IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.77 of 2021
and
C.M.P.No.19092 of 2021

Ravi .. Appellant

Vs.

1. R.Thangavel
2. Senthil .. Respondents

Civil Miscellaneous Second Appeal filed under Section 104 of the Code of Civil Procedure and Section 75(1) of the Provincial Insolvency Act, 1920 read with Section 100 of the Code of Civil Procedure, against the judgment and decree dated 12.06.2019 in C.M.A.No.11 of 2018 on the file of the Principal District Court, Namakkal, reversing the fair and decretal order dated 09.07.2018 in I.P.No.54 of 2007 on the file of the Principal Subordinate Court, Namakkal.

For appellant : Mr.C.Jagadish

JUDGMENT

Civil Miscellaneous Second Appeal is filed against the judgment and decree dated 12.06.2019 in C.M.A.No.11 of 2018 on the file of the Principal District Court, Namakkal, reversing the fair and decretal order dated 09.07.2018 in

I.P.No.54 of 2007 on the file of the Principal Subordinate Court, Namakkal.

2. The first respondent herein (creditor) has filed I.P.No.54 of 2007 under Sections 6 and 9 of the Provincial Insolvency Act to adjudge the second respondent herein as an insolvent, stating as follows:

The second respondent herein borrowed Rs.1,40,000/- on 12.11.2005 from the first respondent-creditor, for his family expenses, urgent need and for his business and executed a Promissory Note agreeing to repay the amount with interest @ 18% per annum. Inspite of repeated demands, the second respondent herein had not repaid any amount either towards interest or principal amount. The second respondent, with a view to delay and defeat his creditors, including the first respondent herein, sold his only property that belongs to him to the appellant herein on 28.09.2007 for Rs.75,000/-, but the fact remains that the property is more worthy. The second respondent herein had under-valued the property and sold it to the appellant herein. The above transfer of property is liable to be set aside under Section 53 of the Provincial Insolvency Act. The second respondent herein is not available in his usual place of residence and he has secluded himself, thereby depriving his creditors of the means of communicating with him. As the acts of the second respondent are the acts of insolvency, it is necessary to adjudge him as an insolvent.

3. The appellant herein has filed counter before the trial Court stating as follows:

The borrowal of Rs.1,40,000/- and also the execution of Promissory Note, are denied by him. The Promissory Note is created for the purpose of the case. The loan and non-re-payment of the amount are also denied. The appellant herein, before purchase of the property from the second respondent herein, enquired regarding the encumbrance, if any on the property and the liability of the second respondent to pay any amount. Only after confirming that there are no encumbrances in the property and that there are no loans for the second respondent herein, the appellant purchased the property as a bona-fide purchaser for valuable consideration and is in possession of the property. The factum of not residing in his usual address to defraud the creditors, is denied. Both the respondents herein collusively filed the petition before the trial Court only to grab money from the appellant herein by creating a false Promissory Note. The first respondent herein has no right to challenge the sale in favour of the appellant. The first respondent is not entitled to any relief in respect of the property purchased by the appellant. There is no mention of any property in the petition. The second respondent has got other properties also and so, the I.P. is not maintainable. The second respondent herein has already executed a sale agreement on 31.10.2003 with one Thangaraj and the same was cancelled and the advance amount was repaid. Only then, the appellant purchased purchased the property from the second respondent on 28.09.2007. The second respondent has paid the advance amount after cancelling the sale agreement from the sale amount paid by the appellant. After purchase of the property, the appellant transferred the Patta in his name and is in possession and paying tax.

4. Before the trial Court, the first respondent herein was examined as P.W.1 and Exs.A-1 and A-2 were marked on his side. On the side of appellant herein, he was examined as R.W.1, besides R.W.2 and Exs.R-1 to R-6 were marked.

5. On consideration of the oral and documentary evidence, the trial Court dismissed the Insolvency Petition filed by the first respondent herein, against which, he filed appeal before the first appellate Court and the appeal was allowed, against which, the second respondent in I.P., had filed the present Civil Miscellaneous Second Appeal before this Court.

