

In the High Court of Judicature at Madras

Dated: 13.07.2017

Coram

The Honourable Mr.JUSTICE RAJIV SHAKDHER
and
The Honourable Mr.JUSTICE ABDUL QUDDHOSE

O.S.A.Nos.146 to 149 of 2013
and M.P.No.1 of 2013

K.I.Sudhir Mathulla

..... Appellant in the above O.S.As

Vs.

1. D.Rajkumar alias Raju
2. Official Assignee
High Court, Madras.

..... Respondents in the above O.S.As

APPEALS under Order XXXVI Rule 1 of the O.S. Rules read with clause 15 of the Letters Patent against the order dated 14.11.2011 passed in Application No.55 of 2010, 88 of 2010, 89 of 2010 and 90 of 2010 in I.P. No 69 of 2006 on the file of this Court.

Application No 55 of 2010:

Application praying that this Hon'ble Court be pleased to annul the order of adjudication dated 06.06.2006 made in I.P. No 69 of 2006.

Application No 88 of 2010:

Application praying that this Hon'ble Court be pleased to the insolvent concerned in I.P. No 67 to 69 of 2006 on the file of this Hon'ble Court to produce an English Version of the day books filed in the said petitions.

Application No 89 of 2010:

Application praying that this Hon'ble Court be pleased to permit the applicant herein to peruse and verify all the documents filed in I.P. No 67 to 69 of 2006 with the help of an auditor.

Application No 90 of 2010:

Application praying that this Hon'ble Court be pleased to directing the Learned Official Assignee to summon the Sales Tax and/or income Tax returns of the persons disclosed as either creditors or debtors in I.P. No 67 to 69 of 2009 on the file of this Hon'ble Court for the year 2003-2004 to 2005-2006 as well

as to secure the properties of Mrs. Shobana Ramesh and M. Jeyanthi, the partners of the insolvents.

For Appellant : Mr.M.S.Krishnan, S.C.
for M/s.Sarvabhauman Associates

For Respondents: Ms.B.Meena, Official Assignee
and Mr.M.Vasantha Kumar,
Deputy Official Assignee - R2
No appearance - R1

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. These appeals have been preferred against four (4) separate orders, of even date, i.e., 14.11.2011, passed by the learned Single Judge in Application No.55 of 2010, Application No.88 of 2010, Application No.89 of 2010 and Application No.90 of 2010.

1.1. The appellant, claims to be a third party, bona fide purchaser of an immovable property, situate at Plot No.66, Pillayar Koil Street, Golden George Nagar, Nerkundram, Chennai - 600 107 (hereinafter referred to as 'subject property').

1.2. Respondent No.1, Mr.D.Rajkumar, had held title, in the subject property, prior to his declaration, as an insolvent. It is this declaration of respondent No.1, as an insolvent, which, affects the interest of the appellant. The appellant, faced with this hurdle, chose to file the aforementioned applications. It is, therefore, the dismissal of the appellant's applications, by the learned Single Judge, which has propelled him to file the captioned appeals.

1.3. It is, important to note, that, the learned Single Judge dismissed Application No.55 of 2010, on the ground that the appellant had no locus standi to challenge the order dated 06.06.2006, whereby, respondent No.1, was declared an insolvent.

1.4. The necessary consequences of the dismissal of Application No.55 of 2010, was that, other three (3) applications, were dismissed by the learned Single Judge as well, albeit, in limine.

1.5. The appellant, thus, assails the impugned orders, essentially, on the ground that conclusions reached by the learned Single Judge that he had no locus, in the matter, was flawed.

2. The factual background, in which, these assertions are made is set out hereinafter.

2.1. Respondent No.1, i.e., Mr.D.Rajkumar, moved, for being declared an insolvent, by filing a petition, on 12.05.2006. The subject property was sold by respondent No.1 to the appellant on 18.05.2006. Respondent No.1 was declared an insolvent, as

indicated above, after adjudication, on 06.06.2006.

2.2. The Official Assignee filed an application, i.e., Application No.95 of 2009 for annulling the sale effected, between the appellant and respondent No.1, on 18.05.2006.

2.3. We are told, that the Official Assignee's application, i.e., Application No.95 of 2009 is still pending adjudication.

4. Since, the appellant's applications qua which the impugned orders have been passed, came up for hearing before the learned Single Judge, they were heard and dealt with via the impugned orders.

5. Mr.M.S.Krishnan, learned Senior Counsel, who appears on behalf of the appellant, in support of the appeals, submits that the orders passed by the learned Single Judge are erroneous in law, in as much as the appellant, who claims to be the bona fide purchaser of the subject property, had the necessary locus to challenge the adjudication order.

5.1. Learned Senior Counsel further submits that, since, the sale of the subject property took place before the order of adjudication was passed, he would come within the ambit of Section 57 of the Presidency Towns Insolvency Act, 1909 (in short, 'the 1909 Act').

