HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.1 OF 2012

JUDGMENT:

1. Aggrieved by the decree and judgment dated 20.06.2011, passed in Appeal Suit No.80 of 2007 by the I Additional District Judge, Kurnool (for short, 'the appellate Court'), the 1st respondent therein preferred this Appeal.

2. Appellant herein was the petitioner, 1st respondent herein was the 2nd respondent and 2nd respondent herein was the 1st respondent in Insolvency Petition No.26 of 2005 on the file of the Court of Senior Civil Judge, Nandikotkur (for short, 'the trial Court').

3. For convenience of reference, the ranks given to the parties in I.P. No.26 of 2005, before the trial Court, will be adopted throughout this judgment.

4. The petitioner, B. Nageswara Reddy (creditor), filed petition under Sections 7, 9(1)(a) read with Sections 4, 5 and 6 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge the 1st respondent as insolvent, entrust the petition schedule property to Official Receiver for administration and to *set-aside* the sale in E.P. No.23 of 2005 in O.S. No.15 of 2004, dated 09.09.2005, alleging that the 1st respondent borrowed an amount of Rs.42,000/- from the petitioner on 30.03.2001, by executing a promissory note, agreeing to repay the same together with interest at 24% *p.a.* either to the petitioner or to his order, but he did not discharge the debt; thereupon, the petitioner filed a Suit in O.S. No.75 of 2004 on the file of Principal Junior Civil Judge, Nandikotkur and obtained a decree against the 1st respondent on 10.09.2004; and, subsequently, filed Execution Petition

No.180 of 2004 under Order XXI Rule 65 of C.P.C. for sale of petition schedule property and came to know that the petition schedule property was already sold in public auction held on 09.09.2005 in E.P. No.23 of 2005 in O.S. No.15 of 2004, which is a suit filed by the 2^{nd} respondent against the 1^{st} respondent, for Rs.1,50,750/-; wherein the 1^{st} respondent colluded with the 2^{nd} respondent and allowed the suit to be decreed *exparte* to defeat and delay execution of the petitioner's decree dated 10.09.2004, brought the schedule property for sale in E.P. No.23 of 2005, wherein the 2^{nd} respondent, being highest bidder, purchased the schedule property in public auction held on 09.09.2005, under Order XXI Rule 72 of C.P.C. and such sale for realisation of decree debt is an act of insolvency under Section 6(1)(e) of the Act, since the amount due to the petitioner is more than Rs.500/-, as required under Section 9(1)(a) of the Act, he is entitled to file a petition to adjudge the 1^{st} respondent as insolvent and, accordingly, filed the petition for the aforesaid reliefs.

5. The 1^{st} respondent filed counter denying material allegations of the petition *inter-alia* contending that petitioner is aware about the debt of 2^{nd} respondent and in the I.P. No.26 of 2000, filed by the 2^{nd} respondent, petitioner was also shown as creditor therein, remained *ex parte* before the trial Court, and as such he has no right to file the present petition and prayed for dismissal of the petition.

6. The 2^{nd} respondent filed counter denying material allegations of the petition including the debt due to the petitioner by the 1^{st} respondent and his obtaining decree on the strength of promissory note while contending that petitioner and himself, being creditors, were shown as respondents 5 and 6 in I.P. No.26 of 2000 which got dismissed by the trial Court. Therefore, the debt due under the promissory note is genuine not created and he obtained a decree on

the strength of the said promissory note filed E.P. No.23 of 2005 in O.S. No.15 of 2004 for realization of the debt due and consequently himself purchased the property in the Court auction, after obtaining necessary permission to participate in the bid under Order XXI Rule 77 of C.P.C., and thereby the 1st respondent cannot be adjudged as insolvent and prayed for dismissal of the Appeal.

7. During course of enquiry, on behalf of the petitioner, himself was examined as PW.1 and also examined PW.2, whose evidence was later eschewed, marked Ex.A-1. On behalf of the respondents, respondents 1 and 2 were examined as respondents 1 and 3 and got examined 2nd respondent, marked Exs.B-1 to B-3.

8. Upon hearing argument of both the counsel, considering oral and documentary available on record, the trial Court allowed the Insolvency Petition adjudging the 1st respondent as insolvent ordering administration of schedule property by the Official Receiver.

