

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

%16.03.2018

S.A.NO.296 OF 2018

SEEMAKURTHI KRISHNA MAHESH

APPELLANT

AND

K.KETHAMUKKALA USHASRI AND THREE OTHERS.

RESPONDENTS

Counsel for the appellant: SRI CH.B.R.P.SEKHAR

Counsel for the respondent ---

< Gist

➤ Head Note.

➤

?Cases Referred:

1. AIR (59) AP 221
2. 1985(2) ALT 534



THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDYS.A.NO.296 OF 2018O R D E R

The appellant herein is the petitioner in insolvency petition. He filed I.P.No.51 of 2008 on the file of Additional Senior Civil Judge, Eluru, under Section 10 of the Provincial Insolvency Act, 1920 (for short 'the Act'), to adjudge him as 'insolvent'. By order and decree dated 15.06.2010, the trial court dismissed the petition. Aggrieved thereby, he preferred appeal in A.SNo.9 of 2011 on the file of VIII Additional District Judge, West Godavari, Eluru. Vide judgment and decree dated 23.10.2017, the lower appellate court dismissed the appeal. Assailing the same, the present second appeal is filed. Thus the unsuccessful petitioner before both the courts below, is the appellant herein.

2. The parties will be referred to as they are arrayed in the trial court.

3. The case of the petitioner is that he is a permanent resident of Chintalapudi village, West Godavari District and doing kirana (groceries) business since ten years and that respondent Nos.1 to 4 are his creditors. He borrowed money from the respondents under the promissory notes and hand letters for investing the same in his kirana business. He incurred huge loss in the business, as he sold the goods to the customers in and around Chintalapudi, on credit basis and could not realize the amounts and as such could not discharge the debts incurred by him. The 1st respondent filed suit in O.SNo.212 of 2005 on the file of Junior Civil Judge's Court, Chintalapudi and the said suit was decreed with costs and as the 1st respondent is going to file execution petition, seeking to arrest him and

as he is unable to pay the decree debt, due to loss in his business, he filed present petition. It is stated that his assets are not sufficient to discharge entire debt of the respondents and that he is the only bread winner of his family and that his father died recently and that he got children. With these averments, he filed petition seeking to declare him as insolvent under Section 10 of the Act.

4. 1st respondent filed counter affidavit and the same was adopted by 2nd respondent. In the counter affidavit while denying the averments made in the petition, it is stated that the petitioner is absolutely solvent and still doing kirana business at Ramakrishna nagar, Chintalapudu, with monthly turnover of Rs.2,00,000/- on his business and getting monthly income of not less than Rs.50,000/-. The petitioner is capable of paying the debts due to the respondents and he has not approached the court with clean hands and suppressed the material aspects. Respondents 3 and 4 never lent any amount and they are not genuine creditors. The 3rd respondent is no other than the nephew of the petitioner and the 4th respondent is his close friend. The petitioner is in possession and enjoyment of huge property at Chintalapudi and he is also in possession and enjoyment of site and building in R.No.913/3, worth more than Rs.10,00,000/-. The petitioner is having six shops apart from the residential house and he let out five shops to the tenants apart from kirana shop and getting income not less than Rs.10,000/- per month as rents from the said shops. The father of the petitioner namely Nageswara Rao, died one year prior to filing of the petition and the petitioner and his father jointly executed two registered settlement deeds on 25.01.2006 in favour of the children of the petitioner namely Kanaka Durga Harshitha and Durga Sai showing the petitioner as natural guardian. The said registered sale deeds

are nominal and created with a view to defraud the creditors like the respondents. The 1st respondent filed suit in O.S.No.212 /2005 on the file of Junior Civil Judge, Chintalapudi against the petitioner herein and one Gandham Jagannadham Rao, who borrowed amount from him jointly and that the said suit was decreed on 10.03.2008. It is further stated that the properties of the petitioner are worth more than Rs.10,00,000/- and they are situated in prime locality and market value of the said property is worth Rs.20,00,000/- and the assets of the petitioner are more than the value of debts and articles mentioned in Ex.B-5 schedule, are false. Petitioner willfully suppressed the house property and approached the court with unclean hands. With these averments the petition was sought to be dismissed.