5.2. In support of his submission, learned Senior Counsel relies upon Section 21 of the 1909 Act, as well. Based on the said provision, learned Senior Counsel submitted that any person, who is aggrieved, could move the Court for setting aside the adjudication order. In support of his submissions, learned Senior Counsel relied upon the judgment of the Supreme Court in: Sankararam & Co. Vs. Kasi Naicker and others, (2003) 11 SCC 699. Reliance was also placed by the Counsel on the judgment of this Court in the matter of Govindaraja Gounder (died) and others V. Rani, 78 L.W. 715.

6. Ms.B.Meena, Official Assignee and Mr.M.Vasanth Kumar, Deputy Official Assignee, submit that the subject sale transaction which was entered into between the appellant and respondent No.1 was fraudulent. In this behalf, it was contended that the purported sale consideration of the subject property was Rs.17,16,000/-, whereas, at the relevant point in time, the appraiser/the valuer had pegged its value at Rs.40.00 lakhs.

6.1. Furthermore, it was submitted that respondent No.1, in his petition seeking declaration of insolvency, had not disclosed the price of the subject property. It was, thus, contended that the order of adjudication passed qua respondent No.1, will relate back to the date when the petition was filed by respondent No.1 for being declared as insolvent. In other words, according to Messrs. B.Meena and M.Vasanth Kumar, the subject property would come within the sway of the adjudication order and therefore, the appellant could not assert title as against the Official Assignee.

7. We have heard the learned Senior Counsel for the Appellant, the Official Assignees and also perused the record.

8. What emerges clearly is as follows: (i) That the Official Assignee's application, i.e., Application No.95 of 2009 seeking to annul the subject sale transaction, which occurred on 18.05.2006, is pending adjudication. (ii) The sale of the subject property took place after respondent No.1 had filed a petition for declaring him insolvent, but prior to the issuance of the order adjudicating him insolvent.

8.1. As indicated above, respondent No.1 had filed his application for being declared insolvent on 12.05.2006, based on which, he was declared insolvent on 06.06.2006. The subject transaction took place on 18.05.2006.

9. In these circumstances, the moot question which arises is: whether the appellant could protect the subject transaction by claiming that he was a bona fide purchaser, who had no notice of presentation of an insolvency petition by respondent No.1 ?

10. For this purpose, we may only have to look at the plain language of Section 57 of the 1909 Act. For the sake of convenience, the said provision is extracted hereafter:

57. Protection of bona fide transactions.-

Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency-

- (a) any payment by the insolvent to any of his creditors;
- (b) any payment or delivery to the insolvent;
- (c) any transfer by the insolvent for valuable consideration; or
- (d) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

11. A bare perusal of the aforesaid provision would show that nothing in the 1909 Act would invalidate, inter alia, a contract or dealing, by/or with the insolvent, which is entered into for a valuable consideration, provided, such transaction takes place before the date of order of adjudication, and that, the person with whom such a transaction takes place does not have notice of presentation of any insolvency petition by/or against the debtor.

12. Prima facie, the appellant's case, as per the dates and events noted above, fits into the provision.

13. The next logical issue which calls for adjudication is: whether this would give locus to the appellant to assail the adjudication order dated 06.06.2006 ?

13.1. The answer to this poser lies in the provisions of Section 21 of the 1909 Act. The relevant part of the said Section, i.e., sub-section (1) of Section 21 is extracted hereafter, for the sake of convenience.

"21.Power for Court to annul adjudication in certain cases .-(1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court shall, on the application of any person interested, by order annul the adjudication and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition."
(Emphasis is ours)

13.2. A bare perusal of the sub-section (1) of Section 21 would show that it has wide amplitude. The Court has been vested with the power to annul an adjudication order, if, it is of the opinion that the debtor ought not to have been adjudged an insolvent or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full.

13.3. The order annulling the adjudication can be passed by the Court based on an application moved by "any person interested", in having the order set aside.

13.4. As noted hereinabove, the appellant had not only filed an application for annulling the order of adjudication passed qua respondent No.1, but had filed three (3) other applications as well.

14. Application No.55 of 2010 was filed by the appellant, broadly, for the relief of getting the order of adjudication annulled. Application No.88 of 2010 was filed by the appellant, for production of day books of respondent No.1, while Application No.89 of 2010 was filed by the appellant to peruse and verify the documents, which were on record of the Official Assignee. The last application, i.e., Application No.90 of 2010 was filed by the appellant for seeking appropriate direction to summon the sales tax and income tax records of respondent No.1.

15. The entire purpose of these applications, as it appears facially, was to persuade the Insolvency Court to annul the order of adjudication on the ground that respondent No.1 had

obtained a declaration of insolvency by employing a fraud. In other words, according to the appellant, at the relevant point in time, when the transaction took place between him and respondent No.1, respondent No.1 was not insolvent.

16. The learned Single Judge, however, it seems short-circuited the entire process by non-suiting the appellant on the ground of locus standi.

