A.Nos.155 to 158 of 2015
in
I.P.No.126 of 2006

PUSHPA SATHYANARAYANA, J.

A.No.155 of 2015 is filed by the learned Official Assignee seeking to declare the transfer of the insolvent's property morefully described in the schedule to the Judges Summons in favour of the respondents 3 and 4 herein as null and void and not binding upon the Official Assignee.

2. A.No.156 of 2015 is filed by the learned Official Assignee seeking to issue a warrant permitting her to seize the property from the custody or possession of the respondents 3 and 4 or any other person acting under the insolvent with the assistance of police and also permit her to break open the lock of the main door, if necessary.

3. A.No.157 of 2015 is filed by the learned Official Assignee seeking to direct the respondents 3 and 4, their men, agent or servants or any person acting on their behalf to deliver the vacant possession of the said property described in the schedule to the judges summons with all documents of title in their possession to the Official Assignee.

4. A.No.158 of 2015 is filed by the learned Official Assignee seeking to permit her to sell the property of the first respondent / insolvent described in the schedule to the Judges Summons in public acution and sale proceeds rateably divided amongst the General Body of Creditors.

5. The facts leading to the filing of the above applications are as follows:-

(i) The first respondent is the borrower and he borrowed a sum of Rs.3,50,000/- from the second respondent on 23.01.2001. A notice was sent on 18.07.2004 by the second respondent to the first respondent demanding the return of the money. Having not received the money, the second respondent filed a suit in O.S.No.4512 of 2004 on the file of the City Civil Court against the first respondent and the suit was decreed ex-parte on 05.01.2005. Admittedly, there was no attachment of the property pending suit or after the decree.

(ii) While so, on 11.02.2005, the first respondent sold the property in favour of the respondents 3 and 4. On 11.07.2005, the second respondent issued legal notice to the first respondent and also to the purchasers, namely, respondents 3 and 4. A reply notice was also sent on 28.07.2005 by the respondents 3 and 4 through their counsel to the second respondent.

(iii) Subsequently, based on the decree obtained, the petitioning creditor/second respondent had filed an Insolvency Petition in I.P.No.126 of 2006 on 25.08.2006. On 28.01.2008, the first respondent was adjudicated as an insolvent ex-parte. On 18.03.2013, the learned Official Assignee had taken steps to realise the property, based on the order passed on 08.04.2013 in A.No.47 of 2013 filed by the petitioning creditor/second respondent.

(iv) In the meanwhile, the respondents 3 and 4, who are the transferees from the first respondent, had availed housing loan, for which, loan was disbursed on 11.02.2005 and there was a mortage on the same day. There was no notice of insolvency served on the respondents 3 and 4.

(v) In the above conspectus of the facts, the learned Official Assignee has filed these applications for the aforesaid reliefs.

6. The applications were resisted by the respondents 3 and 4 by filing their counter affidavit. The third respondent is the father-in-law of the fourth respondent. According to the respondents 3 and 4, the first respondent offered to sell the property bearing New Door No.60, Old Door No.23, Sarangapani Street, T.Nagar, Chennai 600 017 belonging to him for a consideration of Rs.46 lakhs. The respondents 3 and 4, on verification of encumbrances and on search of title of the property, having satisfied with the same, had agreed to purchase the same from the first respondent. The respondents 3 and 4 had applied for encumbrance certificate upto 02.11.2004 and finding that there was no encumbrance, had purchased the said property for a valuable consideration of Rs.46 lakhs and the Sale Deed was executed on 11.02.2005 by the first respondent represented by his Power Agent. The said sum of Rs.46 lakhs was paid by way of Pay Orders, which have been incorporated even in the Sale Deed.

7. Pursuant to the sale, the respondents 3 and 4 had borrowed a sum of Rs.15 lakhs by raising housing loan from the Dena Bank, Mint Street, Chennai 600 079 by depositing the title deed and also the original parent deed of the property. It is stated that as on date, the mortgage loan is subsisting and the respondents 3 and 4 have

been re-paying the same periodically. The respondents 3 and 4, being the bonafide purchasers, having purchased the property for a valuable consideration, cannot be deprived of their possession on the simple allegation that the valuation is incorrect.

