

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.225 OF 2016

1. Suresh S/o Sudama Sachdeo,
Aged about: 50 years, Occ. Business,
R/o Gajanan Pan Mandir, In-front of
Regal Talkies, Tilak Road, Akola.
 2. Anil S/o Sudama Sachdeo,
Aged about: 42 Years, Occ. Business,
R/o Gajanan Pan Mandir, In-front of
Regal Talkies, Tilak Road, Akola.
 3. Dilip S/o Sudama Sachdeo,
Aged about: 40 years, Occ. Business,
R/o Gajanan Pan Mandir, In-front of
Regal Talkies, Tilak Road, Akola.
 4. Ram S/o Sudama Sachdeo,
Aged about: 37 years, Occ. Business,
R/o Gajanan Pan Mandir, In-front of
Regal Talkies, Tilak Road, Akola.
 5. Shyam S/o Sudama Sachdeo,
Aged about: 37 years, Occ. Business,
R/o Gajanan Pan Mandir, In-front of
Regal Talkies, Tilak Road, Akola.
 6. Sau. Sona Sunil Shyamnani,
Age Adult, Occ. Household work,
R/o Sindhi Colony, Pachora, District
Jalgaon.
 7. Sau. Priya Harish Walechha,
Age Adult, Occ. Household work,
R/o Dayal Nagar, Wardha, District
Wardha.
- ... Appellants
(Ori. Applicants)

// VERSUS //

1. Amar Motumal Sachdeo,
Age Adult, Occ. Business,
R/o Behind Amar Krupa Khandelwal
School, Near Vijay Housing Society,
Gorakshan Road, Akola.
2. ~~Bhajawani Cloth Stores,
Through its Partner,
Chandumal Govindrao,
Aged about : Adult, Occ: Business,
R/o Bhaji Bazaar, Akola, Tq. And Dist.
Akola.~~ Appeal abate
against respondent
Nos.2 to 4 as per
Court's Order dated
23.06.2017 and
09.08.2017.
3. ~~Mawandram Chobhrajmal,
Aged about : Adult, Occ : Business,
R/o Bhaji Bazaar, Akola Tq. and Dist.
Akola.~~
4. ~~Wamanrao Sukhdeo wankhade,
Aged about : Adult, Occ : Business,
R/o Biswa Bridge, Tah: Malkapur, Dist.
Buldhana.~~
5. Janta Sari Centre,
Through Madanlal,
Occ: Business, R/o New Cloth Market,
Akola, Tq. and Dist. Akola.
6. ~~S.D. Wahurwagh,
Aged about : Adult, Occ : Business,
R/o Collector office, Akola, Tq. and Dist.
Akola.~~ Respondent Nos.6
to 8 struck off as
per Court's Order
dated 23.06.2017
and 09.08.2017.
7. ~~Rekha Ambalkar,
Aged about : Adult, Occ : Household
work,
R/o Vivra, Tah : Patur, Dist. Akola.~~
8. ~~Shanta Katole,
Aged about : Adult, Occ : Household
work,
R/o Jawaharnagar, Akola, Dist. Akola.~~ ... Respondents
(Ori. Non-applicants)

Shri S.V. Sohoni, Advocate for Appellants.
Shri J.B. Gandhi, Advocate for the Respondents.

CORAM : ANIL S. KILOR, J.

DATED : 25 NOVEMBER, 2021.

ORAL JUDGMENT

This appeal has arisen out of a judgment dated 06.01.2016 passed by the Court of Ad-hoc District Judge-1, Akola in R.C.A. No.204 of 2012, confirming the judgment and decree passed by the Civil Judge Senior Division, Akola in Insolvency Petition No.02 of 2000 dated 16.08.2012, dismissing the petition seeking declaration that the petitioner committed Act of insolvency.

2. Brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court).

3. The petitioner Sudama Motumal Sachdeo had filed the petition under Section 10 of the Provincial Insolvency Act, 1920. During the pending hearing of the petition, said Sudama expired on 30.12.2003. His heirs are brought on record on 05.10.2011.

4. Deceased/petitioner Sudama contends that he was running a business in the name of "Sachdeo Cloth Stores" in front of Regal Talkies, Akola. As he suffered heavy losses in the said business, he closed it down prior to 4 years and before it in the year 1978, there was a flood and at

that time also, he suffered huge losses. For the satisfaction of his liability to the creditors, he sold the furniture of his shop. For 4 years, he has no earning. His wife has also divorced him and children are also separated from him.

