.2, the petitioner cannot have any claim over property covered by Ex.X.2—gift deed. Irrespective of the nature of the oral evidence adduced by RW.2, the document i.e, Ex.X.2 clearly reads that the gifted property is the ancestral property of RW.2 which devolved on him after the death of the father of RW.2. Ex.X.2 is a registered gift deed which was executed long prior to the filing of I.P. Therefore, the contents of Ex.X.2 relating to the nature of property can be accepted in my view. It clearly shows that the gifted property is the ancestral property of RW.2. That being so, the petitioner also will have a share in it. As per Section 30 of the Hindu Succession Act, a coparcener is not entitled to bequeath the entire property by way of gift. As rightly pointed out by the first appellate court, the petitioner having concealed his share in the ancestral house property, at first got executed a gift deed in favour of his wife through his father in the year 2007 to nullify the decree in the suit filed by

1st respondent and later filed the I.P. For such concealment of material fact, he cannot be declared as insolvent as rightly held by the first appellate court.

9) In the result, I find no merits in the appeal and accordingly, the C.M.S.A is dismissed. No costs in the appeal.

As a sequel, miscellaneous petitions pending if any shall stand closed.

U. DURGA PRASAD RAO, J

Date: 03.09.2015

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