9. Aggrieved thereby, the 2nd respondent therein preferred Appeal Suit 80 of 2007 raising various contentions, wherein the appellate Court allowed the Appeal, *setting-aside* the decree and judgment under challenge observing that the petitioner is at liberty to work out his remedies, available to him under the other Acts and provisions of law, if he is so entitled.

10. Aggrieved thereby, the petitioner preferred the instant Second Appeal raising several contentions and the main contention of the petitioner before this Court is that failure to take into consideration the sale of property in execution of decree by a competent Court for payment of money amounts to an act of insolvency but the appellate Court making different observations allowed the Appeal setting-aside the Order of the trial Court and dismissed I.P. No.26 of 2005.

11. At the stage of admission, this Court framed the following substantial question of law:

> Since the property of the second respondent was sold in execution of the decree by the competent Court for payment of money, whether the order passed by the first appellate Court is illegal and contrary to Section 6(c) of the Provincial Insolvency Act and whether the Insolvency Petition by the creditor is maintainable to adjudge the second respondent as insolvent?

12. Considering rival contentions and perusing the material available on record, the following is the recasted substantial question of law that arises for consideration:

> Whether sale of the property in execution of a decree for realization of money amount to an act of insolvency within the meaning of Section 6(1)(e) of the Act and whether the petitioner is required to prove that the sale was tainted by collusion and fraud?

13. **POINT**: According to Section 6(1)(e) of the Act, sale of the property in execution of a decree of any Court for payment of money is an act of insolvency. The petitioner is the creditor and to file a petition under Section 9 of the Act, the petitioner has to satisfy the three requirements under Section 9 that the debt is more than Rs.500/- and it is a liquidated sum payable immediately or at some certain future time and the act of insolvency had occurred within the three months prior to the presentation of the Petition. In the facts of the present case, the debt due to the petitioner-creditor is more than Rs.500/- since the decree was passed for Rs.75,000/- together with subsequent interest, which is marked as Ex.A-1, and it is for recovery of a liquidated sum payable immediately. The sale of property took place on 09.09.2005 for realization of a debt due by the 1st respondent to the 2nd

respondent under the decree in O.S. No.15 of 2004 in E.P. No.23 of 2005; whereas the Petition was filed before the trial Court on 25.10.2005, as per the decree copy. Therefore, the act of insolvency as defined under Section 6(1)(e) of the Act occurred within three months before presentation of the present petition. Thus, the petitioner-creditor satisfied all the three requirements which enable him to file a petition under section 9 of the Act for any of the acts of insolvency committed by the debtor-1st respondent under Section 6 of the Act.

14. The major contention of learned counsel for the 2nd respondent is that in the absence of collusion and fraud alleged between himself and 1st respondent, any sale of the property in execution of a decree in E.P. No.23 of 2005 in O.S. No.15 of 2004, the first respondent-debtor cannot be adjudged as insolvent. This contention can be sustained only in a Petition filed under Sections 4, 53 and 54 read with Section 54-A of the Act for the reason that mere sale of the property in execution of a decree for recovery of money by a competent Court itself is suffice to constitute an act of insolvency and no rider was attached to it, calling upon the creditor to establish that there is a collusion or fraud in sale of the property. However the appellate Court, while dismissing the Appeal, observed that the petitioner-creditor can file a petition for execution of the decree and claim rateable distribution of the amount lying in the trial Court since the decree was not executed by the petitioner-creditor. The appellate Court might have came to such conclusion as the petitioner-creditor failed to prove collusion and fraud in sale of the property, dismissed the Petition allowing the Appeal but this finding is erroneous for the reason that the collusion or fraud are not required to be pleaded and proved when sale of the property in execution of decree for recovery of a money by a competent Court itself constitutes an act of insolvency under Section 6(1)(e) of the Act. Therefore, the finding of the appellate Court is *ex-facie* erroneous.

