



C.M.S.A.No.18 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.18 of 2016

and

C.M.P.No.8742 of 2016

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1. Marappan
2. Rathinam
3. Thangamuthu
4. Saraswathy

.. Appellants

Vs.

1. M.Selvaraj
2. C.Thangavel
3. P.Gunasekar
4. T.M.Thangamuthu
5. T.S.Senthilkumar
6. P.Karuppusamy

.. Respondents

Civil Miscellaneous Second Appeal filed under Section 75 of the Insolvency Act read with Section 190 of the Code of Civil Procedure, against the judgment and decree dated 21.12.2015 made in C.M.A.No.53 of 2011 on the file of the Second Additional District Court, Erode, in reversing the order and final order dated 28.02.2006 made in I.P.No.63 of 1999 on the file of the Second Additional Subordinate Court, Erode.



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For appellant : Ms.Yogalakshmi for M/s.M.Guruprasad

For respondents: Mr.S.Subbaiah. Senior Counsel for

Mr.G.Bharadwaj for R-1

R2 - Died

R3 - Insufficient address

RR-4 to 6 : Notice not yet returned -
either served or un-served

JUDGMENT

This appeal is filed under Section 75 of the Provincial Insolvency Act read with Section 100 of the Code of Civil Procedure (for short, 'CPC'), against the judgment and decree dated 21.12.2015 made in C.M.A.No.53 of 2011 on the file of the Second Additional District Court, Erode, reversing the fair and final order dated 28.02.2006 made in I.P.No.63 of 1999 on the file of the Second Additional Subordinate Court, Erode.

2. Before the trial Court, the appellants herein filed I.P.No.63 of 1999 under Sections 6 to 9 of the Provincial Insolvency Act, stating as follows:

(a) The schedule mentioned properties (in I.P.) absolutely belonged



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to the first respondent herein and he was in possession and enjoyment of the same.

(b) The second respondent in the I.P., borrowed amounts from the appellant/petitioner for his urgent necessity. Similarly, the first respondent herein borrowed Rs.1,35,000/- from the first petitioner for his urgent necessity and executed a Promissory Note on 16.01.1998, promising to re-pay the said sum with interest @ Rs.1.50 per hundred per month, on demand.

(c) The second respondent in the I.P., had not paid any sum towards principal or interest, inspite of repeated demands made in person by the petitioners. The first respondent borrowed a sum of Rs,1,40,000/- from the second petitioner for his urgent necessity and executed Promissory Note on 16.01.1998, promising to re-pay the same with interest @ 18% per annum, payable on demand either to the second petitioner or his order.

(d) Again, the first respondent has borrowed a sum of Rs.25,000/- from the third petitioner and executed a Promissory Note on 20.01.1998 in favour of the third petitioner, promising to re-pay the above sum with interest @ 18% p.a. payable on demand either to the third petitioner.

(e) Again, the first respondent borrowed Rs.25,000/- from the fourth



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petitioner and executed a Promissory Note on 13.06.1997 in favour of the fourth petitioner, promising to re-pay the same with interest at the rate of 18% p.a. payable or demand either to the fourth petitioner.

(f) The first respondent has not paid any sum either towards principal or interest to the petitioners so far, inspite of repeated demands made in person by the petitioners herein.

(g) While that being so, the first respondent, with a view to defeat, defraud and delay the lawful claim due on the above Promissory Notes, sold Item No.1 of the schedule mentioned properties to the respondent Nos.2 to 5 and sold Item No.2 of the schedule mentioned properties to the sixth respondent under two sale deeds, dated 15.03.1999, registered as Document Nos.547 of 1999 and 561 of 1999 on 16.03.1999 in the Office of Sub-Registrar, Perundurai. No provision had been made in the sale deeds for discharging the debts due under the Promissory Notes for the petitioners herein. The respondents were fully aware of the debts due to the petitioners.

(h) The two sale deeds dated 15.03.1999 executed by the first respondent in favour of the respondents 2 to 6 are not binding and they are created with a view to defeat and defraud the petitioners/creditors. Therefore, the first respondent has committed any act of insolvency.

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(i) The first respondent departed from his residence or in his usual place of business. This act of absconding also amounts to act of insolvency.'

(j) The sale deeds dated 15.03.1999 are invalid and it does not bind the petitioners. The petitioners obtained registration copy of sale deeds only on 09.06.1999. The appellants/petitioners are not able to issue notice to the respondents. The petitioners have also intimated the respondents 2 to 6 about the debts due to them, but they have not chosen to discharge the debts.

(k) The first respondent/debtor, by alienating the properties to the respondents 2 to 6, without making any provision whatsoever for due discharge of the debts to the petitioners, have committed an act of insolvency as per the provisions under Section 6 of the Provincial Insolvency Act. Hence, the petitioners have filed the Insolvency Petition to adjudge the first respondent as an insolvent.

