

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.03.2022

Delivered on : 19.04.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.S.A.No.13 of 2019

T.Senthilvelan

... Petitioner

Vs

1. A.Senthil Kumar

2. A.Anbukkarasi

3. Official Receiver
Integrated Court Campus,
Hasthampatti
Salem - 636 007.

... Respondents

PRAYER: Civil Miscellaneous Second Appeal is filed under Section 75 (2) of Provincial Insolvency Act, read with Section 100 of the CPC against the Judgement and Decree passed in C.M.A.No.26 of 2016 on the file of the I Additional District Judge, Salem dated 31.08.2018 reversing the Fair and Final Order dated 11.11.2013 passed in I.P.No.37 of 2008 on the file of the Principal Subordinate Judge, Salem.

For petitioner : Ms.Prithivi.J

For Respondents 1 & 2 : Mr.R.Nalliyappan

For Respondent 3 : No Appearance.

JUDGEMENT

The point in issue in this Civil Miscellaneous Second Appeal is whether the creditor can directly approach the Insolvency Court to have the borrower adjudged an Insolvent without obtaining a decree. This issue has to be answered in order to consider the substantial question of law that has been

framed in this Civil Miscellaneous Second Appeal, namely,

When it is proved that the first respondent / debtor had admittedly borrowed money from the petitioner by executing a pronote as security for the borrowal and subsequently transferred his only property in favour of his wife without consideration and without making provision for his debts, is not the act of the respondent would amount to an act of insolvency?

2. The parties are referred to in the same ranking as before the Insolvency Court.

3. The Civil Miscellaneous Second Appeal has been filed in the following circumstances. The petitioner had filed I.P.No.37 of 2008 on the file of the Principal Subordinate Court, Salem invoking the provisions of Section 9 of the Provincial Insolvency Act.

4. It is the case of the petitioner that on 19.12.2007, the 1st respondent has borrowed a sum of Rs.5,00,000/- in cash from the petitioner to meet his urgent family expenses, for which he had executed a pronote as a security. The 1st respondent had assured that the said amount would be repaid on demand and that interest would be paid every month without a demand being made for the same.

5. The petitioner would contend that despite his repeated demands, the 1st respondent had not come forward to clear the outstanding and had also not paid any amount towards interest. While so, the petitioner came to learn that the respondents were joining hands to create a sham and nominal deed in respect of the 1st respondent's immovable property. A gift settlement deed dated 11.08.2008 is executed by the 1st respondent in favour of the 2nd respondent. The 2nd respondent is the wife of the 1st respondent. Their attempt was to cheat and defraud the lawful claim of the petitioner as well as the other general body of creditors. With this malafide intentions, the 1st respondent had executed a gift deed in favour of the 2nd respondent in respect of the immovable property which is the only property of the 1st respondent.

6. The petitioner would contend that the 2nd respondent was fully aware about the legally enforceable debt of the 1st respondent to the petitioner and to the other body of creditors. Therefore, the petitioner had come forward with the petition to adjudge the 1st respondent as an insolvent.

7. A counter was filed by the 1st respondent which was adopted by the 2nd respondent. The respondents have denied the

very borrowal and the execution of the pronote. It is their case that the pronote is a rank forgery and concocted one. The respondents have also contended that the petitioner did not have the wherewithal to pay such a huge amount of Rs.5,00,000/-. The respondents would submit that no act of insolvency had been committed by them and that they do not owe any money to the petitioner or any other body of creditors.

8. The Insolvency Court, namely, the Principal Subordinate Court, Salem by its order dated 11.11.2013 held that the 1st respondent had committed an act of insolvency by transferring his property in favour of his wife without consideration to defeat and defraud his creditor, namely, the petitioner. The learned Judge has come to the above conclusion by relying upon the evidence of P.W.2, who is said to have witnessed the execution of the pronote.

9. The respondents took up the order on appeal to the I Additional District Court, Salem in C.M.A.No.26 of 2016. The learned I Additional District Judge, Salem by his order dated 31.08.2018 was pleased to allow the appeal and set aside the order passed by the Principal Subordinate Judge, Salem, in I.P.No.37 of 2008.