5. Respondents 3 and 4 did not file any counter affidavit.

6. Based on the above pleadings, the trial court framed the following issue for consideration:

“Whether the petitioner is liable to be adjudicated as insolvent.”

7. To prove his case, petitioner got examined himself as P.W.1 and no documents were marked on his behalf. On behalf of the respondents, no evidence, either oral or documentary, was adduced.

8. Appreciating the evidence on record, the trial court dismissed the insolvency petition holding that petitioner suppressed the fact that he owns properties and assets and thus not entitled to be adjudged as insolvent. Aggrieved thereby, petitioner preferred appeal and the lower appellate court, on re-appreciation of entire evidence, dismissed the

appeal and thereby confirmed the order and decree of trial court. Hence, the present second appeal.

9. The learned counsel for the petitioner, reiterating the averments made in the petition filed under Section 10 of the Act, submits that the petitioner is a petty kirana merchant, doing business in groceries, and he incurred loans from the respondents. The petitioner sold the goods on credit basis and could not realize the amounts and thus suffered huge loss in the business and he has no amount or any assets to discharge the debts. Therefore, the petitioner filed petition under Section 10 of the Act. Learned counsel contended that though the petitioner admitted that he got ancestral property, in the further cross-examination, he has denied the same and the respondents failed to produce any proof that petitioner has got assets and that he is getting income as alleged by them in their counter affidavit. The learned counsel submits that the petitioner is running a small grocery shop and he cannot be expected to maintain accounts like a big business firm. Therefore, the courts below are not justified in drawing an adverse inference for non-production of accounts. With regard to gift deeds, executed by the deceased father of the petitioner in favour of his grandchildren, keeping the petitioner as guardian is concerned, the learned counsel contended that the petitioner has no share in the said property and the petitioner intended to prove his case by adding his children and, therefore, filed I.A.No.533 of 2015, seeking the lower appellate court to remand the matter under Order 41, Rule 23 of CPC. But the lower appellate court, without appreciating the same, dismissed the I.A. With these averments, the learned counsel sought to set aside the impugned orders of both the courts below.

10. To consider the contentions raised by the counsel for the petitioner and to examine whether any substantial question of law is involved in this second appeal, first it is necessary to note the relevant provisions of the Act.

11. Sections 10, 13 and 22 of the Act are the relevant provisions, which provide for declaring the debtor as insolvent and unless the debtor satisfies the conditions laid down there under, he cannot be declared as insolvent. The relevant portions of the said provisions are extracted as under for better appreciation:

10. Conditions on which debtor may petition:--

- (1) A debtor shall not be entitled to present any insolvency petition, unless he is unable to pay his debts and –
- (a) his debts amount to five hundred rupees; or
 - (b) he is under arrest or imprisonment in execution of the decree of any Court for payment of money; or
 - (c) an order of attachment in execution of such a decree has been made, and is subsisting against his property.

(2) ...

13. Contents of petition:

- (1) Every insolvency petition presented by a debtor shall contain the following particulars namely:
- (a) ...
 - (b) ...
 - (c) ...
 - (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him;
 - (e) the amount and particular of all his property, together with—
 - (i) a specification of the value of all such property not consisting of money;
 - (ii) the place or places at which any such property is to be found; and
 - (iii) a declaration of his willingness to place at the disposal of the court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

22. Duties of debtor:--

The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property and such list of his creditors and debtors and of the debts due to and from then, respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments and generally do all such acts and things in relation to his property as may be required by the Court or receiver, or as may be prescribed.

From a reading of above provisions it is clear that under Section 10(1) of the Act, for declaring the debtor as insolvent, he has to satisfy the court that he is unable to pay his debts and in the contents of the petition filed under Section 10, he has to furnish particulars, more particularly under Section 13(1)(e) of the Act, he has to furnish the particulars of the amount and also the particulars of all his property. Under Section 22, on admitting the petition, he has to produce all books of account and give such inventories of his property and such list of his creditors and debtors and the debts due from them.