5. The petitioner further states the name of his creditors to whom, he has to pay the dues. As stated, he has to pay Rs.65,000/- to respondent No.1, his brother in view of the decree in Special Civil Suit No.13/1984, Rs.4,000/- to respondent No.2, Rs.3,000/- to respondent No.3, the total liability of Rs.72,000/- and interest thereon. It is further case of the petitioner that the assets of the petitioner are not sufficient to pay the debt and he is unable to pay those debts. The petitioner is ready and willing to place at the disposal all his assets and accordingly, he prayed for the order of adjudication as an Insolvent.

6. The respondent No.1 by filing his reply resisted the suit.

7. The learned trial Court upon appreciation of oral as well as documentary evidence dismissed the petition vide judgment and decree dated 16.08.2012.

8. The original petitioners/appellants carried out an appeal namely Regular Civil Appeal No.204 of 2012 against the said judgment and decree dated 16.08.2012.

9. The learned lower appellate Court vide impugned judgment and decree dated 06.01.2016 confirmed the decree passed by the learned trial Court and the said judgment and decree is under challenge in the present appeal.

10. I have heard the learned counsel for the respective parties.

11. This Court on 02.05.2016 has framed the following substantial questions of law:

i) “When the learned first Appellate Court has set aside the impugned judgment to the extent of finding on issue no.1 i.e. “Does petitioner prove act of insolvency, as alleged ?” In the judgment passed by the learned trial Court and further answered the said issue in affirmative, then in those circumstances whether the judgment and decree of the learned first Appellate Court rejecting the appeal filed by the present appellants is legal and just ?”

ii) “When paribai, who is divorcee wife of deceased petitioner Sudama was not party to the petition then whether in the absence of Paribai the issue regarding divorce of Paribai, decided by the learned Courts below is legal and valid ?”

iii) “Whether the learned Courts below have failed to appoint court commissioner under the provisions of Section 20 of Provincial Insolvency Act, 1920 before finally deciding the petitioner filed under Section 10 of the Provincial Insolvency Act, 1920 ?”

iv) “Whether the learned Courts below have erred in law in not appointing receiver under Section 56 of the Provincial Insolvency Act, 1920 for valuation of the property before arriving at a final conclusion ?”

12. Shri Sohoni, learned counsel for the appellants submits that though the learned lower Appellate Court set aside the judgment of the trial Court to the extent of finding recorded by the trial Court that the petitioner failed to prove act of insolvency as alleged, the Court has maintained the decree. It is submitted that once the act of insolvency has been proved the relief claimed by the petitioner cannot be denied.

13. He further submits that in absence of Paribai wife of the petitioner as party to the petition, the finding recorded by the trial Court as regards divorce between the petitioner and Paribai is not permissible in the eyes of law.

14. It is submitted that both the Courts below have failed to appoint Court Commissioner under the provision of Section 20 of the Provincial Insolvency Act, 1920 (hereinafter referred to as “Act, 1920”) before finally deciding the petition filed under Section 10 of the Act, 1920 and therefore, according to him the decree passed by both the Courts vitiates. Lastly, he submits that both the Courts below erred in not appointing receiver under Section 56 of the Act, 1920 for valuation of property before arriving at a final conclusion.

15. Lastly, Shri Sohoni, learned counsel for the appellants submits that, in absence of any cross-objection filed by the respondent under Order XLI Rule 22 of the Code of Civil Procedure, this Court cannot consider the submissions of the original respondent as regards the finding recorded by the learned lower Appellate Court in favour of the petitioner in para-39 of the impugned judgment whereby, it is held that the petitioner committed act of insolvency.

16. Shri Sohoni, learned counsel has placed reliance on the judgments in the case of *Hardevinder Singh Vs. Paramjit Singh and others*¹ and *Banarasi v. Ram Phal*², in support of his contentions.

17. *Per contra*, Shri Gandhi, learned counsel for the respondents supports the impugned judgment and decree and submits that there is no occasion for the respondents to file any cross-objection in this matter, as in view of the well settled law that if there is no challenge to the decree, no cross-objection is required to be filed. He accordingly submits that there is no perversity pointed out by the learned counsel for the petitioners in this matter and therefore the appeal needs to be dismissed.

18. Shri Gandhi, learned counsel has placed reliance in support of his contention on a judgment of the Hon'ble Supreme Court of India in

¹ (2013) 9 SCC 261

² (2003) 9 SCC 606

the case of *Prabhakar Gones Prabhu Navelkar (Dead) Through Lrs v. Saradchandra Suria Prabhu Navelkar (Dead) Through Lrs.*³

19. To consider and appreciate the rival contentions of the parties and to answer the substantial questions of law framed by this Court, I have perused the record and gone through the judgments cited by both the parties.