6. While admitting this appeal on 26.11.2021, this Court formulated the following substantial questions of law:

(a) Whether the lower appellate Court is right in law in setting aside the judgment in I.P.No.54 of 2007, particularly when the appellant is a bona-fide purchaser for valuable consideration and entitled for protection under Section 55 of the Provincial Insolvency Act, 1920 ? and

(b) Whether the lower appellate Court has properly appreciated the oral and documentary evidence in the case, particularly, Exhibits R1 to R4 ?

7. The learned counsel for the appellant submitted that the lower appellate Court failed to see that to seek a relief for setting aside a transfer made by an insolvent under Section 53 of the Provincial Insolvency Act, 1920, one must prove that it was a voluntary transfer made without consideration and not in good faith, whereas in the present case, the first respondent has himself admitted that the property was transferred for valuable consideration. Further, the lower appellate Court did not consider Section 55 of the Provincial Insolvency Act, which specifically protects bona-fide transactions and the appellant is entitled to protection thereunder. The lower appellate Court did not consider that even prior to filing of the Insolvency Petition, the appellant had purchased the property for valuable sale consideration, vide sale deed, dated 28.09.2007, whereas the Insolvency Petition was filed on 11.10.2007. The lower appellate Court is not correct in coming to the conclusion that the second respondent has

secluded himself from his usual place of residence. The notice in I.P.No.54 of 2007 was duly served on the second respondent, who entered appearance through his counsel. The finding of the lower appellate Court that the burden is on the appellant to establish that the second respondent possessed various other immovable properties, is wrong. The burden is on the first respondent to prove that the second respondent did not possess sufficient assets and that the debts were more than the value of the assets held by the second respondent herein. The first appellate Court did not consider that except the averments made in the petition filed by the first respondent, no material evidence is produced to prove that the property purchased by the appellant herein is worth more than the sale consideration of Rs.75,000/- and that the sale price was comparatively lower than the actual price.

8. The learned counsel for the appellant further contended that the lower appellate Court did not appreciate the fact that the respondent herein had not substantiated that the property purchased by the appellant is lesser than the actual market price and P.W.1 has categorically admitted in his cross-examination that he has not given the probable price of the property that had been sold in favour of the appellant. The first appellate Court has not considered that the first respondent has not issued any notice demanding payment of

Rs.1,40,000/- and thus, the lower appellate Court did not appreciate the fact that the respondents 1 and 2 herein have colluded with each other with an intention to defraud the appellant. Further, the lower appellate Court did not appreciate Exs.R-1 to R-4 in proper perspective. The appellant has purchased the property only after clearing all the previous encumbrances and he is a bona-fide purchaser for valuable consideration.

9. The reason given by the lower appellate Court that non-initiation of the alleged promissory note by the first respondent against the second respondent is not fatal and not a matter of fact to decide the Insolvency Petition, is erroneous and contrary to the settled principles of law. The duty of the Court is to arrive at a conclusion if there existed any debt payable by the second respondent to the first respondent. There is no basis for the lower appellate Court to set aside the sale deed dated 28.09.2007 marked as Ex.P-2 on the ground that it is not made with bona-fide intention.

10. It is the case of the respondents that the second respondent borrowed a sum of Rs.1,40,000/- on 12.11.2005 from the first respondent/creditor for his family expenses and promised to re-pay the same with interest @ 18% per annum. When he did not re-pay the amount, in order to defeat and defraud the

amount borrowed from the first respondent, the second respondent sold the property to the appellant, who knowing fully well that in order to defraud him, he purchased the property on 28.09.2007, whereas, the sale deed shows otherwise. Admittedly, the second respondent had borrowed Rs.1,40,000/- on 12.11.2005 and the appellant purchased the property on 28.09.2007. After borrowal of the amount, the first respondent filed Insolvency Petition before the trial Court. Though the trial Court failed to appreciate the evidence, the first appellate Court being the fact-finding Court, re-appreciated the evidence and set aside the order passed by the trial Court and allowed the appeal. The appellant has not proved that he is a bona-fide purchaser for valuable consideration without effecting notice. The second respondent borrowed money from the first respondent, and the same was due to be paid. Therefore, the second respondent committed the act of insolvency.