3. Counter statement has been filed by the sixth respondent before the trial Court, denying that that the properties described in the schedule to the Insolvency Petition, absolutely belonged to the first respondent and he is in possession and enjoyment of the suit properties. The petitioners and



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the respondents are all belonging to the same local area and each one know each other, apart from the sale proceedings being known to both parties. The alleged Promissory Notes and demand of payment, are denied on the ground that the Promissory Notes are created for the purpose of the case. The contention of the appellants/petitioners that the sixth respondent is aware of the debt due to the petition, is denied and in order to get unlawful gain from the sixth respondent, the appellants colluded and had come forward with the Insolvency Petition. Further, the sixth respondent purchased an extent of undivided 448 Square Feet vacant site from the first respondent and one Prabakaran. The first respondent is entitled only for half-share therein. Even the schedule of properties described in the petition, is denied. It is the stand of the sixth respondent in the counter statement that he purchased the property, i.e. 448 Sq.Ft. from the first respondent and one Prabakaran for value and consideration and that the sale proceedings are genuine and valid. From the date of purchase, the sixth respondent is in possession and enjoyment of the properties. The first respondent, having his non-ancestral properties in S.F.No.45/14, 19, 20 and S.F.No.39-1, 6B, 13 and 45/12, 17 in Pattakaranpalayam Village in Perundurai Taluk worth about more than Rs.5 lakhs and hence, the petitioners (appellants herein) are not entitled for the claim made in the I.P.

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4. Upon considering the oral and documentary evidence adduced on either side, the trial Court allowed I.P.No.63 of 1999 on 28.02.2006 under Section 27(1) of the Provincial Insolvency Act adjudging the first respondent herein as 'insolvent' and the time for discharge of one year, was granted by the trial Court. The Official Receiver of Erode was appointed as Receiver and the Gazette Publication under Section 30 of the Provincial Insolvency Act, 1920 was directed to be made forthwith.

5. Challenging the above order passed by the trial Court, the creditor (sixth respondent in I.P) has filed appeal before the Second Additional District Court, Erode in C.M.A.No.53 of 2011 (with I.A.No.525 of 2013) and the said first appellate Court (lower appellate Court) reversed the judgment of the trial Court, thereby, C.M.A.No.53 of 2011 was allowed.

6. Feeling aggrieved by the above said judgment of the first appellate Court, the creditors (petitioners in I.P.No.63 of 1999) have preferred the present appeal before this Court, and this appeal has been admitted on 08.06.2016 on the following substantial questions of law:

(i) Whether the procedure adopted by the Appellate Court in dealing



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with the application for additional evidence is in consonance with Order 41

Rule 27 of the CPC ?

(ii) Whether the Appellate Court is right in setting aside the order in toto, when the 6th respondent alone contested ? and

(iii) Whether the order passed by the Appellate Court is in consonance with the provisions of the Provincial Insolvency Act ?

7. On notice, the first respondent herein (M.Selvaraj - debit purchaser - creditor) has raised the following preliminary objections:

(i) The main proceedings in I.P.No.63 of 1999 was only to adjudicate the alleged debtor Thangavel as an insolvent, and though he was adjudged so by the trial Court, on appeal, the order of adjudication had been set aside and I.P.No.63 of 1999 came to be dismissed, and as such, unless and until the alleged debtor Thangavel has been served, there cannot at all be any other proceedings in his absence.

(ii) Since the debtor Thangavel himself having passed away, unless and until and if allowable and permitted in law, to bring his legal representatives on record, the present appeal cannot be pursued, and the same has to be dismissed as abated.

(iii) Further, the debtor Thangavel having been given up in this

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appeal, it would mean that the debtor Thangavel was given up in I.P.No.63 of 1999 itself, and so, when there is no debtor to be adjudicated as an insolvent, no other proceedings could be continued by the appellants.

(iv) As provided under Section 17 of the Presidential Insolvency Act, the proceedings could be continued, unless the Court otherwise orders so far as may be necessary for the realisation of the property of the debtor.

(v) The realisation of the property of the debtor would arise only when there is an order of adjudication under Section 27 of the said Act, and the effect of order of adjudication is in the manner as provided under Section 28 of the Act.

(vi) Under Section 17 of the Act, there cannot at all be any need or necessity whatsoever, as the properties of the debtor as an adjudicated insolvent, have not been ordered to be vested for realisation of properties and distribution of the proceeds among his creditors.

(vii) Accordingly, when the debtor himself having been given up, and not being party to the proceedings, the present CMSA may be dismissed.

(viii) Even otherwise, and taking it for granted that the proceedings can be continued, still, the legal representatives of the deceased debtor ought to be brought on record, and in the absence of the deceased not being represented by his legal representatives, the present appeal cannot



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be proceeded with on merits, and it may be dismissed as abated.

