



C.M.A.(MD)No.360 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 17.06.2022

Delivered On : 12.09.2022

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A.(MD)No.360 of 2022

R.Swarnavel

.. Appellant / Respondent / Creditor

Vs.

Logarani

.. Respondent / Petitioner / 3rd Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 75 of Provincial Insolvency Act, against the order, dated 09.09.2021, passed in I.A.No.20 of 2018 in I.P.No.37 of 2017, on the file of the Additional District Judge (FTC), Theni.

For Appellant

: Mr. P.Raja

For Respondent

: Mr. S.Sitharthan

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the order, dated 09.09.2021, passed in I.A.No.20 of 2018 in I.P.No.37 of 2017, on the file of the Additional District Judge (FTC), Theni. The appellant herein is the respondent in



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I.A.No.20 of 2018 and creditor-petitioner in I.P.No.37 of 2017. The respondent herein is the petitioner in I.A.No.20 of 2018 and third respondent in I.P.No.37 of 2017.

2. Brief substance of the petition filed by the petitioner, in I.A.No.20 of 2018 in I.P.No.37 of 2017, is as follows:

2.1. The petitioner is the third respondent in I.P.No.37 of 2017. The main petition was filed by the respondent, to adjudicate the first respondent in the main petition as insolvent and to vest his properties, as on the date of the filing of I.P. No. 4 of 2015 in the hands of the official receiver for sale and an equitable distribution of proceeds amongst his creditors in accordance with law and costs. There was no specific Act of insolvency. The legal requirements and ingredients as per law are not fulfilled and hence, the main insolvency petition is not maintainable, either on facts or on law. The remaining two persons, namely, Ram Prasath and Shanmugam Velsamy, who were alleged to have entered into a lease agreement along with the respondent herein, were not added as parties to the proceedings and the amount due to them can be claimed only by all of them jointly and the claim is barred by limitation. The property mentioned in the petition was purchased, on 11.04.2016, by the respondents 3 to 5, mentioned in the I.P.No.4 of 2015. Item No.1 of the schedule B property was mortgaged with Axis Bank, Theni Branch and major part of



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the sale consideration was paid to redeem the property. If the respondent has a right to question the alienations the same should be only within three months as per Section (9) (1) (c) of the Insolvency Act. At least within a period of one year from the date of alienation, if the transaction is fraudulent. The respondent has obtained an encumbrance certificate on 26.06.2016. The petition in I.P.No.37 of 2017 ought to have filed within three months from the date of sale deed or within one month from the date of receipt of the encumbrance certificate.

2.2. The respondent in I.A.No.37 of 2017 and his brother had filed a complaint before the District Crime Branch, in Crime No.2 of 2015 and the case was taken on file in C.C.No.266 of 2016, pending before the Chief Judicial Magistrate, Theni. I.P.No.37 of 2017 was filed only on 09.07.2017, that is, after the limitation period, not within one year from the date of knowledge and the petition to be dismissed at the threshold as the petition is not maintainable.

3. Brief substance of the counter filed by the respondent, in I.A.No.20 of 2018 in I.P.No.37 of 2017, is as follows:

The respondent herein has filed the petition in I.P.No.37 of 2017 to adjudicate the first respondent in the main petition as insolvent and to vest his property as on the date of filing of I.P.No.4 of 2015 in the hands of the Official



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Receiver for sale and an equitable distribution of proceeds amongst his creditors.