8. It is further stated by the respondents 3 and 4 that even on the date of purchase, the guideline value of the property is Rs.46,00,000/- per ground and the respondents 3 and 4 had paid the correct consideration and purchased the said property. While so, the second respondent/decree holder had sent a notice dated 11.07.2005 stating that there is a decree in his favour on 05.01.2005 and that only when the execution was levied and encumbrance certificate was applied, the sale made by the first respondent in favour of the respondents 3 and 4 came to light. The second respondent/petitioning creditor had alleged that the sale itself is a fraudulent one and it was made only to defeat the legitimate rights of the second respondent/decree holder. The respondents 3 and 4 had also sent a reply dated 28.07.2005 informing the second respondent that they had purchased the property *bona fide* for the valuable consideration after verifying the marketable title of the first respondent. When the respondents 3 and 4 purchased the property, there was no

encumbrance over the same and there is no attachment or charge created over the property. In such circumstances, the second respondent/decree holder had filed insolvency petition against the first respondent long after the execution of the Sale Deed and the reply notice was sent by the respondents 3 and 4 through their counsel stating that without making them as parties to the proceedings, he obtained an order of adjudication. The second respondent/ petitioning creditor, knowing the purchase by the respondents 3 and 4, had resorted to get the adjudication of the first respondent/insolvent, without adding the respondents 3 and 4 as parties. Hence, it is pleaded that the sale is protected under Section 57 of the Presidency Town and Insolvency Act, 1909 and the prayer sought for by the learned Official Assignee cannot be granted.

9. The question that has to be decided is as to whether the Sale Deed executed by the first respondent in favour of the respondents 3 and 4 is null and void and whether other consequential reliefs can be granted?

10. Section 55 of the Presidency Town and Insolvency Act, 1909 (in short PTI Act) reads as follows:-

> *"55. Avoidance of voluntary transfer.- Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee."*

The burden of proof under Section 55 of the Act is on the Official Assignee. The Official Assignee has to prove under this Section that not only the sale, which is impugned by her, took place within two years, but also the purchaser did not act in good faith and had not paid valid consideration. Only when the above burden is discharged, the transfer made by the first respondent becomes voidable under Section 55 of the PTI Act against the Official Assignee. It is albeit difficult to prove the fraudulent nature of the transaction in insolvency cases by direct evidence and thus, the Official Assignee or even the petitioning creditor can only rely on the circumstantial evidence and based the claim on the conduct of the parties.

11. In the case on hand, admittedly, there was only one property, which was transferred in favour of the respondents 3 and 4 by the first respondent/insolvent. The sale has taken place much prior to the date of adjudication. Once the Official Assignee discharges the prima *facie* burden which lay upon her, the burden will automatically shift on the transferees, namely, the respondents 3 and 4. The learned Official Assignee has to prove that there was a good faith on the part of the respondents 3 and 4. While determining the question as to whether the transfer was made in good faith, the other circumstances surrounding the transaction have to be considered. The burden of the Official Assignee is not only to discharge the act in good faith, but also in proving the consideration passed on under the said transaction. It is not sufficient, if the Official Assignee points out the suspicious circumstances, while discharging her onus on the question of good faith and consideration, but also has to satisfactorily establish the facts she alleges. In this regard, P.W.1, who is the officer in the Office of the Official Assignee, has deposed in the cross examination as follows:-

> *"It is correct to state that I am not aware whether the valuer has given any notice to the respondents 3 and 4. It is incorrect to state that the said applications have been filed only based on Ex.A3. Witness Adds:- They are filed based on Ex.A1 and A3.*

Based on the report given by the valuer, we have filed the aforesaid applications as the property was sold for a lesser value to the R3 and R4. It is correct to state that according Page No.3 of Ex.P3, the valuer mentioned the guideline value of the land at Rs.1801. The computer generated copy of the guideline value extract from the Government website in respect of the property at Sarangabani Street is shown to the witness and the same is marked as Ex.R.1. It is correct to state that Ex.R1 is the Guideline Value of the property at that time. It is correct to state that the valuer has adopted Rs.200 per sq.ft for the building therein. It is correct to state that the respondents R3 and R4 have given more value then the valuer mentioned in Ex.A3 in respect of the building of the property."

