

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY
CIVIL MISCELLANEOUS SECOND APPEAL No.76 of 2013

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JUDGMENT:

This appeal is preferred against the judgment and decree in A.S.No.147 of 2008 passed by V Additional District Judge, West Godavari at Eluru, whereunder the finding of the trial Court in I.P.No.21 of 2006 was confirmed.

2. The appellant/petitioner claiming to be a creditor filed I.P.No.21 of 2006 under Section 9 of the Provincial Insolvency Act, 1920 (for short, 'the Act') to adjudge the first respondent as insolvent alleging that the first respondent borrowed Rs.75,000/- under a promissory note from her on 10.07.2003 agreeing to repay the same together with interest at 24% per annum. Since the first respondent failed to discharge the debt due, the appellant-creditor was forced to file a suit O.S.No.27 of 2006 on the file of the Principal Senior Civil Judge, Eluru for recovery of the amount due under the promissory note and also obtained an attachment before judgment under Order XXXVIII Rule 5 of C.P.C. vide order in I.A.No.104 of 2006.

3. While the matter stood thus, the first respondent to discharge the debts due to respondent Nos.2 and 3, sold the property by executing registered sale deeds. Thus, the appellant-creditor sought to adjudge the first respondent as insolvent as the act of transfer of immovable property shown in the 'B' schedule is an act of insolvency under Section 6 (1) (b) of the Act and to annul those transactions covered by sale deeds marked as Exs.A.1 and A.2, dated 04.05.2006.

4. The first respondent remained *ex parte* and the second respondent filed counter denying the money transaction between the appellant and the first respondent, while pleading ignorance about the debt and contended that the sale deed itself was executed only to

discharge the mortgage debt dated 23.01.2006 and therefore, it is a bona fide transaction for valuable consideration. Consequently, the transaction cannot be cancelled. Similarly, the third respondent also filed counter raising same contention and prayed for dismissal of the petition.

5. During course of enquiry, on behalf of the appellant/ petitioner, PW.1 was examined and Exs.A.1 to A.4 were marked. On behalf of the respondents, RWs.1 and 2 were examined and Exs.B.1 to B.4 were marked.

6. The trial Court upon hearing argument of both the counsel, and considering oral and documentary evidence available on record, dismissed the petition as the appellant-creditor failed to establish her right to file a petition under Section 25 (1) of the Act on the ground that the transfer was only for discharging the mortgage debt i.e., secured debts.

7. Aggrieved by the order and decretal order passed by the Additional Senior Civil Judge, Eluru in I.P.No.21 of 2006, the appellant-creditor preferred A.S.No.147 of 2008, which ended in dismissal vide order dated 12.03.2012.

8. Aggrieved by the judgment and decree in A.S.No.147 of 2008, the present appeal is preferred raising various contentions.

9. In ground No.10 of grounds of appeal, the appellant-creditor raised several substantial questions of law, but all the substantial questions of law mentioned in ground No.10 from 'a to e' are only substantial questions of fact.

10. The main contention of Sri K.Chidambaram, the learned counsel for the appellant, is that the appellant-creditor did not produce any material, but filed set of documents under Order XLI Rule 27 of C.P.C.

along with this appeal. They are required to be considered by this Court.

11. The appellant-creditor did not produce any material to show that there exists relationship of creditor and debtor between the appellant and the first respondent except producing Exs.A.2 and A.4 to establish the relationship of creditor and debtor but, the trial Court disbelieved it. However, the documents produced before this Court as additional evidence may establish the relationship between the appellant-creditor and the first respondent-debtor. But, it is purely a question of fact and not a substantial question of law. In view of limited jurisdiction of this Court under Section 100 of C.P.C., I find that no substantial question of law required to be decided by this Court. It is an admitted fact that the appellant-creditor filed O.S.No.27 of 2006 and obtained an attachment before judgment under Order XXXVIII Rule 5 of C.P.C. which is still subsisting. The appellant-creditor also obtained a decree, which is sought to be received by this Court and the same is annexed to the petition filed under Order XLI Rule 27 of C.P.C. When the appellant obtained an order of attachment before judgment under Order XXXVIII Rule 5 of C.P.C., till it is raised the appellant-creditor is entitled to proceed against the property for recovery of the amount, subject to legal entitlement. Hence, the appellant-creditor may recover amount proceeding against the property subject to permissibility under law.

12. With the above observations, the Civil Miscellaneous Second Appeal is dismissed at the stage of admission itself, but without costs.

13. Consequently, Miscellaneous Petitions, if any, pending in this Civil Miscellaneous Second Appeal shall stand closed.

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M.SATYANARAYANA MURTHY, J

Date: 07.09.2015

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