
(1970) 12 KAR CK 0005
In the Karnataka High Court
Case No : Misc. First Appeal No. 211 of 1970

A.T.P. Shivachandra

APPELLANT

Vs

Swarna Silk House and Others

RESPONDENT

Date of Decision : 01-12-1970

Acts Referred:

Provincial Insolvency Act, 1920 — Section 4, 73 (3), 9

Citation : AIR 1971 Kar 255 : (1971) 1 MysLJ 209

Hon'ble Judges : B. Venkataswami, J

Bench : Single Bench

Advocate : K.S. Narayan, for the Appellant; B.V. Sreenivasa Murthy, for the Respondent

Final Decision : Dismissed

Judgement

B. Venkataswami, J.—This is an appeal purporting to be u/s 75(2) of the Provincial Insolvency Act, hereinafter referred to as the Act. It is preferred by the respondent in Insolvency Case No. 12/67 on the file of the Second Additional District Judge, Bangalore, and is directed against an order made therein on 4-2-1970 whereby it was held that the insolvency application was maintainable.

2. The few relevant facts are as follows: The appellant was a partner of Swarna Silk House a partnership firm consisting of three partners. It is alleged that the appellant was only a working partner and as such entitled to draw not more than Rs. 3,000/-, a year from the firm, subject to a share in the profits. The respondents' case is that in a certain year the appellant drew Rs. 26,000/- and odd in excess of the amount permissible as per the agreement of partnership. It would appear, he had alienated the only property standing in his name in favour of his wife for a nominal consideration of Rs. 1,000/-. Presumably, it is this conduct on his part that is construed as an act of insolvency by the remaining partners for founding the present petition u/s 9 of the Act.

3. It is averred in the petition that the partnership firm was under a process of

voluntary winding up. Further, it is stated that on taking accounts for the year ending 22-10-1967, and on the information furnished by their auditor, amount that was actually found due from the appellant to the firm was Rupees 26,053-25. The appellant, therefore, is indebted to the extent of the aforesaid sum.

4. The appellant in his objections. Inter alia, has stated that he was not a mere "working partner", and the sum claimed is not due and, unless the accounts of the partnership are finally settled, the appellant cannot be held liable for any sum as a "debt" owed by him. He has also questioned the act of insolvency alleged and explained the circumstances attending the alienation of his only property in favour of his wife. He has also contended that in the above circumstances, the petition would not be maintainable.

5. On a preliminary objection taken by the appellant, as to the maintainability of the petition against a partner, and particularly when the accounts of the partnership have yet to be finalised, the learned District Judge held that it was a matter for evidence and as such the petitioner cannot be non-suited at this preliminary stage. The present appeal is directed against this order.

6. Sri K. S. Narayan, the learned counsel appearing on behalf of the appellant, has mainly contended that the debt attributed to his client was not a liquidated one and therefore not an ascertained sum. He also contended, rather faintly, that a petition in insolvency would not lie by one partner against another. Moreover, the sum in regard to which the appellant is said to be indebted is clearly subject to a final settlement of accounts and as such cannot be said to be ascertainable by adopting any simple and uncomplicated process. Since insolvency of a person, seriously affects a person's status in society, it must be strictly construed against the respondents. In short, the petition cannot be entertained u/s 9 of the Act.

7. In support of these submissions, he placed reliance on some decided cases. They are reported in the following volumes Mahadeo Prasad Vs. Sheo Dass, I shall briefly refer to these cases at a later stage of this judgment. Prima facie, it seems to me, the appeal is not maintainable. The appeal purports to be one made u/s 75(2) of the Act. This section expressly provides for appeals against any decision or order as is specified in Schedule I. Schedule I of the Act specifies the provisions, the decision or Order under which is appealable u/s 75(2) of the Act. For the present we are concerned with Section 4 of the Act. Indeed, this is the provision which is said to apply to the facts of the instant case, according to the learned Counsel for the appellant. The language of Section 4 clearly seems to point to decisions or orders on questions arising in case of insolvency. It seems to me, that the provisions of that section clearly relate to post-adjudication proceedings and not to a case where a person is yet to be adjudged an insolvent according to the Act, as in the present case. In saying this, the provisions of Section 75(3) of the Act cannot be overlooked. That Sub-section provides for appeals against any order other than those falling under Sub-sections (1) and (2) of Section 75. But, in order to avail of that provision, the condition to be fulfilled

is that the leave of the appellate Court ought to be obtained. In the Instant case, question, raised is not one falling u/s 4 of the Act. nor has any leave been obtained for lodging the present appeal. Hence, the present appeal is clearly not maintainable. Since this question was not debated at the Bar. I do not propose to rest the decision in this appeal on this ground alone.