12. P.W.2 is the chartered engineer, who had given the valuation report of the property in question under Ex.A3 dated 21.09.2017. The evidence of P.W.2 is as follows:-

"The said document was provided to me by the Office of the Official Assignee. The sale deed that I had seen is Ex.A1. It is correct to state that as on 2005, the building was 50 years old. It is correct to state that I have not stated in my report that the building was 50 years old, but I have stated as a old building. The guideline value of the land as on

11.02.2005 was Rs.1801 sq.ft. It is correct to state that as per the guideline value, the value of the property as on 11.02.2005, was Rs.41 lakhs and odd. It is correct to state that I have not produced any document to show that the guideline value is different from the market value. It is also correct to state that I have not produced any document to show that the market value of the property as on 11.02.2005 was Rs.85 lakhs. It is correct to state that I was not aware of the nature of the building, whether it was in dilapidated state or was having sound structure as on 11.02.2005."

13. Further, P.W.2 has stated that the valuation was arrived at based on his assessment and he has not stated that the method by which he had arrived at the value of the property. From the evidence of P.W.1 and P.W.2, the value given in Ex.A-1 dated 11.02.2005 is correct. Therefore, the allegation made in the report of the Official Assignee that the consideration, for which the sale deed was executed is substantially low, is not satisfactorily proved.

14. The husband of the fourth respondent, who was examined as R.W-1, has also signed as a witness in the Sale Deed executed by the first respondent/insolvent in favour of the respondents 3 and 4. He

has specifically denied that the property was valued less. The evidence of R.W.1 is as follows:-

> *"The Respondent 3 and 4 applied for a loan in the Dena Bank. Before the execution of sale deed the Respondent 3 and 4 applied for a loan. It was a housing loan. The subject property was the security for the said loan. The 3rd and 4th Respondent are having bank account at Dena Bank, George Town Branch and they applied for a housing loan. The loan was sanctioned by the bank without any agreement or any receipt given by the Insolvent. I deny the suggestion that there must be sale agreement or any receipt given by the Insolvent and I am suppressing the said fact before this Court. The pay order was issued in the name of Insolvent Balaji. The pay order was encashed by Balaji, Mr.Alagappan collected the pay order from the Bank. I have not stated in my proof affidavit that the pay order was collected by Alagappan and the same was encashed by Balaji. I deny the suggestion that the Respondents 3 and 4 together with Alagappan and Balaji colluded together to put the property beyond the reach of creditors. I am doing Two Wheeler Finance business. My father also was doing the same business. I deny the suggestion that the Insolvent had a financial crisis and hence I have obtained the sale deed from the Insolvent which is sham and nominal."*

It has been specifically pleaded that the purchasers/respondents 3 and 4 were not parties to the insolvency proceedings, despite the fact that the second respondent/petitioning creditor was issued with notice as early as on 28.07.2005, whereas, the insolvency petition was filed only on 25.08.2006.

15. Section 55 of the PTI Act has to be read together with Section 57. Section 57 of the PTI Act provides for protection for *bona fide* transaction.

> *"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. Realization of property"*

The proviso to above Section is applicable to the facts of the present case.

16. The two conditions that have to be satisfied to have protection under Section 57 of the PTI Act are:

(i) the transfer must be for valuable consideration; and

(ii) the transferee should not have a notice of insolvency petition by or against the debtor.

17. Admittedly, in this case, the property was purchased by the respondents 3 and 4 for valuable consideration, which has been proved even in the evidence of P.Ws.1 and 2. It is also evident from the records that despite notice by the respondents 3 and 4 to the second respondent, the second respondent had not added the purchasers as parties to the insolvency proceedings. Hence, the transaction is protected under Section 57 of the PTI Act.