15. One of the major contentions of Sri J. Janaki Rami Reddy, learned counsel for the 2^{nd} respondent, is that unless the relief of annulment of sale is sought for, the 1^{st} respondent-debtor cannot be adjudged as insolvent but this contention is without any merit for the reason that after adjudging the 1^{st} respondent-debtor as insolvent, the petitioner-creditor is under obligation to prove the debt before the Official Receiver under Section 49 of the Act and thereafter the Official Receiver is entitled to file a petition under Section 4 or Section 53, 54 after following the procedure under Section 54-A of the Act to avoid the transaction of a sale of property in the execution proceedings in E.P. No. 23 of 2005 in O.S. No.15 of 2004 by the 2^{nd} respondent. The precondition for annulment or avoidance of fraudulent transfer under Section 53 of the Act is adjudging the debtor as insolvent and proof of debt, till adjudging the debtor as insolvent and proof of debt by the creditor under Section 49 of the Act, question of avoidance or annulment of any transfer under section 53 does not arise. Hence, I find no substance in this contention.

16. When similar question came up for consideration before this Court in ***Vallabhaneni Buchiramayya and others Vs. Sri Davlapatla Mariyya and another***[1], it was held as follows:

> "In order to attract Section 6(e) it is sufficient if there is a sale in execution of a decree and it is not necessary that the sale should be confirmed. The fact that subsequently such a sale is set-aside is immaterial."

17. According to the law laid down by this Court in ***Vallabhaneni Buchiramayya***[1], mere sale of the property in execution of a decree for recovery of money by a competent Court is sufficient and placing reliance on the decision of this Court referred supra, I find that the sale of the property in execution of the decree in E.P. No.23 of 2005 in O.S. No.15 of 2004 is an act of insolvency under Section 6(1)(e) of the Act

and the petitioner-creditor is not required to establish that it is collusive or fraudulent transaction. Therefore, sale of the schedule property in execution of the decree constitutes an act of insolvency and the petitioner-creditor satisfied the requirements under Section 9 of the Act and thereby adjudging the first respondent-debtor as insolvent by the trial Court is justifiable but the appellate Court reversed the finding of the trial Court without adverting to the law laid down by this Court and the reasons assigned by the appellate Court are not based on either factual foundation in the pleadings *i.e.,* counter filed by the respondent or based on any law laid down. Hence, the finding of the appellate Court is hereby set-aside.

18. A creditor petition can be dismissed under Section 25 of the Act, under three circumstances:

i) the absence of the right of the creditor to make the application;

ii) failure to serve the debtor with the notice of the admission of the petitions; and

iii) the ability of the debtor to pay his debts.

19. In addition, the Court has been given discretion to dismiss the petitions 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 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 such as putting pressure upon the debtor or for extorting money from him, or where the petitioner-creditor having refused tender of money, fraudulently and maliciously files the application.

20. In ***Yenumula Malludora Vs. Peruri Seetharathnam and others***[2]. In ***Yenumula Malludora***[2], the Apex Court dealt with the similar question in Para 4 and held that the Act lays down in Section 6 what acts are to be regarded as acts of insolvency. It is a long list, some are voluntary acts of the insolvent and some others are involuntary. The involuntary acts are of a kind by which a creditor is able to compel a debtor to disclose his insolvent condition even if the insolvent is careful enough not to commit a voluntary act of insolvency. In the present case, sale of the property took place on 09.09.2005 in I.P. No.26 of 2005 in execution of the decree for recovery of money and it is an involuntary act which falls within the ambit of Section 6(1)(e) of the Act.

21. Learned counsel for the 2nd respondent sought permission to raise that the transfer is not fraudulent, if any petition is filed under Sections 4, 53 and 54 of the Act.

22. Therefore, granting leave to the second respondent to raise any contention before the trial Court in the event of filing any petition under Sections 4, 53, 54 of the Act, to set-aside the transfer or annulment of the sale, this Appeal is allowed setting-aside the decree and judgment dated. 20.06.2011 passed in Appeal Suit No.80 of 2007, restoring the order dated 19.04.2007 passed in Insolvency Petition No.26 of 2005.

In view of my foregoing discussion, the Civil Miscellaneous Second Appeal is allowed.

In consequence, miscellaneous petitions, if any, pending in this Appeal, shall stand closed. No order as to costs.

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M. SATYANARAYANA MURTHY, J

Date: 12-06-2015.
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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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[1] AIR 1961 97(V 48 C 26)

[2] AIR 1966 SC 918