The first respondent in the main petition filed an insolvent petition under Section 10 of the Provincial Insolvency Act, in I.P.No.4 of 2015 before the Principal District Judge, Theni, to declare him as an insolvent. That petition was dismissed for default. The Act of insolvency committed by the first respondent, by name, Vignesh Gandhan, is a continuing one that he himself has moved a petition, for restoration of I.P.No.4 of 2015, hence, the respondent in I.A.No.20 of 2018 was mentioned as creditor No.101 in I.P.No.4 of 2015. Hence, the respondent herein is entitled to file I.P.No.37 of 2017. The said Axis Bank was mentioned as the first respondent in I.P.No.4 of 2015. There are 121 respondents in I.P.No.4 of 2015 and the petitioner herein is well aware of the proceedings in I.P.No.4 of 2015. The third respondent in I.P.No.37 of 2017 colluded with the first respondent/Vignesh Gandhan, who is the petitioner in I.P.No.4 of 2015 to cheat the other 120 creditors, had filed this petition. The petitioner settled the amount for the first creditor mentioned in I.P.No.4 of 2015, but also had settled the claim of the second creditor, viz., Govindahan, who had filed a recovery suit and got an attachment order. Hence, the debtor -Vignesh Gandhan is to be declared as an Insolvent and his properties mentioned in I.P.No.4 of 2014 are to be brought for sale.

4. On the side of the petitioner, no witness was examined and 4 documents were marked. On the side of the respondent, no witness was examined and no



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document was marked. The trial Court allowed the petition, in I.A.No.20 of 2018 and has rejected I.P.No.37 of 2017. Against that order, the appellant has approached this Court on the following grounds:-

4.1. The trial Court has erred in permitting the respondent herein to argue some other's case and helped the debtor to defraud the creditors. The first respondent in I.A.No.37 of 2017, viz., Vignesh Gandhan, has committed various acts of insolvency and he filed a petition under Section 10 of the Provincial Insolvency Act in I.P.No.4 of 2015, before the Principal District Judge, Theni, to adjudicate him as an insolvent. The petitioner in I.P.No.4 of 2015, Vignesh Gandhan, and his family owns huge landed area and they are running a number of Schools. In I.P.No.4 of 2015, he has admitted that he borrowed money from 122 debtors including Banks, Private financiers, School teachers and from this appellant. To protect himself, Vignesh Gandhan filed an Insolvency Petition in I.P.No.4 of 2015 and after leaving the I.P petition to be dismissed for default, he sold a prime property worth several Crores to the respondent herein, namely, Logarani, for a low rate, who has paid only part of the amount alone, to some of the debtors of Vignesh Gandhan, including the Axis Bank. The respondent herein colluded with the said Vignesh Gandhan had purchased the property mentioned in I.P.No.4 of 2015. The appellant herein has filed a petition in I.P.No. 37 of 2017 and the same was rejected by the trial Court, on



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the basis of an application filed by a third party, who filed a petition in I.A.No.20 of 2018. The first respondent therein/ Vignesh Gandhan, who was sought to be declared as Insolvent remained absent. Vignesh Gandhan failed to produce any document to prove that he has not committed any act of insolvency. In the above circumstances, the trial Court erred in rejecting the petition on the basis of the application of the respondent herein. The respondent colluded with Vignesh Gandhan with the motive to detriment the interest of huge number of debtors mentioned in the I.P. No.4 of 2015.

4.2. Though Vignesh Gandhan filed I.P.No.4 of 2015, he failed to issue notice and left the case dismissed for default. Once the Debtors came to know about such dismissal, he filed a petition to restore the same, in I.A.No.111 of 2018 in I.P.No.4 of 2015. Hence, the act of insolvency still continues even after the filing of the petition in I.P.No.37 of 2017. There is no question of limitation, since the act is a continuing one. The person against whom the insolvency petition was filed, had himself acknowledged the Debt, to the appellant. If at all the sale in favour of the respondent is genuine, she has every right to prove the same before the trial Court, but, without placing the matter for trial, rejecting the petition in I.P.No.37 of 2017 is a pre-conceived notion and is not proper. The trial Court indirectly declared the title of the respondent. The trial Court failed to examine the first respondent and



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rejected I.P.No.37 of 2017 and thereby permitted the unlawful act of the first respondent / Vignesh Gandhan to continue. When a petition to declare the first respondent as insolvent is pending for consideration in I.A.No.111 of 2018 in I.P.No.4 of 2015, there is no bar for this appellant, to file a petition for declaring the first respondent as insolvent. The impugned order is to be set aside.