17. In our view, given the wide language of Section 21 of the 1909 Act, which empowers the Court to annul an order of adjudication, based on the application of any person interested, the appellant, could not have been non-suited on the ground that he had no locus standi.

17.1. The appellant was clearly a person interested in having the order, adjudicating respondent No.1 as insolvent, annulled, as it impacted his right, in the subject property.

17.2. The expression, "any person interested", which finds mention in Section 21, of the 1909 Act, is broad enough to include a third party who seeks to claim interest in the asset of an insolvent.

17.3. It would be relevant to note that in a similar provision, that is, in Section 35 of the Provincial Insolvency Act, 1920 (in short '1920 Act'), the expression incorporated is "debtor" or "any other person interested". A learned Single Judge of Bombay High Court who was dealing with an application of a debtor for annulment of an order of adjudication, preferred under Section 21 of the 1909 Act, ruled in the matter of Suresh Manharlal Mehta Vs. ICDS Ltd., Mumbai, in 2009 (5) Mh.L.J. 41 that the expression "any person interested" found in Section 21 of 1909 Act, would exclude a debtor. The reasoning of the Court is based on, as indicated above, the difference in the expression used in the two sections in what are otherwise two similar provisions.

17.4. We may, only indicate that, in this case, we are not required to decide this aspect of the matter. What is important, for our purpose, is to ascertain, based on the language of Section 21 of the 1909 Act, as to whether a third party, such as the appellant, who claims to be a bona fide purchaser, can come within the purview of Section 21 of the 1909 Act. According to us, the expression "any person interested" found in Section 21, of the 1909 Act, is wide enough to include a third party who claims to be a bona fide purchaser and claims to have no notice of the factum of presentation of insolvency petition by or against the debtor.

18. In this regard, we may advert to the judgment of a Division Bench of the Calcutta High Court, in the matter, Anila Bala Debi Vs. Kanai Lal Daga, reported in 1948 Vol.I I.L.R. Calcutta Series 131.

18.1. In that case, the person, who moved for annulment of the adjudication order, under Section 35 of the 1920 Act, was a purchaser of the insolvent's property. The purchaser was in fact insolvent's daughter-in-law. The property in issue had been bought pending declaration of insolvency. The District Judge, had dismissed the application, seeking annulment of the order of insolvency, on the ground that the appellant had no locus standi to present an application under Section 35 of the 1920 Act. It was further observed that the appellant, had firstly, failed to prove that she was a bona fide purchaser for value without notice, and secondly, she was unable to satisfy the Court that, if evidence was actually adduced before the concerned Court, no adjudication order could have been passed. On appeal, the Division Bench, set aside the order, and annulled the order of adjudication and, while doing so, made the following apposite observations:

"Having heard the learned advocates on both sides it seems to us, that, in making the order, the Court below approached the case from a wrong standpoint altogether, and the decision cannot be supported in law.

So far as the first ground is concerned, it is perfectly true that, if a third party purchases a property belonging to the debtor pending any insolvency proceeding, which ends in adjudication, he cannot acquire any title against the receiver, whose title dates back to the date of presenting the insolvency petition. But this presupposes that the order of adjudication is validly and properly made. If the order of adjudication itself is challenged as a nullity, a purchaser of the property after the application for adjudication is presented can certainly maintain an application under Section 35 of the Provincial Insolvency Act, and if he succeeds in proving that the order of adjudication ought not to have been made, he will be certainly a person "interested" within the meaning of Section 35 of the Provincial Insolvency Act."

(emphasis is ours)

18.2. Thus, as indicated above, in our view, the appellant had the necessary locus to challenge the order of adjudication.

19. Therefore, in our view, the order passed by the learned Single Judge in Application No.55 of 2010 would have to be set aside. The logical sequitur, would be that the impugned order passed qua the other three (3) applications, i.e., Application Nos.88, 89 and 90 of 2010 would also have to be set aside. It is ordered accordingly.

19.1. In sum, we allow the captioned appeals and set aside the impugned orders.

19.2. We may, however, make it clear that the observations made hereinabove, will not impact the merits of the matter. The appellant would have to, inter alia, prove he was a bona fide purchaser who had no notice of the presentation of insolvency petition by the debtor.

19.3. Furthermore, we direct re-hearing of Application Nos.55, 88, 89 and 90 of 2010. These applications, will be taken up along with Official Assignee's application, i.e., Application No. 95 of 2009.

20. List the matter, for appropriate directions, before the learned Single Judge on 30.08.2017.

21. Consequently, the connected Miscellaneous Petition is closed. However, there will be no order as to costs.

-s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

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To

1. The Sub Assistant Registrar
Original Side Section
High Court, Madras.
2. The Official Assignee
High Court, Madras.

+1 CC to Ms. Sarvabhuman Associates, sr 48965.

O.S.A.Nos.146 to 149 of 2013
and M.P.No.1 of 2013

SP(09/08/2017)