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(ix) The present appeal is not maintainable under Section 75 of the Act for the following reasons:-

(a) The Insolvency Petition has been filed to adjudicate the debtor as insolvent, and an appeal having already been filed and allowed, the order of the District Court had become final.

(b) If at all as provided under first proviso thereto, only a Civil Revision Petition would lie, subject to the matter being covered under the first proviso, and as such, the CMSA would not lie, whereas, if at all a CRP under Section 115 of the CPC alone, is maintainable, subject to the merits.

(c) The further proviso (second proviso) relating to the appeal to the District Court and further appeal to this Court, applying Section 100 of the CPC, would be related only in respect of a decision if made, under Section 4 of the Act.

(d) The proceedings are not under Section 4 of the Act, and Section 4 will apply only when it relates to deciding the power of the Court to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, etc., to decide for the purpose of doing complete justice or making a completion of

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distribution of property in any such case.

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(e) In view of the fact that the proceedings are only related to adjudication under Sections 6, 7 and 9 of the Act, any of the orders passed not falling under Section 4 of the Act, the present appeal is not maintainable.

8. Learned counsel for the appellants/creditors submitted that the second respondent in the I.P. borrowed huge amounts from the appellants for his urgent needs. On several occasions, he has not re-paid the said amounts either towards principal or towards interest. Certainly, in order to defeat, defraud and delay the loan claim made beyond the date, he sold the first item of the schedule properties to the respondents 2 to 6 in the I.P., and the second item of the schedule properties to the first respondent in the I.P. under two sale deeds, dated 15.03.1999 and 16.03.1999. In the said sale deeds, there is no provision made for discharging the debt due to the appellants/creditors. The respondents 1 and 3 to 6 were fully aware of the debts due to the appellants/creditors and in order to defraud and delay the claim, the second respondent sold the properties. The second respondent is debarred from his residence and the act of absconding also amounts to act of insolvent. The sale deeds in favour of the second

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respondent to the other respondents, are not binding on the appellants herein, and therefore, the creditors filed the Insolvency Petition before the trial Court. The trial Court rightly allowed the I.P., whereas, neither the second respondent nor the other respondents filed appeal, except the first respondent herein. The first appellate Court failed to appreciate the evidence and allowed the application filed by the creditors under Order 41 Rule 27 CPC without any basis and without any appreciable evidence. The lower appellate Court dismissed the application on the ground that the trial Court did not take prompt steps to serve the second respondent in the I.P. The first appellate Court allowed the appeal and dismissed the I.P., since there was no independent oral and documentary evidence regarding the abscondance of the second respondent (debtor) in the I.P., and therefore, the impugned judgment of the first appellate Court is liable to be set aside.

9. Per contra, learned counsel for the first respondent/debtor-purchaser, submitted that the second respondent died and no steps were taken to implead his legal heirs. Therefore, the appeal itself is abated and this Court may dismiss this appeal as abated. He further submitted that the appeal under Section 75(1) of the Provincial Insolvency Act, 1920, read with Section 100 of the Code of Civil Procedure (for short, 'CPC'), would

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not arise and that the appellants herein have not filed the Insolvency Petition under Section 4 of the Provincial Insolvency Act. Therefore, under Section 75, proviso 2 therein, only application filed under Section 4 of the Provincial Insolvency Act can be decided by the Subordinate Court against the appeal filed before the District Court, and hence, as against the judgment of the District Court, the Second Appeal would lie before High Court against the order passed in the petition filed under Sections 6 to 9 of the Provincial Insolvency Act. Therefore, against the judgment of the lower appellate Court, only Revision Petition will lie and not the Second Appeal, and hence, this appeal itself is not maintainable.

10. The learned counsel for the first respondent further contended that though the trial Court failed to appreciate the evidence also, considering the legal provisions and without directing the appellants herein to produce materials for abscondance of the second respondent herein, simply, he was declared as 'insolvent'. The lower appellate Court rightly appreciated that there is no material to show that the second respondent/debtor was absconding. Therefore, the first appellate Court rightly allowed the appeal.



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11. The learned counsel for the first respondent also contended that the application filed Order 41 Rule 27 CPC was also allowed, stating that the second respondent was having sufficient means or other properties and the second respondent was not having the properties which were sold by the second respondent to the other respondents. Therefore, the second respondent cannot be declared as 'insolvent'. The property(ies) sold by the second respondent to the other respondents, is not binding on their side. Therefore, the present CMSA is liable to be dismissed.