11. In support of his submissions, the learned counsel for the appellant relied on a decision of this Court reported in 2014 (4) LW 65 (R.Balamurugan Vs. Ponnusamy and others), in which, it was held as follows:

> "15. The learned counsel for the first respondent relied on the following decisions in support of his contentions.
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> 1. In AIR 1960 Supreme Court 70 (Ram NI.Ramaswami Chettiar and others Vs. The Official Receiver, Ramanathapuram at Madurai, in which, para 28 reads as follows:
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> > "28. That this is the intention of the legislature is also made clear by the other provisions of the Act vis-a-vis

transfers. The Act provides for three stages:(1) Transfers made before the presentation of the insolvency petition; (2) transfers made after the presentation of the petition and before the order of adjudication; and (3) transfers made after adjudication. A transfer made after adjudication is not binding on the Receiver. A transfer by an insolvent after the filing of the petition is also not binding on the Receiver subject to a protection clause. A purchase in good faith under a sale in execution (S.51(3)) and transfer intervivoce in good faith for valuable consideration (S.55) fall within the protected class of transactions. A transfer before the filing of the petition is binding on the Receiver unless it is annulled under Sections 53, 54, 54-A of the Act. The scheme of the Act in regard to transfers clearly demonstrates that transfers before the filing of the Petition are good unless they are annulled in the manner prescribed in the Act and even the doctrine of relating back of the order of adjudication does not reach them as they fall on the other side of the line."

... ...

17. ...

The fourth decision reported in 2012-5-LW 317 = 2012 (6) CTC 543 (R.Venkatesh Vs. Kalliammal and others), in which, in para 19, it is held as follows:

> "19. Further, Section 55 of the Provincial Insolvency Act, gives protection to the bona fide purchasers and the scope of Section 55 has been dealt with by the Honourable Supreme Court in the judgment reported in the case of Sankar Ram and Co. Vs. Kasi Naicker and others, 2004-1-LW 119 = 2003 (11) SCC 699, held as follows:-
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> > "... .... .
> >
> > .. We may add that Sections 28 and 55 must be read together harmoniously. As already noticed above, these Sections are designed and intended to serve different purposes. In the Proviso to Section 55 itself, there is reference to the order of adjudication and the presentation of Insolvency Petition are two different events essentially referring to two different dates. When in the same proviso, the legislature consciously made a clear statement as to two different dates, they should be given effect to. If the intention of the Proviso to Section 55 of the Act was not to protect even a bona

> fide transferee for valuable consideration without notice of presentation of Insolvency Petition before an order of adjudication was made, the legislature could have simply said--any transaction taking place after the date of presentation of any Insolvency Petition by or against the debtor instead of qualifying the transaction that takes place before the date of the order of adjudication. In this situation, the said Proviso which is intended to service a definite purpose should be given full meaning and effect. It is not possible to ignore a part of the provision, namely, "any such transaction takes place before the date of the order of adjudication". It stands to reason as well, that a bona fide transfer for valuable consideration without the knowledge of the presentation o the Insolvency Petition on the date of transfer of property is to be protected."

> 18. On a careful reading of the above said decisions relied on by the revision petitioner reveal that the revision Petitioner is a bona-fide purchaser for valuable consideration even prior to the filing of the Insolvency Petition and therefore the first respondent is not entitled to the above said relief and the trial Court has correctly rejected the prayer of the first respondent that to pass an order to vest the petition mentioned property with the official receiver. But the first appellate Court has wrongly set aside the above said order and directed to entrust the property to the official receiver and the above said finding is illegal and perverse as rightly pointed out by the learned counsel for the revision petitioner. Therefore the above said order passed by the first appellate Court is to be set aside and the revision Petition is to be allowed."

