



C.M.S.A.No.3 of 2018

N THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22-03-2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.3 of 2018
and
C.M.P.No.2132 of 2018

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1. R.Pushparani
2. V.Ragunathan

.. Appellants

Vs.

1. J.Perumayee (died)
- R.Aruljothi (died)
2. R.Sivakumar
3. S.Chidambaram
4. M.K.Saravanan
5. T.Nehru
6. M.Marimuthu
7. E.Muthukumar
8. V.Sundararajan
9. K.M.Ponnusamy
10. S.Rajkumar
11. Shanmugaktharasu
12. P.Ranganathan
13. P.Jayaraman
14. M.Ganesan
15. Srinivasan
16. M.Ramasamy

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17. M.Muniappan
18. S.Ayyavu
19. Kumaravel
20. Patel
21. N.N.Natarajan
22. Palanisamy
23. S.Baskaran
24. S.Shanthi
25. Thilakavathi Yarn Stores
26. Madheswaran
27. S.S.M.Kandasamy Chettiar
28. Veerappan
29. Moorthy
30. Palaniappan
31. Mohan
32. Seerangan
33. Sivashanmugam
34. K.M.Kadirvel
35. Saraswathi
36. R.Rajamanickam
37. N.Venkatachalam
38. Gurusamy
39. Pa.Se.Nagaraj
40. Sekar
41. R.Durai
42. K.Nachimuthu
43. Muthusamy

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44. Duraisekar
45. N.Sadasaivam
46. Mythili
47. Iruthayaraj
48. Shanmugam
49. C.Velu
50. Eswari
51. O.G.Ramasamy
52. S.Sakthi
53. Navaneethan
54. Gajalakshmi Tex
55. Imannan
56. Muthusamy (Solaikarar)
57. A.Muthu Vijayan
58. Arumuga Gounder
59. A.T.Ponnusamy
60. Shanmugam
61. Kannan Chettiyar
62. L.Thangavel
63. Sekar
64. S.Sellammal
65. Puvaneswari
66. L.Sivaraman
67. N.Shanmugam
68. Pachagounder
69. P.Ramasamy
70. Meenachi

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71. S.Prabakaran

72. K.T.Marimuthu

73. The Official Receiver,
District Court, Erode.

74. J.Sivakumar (died)
(R-74 brought on record as LR of the
deceased 1st respondent, viz., J.Perumayee,
vide Court Order dated 26.12.2021
made in C.M.P.No.14715 of 2020 in
C.M.S.A.No.3 of 2018)

75. Anitha

76. Minor S.Lingeswar
(Respondents 75 and 76 brought on record as LRs
of the deceased R-74, viz., J.Sivakaumar,
vide Court order dated 21.07.2022
made in C.M.P.No.2169 of 2022 in
C.M.S.A.No.3 of 2018)

.. Respondents

Civil Miscellaneous Second Appeal filed under Section 75(1) of the Provincial Insolvency Act, 1920 read with Section 100 (1) of the Civil Procedure Code, against the judgment and decree dated 07.11.2017 made in C.M.A.No.37 of 2013 on the file of the Fourth Additional District Court, Erode District, at Bhavani, confirming the fair and decretal order dated 21.11.2012 made in I.P.No.19 of 2003 on the file of the Sub-Court, Bhavani.

For appellant : Mr.N.Manokaran

For respondents: Mr.P.Sesubalan Raja for RR-75 and 76

R-1 - Died

R-74 - Died

R-50 - Notice served, No appearance

R-73 - No appearance



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JUDGMENT

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This appeal is filed against the judgment and decree dated 07.11.2017 made in C.M.A.No.37 of 2013 on the file of the Fourth Additional District Court, Erode District, at Bhavani, confirming the fair and decretal order dated 21.11.2012 made in I.P.No.19 of 2003 on the file of the Sub-Court, Bhavani.

2. The first respondent (since deceased) earlier filed I.P.No.19 of 2003 to adjudicate her as 'insolvent' in terms of Sections 7, 10 and 13 of the Provincial Insolvency Act, stating as follows:

She was an agriculturist and also doing finance and yarn business. She borrowed loan from the respondents 1 to 74 in I.P.No.19 of 2003 for running her business. It resulted in loss leading to its closure. She was unable to re-pay the debts owned by her to the creditors. Her properties were tried to be put in sale by the creditors to knock its door at a very low price. She described her properties in 'B' schedule and her debts in 'A' schedule and was willing to put her properties at the disposal of the Court to discharge her debts. She has not sold or purchased any property within three months of the application. Her debts worth Rs.84,16,397/-, which exceeds Rs.500/- and she was unable to pay the same. Hence, she prayed to adjudicate her as 'insolvent'.