10. The learned I Additional District Judge, Salem had observed that the petitioner had not obtained a decree but has rushed to the Insolvency Court. The learned I Additional District Judge, Salem had observed that this move clearly indicated that the petitioner's intent was to circumvent the regular procedure for recovery of money and also from paying the Court fee for such recovery.

11. The learned I Additional District Judge, Salem has also discussed the oral evidence of P.W.1 and P.W.2 and held that a perusal of the same would show that the petitioner's case has not been proved and had gone on to observe that the filing of the Insolvency Petition clearly indicated that the petitioner had some axe to grind with the 1st respondent.

12. Challenging the above order, the petitioner has filed this Civil Miscellaneous Second Appeal, which has been admitted on the substantial question of law stated supra.

13. Ms.Prithvi, learned counsel appearing for the petitioner would contend that the borrowal has been proved by the petitioner by examining P.W.2, who has not only deposed about the authenticity of the pronote but also the signature of the petitioner as also the passing of consideration. She would submit that the learned I Additional District Judge, Salem has committed an error in contending that the petitioner has to

first get a decree in respect of the amounts due under the pronote.

14. The learned counsel would rely upon a Division Bench Judgement of this Court reported in ILR 1942 Mad 147 - Mundla Gangi Reddi Vs. Golla Narasimha Reddi, where the Bench has considered the question, whether the relationship of creditor and debtor between the adjudging creditor and alleged debtor has to be decided by the Insolvency Court itself. The learned Judges had gone on to answer this query in the affirmative. This, the learned counsel would state, clearly indicates that the filing of the Insolvency Petition was very much in order.

15. The learned counsel would further rely upon the Judgement reported in 1954 SCC OnLine All 33 - Mahadeo Prasad Vs. Sheo Dass, where once again the Judgement is of a Division Bench of the Allahabad High Court, where the learned Judges have referred to the Judgement in Madla Gangi Reddy referred supra and observed with approval the proposition that the application for insolvency cannot be rejected merely because complicated questions of fact and law would arise.

16. Another Judgement that has been relied upon by the learned counsel for the petitioner is once again the Judgement of the Allahabad High Court reported in 1956 SCC OnLine 47 - Abdul Shakur and others Vs. Kotwaleswar Prasad and others. This Judgement has been rendered by the Full Bench, wherein, two questions had been referred to the bench:

(i) Whether the presumption mentioned in clause (a) of Section 118 of the Negotiable Instrument Act, 1881, could be invoked in Insolvency Proceedings when the debt is called in question?

(ii) If it can be invoked, would a doubt regarding passing of consideration under the instrument coupled with a denial by the maker of the instrument deprive the creditor of the benefit of presumption and require him to prove that consideration had actually passed.

The learned counsel would submit that the questions raised here has a direct bearing on the case on hand.

17. The Three Judges had differing opinion regarding the above two questions. While two of them answered the 1st question in the affirmative, one of them answered it in the negative. With regard to question No.2, the result was the same. The learned counsel would therefore contend that the creditor, namely, the petitioner had proved the execution and passing of consideration by examining P.W.2, which she says has not been rebutted by the respondents.

18. The Judgement of this Court reported in AIR 1979 Mad 74 - S.Leelavathi and another Vs. N.Durairaj and another, was also pressed into service by the learned counsel, where once again the Judgement of Madla Gangi Reddy was quoted with approval and she would rely upon the Paragraph No.7 of the Judgement therein.

19. The other Judgement relied upon by the learned counsel is that one reported in 1988 (II) CTC 238 - Sadasivam Vs. M.Muthuswamy and two others, where the learned Judge has held that the Insolvency Court could examine the Judgement debt. The learned counsel would therefore submit that the Appellate Court has erred in observing that the petitioner cannot directly approach the Insolvency Court.

20. Per contra, Mr.Nalliappan, appearing on behalf of the respondents would submit that the very application is not maintainable since no adjudication as contemplated under Section 24 of the Provincial Insolvency Act has been done. The petitioner has straight away filed the Insolvency Petition without first obtaining a decree, particularly, when the very borrowal has been denied by the respondents. The 1st respondent has clearly stated that the pronote is a rank forgery and that the petitioner did not have the wherewithal to give such a huge sum of Rs.5,00,000/-.