5. On the side of the appellant, it is stated that the pendency of the restoration petition in I.A.No.111 of 2018 in I.P.No.4 of 2015 was not considered by the trial Court and that a question of limitation is a mixed question of fact and law and the facts of the case are to be considered before deciding the question of limitation. A judgment of the Hon'ble Supreme Court reported in **2020-17-SCC-260 (Shakti Bhog Food Industries Limited V. Central Bank of India and another)** is cited, wherein, it is stated as follows:-

“22. It is well established position that the cause of action for filing a suit would consist of bundle of facts. Further, the factum of suit being barred by limitation, ordinarily, would be a mixed question of fact and law. Even for that reason, invoking Order VII Rule 11 of the CPC is ruled out. Whether this plea taken by the appellant is genuine and legitimate, would be a mixed question of fact and law, depending on the response of the respondents.



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WEB COPY 6. On the side of the appellant, it is stated that a suit cannot be rejected on the basis of a written statement. Only after a full-fledged trial, the Court can come to a conclusion whether the suit or a petition is valid and the relevant facts are only the averments in the plaint. A judgment of the Hon'ble Supreme Court reported in **2003-1-SCC-577 (Saleem Bhai and others V. State of Maharashtra and others)**, wherein, it is stated as follows:-

“For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.”

7. On the side of the appellant, it is further stated that the original cause of action was filing an I.P petition in I.P.No.4 of 2015 and by the Debtor and now the second cause of action is the continuation of the earlier cause of action. When a petition in I.A.No.111 of 2018 to restore the earlier I.P petition in I.P.No.4 of 2015 is pending, there is no question of limitation.



8. On the side of the appellant, it is further stated that Order – 7, Rule 13 of C.P.C. Permitting the filing of a fresh suit on the same cause of action and if the earlier suit is permitted to be continued, it would continue in the old number and the parties to the litigation would be able to get their claim adjudicated on merits. A judgment of the Supreme Court reported in 1998-7-SCC-184 (***Raptakos Brett & Co.Ltd., V. Ganesh Property***) is cited, wherein, it is stated as follows:-

“As rightly submitted by Dr. Singhvi that, Order 7 Rule 13 of the CPC would permit the filing of a fresh suit on the same cause of Action and if the earlier suit is permitted to be continued it would continue in the old number and the parties to the litigation would be able to get their claim adjudicated on merits earlier while on the other hand if such subsequent registration is not held to be of any avail, all that would happen is that a fresh suit can be filed immediately after such registration and then it will bear a new number of a subsequent year.”

9. On the side of the appellant, it is further stated that whether a plaint discloses a cause of action which is a question of fact, which has to be gathered on the basis of the averment made in the plaint. To substantiate this claim, a Judgment of the Hon'ble Supreme Court reported in ***2006-3-SCC-100 (Mayar (H.K) Ltd and others V. Owners & Parties Vessel M.V. Fortune Express and others)*** is cited, wherein, it is stated as follows:-



“12.”From the aforesaid, it is apparent that the plaintiff cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants. “



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10. On the side of the appellant, it is further stated that the appellant and

others were noted as the Creditors in I.P.No.4 of 2015 filed by Vignesh Gandhan.

The said Vignesh Gandhan allowed the petition to be dismissed for default and he sell the property to the present respondent, who was mentioned as the third respondent in the original I.P petition. This amount to a cause of action under Section 6(1)(f) of the Act. By executing a sale deed, Vignesh Gandhan deprived the creditors from getting back their amount. Just to alienate the property, Vignesh Gandhan has allowed the I.P.No.4 of 2015 to be dismissed for default, then, to escape from the creditors, he has filed a restoration petition in I.A.No.111 of 2018. So, this amount to continuation of cause of action under Section 9 of the Act. The respondent herein is a third party and the respondent has no locus standi to question limitation or the right of the appellant. The appellant was mentioned as a Creditor in I.P.No.4 of 2015 and the respondent herein, who is a third party cannot question the validity of the lease agreement, in favour of the appellant.

