THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.32 OF 2012

JUDGMENT:

Respondent No.2 in I.P.No.15 of 2002 on the file of the Additional Senior Civil Judge, Eluru filed this appeal aggrieved by the judgment and decree, dated 25.01.2012 in A.S.No.2 of 2007 passed by the V Additional District Judge (Fast Track Court), West Godavari, Eluru, whereunder and whereby the order passed by the trial Court was confirmed adjudging the Sri Vakkalagadda Hari Satya Venkata Gopal, the 3rd respondent herein, as insolvent.

For convenience of reference, the parties herein will be referred to as arrayed before the trial Court in I.P.No.15 of 2002, throughout the judgment.

The petitioners/creditors filed the said I.P. under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge respondent No.1 (Sri Vakkalagadda Hari Satya Venkata Gopal), as insolvent and vest the schedule property on the Official Receiver for administration, alleging, that respondent No.1 borrowed a sum of Rs.5,00,000/- from petitioner No.1 on 04.01.2001 and executed a demand promissory note on 06.01.2001. Respondent No.1 also deposited his title deeds pertaining to petition 'A' schedule property and executed a memorandum of deposit of title deeds on 09.10.2001, thereby created a mortgage by deposit of title deeds against 'A' schedule property. Respondent No.1 again borrowed a sum of Rs.2,00,000/- from petitioner No.2 and executed a demand promissory note in his favour agreeing to repay the same with interest either to petitioner No.2 or to his order as and when demanded.

Despite demands made by both the petitioners, respondent No.1

did not discharge the debts due under mortgaged promissory note. However, to delay and defeat the claims of genuine creditors, respondent No.1 alienated his property in favour of respondent No.2 by executing a registered sale deed, dated 01.12.2001, and such transfer amounts to an act of insolvency. Therefore, the petitioners prayed to adjudge respondent No.1 as insolvent.

Respondent No.1 filed counter denying borrowal of amount from the petitioners, execution of promissory notes and also creation of mortgage by deposit of title deeds, while contending that he is a rich business man. He further stated that having suffered loss in the business, he was unable to discharge the debts and, therefore, a Committee was formed to settle his transactions. In that connection, at their request, he executed the said sale deed in favour of respondent No.2 without receiving any consideration and it is only nominal. He further contended that the petitioners are carrying on the chit fund business and respondent No.1 is subscriber in one of the chits and in that connection, the petitioners obtained signatures on blank papers and thereafter though respondent No.1 discharged the debt due towards the chit, the petitioners did not return the signed blank papers and taking advantage of those papers, the mortgage and promissory notes were created by fabricating the documents and finally prayed to dismiss the petition.

Respondent No.2 also filed a separate counter contending that she is a *bona fide* purchaser of the schedule property for valuable consideration and that respondent No.1 did not commit an act of insolvency and, therefore, she is entitled to protection and prayed for dismissal of the petition.

During the course of enquiry, on behalf of the petitioners, PWs.1 to 3 were examined and Exs.A1 to A9 were marked and on behalf of the respondents, RWs.1 to 3 were examined and Ex.B1 was marked.

Upon hearing the argument of both the learned counsel and considering oral and documentary evidence available on record,
on 17.10.2005, the Additional Senior Civil Judge, Eluru, allowed the I.P., in part adjudging respondent No.1 as insolvent, while directing the Official Receiver to take possession of all the properties of respondent No.1 including 'A' schedule property for administration.

Aggrieved by the same, respondent No.2 in I.P.No.15 of 2002 preferred A.S.No.2 of 2007 before the V Additional District Judge, West Godavari, Eluru.

After hearing the argument of both the counsel and considering the oral and documentary evidence available on record, the appellate Court dismissed the appeal on 25.01.2012 confirming the order passed by the trial Court.

Challenging the concurrent findings recorded by the trial Court as well as the appellate Court, the present Civil Miscellaneous Second Appeal is preferred raising several contentions.

Considering the contentions of both the counsel and after perusing the material available on record, the substantial questions of law that arise for consideration are:

1) Whether the filing of I.P.No.15 of 2002 by respondent No.2 against the petitioners herein and its dismissal on merits operates as *res judicate* and thereby the petitioners are not entitled to claim any relief in the Insolvency Petition?

2) Whether respondent No.1 be adjudged as an insolvent when the security for the debt due to the petitioners is worth more than the debt due?

POINT No.(1):- The first and foremost contention raised by the learned counsel for respondent No.2 is that when I.P.No.15 of 2002 filed by respondent No.2 was dismissed on merits, wherein the petitioners herein are the parties, the present appeal is not maintainable, as it operates as *res judicata.* In a petition filed under Section 10 of the Act, the debtor has to prove *prima facie* the case of insolvency, including proof that his debts amounting to Rs.500/-; or he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or an order of attachment in execution of such a decree has been made, and subsisting, against his property. Besides establishing the conditions under Section 10 (1) of the Act, the debtor has to disclose all of his properties under Section 13 (e) of the Act. If the debtor suppresses any of the property own and possessed by him, the petition is liable to be dismissed. The reason for dismissal of I.P.No.15 of 2002 is non-compliance of Section 13 (e) of the Act, as he failed to disclose the property own and possessed by him and also invented a false list of creditors. The order in I.P.No.15 of 2002 attained finality, since it was not challenged. The debtor can file a petition subject to establishing any of the acts under Section 6 of the Act, subject to establishing the requirements under Section 9 of the Act. There is lot of distinction between the pre-conditions to file a petition by the debtor under Section 10 of the Act and by the creditor under Section 9 of the Act. Merely because the debtor failed to prove his contention in a petition filed under Section 10 of the Act dismissal of petition on account of suppression of properties in violation of obligation under Section 13 (e) of the Act, that does operate as *res judicata.* Therefore, the contention of the counsel for the appellant that the judgment in I.P.No.15 of 2002 operates as *res judicata* is without any substance and on this ground, the order of the trial Court, as confirmed by the appellate Court, cannot be reversed. Accordingly, the point is answered against respondent No.2 and in favour of the petitioners.

POINT No.(2):- One of the contentions of the respondents is that the mortgaged property is worth more than the debt due and no doubt the value of the property may be more than the debt due, but respondent No.2 committed an act of insolvency under Section 6 (1) (b) of the Act and the petition is based on the acts of insolvency that took place within three months preceding to the date of institution of the petition and when the debt is more than Rs.500/-, the creditor can maintain a petition under Section 9 of the Act. Merely because the value of the property mortgaged with petitioner No.1 by deposit of title deeds is more than the debt due, the insolvency Court cannot exercise its discretion to adjudge respondent No.1 as insolvent and it is not a ground under Section 25 of the Act. Therefore, this contention is without any legal force and it will not stand any legal scrutiny.

In view of my foregoing discussion, I find no legal infirmity in the order passed by the trial Court, which was confirmed by the appellate Court, warranting interference by this Court.

In the result, the Civil Miscellaneous Second Appeal is dismissed confirming the judgment and decree dated 25.01.2012 passed in A.S.No.2 of 2007 on the file of the V Additional District Judge, West Godavri, Eluru. However, liberty is given to respondent No.2 to raise any contention that is available legally including the plea of *bona fide* purchaser for valuable consideration under Section 55 of the Act in a petition filed under Sections 52 and 53 read with Section 4 of the Act, for annulment of transaction covered by sale deed executed in favour of respondent No.2 by respondent No.1. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in the appeals shall stand closed.

***M.SATYANARAYANA MURTHY,* J**

16.07.2015

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