21. The learned counsel would further submit that the payment of this sum of Rs.5,00,000/- has not been proved by the petitioner despite which the Insolvency Court had adjudicated the 1st respondent an insolvent, which has been rightly set aside by the I Additional District Judge, Salem in C.M.A.No.26 of 2016.

22. The learned counsel would further submit that the petitioner has not proved the contention that the transfer is fraudulent except for making a statement in the petition. The same has not been proved by the petitioner on whom the onus of proof lies. He would, in this regard, rely on the Judgement of this Court reported in 2012 (3) CTC 25 - P.R.Pajus (Debtor) Vs. P.Uma Maheswaran and others.

23. The learned counsel would also rely on the Judgement reported in 2014 (4) CTC 871 - E.K.Gopal Vs. C.Manoharan and others, wherein the learned Judge has observed that a mere transfer of property without proof of the intention to defeat or delay the creditor does not constitute an act of insolvency. He would therefore submit that in the absence of such proof, the very petition filed by the petitioner is liable to be set aside and the learned I Additional District Judge, Salem has rightly

set aside the order passed by the Principal Subordinate Judge, Salem.

24. Heard the learned counsel and perused the records.

25. The petitioner has come to the Court with a case that he had extended a loan of Rs.5,00,000/- to the 1st respondent on 19.12.2007 and on the said date the 1st respondent had executed a pronote in favour of the petitioner. On 11.03.2008, the 1st respondent had settled his property on his wife the 2nd respondent. This is a clear act of insolvency made with an intent of defeating and delaying the creditors.

26. The 1st respondent on the other hand would submit that he has not borrowed any money from the petitioner nor signed a pronote. The signature in the document has also been denied. However, it is the petitioner's case that after the borrowal, the 1st respondent has settled his property on his wife, the 2nd respondent herein. This is the act of insolvency pleaded by the petitioner. Therefore, the act of insolvency pleaded is the settlement of property by the 1st respondent to the 2nd respondent. In order to arrive at that conclusion, the petitioner has to first prove that there is a valid borrowal by the 1st respondent. The petitioner in order to prove the borrowal had examined one Mahalakshmi who is the attesting witness of the pronote as P.W.2.

27. A perusal of the Chief examination and cross examination of P.W.2 who is stated to be the witness to the pronote shows glaring discrepancies with reference to the consideration. It is the case of the petitioner that a sum of Rs.5,00,000/- in cash has been given on the date of execution of the pronote. However, P.W.2 in her evidence would say five bundles of Rs.500/- notes had been given, which means that even according to P.W.2 witness it was only a sum of Rs.2,50,000/-. This assumes significance considering the fact that the 1st respondent has denied the borrowal and receipt of the money. The 1st respondent has clearly stated that the petitioner does not possess wherewithal to give such a huge amount in cash. Therefore, the payment of a sum of Rs.5,00,000/- is in doubt and has not been proved by the petitioner especially when the borrowal is denied.

28. The petitioner has not produced a copy of his bank statement or any other document to show his capacity to extend a loan of a sum of Rs.5,00,000/- in cash to the 1st respondent. These are the disputed issues, which can be gone into only by a Civil Court. Without exhausting that remedy, the petitioner has directly approached this Court.

29. Since the petitioner has directly filed a petition before the Insolvency Court, it would make useful reading to understand the Scheme of the Provincial Insolvency Act - relating to a petition filed by a creditor.

Section 6 of the Provincial Insolvency Act sets out the acts of Insolvency as follows:

"6. Acts of insolvency.-1[(1)] A debtor commits an act of insolvency in each of the following cases, namely:—

(a) If, in 2[India] or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(b) If, in 2[India] or elsewhere, he makes a transfer of his property or of any part thereof, with intent to defeat or delay his creditors;

(c) if in 2[India] or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(d) If with intent to defeat or delay his creditors,—

(i) he departs or remains out of 3[the territories to which this Act extends];

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself;

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(e) If any of his property has been sold in execution of the decree of any Court for the payment of money;

(f) If he petitions to be adjudged an insolvent under the provisions of this Act;

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or

(h) If he is imprisoned in execution of the decree of any Court for the payment of money.