18. The learned counsel for the respondent placed his reliance on the decision of the Hon'ble Supreme Court reported in (***2003) 11 SCC 699 [*****SANKAR RAM AND CO., -VS- KASI NAICKER AND OTHERS]*, *wherein in Paragraphs 8 and 9, it has been held as follows:-*

"Proviso to Section 55 of the Act protects bona fide transactions mentioned in clauses (a) to (d) of Section 55. As per the proviso, in order to get protection to transactions mentioned in the said Section, two conditions are to be satisfied – (1) that any such transaction takes place before the date of the order of adjudication, and (2) that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition. By implication flowing from the said proviso, any transaction that takes place after the date of the order of adjudication does not get protection of proviso to Section 55 whether or not the person with whom such transaction takes place has any notice of the insolvency petition by or against the debtor.

9. In the case on hand on the facts found, it is clear that the shares were transferred in favour of the appellant before the date of the order of adjudication was made on the insolvency petition filed by Kasi Naickar and the appellant had no knowledge at the time of purchasing the shares as to the presentation of the insolvency petition, the transfer of shares was for valuable consideration and such transfer was bona fide. In this view, the appellants did satisfy the requirements of proviso to Section 55 of the Act and hence they are entitled for the claim made by them. We may add that Sections 28 and 55 must be read together harmoniously. As already noticed above, these Sections are designed and intended to serve different purposes. In the proviso to Section 55 itself, there is reference to order of adjudication and the presentation of any insolvency *petition. Order of adjudication and presentation of insolvency petition are two different events essentially referring to two different dates when in the same proviso, legislature consciously made a clear statement as to two different dates, they should be given effect to. If the intention of the proviso to Section 55 of the Act was not to protect even a bona fide transferee for valuable consideration without notice of presentation of insolvency petition before an order of adjudication was made, the legislature could have simply said any transaction taking place after the date of presentation of any insolvency petition by or against the debtor instead of qualifying the transaction that takes place before the date of the order of adjudication. In this situation, the said proviso which is intended to serve a definite purpose should be given full meaning and effect. It is not possible to ignore a part of the provision, namely, "any such transaction takes place before the date of the order of adjudication". It stands to the reason as well, that a bona fide transferee for valuable consideration without the knowledge of the presentation of insolvency petition on the date of transfer of property is to be protected."*

19. Reliance was also placed on the decision of this Court reported in ***2009 (8) MLJ 753 [S.BASKAR -VS- P.VIJAYA SEKAR REDDY AND OTHERS],*** *wherein relying upon the aforesaid judgment* in paragraphs 18 and 19, *it was held* as follows:-

"18.In the application filed by OA only two factors were pointed out for setting aside the sale. The first one was that both sales have taken place within two years prior to adjudication. But Section 55 cannot be read in isolation. As pointed out by the Supreme Court in Shankar Ram & Co. v.Kasi Naicker and others (Supra) both sections 55 and 57 of the PTI Act have to be read together for a purposive construction. If read in that light, the first objection must fail.

19.The second objection related to the huge difference in sale consideration to the extent of 60 lakhs so as to throw suspicion. But as pointed out by the Division Bench judgment of this court, which quoted Mulla's Law of Insolvency in India with its approval, inadequacy of price or suspicious circumstances without anything more is not enough to set aside a sale. This is especially in the context that the Supreme Court in Shankar Ram & Co v. Kasi Naicker and others (supra) has held the sale before adjudication is not void but voidable. Further, the division bench has held that the absence of proof of good faith is not to be found on the insolvent, but on the transferee. No such averments have been made against R4 and R5 or found in the application. Hence it is not a fit case where the matter should be sent for recording evidence on this issue in the absence of pleadings."

20. If the facts of the instant applications are weighed in the light of the above judgments, it is clear that much prior to the passing of the order of adjudication, the transfer was made by the insolvent and the respondents 3 and 4, being the bonafide purchasers for valuable consideration without the knowledge of the presentation of the insolvency petition, are to be protected.

21. Following the legal precedents enumerated in the aforesaid judgments and in the factual position, it is to be stated that the applications filed by the learned Official Assignee must fail.

22. In the result, these applications stand dismissed as devoid of merits.

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Index: yes/No

Internet: Yes/No

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