8. I shall now turn to the merits of the matter. On behalf of the appellant some stress was laid on the opening words of Section 9 of the Act, which reads thus: "A creditor shall not be entitled to present an insolvency petition against a debtor unless--." The words "not be entitled to present," it is argued, would clearly import the idea that a petitioner should be barred at the threshold of the Court unless he satisfies all the three conditions of that section. I am not persuaded to accept this contention. It seems to me, that on a fair reading of the section, it merely lays down that a creditor will be entitled to maintain a petition only if he satisfies the conditions specified therein. In this view, the question of fulfilment of such conditions, is always a matter which can be determined only by evidence, including admissions made by parties in the pleadings. In case the conditions are shown not to have been fulfilled, the petition of the creditor will have to be thrown out. In the instant case, the lower Court in coming to the conclusion that the petition is not maintainable, has not concluded the question once for all. On the other hand, it has kept the Question open for further consideration, after all the evidence is recorded in the case. This, in my opinion, is clearly right and is in accord with the provisions of Section 9 of the Act as interpreted earlier.

9. But, the argument of Sri Narayan is that on the face of the pleadings and other circumstances, it would be clear that the main condition of an "existing debt" as enjoined by Section 9 of the Act would not be fulfilled. In support of this argument of his he invited attention to the correspondence between the parties and other relevant documents evidencing the partnership. In his view, debt attributable to the appellant is not in respect of a clearly ascertained sum. The matter was still being disputed by the appellant. At any rate, until all the partnership accounts are finally settled, it would not be possible to fix the liability of the appellant, in which event only it becomes a debt. Any possibility of a future determination of the exact liability of the appellant will not be of any consequence to maintain the present petition u/s 9 of the Act. I am also unable to accept his argument on behalf of the appellant.

10. I shall now briefly advert to some of the cases referred: In Ghisulal-Ganeshi Lal Vs. Gumbhirmull-Pandya and Another, it is observed that partners are not, as regards partnership dealings, considered as a debtor and creditor inter se until the concern is wound up or until there is a binding settlement of the accounts.

11. In (AIR 1939 Cal 3131, in referring to Section 9, it is observed that clauses (a), (b) and (c) of that section merely lay down three conditions on which a petitioning creditor is entitled to found his petition.

12. In P.N.V. Ratnasami Naidu and Others Vs. K.S.P.A. Subba Reddiar, a learned

Single Judge of the High Court at Madras, has observed as follows:

"It is only when the account is of a simple nature that it can form the basis of insolvency proceedings. If there are entries in the accounts which are open to serious disputes and the account is subject to counter claims and an enquiry is necessary to ascertain which items and which counter claims are true, then it is not a claim for a liquidated sum and the insolvency Court cannot accept such a claim as the basis for adjudicating a person insolvent."

13. In Mahadeo Prasad Vs. Sheo Dass, it is held that the relationship of partners in business could not be said to be that of a creditor and a debtor and that the amount which may be found due cannot be said to be a liquidated sum within the meaning of Section 9(1)(b).

14. Before proceeding further, it is useful to refer to a passage in Williams on Bankruptcy which has some bearing on the question whether a partner can maintain a petition in insolvency against another partner. At page 48 of the 17th Edn. of the Book, the learned Author observes thus:

"A partner could not formerly have presented a petition against his co-partner except in cases where he could have maintained an action at law for the debt; but, probably, since the Judicature Acts, an amount ascertained to be due from one partner to another in an action for dissolution of partnership or for an account would support a petition."

15. Even if the present case is considered in the light of the above enunciations, the appeal will have to fail As observed by me earlier, if Section 9 of the Act has to be held up as a bar to the petition, the question whether in fact the conditions enumerated therein have been fulfilled or not. will have to be investigated with reference to the evidence that may be adduced in the case. The stage in which the case is at present, it would be clear that one party has been asserting that the amount shown as due is an ascertained sum and, on the other hand, the other party has been contending that no debt at all is due. It is no doubt true, that one of the contentions is that even when a sum has been ascertained as due from a partner on account of partnership, it would not amount to a liquidated sum falling u/s 9(b) of the Act. But taking all the circumstances into consideration. I refrain from expressing any opinion on this question for the present. Moreover, as observed earlier, this question was only faintly touched upon by the learned counsel for the appellant. In any event, all the questions fall to be decided, if and when appropriate issues are raised in that behalf.

16. For the above reasons. I am of the opinion that this appeal deserves to fail, and is dismissed. No costs.