



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 18.08.2017
DELIVERED ON : 16.02.2018
CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU
C.M.S.A. (MD)No.21 of 2013
and
M.P. (MD)No.1 of 2013

1.K.B.Lakshmikantham
2.K.B.Jeyanthi
3.K.B.Jeyakumar
4.K.B.Jagadeeshwaran
5.T.A.Jeyashree

... Appellants 1 to 5 / Appellants 2 to 6 /
Petitioners
vs.

1.P.Natarajan
2.Meenakshi
3.Thiraviyapandian
4.Padmavathi
5.Pushpa @ Subbammal
6.N.Karthik
7.P.Meenakshisundaram @ P.M.Sundaram
8.M.Susila
9.M.Jeyanthi
10.M.Parameswaran
11.Mariappan

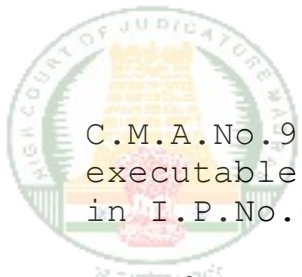
... Respondents 1 to 11 /
Respondents 1 to 11/
Respondents 1 to 11

PRAYER : Civil Miscellaneous Second Appeal filed under Section 100 of the Civil Procedure Code and Section 75(2) of the Provincial Insolvency Act against the fair order and Ex-order dated 05.04.2013 in C.M.A.No.9 of 2009 passed by the IV Additional District Court, Madurai, confirming the fair order and executable order, dated 10.08.2009, in I.P.No.86 of 1998 passed by the III Additional Sub Court, Madurai.

For Appellants : Mr.D.Nallathambi

For Respondents : Mr.G.Sridharan for R.3, R.4 & R.11
No appearance for R.1,R.2& R.5 to R.10

JUDGMENT



C.M.A.No.9 of 2009, dated 05.04.2013, confirming the fair and executable order passed by the III-Additional Sub Court, Madurai, in I.P.No.86 of 1998, dated 10.08.2009.

2. It is seen that during the pendency of C.M.A.No.9 of 2009, the original petitioner viz., K.G.Balaraman died and the present appellants were impleaded as legal heirs of the original petitioner. Therefore, for better appreciation, the parties are referred to as per their rank mentioned in I.P.No.86 of 1998.

3. The facts of the case, as averred in the affidavit, are as follows:

The respondents 1 and 2 herein have borrowed a sum of Rs.3 lakhs from the original petitioner viz., K.G.Balaraman and executed a promissory note in favour of him on 28.02.1996, in which the respondents 1 and 2 have agreed to pay 12% interest per annum for the amount borrowed to the original petitioner. Alleging that the respondents 1 & 2 have neither paid the principal nor interest for the loan amount and that the respondents 1 and 2 have mounting debts to the extent of Rs.40 lakhs and that in order to defeat the rights of the creditors, including the original petitioner, the respondents 1 and 2 in collusion with the respondents 3, 4 & 11 have created bogus records as if the respondents 1 and 2 sold their one and only immovable property to the respondents 3, 4 and 11, the original petitioner had filed an insolvency petition in I.P.No.86 of 1998 on the file of the III-Additional Sub Court, Madurai, to declare the respondents 1 & 2 as insolvents and order vesting the property in question in the hands of the official receiver, Madurai District, for lawful distribution among the creditors. As the said I.P., was dismissed by the lower Court, by an order dated 10.08.2009, the original petitioner has preferred an appeal in C.M.A.No.9 of 2009 on the file of the IV Additional District Court, Madurai. As the same was also dismissed by the lower Appellate Court, by order dated 05.04.2013, the appellants, being the legal heirs of the original petitioner, have preferred this appeal.

4. At the time of presentation of this Civil Miscellaneous Second Appeal, the appellants have raised the following substantial questions of law:-

1. When the Act of Insolvency is clearly proved and admitted, the dismissal of the Insolvency Petition is valid under law?
2. Whether the First Appellate Court having found that the requirement of the creditors to file a suit proceeding pending I.P petition is not required U/S. 28 of the Insolvency Act as erroneously found by the



Trial Court, dismissal of the First Appeal is valid and lawful under law and facts?

5. The learned Counsel for the original petitioner / appellants would submit that the respondents 1 & 2 are not able to pay the debts due to the original petitioner as well as the other creditors. But, they attempted to transfer their one and only immovable property, mentioned in the petition, to the respondents 3 & 4 with an intention to defraud the creditors. Further, within a period of 90 days from the date of presentation of the sale agreement, the original petitioner has instituted the I.P. proceedings. It is the grievance of the appellants that both the Courts below, without appreciating the material facts, have denied the claim of the original petitioner and aggrieved thereby, they are before this Court.