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3. In the counter statement filed by respondent No.50, before the trial Court, it is stated that the petitioner had not borrowed a sum of Rs.1,50,000/- from this respondent and had executed a Promissory Note. The petitioner's husband one Jayaraman was working as Teacher in Government Higher Secondary School and he had only borrowed a sum of Rs.40,000/- from the respondent No.50 on 20.11.2001 and had executed a Promissory Note. As he did not repay the amount, a suit in O.S.No.525 of 2004 was filed and it was decreed on 18.06.2004, against which the appeal filed, was dismissed. The petitioner has got agricultural lands and Fixed Deposits. The petitioner filed the application for making unlawful gains. The respondent No.50 was not a necessary party and the application may be dismissed as against her.

4. In the counter statement filed by respondent No.73 and adopted by respondent No.74, it is stated that the petitioner was willing to sell "B" schedule properties and entered into a written agreement with respondent No.73 on 10.09.2003 and also entered into another agreement with respondent No.74, who is the husband of respondent No.73. During that time, the petitioner has received advance amount and discharged all her debts including the bank loans. To defraud the respondents, the petition has been filed. The other respondents are not creditors of the petitioners and in turn, they are close relatives and friends of her. Hence, the petition may be dismissed.

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5. Before the trial Court, P.W.1 and P.W.2 were examined and no exhibit was marked on their side. On the side of the respondents before the Tribunal, R.W.1 and R.W.2 were examined and Exs.R-1 and R-2 were marked.

6. The trial Court, on an analysis of the oral and documentary evidence, allowed I.P.No.19 of 2003 adjudicating the petitioner as insolvent and the Official Receiver was directed to take charge of the properties of the insolvent petitioner shown under Schedule "B" and put them to sale and to rateably distribute the sale proceeds amongst the creditors. Challenging the same, respondent Nos.73 and 74 have filed C.M.A.No.37 of 2013, which was dismissed, against which, respondent Nos.73 and 74 have filed the present Civil Miscellaneous Second Appeal before this Court.

7. The appellants have raised the following substantial questions of law in the grounds of appeal:

(i) Whether the Courts below are right in adjudging the first respondent as an "insolvent", in the absence of any legal evidence to prove the undisclosed liabilities mentioned in the "A" schedule ?

(ii) Have not the Courts below committed an error in declaring the first respondent as an "insolvent", when she had failed to prove the genuineness of

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her debts listed in "A" schedule particularly, in the absence of any contest from the respondents 1 to 50 and 52 to 72 ?

(iii) Whether the Courts below have committed an error in ignoring the claim of the appellants under the registered sale agreement dated 10.09.2003 executed in respect of the 1st item of "B" schedule ?

(iv) Whether the Courts below erred in non-suiting the appellants on the ground that a single creditor cannot maintain the insolvency petition by overlooking Section 7 of the Provincial Insolvency Act, 1920 and more so, in the absence of any proof for the other debts or creditors ?

(v) Whether the judgment of the Courts below are perverse in arriving at a conclusion that the first respondent is a man of means, especially when he does not have any other property to settle the debt or to satisfy the money decree, dated 31.10.2013 made in O.S.No.218 of 2012 ?

8. Learned counsel for the appellants submitted that the first respondent, in order to clear the debts, executed a sale agreement in favour of the appellants and it is also registered and had been maintained, and since the advance amount was also paid and since the first respondent was not ready and willing to perform his part of contract, he filed a suit for specific performance. In order to defeat the claim, he filed the claim petition and all the respondents are close relatives and both the Courts below failed to appreciate the oral and

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documentary evidence and the first respondent was declared as an 'insolvent'.

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9. Learned counsel for the respondent Nos.75 and 76 submitted that the first respondent borrowed several debts from the other respondents and he could not clear the debts and therefore, the first respondent made disturbance to the appellants and hence, the suit in O.S.No.93 of 2005 was filed by the first appellant. Though the first respondent who filed the insolvency petition stated that all the respondents are creditors to them, but the 50th respondent is only her husband who borrowed the money and the 50th respondent filed the suit in O.S.No.525 of 2004 and she is the husband of the first respondent and she has nothing to do with the debts.