[(2) Without prejudice to the provisions of sub-section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub-section (3) and the debtor does not comply with that notice within the period specified therein:

Provided that where a debtor makes an application under sub-section (5) for setting aside an insolvency notice—

(a) in a case where such application is allowed by the District Court, he shall not be deemed to have committed an act of insolvency under this sub-section; and

(b) in a case where such application is rejected by the District Court, he shall be deemed to have committed an act of insolvency under this sub-section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later:

Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily, outside India, unless the creditor obtains the leave of the District Court therefor.

(3) An insolvency notice under sub-section (2) shall—

(a) be in the prescribed form;

(b) be served in the prescribed manner;

(c) specify the amount due under the decree or order and require the debtor to pay the same or to furnish security for the payment of such amount to the satisfaction of the creditor or his agent;

(d) specify for its compliance a period of not less than one month after its service on the debtor or, if it is to be served on a debtor residing, whether permanently or temporarily, outside India, such period (being not less than one month) as may be specified by the order of the District Court granting leave for the service of such notice;

(e) State the consequences of non-compliance with the notice.

(4) No insolvency notice shall be deemed to be invalid by reason only that the sum specified therein as the amount due under the decree or order exceeds the amount actually due, unless the debtor, within the period specified in the insolvency notice for its compliance, gives notice to the creditor that the sum specified in the insolvency notice does not correctly represent the amount due under the decree or order:

Provided that if the debtor does not give any such notice as aforesaid, he shall be deemed to have complied with the insolvency notice if, within the period specified therein for its compliance, he takes such steps as would have constituted a compliance with the insolvency notice had the actual amount due been correctly specified therein.

(5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the District Court to set aside the insolvency notice on any of the following grounds, namely:-

(a) that he has a counter-claim or set-off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that-

(i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or

(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of application.

Explanation.-For the purposes of this section the act of an agent may be the act of the principal.

30. A reading of the petition filed by the petitioner would indicate that the Act of Insolvency alleged is one falling under Section 6 (1) (b). Section 6 (2) would not apply to the case on hand as no decree has been obtained by the petitioner against the 1st respondent for payment of money.

31. As the petitioner's case falls within the provisions of Section 6 (1) (b) it has to be seen if the provisions of Section 9 (1) (c) has been satisfied. The act of insolvency alleged in the Gift Settlement deed dated 11.08.2008 and the petition under Section 9 has been filed with a month therefore the condition has been satisfied.

32. It has to be analysed if the 1st respondent has committed the act of insolvency as stated by the petitioner. In order to attract the provision of Section 6 (1) (b) the pre requisite is that the 1st respondent should be a debtor and being so he has made a transfer of his property.

33. As discussed in paragraph nos.27 and 28 the petitioner has not been able to prove that the 1st respondent was a debtor. Once the 1st ingredient is not proved the Court has to only arrive at the irresistible conclusion that the act of insolvency as pleaded is not proved.

34. In the Judgement reported in AIR 1955 All 352 - Mahadeo Prasad Vs. Sheo Dass, the Division Bench had held that a sum can be said to be liquidated if it could be computed with certainty and a debt would be said to be liquidated if it could be readily ascertained on inquiry.

35. If the debt is not liquidated debt and requires elaborate enquiry in order to ascertain no due, then the application under Section 9 is not maintainable. In another Judgement of Full Bench of the Allahabad High Court reported in AIR 1956 All 403 - Abdul Shakur and others Vs. Kotwaleswar Prasad, the Bench had held that there are two stages at which an Insolvency Court should go into a question as to whether a debt exists. Paragraph No.20 of the said Judgement reads as follows:

"There are two stages at which an Insolvency Court may have to go into the question whether a debt exists, once when it is moved by a creditor for adjudication and secondly when a creditor wants his debt to be entered in the schedule. At either stage it is open to the Insolvency Court to go behind the decree and to hold that in spite of the decree there was no consideration for the debt. The insolvent may be bound by the decree but not the other creditors nor the official receiver, and Section 4, Provincial Insolvency Act expressly confers powers upon every Insolvency Court to decide all questions of any nature whatsoever which may arise in any case of insolvency coming within its cognizance. Therefore, it cannot be doubted that whether a negotiable instrument was drawn or made for consideration or not is a question which can be gone into by an Insolvency Court. The presumption contained in Section 118 does not remove the issue of consideration from the jurisdiction of the Court; it simply regulates the onus of proof by calling upon the other party to lead evidence to prove the absence of consideration. The onus that is placed by Section 118 upon the other party is not shifted back to the holder of the instrument by the Insolvency Act. An Insolvency Court is entitled to go into the question of consideration, but it does not follow necessarily that the consideration must be proved first by the holder of the instrument. A creditor has to prove his debt and when he produced the negotiable instrument and proves its execution, he is entitled to rely upon the presumption and to call upon the other party to prove the absence of consideration. The law requires him to prove the debt but not necessarily the consideration. He has to prove the debt in accordance

with the rules of evidence and one of the rules of evidence is that it shall be presumed that a negotiable instrument was made or drawn for consideration. Whatever onus rests upon him for proving his debt is discharged by his producing the negotiable instrument and proving its execution by the insolvent. If the insolvent or another creditor or the official receiver challenges the validity of the instrument on the ground of want of consideration, the Insolvency Court is not precluded from going into the question and will go into it but the onus will lie upon the insolvent or the other creditors or the official receiver to rebut the presumption by proving the want of consideration. If the want of consideration is proved, then only will the holder be called upon to prove the passing of consideration. The presumption has been borrowed by the Indian Legislature from the English law; many of the provisions of the Provincial Insolvency Act also are borrowed from British Bankruptcy Acts. But no English authority has been cited in support of the proposition that the presumption is to be drawn against the maker of the negotiable instrument and not against other persons such as an official receiver or other creditors of the maker. There is also no English authority suggesting that the onus of proof shifts in certain circumstances from the party alleging the want of consideration to the party relying upon it. The English authorities, which I have referred to above, simply lay down that an Insolvency Court is entitled to go behind a decree or judgment and decide whether there was a good consideration for the debt. They were referred to by this Court in --

'Union Indian Sugar Mills Co., Ltd. v. Brij Lal Jagannath', and by a Bench of the Bombay High Court in -- 'Jethmal Narandas v. Mahadeo Anandji'. It is unnecessary to deal with the cases of Union Indian Sugar Mills Co. Ltd., and Jethmal Narandas because they do not decide anything more than what was decided in the English cases."

36. The Bench had held that the creditor has to prove his debt. The above observation presupposes a decree and the reasons why the Insolvency Court cannot go behind the decree. In the other Judgement relied upon by the learned counsel for the petitioner 1998 (II) CTC 238 - Sadasivam Vs. M.Muthuswamy and two others, the learned Judge has observed that in order to proceed with the insolvency proceedings it has to be first established that there exists a creditor debtor relationship and

unless this relationship is established the question of proceeding further to adjudicate the alleged debtor as insolvent will not arise.

37. In the instant case, the petitioner has not been able to establish that the transfer was fraudulent one, particularly when the petitioner has not been able to establish the very debt. That apart, the witness examined on the side of the petitioner to prove passing of consideration has not been able to prove the same and on the contrary has stated that lesser amount has been given. These circumstances would clearly show that allegations of the respondents that the suit promote and the alleged borrowal all are created documents stands proved.

38. This Court in the Judgement reported in 2012 (3) CTC 25 - P.R.Pajus (Debtor) Vs. P.Uma Maheswaran and others, had observed that burden of proof to prove that a transfer is fraudulent one lies on the person alleging so and unless this onus is discharged the settlement deed executed by the 1st respondent in favour of the 2nd respondent cannot be declared as a fraudulent one. The learned Judge in this case had stated that a mere averments in the petition is not sufficient to invoke the provision. The petitioner has to step into the box and make out prima facie strong case in support of the averments so raised. In the case on hand the petitioner has failed to prove his case.

39. Therefore, I see no reason to interfere with well considered Judgement of the learned I Additional District Judge, Salem and the Civil Miscellaneous Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

kan

To

1. The I Additional District Judge,
Salem
2. The Principal Subordinate Judge,
Salem.

3. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.26471

+1cc to Mr.R.Nalliyappan, Advocate, S.R.No.26435

C.M.S.A.No.13 of 2019

EV(CO)
SU(06/05/2022)