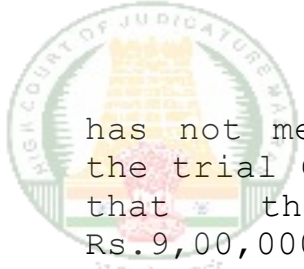
6. The learned Counsel for the respondents 3, 4 & 11, who are the *bona fide* purchasers of the property in question, submitted that PW1 / original petitioner has stated in his evidence that the respondents 1 & 2 have borrowed a sum of Rs.9,00,000/- from him and executed 3 promissory notes, which were also marked before the lower Court. The original petitioner has also stated in his evidence that the respondents 1 & 2 have totally borrowed a sum of Rs.40 Lakhs from him, his family members and other creditors. To that extent, they have not produced any proof to substantiate their claim and hence, the Courts below have rejected the claim of the original petitioner.

7. Heard the learned Counsel appearing for the appellants as well as the learned Counsel appearing for the respondents 3, 4 & 11. There is no representation for respondents 1, 2, 5 to 10.

8. A perusal of records would show that the respondents 1, 2, 5 to 10 remained *ex- parte* in both the Courts below.

9. Admittedly, the original petitioner was a tenant in a portion of suit property of the respondents 1 and 2 and he has also admitted in his evidence that he had been running a petty coffee shop for a monthly rent of Rs.300/-, which was paid by him @ Rs.10/- per day. As stated earlier, the respondent Nos.1 and 2 did not appear before the Courts below and only the contesting respondents alone appeared before the Courts below as well as before this Court. Therefore, it is the duty of the original petitioner, who instituted the case, to establish the case with acceptable evidences that the respondents 1 and 2 have become insolvents.

10. A perusal of the documents would show that the original petitioner has shown a list of liabilities of the respondents 1 & 2 and their family members for a sum of Rs.37,80,000/-, but, he



has not mentioned the names of such creditors. Moreover, before the trial Court, he has marked only three promissory notes showing that the respondents 1 & 2 are liable for Rs.9,00,000/-. But, in the petition, the original petitioner has stated only about one promissory note, for a sum of Rs.3,00,000/-. Moreover, in the cross examination, it was stated by PW1 / original petitioner that he has sold his house at Anna Nagar for a sum of Rs.12 Lakhs and he has given the said sum to the first respondent as loan. But, in order to substantiate his claim, no evidence/document was produced before the Court. Thus, the original petitioner has failed to prove that the respondents 1 and 2 have become insolvents.

11. Mere transfer of assets by debtors *per se* would not constitute an act of insolvency. The appellants have miserably failed to prove that the intent of the respondents 1 & 2 is to defeat / delay the creditors. Section 6(b) of the Act is applicable only in cases where a transfer is made with an intent to defeat or delay the creditors. Having failed to prove that a charge has been created over the suit property, the appellants could not question the dismissal of the first appeal.

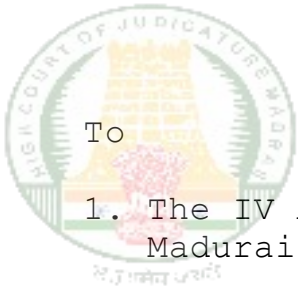
12. No doubt, the lower Court has erred in giving a finding that the original petitioner has not taken any steps to recover the so called loan amount / pro-note given to the respondents 1 and 2. The lower appellate Court has rightly held that the said observation of the trial Court is totally wrong, in view of Section 28 of the Provincial Insolvency Act. As stated earlier, having failed to prove the status of the respondents 1 and 2 and to prove that the suit property was transferred with an intent to defeat or delay the creditors, the original petitioner / appellants cannot get the relief. The Courts below have rightly rejected the relief sought for by the original petitioner. This Court does not find any reason to interfere with the same. Thus, the substantial questions of law raised by the appellants are answered against them.

13. In result, this Civil Miscellaneous Second Appeal is dismissed. It is open to the appellants to recover the amount due from the respondents 1 & 2 in the manner known to law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar



To

1. The IV Additional District Court,
Madurai.

2. The III Additional Sub Court,
Madurai.

+1cc to Mr.D.Nallathambi, Advocate Sr.No.49470

+1cc to Mr.G.Sridharan, Advocate Sr.No.49131

GK

VB/SV/MMS/SAR4/26.02.2018/5P/5C

**C.M.S.A. (MD) No.21 of 2013
and**

**M.P. (MD) No.1 of 2013
16.02.2018**