10. As far as substantial questions of law are concerned, though the first respondent filed I.P.No.19 of 2003 showing the list of the respondents/creditors, respondent Nos.73 and 74 are all creditors and in the Insolvency Petition, they have been shown as respondents and also the Promissory Note said to have been executed in favour of them for money. But none of the documents had been produced by the appellants, though the Promissory Note must be with the creditors who gave the money and other particulars and the appellants have not produced the Statement of Accounts or any other document to show that she is a debtor and borrowed money from the respondents. But she has not given any

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proof or even in the proof affidavit, she has not stated as to how much amount she borrowed from the other respondents and what are the documents executed in support of the same. She has not proved that she borrowed money and executed those documents. It is the duty of the appellants that she has a debt over and above the worth of the properties. From the materials and the evidence available on record, it is seen that the first respondent has not established that she owed a debt over and above the worth of the B-schedule property and has not established A-schedule debts and no documentary evidence is produced on the side of the appellants and even no notice was sent by any of the creditors to settle the money either for the Promissory Note or for any other debts. If at all the first respondent has borrowed money and though she has stated that the total debts amount to Rs.84,16,397/-, which exceeds Rs.500/- and if she is unable to pay it, however, no evidence is produced to show that she borrowed the money. If at all she borrowed the money from any of the respondents/creditors, certainly, they would have sent demand notice or otherwise, would have taken steps to file a suit for recovery of money against her and would have attached the properties. There is no such evidence or document to show that any of her creditors has sent any notice or filed the suit against her. Therefore, the petitioner in the Insolvency Petition, the first respondent in this appeal, had not established that she has borrowed the amount and even 72nd and 74th respondents have stated that only she

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executed a registered sale agreement even in the year 2003, and to the appellants, and in order to defeat the claim of the appellants, they have filed a false case. Except the agreement on the side of the respondents, marked as an exhibit and the suit filed by the respondent No.50 against the husband of the first respondent, no other document is produced.

11. As already stated, if at all the first respondent borrowed the money, demand notice or suit might have been filed to recover money and no creditor would keep quiet and there is no such evidence or material in this case. Even the appellants have really stated in the counter affidavit that except respondent Nos.73 and 74, all the other respondents are only relatives of the first respondent/petitioner in the Insolvency Petition, and therefore, they did not come to the Court and contest the case. Therefore, as stated above, except the appellants, no other respondent had contested the case and the first respondent has also not established that those respondents are the creditors and the first respondent has borrowed money from them and issued a cheque or Promissory Note. If at all the first respondent has issued the cheque, definitely, the counter-foil of the cheque would be with the first respondent/petitioner in I.P. She has not stated that in the A-schedule property of the petition that she issued cheque or Promissory Note. Though there may not be any counter-foil for the Promissory Note, and if it is cheque, she would have got counter-foil and no date of

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borrowal has been given and as to whether they have paid interest or not, is not known. If at all they have paid any interest or even the principal amount, it is also not known and clear and at any angle, on seeing the entire records, though the first respondent has shown 74th respondent as a creditor, but she has not produced any of the document. As stated earlier, the counter-foil of the cheque or the demand notice issued by any of the respondents to the first respondent, except the appellants or any suit or demand notice have been issued or the suit having been filed or a case for dishonour of the cheque under Section 138 of the Negotiable Instruments Act and if at all the first respondent issued a cheque and subsequently did not pay the amount, definitely, any one of the creditors/respondents would have filed a complaint under Section 138 of the Negotiable Instruments Act or filed a suit for recovery of money or Promissory Note or at least would have issued demand notice to the first respondent/petitioner in the Insolvency Petition who has not filed any of the documents and in order to establish that the respondents are the creditors, the appellants are only the agreement holder and it is a registered document and since the first respondent is insolvent, the appellants have not established that they incurred a debt over and above the worth of the properties, namely in the B-schedule.

12. Therefore, in the above facts and circumstances, this Court finds that both the Courts below have not appreciated and re-appreciated the evidence in

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proper perspective and hence, the appreciation of evidence by the Courts below, is perverse. All the substantial questions of law are answered in favour of the appellants and against the first respondent/petitioner in the Insolvency Petition. This Court finds that the judgments of both the Courts below are liable to be set aside. Accordingly, they are set aside.

13. In the result, this CMSA is allowed. There shall be no order as to costs. Consequently, C.M.P. is closed.

22-03-2024

CS

To

1. IV Additional District Judge, Erode, at Bhavani
2. The Subordinate Judge, Bhavani.
3. The Official Receiver, District Court, Erode.
4. The Section Officer, V.R. Section, High Court, Madras.

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P. VELMURUGAN, J

CS

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Pre-delivery Judgment
in C.M.S.A.No.3 of 2018

Judgment delivered on 22.03.2024

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