
(2011) 02 AP CK 0031

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Second Appeal No. 136 of 2005

Bachu Srinivasa Rao

APPELLANT

Vs

Yerramsetti Saraswatamma and Others

RESPONDENT

Date of Decision : 08-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Provincial Insolvency Act, 1920 — Section 6, 6(1)

Citation : AIR 2011 AP 335 : (2011) 4 ALD 119

Hon'ble Judges : G. Chandraiah, J

Bench : Single Bench

Advocate : V. Ch. Naidu, for the Appellant; V.S.R.A. Anjaneyulu and G. Venkateswara Rao, for the Respondent

Final Decision : Allowed

Judgement

G. Chandraiah, J.—Heard both the counsel.

2. Aggrieved by the judgment and decree dated 30.09.2004 passed by the court of VI Additional District and Sessions Judge, Fast Tract Court, Krishna at Machilipatnam in A.S. No. 9/1999, in confirming the judgment and decree dated 22.12.1998 passed by the court of Senior Civil Judge, Avanigadda in I.P. No. 2/1997, in declaring the 1st Respondent-Debtor, as insolvent, the 3rd party purchaser of the suit schedule property from the 1st Respondent/Debtor and her two sons i.e., Respondents 2 and 3, filed the present civil miscellaneous second appeal.

3. The parties shall be referred to as per their array in the Insolvency Petition.

4. The Creditor/Petitioner filed the petition u/s 6(1)(a) of the Provincial Insolvency Act, 1920, (for short "the Act") to declare the 1st Respondent - Debtor as "insolvent". His case is that the 1st Respondent borrowed an amount of Rs. 28,000/- from him under a promissory note dated 4.11.1996 (Ex. A-2), agreeing to pay interest at 12 per cent per annum. But she failed to discharge

the debt in spite of notice under Ex. A-3. Further, in the reply, Ex. A-4, the 1st Respondent denied the execution of promissory note. The 1st Respondent has life estate in the suit property by virtue of the original gift deed, Ex. A-5 dated 17.5.1956, executed by her husband, along with her sons, who are Respondents 2 and 3, in whose favour the vested remainder stands. They sold the property on 26.4.1997 under Ex. A-1 to the 4th Respondent, (third party purchaser), with an intention to delay and defraud the creditors. Hence, the Petitioner is filed on 24.7.1997 within three months, complaining that Ex. A-1 is an act of "insolvency" within the meaning of Section 6(1)(a) of the Act. Therefore, the Petitioner prayed to adjudge the 1st Respondent as insolvent and vest her property in the Official Receiver, Krishna for administration and discharge.

5. The Respondents 1 to 3 filed a common counter and the 4th Respondent also filed another counter affidavit. The Respondents 1 to 3 denied execution of Ex. A-2 promissory note. They contended that they sold the property to the 4th Respondent for good and adequate consideration and executed the original of Ex. A-1 and that there is no fraudulent transfer and there is no act of insolvency committed by 1st Respondent. The 4th Respondent also sought to dismiss the insolvency petition.

6. Based on the above averments, the trial Court framed the following issues for consideration:

1. Whether the Petitioner has right to present the petition?
2. Whether the 1st Respondent has committed an act of insolvency?

If so, whether she is liable to be adjudged insolvent?

7. In support of the case of the Petitioner, he got examined P.Ws. 1 to 3 and got marked Exs. A-1 to A-5. On behalf of the Respondents, the 1st Respondent was examined as R.W. 1 and no document was marked on behalf of the Respondents.

8. Appreciating the entire evidence, both oral and documentary, the trial Court answering both the issues in favour of the Petitioner, adjudged the 1st Respondent as insolvent.

9. Aggrieved by the same, the 4th Respondent, who is the third party purchaser from the 1st Respondent, filed the first appeal in A.S. No. 9/1999 on the file of VI Additional District and Sessions Judge, Fast Tract Court, Krishna at Machilipatnam. By judgment and decree dated 30.09.2004, the lower appellate Court dismissed the appeal and confirmed the judgment and decree of the trial court. Hence, the present second appeal.

10. The learned Counsel appearing for the Appellant contended that the creditor failed to prove that the debtor with an intention to defeat or delay his creditors, sold the suit schedule property and in the absence of such prove, which is required u/s 6(1)(b) of the Act, the debtor cannot be adjudged as insolvent. He stated that mere delay in payment of debt, cannot be a ground to file a petition

under the Act to declare the debtor as insolvent. He stated that the Appellant is a bona fide purchaser and is not a creditor. Relying on the judgment of a learned single Judge of this Court reported in Vadamala Sanjeevi Reddy Vs. K. Ellappa Reddy and Others, he contended that unless the ingredients of Section 6(1)(b) of the Act are satisfied, i.e., the sale is made with an intention to delay and defraud the creditors, the debtor cannot be adjudged as insolvent. He stated that the debtor, as per Ex. A-1 has 0.49 cents of immovable property and the same is sufficient to satisfy the debt under Ex. A-1 promissory note and without noticing this aspect, the court below erroneously declared the debtor as insolvent. He stated that mere transfer of assets by debtor is not per se an act of insolvency and if the debtor had sufficient assets remaining with him to discharge his debts, he could not be declared as insolvent. In support of this contention, he relied on the judgment of the High Court of Pirthi Vs. Budh Singh, and also on the judgment of our High Court in M. Sreeramulu v. P. Singayya 1967 (2) An. W.R. 329. He contended that the "intention to defeat or delay the creditors" as envisaged in the section, shall relate to whole body of creditors and it shall not be in respect of single creditor. It is also contended that the Official Receive did not follow the procedure. With these averments, the impugned judgment and decree of the court below is sought to be set aside.