11. On the side of the respondent, it is stated that the petitioner is one of the respondent in I.P.No.4 of 2015 and the I.P was dismissed on 24.11.2015 and the petitioner was aware of the dismissal of the petition. Restoration Petition filed by the petitioner in I.A.No.111 of 2018 in I.P.No.4 of 2015 was also dismissed by the trial Court. The petitioner can take steps against the dismissal of the original I.P.



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Petition, three months from the date of disposal of the petition, that is within three months, i.e., from 24.11.2015, the Petition in I.P.No.37 of 2017, ought to have been filed. The respondent purchased property after the I.P was dismissed for default. The appellant has not come forward with petition in I.P.No.37 of 2017 within one year. The appellant obtained Encumbrance certificate, but, failed to file this petition within one year from the date of knowledge. The appellant has filed a complaint before the District Crime Branch and F.I.R in Crime No.2 of 2015 was registered and was taken on file in C.C.No.of 2015 and even though the appellant is having the knowledge, I.P.No.37 of 2017 was filed after the period of limitation and the question of law was not reflected in the petition.

12. On the side of the respondent, it is stated that the matter to be decided is a mixed question of law and that the petition in I.P.No.37 of 2017, ought to have been filed within three months from the date of dismissal of the petition in I.P.No.4 of 2015. A Judgment of this Court reported in **1997-1-CTC-38 (Chellathurai Nadar V. Ramaswami Pillai and others)** is cited, wherein, it is stated as follows:-

“It is only in a debtor petition, where the debtor has made a statement that he is unable to pay the amount due to his creditors, the said representation can be taken as an act of insolvency and on that basis, he could be adjudged as an insolvent. In view of the fact that the present petition is a creditor petition, it cannot be done. In that



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view also, I hold that the order passed by the learned District Judge is well founded and does not call for any interference by this Court”.

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13. On the side of the respondent, it is stated that the alleged lease agreement was not registered only one of the agreement holder has come forward with a petition in I.P.No.37 of 2017. The other two persons have not come forward to file the petition and hence, the petition is liable to be dismissed.

14. On the side of the respondent, it is further stated that it is the duty of the Court to protect the interest of the subsequent purchaser, who bought the property for valuable consideration. A judgment of the Hon'ble Supreme Court reported in **2003-11-SCC-699 (Sankar Ram and Co. V. Kasi Naicker and others)** is cited on the side of the respondent, wherein, it is stated as follows:-

“Proviso to Section 55 of the Provincial Insolvency Act, 1920, protects bonafide 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.”



15. A Judgment of this Court reported in **2009-5-LW-676** (*The*

Association of the Creditors of the Madras Roasted Gram Mills & 4 others V.

Krishnan), is cited on the side of the respondent, wherein, it is stated as follows:-

“As per section 9(1)(c), creditor was obliged to disclose the actual date of occurrence of the Act of insolvency since the Act of insolvency must have occurred within three months before the presentation of petition.”

16. Another Judgment of this Court reported in **1935-MWN-685** (*Kaku Chenchuramana Reddi V. Palapu Arunachalam*), is cited on the side of the respondent, wherein, it is stated as follows:-

“4. I agree. I think the language of the Act itself makes it clear that [Section 9](#) fixes the conditions and not a period of limitation to a creditor's right to present an insolvency petition. [Section 7](#) provides that-

Subject to the conditions specified in this Act, if a debtor commits an act of insolvency an insolvency petition may be presented by a creditor and the Court may on such petition adjudicate the debtor insolvent.” The conditions are specified in [Section 9](#), which says, in Sub-[section 1\(c\)](#), that a creditor shall not be entitled to present a petition against a debtor “unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition”. So that, according to the terms of the Act,



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the debtor's act of insolvency is the foundation of the creditor's right to present a petition to have the debtor adjudicated, and unless the act of insolvency took place within three months before the presentation of the petition it will not serve to support the petition. “