12. Heard both sides and perused the materials available on record.

13. As far as the first substantial question of law is concerned, the affidavit filed by the second respondent under Order 41 Rule 27 CPC, is not in accordance with Rule 27 CPC. Mere production of the Adangal itself, is not sufficient and the respondents ought to have examined the witness and prove that the petitioner was still having the said land in his name. The first appellate Court ought to have, if at all satisfied that the document could not be produced before the trial Court, either examined the witness and mark the document, or otherwise, the lower appellate Court could have directed the trial Court to record the additional evidence and

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send it back for disposal of the appeal. When the first appellate Court rejected the other document as erroneous and simply marked the Adangal and the same was not marked by examining any witness, there is no evidence regarding the worthiness of the property, and also as on date, whether the property(ies) was/were in the hands of the second respondent, and even sometimes, if the property(ies) are alienated, the alienation would not have mutated the Patta. Therefore, mere production of the Revenue Records and marking the Revenue Records alone would not be sufficient to come to the conclusion that the second respondent in the I.P., was having the said property(ies), and hence, allowing the petition filed under Order 41 Rule 27 CPC and giving a finding, is perverse, and therefore, the first substantial question of law is answered against the respondents herein.

14. As far as the second and third substantial questions of law, are concerned, as appellate Court, the first appellate Court has got every power to re-appreciate the evidence and give finding independently. In case the first appellate Court finds any defect in the procedures followed by the trial Court, then the first appellate Court ought to have remitted the matter back to the trial Court and neither the second respondent before the

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trial Court, nor his legal heirs, have approached the Court and stated that they were very much available and that he did not abscond. But however, the first appellate Court failed to consider the same and while allowing the First Appeal, the first appellate Court simply dismissed the I.P., on the ground that the respondents before the first appellate Court did not prove the abscondance of the second respondent before the trial Court.

15. On a reading of the entire materials, it is seen that the first appellate Court has not followed the provisions of law and while allowing the appeal and setting aside the order passed by the trial Court, and if the appellate Court finds that sufficient materials are available before it and the trial Court failed to appreciate the evidence and give correct finding, the first appellate Court can always re-appreciate the material evidence produced before the trial Court. The first appellate Court is a final Court of finding of facts and the first appellate Court shall give independent finding and in case the first appellate Court finds that there are bereft of particulars and also there was no material placed, the first appellate Court, in order to meet the ends of justice, ought to have remitted the matter back to the trial Court and give opportunity to the parties to establish their claim. Instead of doing so, the first appellate Court failed to follow either the procedures of

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the CPC or the provisions of the Provincial Insolvency Act, and simply allowed the appeal and set aside the order of the trial Court, which is unwarranted. Being the fact-finding Court, the first appellate Court can always record the additional evidence if any and pass orders after recording the additional evidence, or otherwise, the first appellate Court can remit the matter back to the trial Court for recording additional evidence and for fresh consideration. In this case, the first appellate Court disposed of the appeal without recording any evidence and simply accepted the Revenue Records and came to the conclusion that the second respondent has got the property. Further, the abscondance is not proved before Court. The first appellate Court could have followed the procedures for the additional evidence in order to meet the ends of justice or remitted the matter back to the trial Court in order to give an opportunity to the parties and the appellate Court could have remitted the matter back to the trial Court. Accordingly, the impugned judgment of the first appellate Court is set aside. The trial Court can take de-novo trial and dispose of the Insolvency Petition in accordance with law.

16. As far as the maintainability of the present appeal, raised by the respondents, is concerned, though the petition was filed under Sections 6

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to 9 of the Provincial Insolvency Act, before the trial Court, however, Section 75(i) of the said Act shows that in matters that fall under Schedule-I of the Provincial Insolvency Act, appeal before the High Court is maintainable. As far as Section 25 of the Provincial Insolvency Act, as per Schedule-I, the present appeal filed under Section 75(2) of the Provincial Insolvency Act, is maintainable.

17. On a reading of the first appellate Court's judgment, its finding is that service of notice to the second respondent before the I.P., or abscondance, has not been proved. Therefore, the first appellate Court allowed the appeal and dismissed the Insolvency Petition. Therefore, it falls under Section 25 of the Provincial Insolvency Act which is covered under Schedule-I of the Act. Therefore, the present appeal filed by the appellants before this Court is maintainable.

18. All the substantial questions of law are answered in favour of the appellants and against the respondents. The impugned judgment passed by the First Appellate Court is set aside. The matter is remitted back to the trial Court and the trial Court is directed to give opportunity to all the parties and conduct de-novo trial and dispose of I.P.No.63 of 1999 within a period of four months from the date of receipt of a copy of this judgment.

19. This appeal is allowed with the above observations. There shall



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be no order as to costs. Consequently, C.M.P. is closed.

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CS

Office to note: Issue order copy by 18.03.2024

To

1. Second Additional District Court, Erode.
2. Second Additional Sub-Court, Erode.
3. The Section Officer, V.R. Section, High Court, Madras.

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P. VELMURUGAN, J

CS

Pre-delivery Judgment
in C.M.S.A.No.18 of 2016

Judgment delivered on 14.03.2024

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