12. Considering Section 10 of the Act, a Division Bench of this court in *BONAGIRI YELLALU v. NAGULA VARAM CHENCHU SUBBAIAH*¹ held as under:

“7. ... Whatever may have been the position under the old Act, Section 10 makes it abundantly clear that a debtor shall not be entitled to present an insolvency petition unless it is proved that he is unable to pay his debts. It is therefore, an essential pre-requirement for debtor-petitioner to get an order of adjudication to satisfactorily establish that he is unable to pay his debts. The requirement of Section 10, therefore has to be necessarily satisfied by the debtor.”

13. In view of the above provisions and judgment of the Division Bench, the points that arise for consideration in this second appeal are:

- (i) Whether the petitioner could satisfactorily establish that he is unable to pay his debts and liable to be declared as 'insolvent', and
- (ii) Whether the judgments of the courts below, warrant any interference?

¹ AIR (59) AP 221

14. To prove his case, the petitioner got examined himself as P.W.1 and in the chief examination, deposed as per the averments made in the petition. In the cross-examination, he admitted that the respondents 2 to 4 did not file any suit against him for recovery of money. His further evidence disclosed that he did not file any documents to show that these respondents got issued any legal notices to him. He also admitted that 3rd respondent is his nephew and 4th respondent is his relative. In his further cross-examination, he categorically admitted that he is the guardian of his son Durga Sai and daughter Harshitha; and that his deceased father Rajeswara Rao executed gift deed in favour of his children in respect of their ancestral properties and in the said gift deeds, the petitioner himself acted as guardian of his children. The petitioner has also admitted that his father gifted a house and house site covered by R.S.No.913. In his further cross-examination, the petitioner while denying the suggestions that he is running a provision shop in the building covered by R.S.No.913 and also residing in the said building, and that he is getting income of Rs.10,000/- per month; volunteered to state that the said property is their ancestral property.

15. From the above evidence it is clear that the deceased father of the petitioner executed gift-cum-settlement deeds in favour of his grandchildren, keeping the petitioner as guardian. The petitioner admitted that there is ancestral property, which goes to show that he has share in the said property. His case in the claim petition is that he has no assets and immovable properties. This averment of the petitioner, is disproved by his own admission in the cross-examination.

16. As per the provisions noted above, under Section 13(1) (e) of the Act, the petitioner, in the petition filed under Section 10 of the Act, has

to furnish particulars of the amount and the particulars of all his properties. As per his admission he has ancestral property. But in the petition, he failed to furnish the particulars. This is one of the circumstances, which goes to show that the petitioner suppressed the fact of his own property.

17. The further case of the petitioner is that he borrowed amounts from respondents and executed promissory notes and hand letters. The 1st respondent filed suit and it was decreed. The petitioner did not file any promissory notes said to have been executed by him in favour of respondents 2 to 4 and they also did not file any suits. Had petitioner really borrowed any amounts from respondents 2 to 4, they would have issued legal notices asking him to repay. In the cross-examination petitioner stated that he did not file any documents to show that these respondents got issued any legal notices. He also did not file the promissory notes and the hand letters said to have been executed by him in their favour.

18. The case of the respondents 1 and 2 in their counter affidavit is that respondents 3 and 4 never lent any amount and they are not genuine creditors. As already noted above, petitioner did not file any legal notices issued by them and also did not file any alleged promissory notes and the hand letters, as alleged by him. This has also been admitted by him in the cross-examination. In his cross-examination, petitioner further admitted that respondent No.3 is his nephew and 4th respondent is his relative. These circumstances and the categorical admission of the petitioner, establishes that respondents 3 and 4 are not real creditors.

19. The further case of the petitioner is that he borrowed the amount from respondents by executing the promissory notes and hand letters and invested the amount in kirana business and sold items on credit basis and they failed to pay back the amount and thus sustained loss. In other words, his case is that he sustained loss in his kirana business. As per Section 22 of the Act, which is extracted above, on admitting of the petition, petitioner is required to produce all books of accounts and at any time thereafter give such inventories of his properties and such lists of creditors and debtors and of the debts due. Along with the petition, petitioner has not produced account books of his business and such inventories of his properties and list of debtors and the debts due to him. This circumstance also disentitles the petitioner to declare him as insolvent.