12. Heard the learned counsel for the appellant and perused the materials available on record.

13. As far as the first substantial question of law is concerned, the first respondent has not proved that, for filing Ex.A-1 to show that the second respondent borrowed Rs.1,40,000/- and executed Promissory note (Ex.A-1), neither the second respondent nor the appellant proved that the amount was repaid. Further, Ex.A-2 shows that the sale deed executed by the second respondent in favour of the appellant was dated 18.09.2007 after borrowal of the money. The appellant claims that he is a bona-fide purchaser for valuable consideration without notice of defective title or debt. When that is his case, it is for the appellant to prove that he is a bona-fide purchaser. The appellant has admitted during the cross-examination that he has not seen Encumbrance Certificate prior to the purchase of the property. Further, he said that in order to discharge the amount to the earlier agreement-holder, he paid the money and the sale agreement was cancelled, but whereas the recital of Ex.A-2 shows otherwise. Further, the learned trial Judge has stated that the first respondent has not proved that the second respondent had no other property.

14. It is settled proposition of law that the facts cannot be proved negatively and if the appellant states that the petitioner in the Insolvency Petition has some other property, it may be for them to prove it.

15. The first respondent filed the Insolvency Petition and only the second respondent has no other property and there is no material to show that other than the property covered under Ex.A-2, the second respondent has other properties also. Therefore, the trial Court rightly appreciated the evidence and held that the appellant was not a bona-fide purchaser and the appellant is not entitled for the benefit of Section 55 of the Provincial Insolvency Act, and therefore, the first appellate Court rightly re-appreciated the evidence and set aside the order of the trial Court and declared the second respondent as an 'insolvent'. Thus, the first substantial question of law is answered against the appellant and in favour of the respondents.

16. As far as the second substantial question of law is concerned, on a perusal of the records, it is seen that the trial Court has failed to appreciate the documents Exs.R-1 to R-4 properly, whereas the first appellate Court re-appreciated the evidence of both the appellant and the respondents. Though R.W.2 has stated only that he was a witness to the sale agreement with the third party in Ex.A-1, whereas he has not stated that he is a witness to the other documents and also he was not aware about the other facts. R.W.2 has also not stated that in his presence, the amount of Rs.50,000/- was given to the original agreement-holder, and therefore, even he has admitted the cancellation of an

agreement, and it is not stated that the amount was paid to the agreement-holder and he has also stated that he has not signed in Ex.A-2 sale deed. The appellant has not examined any person who was witness in Ex.A-2 sale deed in favour of the appellant. Therefore, though the trial Court failed to appreciate the evidence and facts, the first appellate Court re-appreciated the evidence and found that the appellant has not proved that he is a bona-fide purchaser and when once the appellant admitted that the property belongs to the second respondent, and he purchased the property from the second respondent, the said sale deed Ex.A-2 is only after the alleged loan transaction between the respondents.

17. Therefore, in the above circumstances, it is the duty of the appellant to prove that he is a bona-fide purchase without notice of loan transaction between the respondents. This Court does not find any perversity in re-appreciation of the evidence by the fist appellate Court. The second substantial question of law is answered against the appellant and in favour of the respondents.

18. Further, on a reading of Section 6(2) of the Provincial Insolvency Act, it is clear that in order to defeat the claim of the petitioner, if a debtor has sold

the property to a third party and the transaction takes place between the date of loan and the presentation of the Insolvency Petition, the Insolvency Petition is maintainable.

19. The decision relied on by the learned counsel for the appellant, extracted supra, is not applicable to the facts of the present case on hand.

20. Therefore, for the reasons stated supra, the CMSA is dismissed. There shall be no order as to costs. Consequently, C.M.P. is closed.

19.03.2024

Index: Yes/no
Speaking Order: Yes/no
Neutral Citation: Yes/no
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To

1. The Principal District Judge, Namakkal.
2. The Principal Subordinate Judge, Namakkal.
3. The Section Officer, V.R. Section, High Court, Madras.

P.VELMURUGAN, J

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Pre-delivery Judgment in
C.M.S.A.No.77 of 2021

Judgment delivered
on 19.03.2024