17. On the side of the appellant, it is stated that in I.P.No.4 of 2015, no notice was served on the appellant. I.P.No.4 of 2015 was filed only to safe guard the said Vignesh Gandhan from the proceedings to be taken by the creditors. The interest of a debtor cannot be protected by law. The respondent herein has paid the Bank loan and the respondent also settled amount due for some other creditor, who obtained an order of attachment. By settling the amount due for the said creditors, it is clear that the respondent herein is well aware of the pendency of I.P.No.4 of 2015 and that the respondent is not a genuine purchaser. Only with the motive to help the said Vignesh Gandhan and to deprive the rights of the other creditors, the respondent has filed the petition in I.A.No.20 of 2018. All the three lease agreement holders were mentioned in I.P.No.4 of 2015. The appellant has not filed I.P.No.37 of 2017 for his own benefit, he has filed the petition only for the benefit of all the creditors and the respondent cannot question the validity of the lease agreement by filing I.A.No.20 of 2018.



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WEB COPY 18. Records perused. One Vignesh Gandhan has filed a petition in I.P.No. 4 of 2015, wherein, he has mentioned the appellant as one of the creditors. Axia Bank was also mentioned as one of the Creditors. Subsequently the petition was dismissed for default on 24.11.2015. The said Vignesh Gandhan has filed a petition in I.P.No.111 of 2018, to restore the I.P.No.4 of 2015. In between the period, the said Vignesh Gandhan has executed a sale deed in favour of the respondent herein. This property was mentioned in the list of properties in I.P.No.4 of 2015. The appellant herein has filed a petition in I.P.No.37 of 2017. The case of the appellant is that the said Vignesh Gandhan has executed sale deeds with a motive to deprive the creditors.

19. The claim of the respondent is that the petition in I.P.No.37 of 2017, ought to have been filed within three months from the date of dismissal of I.P.No.4 of 2015. The claim of the appellant is that no notice was served on him in I.P.No.4 of 2015.

20. The case of the appellant is that the respondent is not a genuine purchaser. The respondent has settled the loan due for the first respondent and settled the loan due to another person, who already obtained an order of attachment



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and that the respondent is not having *locus standi* to question the petition in I.P.No.

37 of 2017 and that he is a third party to the entire petition.

21. It is seen that the respondent herein is the third respondent in I.P.No. 37 of 2017. The appellant herein was mentioned as one of the creditors in I.P.No.4 of 2015. The respondent is questioning the validity of the unregistered lease agreement in favour of the appellant herein. The respondent is questioning the non-joinder of the other persons mentioned in the lease agreement. Whether the appellant is having any right through an un-registered lease agreement, can be decided only after trial. Whether the respondent is a genuine purchaser also can be decided only after a full-fledged trial.

22. The appellant was mentioned as one of the creditors in I.P.No.4 of 2015 and after the dismissal of the I.P., the said Vignesh Gandhan has filed a petition in I.A.No.111 of 2018 to restore I.P.No. 4 of 2015. It is seen that during default period, the said Vignesh Gandhan had alienated the property. There is a possibility of a motive to deprive the creditors.

(i) Whether the sale transactions done by Vignesh Gandhan is a genuine one?



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(ii) Whether the respondent is a genuine purchaser to be protected?

WEB COPY (iii) Whether the I.P.No.37 of 2017 is bad for non-joinder of necessary parties?

(iv) Whether the unregistered lease agreement in favour of the appellant is valid?

(v) Whether notice in I.P.No.4 of 2015 was served on the appellant?

The above facts are to be decided after a full-fledged trial, in I.P.No.37 of 2017. The right of the creditors cannot be thrown out at the threshold.

23. In view of the above circumstances, the Appeal is allowed by setting aside the order, dated 09.09.2021, passed in I.A.No.20 of 2018 on the file of the Additional District Judge (FTC), Theni, and by restoring I.P.No.37 of 2017. The trial Court is directed to dispose of the petition in I.P.No.37 of 2017 afresh, in accordance with law. No costs.

12.09.2022

Index : Yes/No

Internet : Yes/No

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Note : In view of the present lock down owing to COVID – 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

- 1.The Additional District Judge (FTC),
Theni.
- 2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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R. THARANI, J.

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Pre-delivery Judgment made in
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