20. The Hon'ble Supreme Court of India in the case of *Prabhakar (Supra)* has observed thus:

“54.Before we consider the question, it is necessary to enter the actual findings rendered by the High Court in regard to the title. The High Court finds that recognition of share of Gones is done in document dated 21.1.1919. It is further found as under:

“31.Admittedly, no time limit is fixed for the payment of share or exercise of right in the Deed dated 21.1.1919. This document also does not specify that prior payment should be made by Gonesh due to be made thereunder, or that such payment is a condition precedent. Thus, acknowledgment of liability to part with property described therein is absolute and unambiguous. This document contains an unambiguous recital about acknowledgment of existence of right of Gonesh to the properties.”

Right of Gonesh to receive share, is thus, crystalized, and he has derived a right enforceable in law and according to law.” We have already referred to the law laid down by this Court in regard to Order XLI Rule 22 of the Code of Civil Procedure. In an appeal if the respondent does not want any change in the decree of the lower court, it is not necessary for him to file an appeal or cross objection to merely support the decree already passed without any variation in the decree but by challenging the correctness of the findings in the judgment. The appellants are correct in contending that if a challenge is made to a decree by a respondent then necessarily the respondent must file either an appeal or a cross objection. In this case however, the suit filed by the appellants stood dismissed by the first appellate court. The two appeals which were carried by the appellant before the High Court were dismissed. Resultantly, the decree

³ (2019) 11 SCALE 381
C.L.Dhakate

of the first appellate Court dismissing the suit came to be confirmed. Before this Court the respondents are not seeking to challenge the decree. They do not wish any variation of the decree. They seek to have the decree confirmed. They support the decree entirely. The decree is one dismissing the suit. They are only seeking to support the said decree by challenging one of the findings namely the finding relating to title. For doing the same, it is not necessary for them to file an appeal or cross objection as by having the finding overturned in regard to title they are not seeking to have a different decree passed in any manner. Hence we reject the contention of the appellants that it is not open to the respondents to contest the finding on title without filing cross objection.”

21. In the teeth of above referred well settled principle of law, as no challenge is raised by the respondent to the confirmation of the decree passed by the learned first Appellate Court, I do not find any substance in the submissions of Shri Sohoni, learned counsel for the appellants that in absence of cross-objection filed by the respondent this Court cannot go into the question relating to issue No.1 and additional issue No.2 as framed by the trial Court and accordingly the same is rejected.

In view of the findings recorded herein above any answer to the substantial question of law Nos.(iii) and (iv), will not change the result of this appeal. Hence, I do not think to dvelve upon the same in the facts and circumstances of the present case.

22. Now moving to the main controversy in this matter, the learned lower Appellate Court has confirmed the judgment and decree of the learned trial Court dated 16.08.2012 whereby the learned trial Court

has denied decree in favour of the petitioner under Section 10 of the Act of 1920.

23. Though the learned lower Appellate Court has set aside the judgment to the extent of the learned trial Court's finding on issue No.1 and additional issue No.2, however, by observing the conduct of the petitioner that the insolvency petition was not moved bonafidely but to defeat the interest of non applicant No.1-Amar, who is holding a decree for recovery of Rs.65,000/- along with interest etc. against the petitioner.

24. Both the courts have considered the conduct of the petitioner while denying decree as sought for by the petitioner. Both the Courts have concurrently held that the petitioner purchased the house property in the name of his wife Paribai so as to deprive the non applicant No.1-Amar from satisfying the said compromise decree against the petitioner-Sudam.

25. As regards the issue of divorce between the petitioner and his wife Paribai is concerned, it is the case of the petitioner that there was a divorce between him and Paribai which he failed to prove and therefore the learned trial Court has rightly held that there was no divorce between the petitioner and Paribai. To set aside the said finding, the only reason

given by the learned lower Appellate Court is that Paribai was not party to the suit. Whereas, it is the case of the petitioner that there was a divorce between the petitioner and his wife. Therefore, the burden lies on the petitioner to establish and prove the said fact. In absence of any evidence in that regard, the trial Court has rightly rejected the said case of the petitioner.

26. As far as the judgments cited by the learned counsel for the appellant in the case of *Hardevinder Singh Vs. Paramjit Singh and others and Banarasi v. Ram Phal*, there is no dispute about the law laid down in the said judgments. However, in the absence of any challenge to the decree none of the above judgments holds that it is necessary to file cross-objection.

27. In that view of the matter, I am of the opinion that the said judgments are not of any help to the petitioner.

28. Accordingly I have answered the substantial questions of law in above terms. In these circumstances, I pass the following order:

29. The appeal is **dismissed**. No order as to costs.

[ANIL S. KILOR, J.]