11. On the other hand, the learned Counsel appearing for the Respondent/Creditor supporting the impugned judgments of the courts below contended that as the debtor with an intention to defeat and defraud the creditors, sold the property, the creditor filed the insolvency petition and the courts below by appreciating the material evidence on record in right perspective, concurrently adjudged the debtor as insolvent and there is no question of law for interference of this Court u/s 100 Code of Civil Procedure, and hence sought for dismissal of the appeal.

12. In view of the above rival contentions and the material available on record, the substantial question of law that arises for my consideration is - "When the specific contention of the creditor is that the debtor with an intention to delay and defraud her creditors, disposed of her property, whether the courts below are justified in adjudging the debtor as insolvent, without recording any specific finding with regard to her intention to delay and defraud the creditors, which is the requirement of Section 6(1)(b) of the Act and whether the appreciation of the evidence by the courts below is perverse on this aspect?

13. The case of the creditor is that the 1st Respondent borrowed an amount of Rs. 28,000/- from him under Ex. A-2 and in spite of demands, did not repay the amount and with an intention to delay and defraud the creditors, sold the suit schedule property to the third party (Appellant herein) and hence she has to be adjudged as "insolvent". The Respondents denied the averment of the creditor.

14. In the present case, though the creditor has filed petition u/s 6(1)(a) of the Act, has stated that the sale in favour of the third party purchaser by the debtor was with an intention to delay and defeat the creditors. The concept of intention

to delay and defeat the creditors, occurs in Clause (b) of Section 6(1) of the Act. Both Sub-clauses (a) and (b) of Sub-Section 1 of Section 6 of the Act are extracted as under to see which provision of law is to be invoked in view of the averments of the creditor:

6. Acts of insolvency (1) A debtor commits an act of insolvency in each of the following cases namely:

(a) If, in India or elsewhere, he makes a transfer of all or substantially all his property to a third party for the benefit of his creditors generally;

(b) If, in India or elsewhere, he makes a transfer of his property or of any part thereof, with intent to defeat or delay his creditors;

15. From a reading of the above provision it is clear that if the allegation is that the debtor transferred his property or of any part thereof, with intent to defeat or delay his creditors, the same falls under Clause (b) of Sub-section (1) of Section 6. Though the Petitioner has filed the Petitioner u/s 6(1)(a) of the Act, there are no pleadings to that effect that he transferred the property to a third party for the benefit of his creditors generally, curiously, both the courts found that the transfer under Ex. A-1 is an act of insolvency as defined u/s 6(1)(a) of the Act, because, admittedly R.W. 1 sold the property and discharged some debts only, but she did not sell the property for the benefit of all his creditors generally. In the absence of pleadings, any amount of evidence cannot be looked into. Hence, in view of the averments of the Petitioner with regard to intention of the debtor to delay and defraud the creditors, it is expedient to look into the material on record to see whether the said ingredient is proved based on evidence, to declare the debtor as "insolvent". This Court in *Sanjeevi Reddy v. Ellappa Reddy* (1 supra), while considering Clauses (b) and (c) of Sub-Section 1 of Section 6, held as under:

5. A careful reading of the Section, particularly the above said two provisions, would reveal that the Section is exhaustive with regard to what constitutes an act of insolvency. It is therefore plain that nothing can be considered as an act of insolvency Unless it can be brought under one or the other clauses of Section 6. Adjudging a person as insolvent results in bringing about serious consequences. It becomes therefore necessary to take particular care to see that the provision of law is observed strictly and correctly applied. The Section discloses that the condition precedent to adjudicate a debtor insolvent on the petition of a creditor is that the debtor must have committed one or the other of the acts of insolvency set out in Section 6. It is, therefore, necessary before he is adjudicated an insolvent that the facts alleged must constitute an act of insolvency within the meaning of Section 6.

16. In view of the above provision and the law laid down by this Court, it is necessary to examine whether the creditor could prove his averments with regard to the intention of the debtor to delay and defraud the creditor and whether the acts complained, would result in declaring the debtor as insolvent?

17. To prove the case of the Petitioner, he examined himself as P.W. 1 and deposed as per the petition averments and the witnesses examined on his behalf as P.Ws. 2 and 3, supported his case and deposed that Ex. A-2 promissory note was executed by the 1st Respondent. The 1st Respondent - Debtor denied the averments in the petition and in the cross-examination deposed that her family were in debt trap for the last five years and she has been borrowing from others to discharge the debts incurred by her son and for that purpose, she sold the land under Ex. A-1. She also deposed that still there are certain debts to be discharge. In her further cross-examination, she deposed that she has promised to P.W. 1 also that she will discharge the debt, which was incurred by her originally at Rs. 14,000/- after selling the land to 4th Respondent, but he did not wait and filed this petition. P.W. 1 obtained a promissory note for Rs. 28,000/- from her though he lent Rs. 14,000/- and that he filed the suit on the basis of the pronote only.

18. From a perusal of the evidence on record, there is no tangible evidence to the effect that the debtor made transfer of her property or of any part thereof, with intention to defeat or delay his creditors.

19. The courts below, have not framed any issue with regard to the averment of the Petitioner with regard to intention of the debtor with regard to delay and defraud the creditors and in order to invoke the said clause, the ingredients have to be proved. Therefore, when the averments of the Petitioner are not proved, even if there is transfer of property by the debtor, he cannot be declared insolvent. On this count alone, the impugned judgments of both the courts below are liable to be set aside.

20. For the foregoing reasons, the substantial question of law framed is answered in favour of the Appellant and the impugned judgments and decrees of the courts below are set aside and the appeal is allowed and consequently the I.P. No. 2/1997 is dismissed.

No costs.