20. The other argument of the learned counsel for the petitioner is that as the gift deeds were executed by his father in favour of his children, they are proper and necessary parties and to add them and to lead evidence to prove his case, petitioner filed I.A.No.533 id 2015, under Order 41, Rule 23, seeking remand, but the lower appellate court rejected the prayer of the petitioner in this regard, therefore, he was not given sufficient opportunity.

21. Order 41 of C.P.C. deals with appeals from original decrees. Rules 23, 23-A and 25 are the relevant provisions, where the appellate court can exercise discretion for remand of the matter to the trial court.

Order 41, Appeals from Original Decrees:

Rule 23: Remand of case by Appellate Court: Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court, in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, the Appellate Court may, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order

to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

Rule 23-A. Remand in other cases—where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

Rule 25. Where Appellate court may frame issues and refer them for trial to Court whose decree appealed from:--

Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred, and in such case shall direct Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefore within such time as may be fixed by the Appellate Court or extended by it from time to time.

A reading of above provisions, under Rule 23, if the suit is decreed on a preliminary issue and if the appellate court reversed the judgment of the trial court and while doing so, considers it necessary in the interest of justice to remand the case, the appellate court may remand the case with a further direction as to what issue or issues to be tried. Rule 23 can be invoked where the suit is disposed of on a preliminary issue. Under Rule 23-A, in other cases, where the suit is disposed of other than on preliminary issue and in the appeal, the appellate court reversed the judgment and decree of the trial court, and a retrial is considered necessary, then the appellate court, shall remand the case to trial court, with directions as mentioned under Rule 23. Under Rule 25, another circumstance is envisaged i.e., where the appellate court finds that the trial court has omitted to frame or try any issue to determine any question of fact, which the appellate court considers it essential for determination

of the issue involved, then the appellate court, may, if necessary, frame such an issue or issues and remand the matter for trial and in such case, direct the trial court to take additional evidence required.

22. A combined reading of the above provisions makes it clear that to remand the matter to trial court under Order 41 of C.P.C., the appellate court shall have to first come to the conclusion that the judgment of the trial court is wrong and while reversing such judgment, considers it necessary in the interest of justice to remand the matter to trial court with further directions, as enumerated in the Rules extracted above. In other words, for remand, the appellate court has to *prima facie* come to the conclusion that the judgment of the trial court is erroneous.

23. In *K.SRIRAMULU v. K.V.RADHAKRISHNAMURTHY*² this court held that “*the order of remand made without coming to a conclusion that the decision of a trial court is wrong and that it is necessary to reverse or set aside the decree, is illegal. The appellate Court has to consider the evidence on record and then to arrive at a conclusion whether the finding recorded by the trial court cannot be supported on evidence on record. Then the further question to be considered is whether it is a case for remand. In that behalf, conduct of the parties has to be considered viz., whether they have sufficient opportunity to adduce evidence at the trial but not brought on record, if not, whether it would be a case to afford such an opportunity.*”

24. In the present, prior to the filing of the suit, the father of the petitioner executed the gift deeds in favour of the children of the petitioner and the petitioner is the guardian and the petitioner also admitted to this fact and his evidence showed that he got share in the

² 1985(2) ALT 534

ancestral property. Suppressing these facts, he filed the petition seeking to declare him as insolvent. During trial, petitioner had sufficient opportunity to lead evidence. He failed to avail the same. In the light of admissions of the petitioner and the facts and circumstances of the case, it cannot be said that the trial court as well as appellate court, have committed any error in rejecting the claim of the petitioner for declaring him as insolvent under Section 10 of the Act, therefore question of seeking remand, enabling the petitioner to add parties and lead evidence, does not arise.

25. In my considered view, both the courts below, based on evidence on record, have recorded concurrent findings on facts that the petitioner suppressed his properties and assets and thus not entitled to be adjudged as insolvent. These concurrent findings on fact, in the absence of contra evidence, cannot be interfered with in the second appeal and the issues are answered accordingly.

26. For the foregoing reasons, I do not find any question of law, much less substantial for interference of this court under Section 100 CPC and the second appeal is accordingly dismissed at the stage of admission.

27. Miscellaneous petitions, pending if any, shall stand closed. No costs.

A. RAJASHEKER REDDY, J

DATE: 16—03—2018

AVS

Note: LR. copy to be marked.

B/O