

(1988) 11 KAR CK 0036
In the Karnataka High Court
Case No : C.R.P. No. 2833/1986

K. Vuikuntu Baliga and Others

APPELLANT

Vs

Pangal Nayak Bank Ltd.

RESPONDENT

Date of Decision : 07-11-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Provincial Insolvency Act, 1920 — Section 6(1)

Citation : (1988) 3 KarLJ 456

Hon'ble Judges : S. Rajendra Babu, J

Judgement

Rajendra Babu, J.-Pursuant to a decree made in O.S. No. 74 of 1968 on the file of the Civil Judge, Mangalore, at the instance of the respondent a notice was issued under Section 6A of the Provincial Insolvency Act, as applicable to the Mysore State (hereinafter referred to as "Act") seeking payment of money within 30 days in I.C. 48/79. Petitioners filed an application to set aside the said notice but no order was made on that application and the proceedings stood closed. Thereafter a petition was filed under Sections 6, 7 and 9 of the Provincial Insolvency Act for adjudication of the petitioners as Insolvents before the Principal Civil Judge, Mangalore, in I.C. No. 17 of 1980 and the same was allowed. Against the said order Miscellaneous Appeal No. 16 of 1984 was filed before the District Judge of Dakshina Kannada at Mangalore and the same having been dismissed this revision petition is filed. Though several contentions have been raised in this petition, it is sufficient to consider only one of them.

2. Before I take up the consideration of the contentions it is necessary to briefly survey the provisions of the Act. If a debtor commits an act of insolvency a petition can be filed under Section 7 of the Act to adjudge him an insolvent. Under Section 24(1)(c) of the Act one of the matters on which the court requires proof is that the debtor has committed an act of insolvency alleged against him. In the case of a petition presented by a creditor if the court is not satisfied with the proof of his alleged act of insolvency, it shall dismiss the petition as provided under Section 25(1) of the Act. Thus the insolvency court has no power to

adjudicate any person as insolvent unless he is a debtor and has committed an act of insolvency as defined in the Act. The foundation of jurisdiction for insolvency court to adjudge a person insolvent is act of insolvency. The acts of insolvency are enumerated in Section 6 of the Act. To the Act Section 6(1) was added by Mysore Act 7 of 1963. Section 6 in the Provincial Insolvency Act was substantially amended by adding sub-sections (2) to (5) and renumbering the existing Section 6 of the Act as sub-section (1). The explanation thereto remains unaffected. After the act as was amended by Central as stated above, the Mysore Insolvency Rules were amended which came into force in 1982.

3. Old Section 6(1) of the Act states that a debtor commits an act of insolvency if after a creditor has served a notice on him under the Act in respect of a decree or an order for the payment of any amount due to such creditor, the execution of which is not stayed he does not, within the period specified in the notice which shall not be less than one month, either comply with the requirements of the notice or satisfy the Court that he has a counter claim or set off which equals or exceeds the decretal amount he could not lawfully set up in the suit or proceeding in which the decree or order was made against him. Section 6A provides procedure regarding issue of notice and sub-section (2) of Section 6A states that such notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement, but if the debtor does not give such notice, he shall be deemed to have complied with the insolvency notice, if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein. Rule 5 of the Rules framed under the Act provides for the form in which notice could be issued and also that any person served with such notice, may, within the time allowed for compliance apply to the Court for sufficient reasons see fit to allow, apply to the court to set aside the insolvency notice on the ground that he has paid the amount claimed or furnished security thereof or on the ground that he has a counter-claim which he could not set-up in the suit or on any other ground would in law entitle him to have the notice set aside. In identical terms new Section 6(5) provides for similar reasons to invalidate the notice except for the last reason. Thus, in substance, there is no difference between the provisions in old Section 6(i) and new section 6(2) of the Act in regard to the issue of notice and service of notice and compliance thereof or the effects of non-compliance. What was provided in old Section 6(i) is provided in new Section 6(2) and (3) and old Section 6A becomes part of new Section 6(3). What was provided in Rule 5(9) becomes part of the Act under new Section 6(5). Therefore to constitute an act of insolvency there must be a notice issued under old Section 6(i) or under new Section 6(2).

4. In the present case, admittedly the notices in respect of the decree referred to earlier calling upon the debtors to satisfy the decree within the period of 30 days or to satisfy the court that he has a counter-claim or set-off has been issued in

the month of October 1979 and served on the first petitioner on 20.10.1979 and on 2nd and 3rd petitioners on 30-10-1979.

The learned counsel for the petitioners contended that period specified in the notice is only 30 days for compliance thereof and such specification of one month inasmuch as the month of October has 31 days. This aspect of the matter had not been raised either before the first court or before the appellate court, and for the first time raised before this court, but this question being one which goes to the root of the matter and does not involve any investigation of facts or collection of evidence, I permitted the same to be raised.

Therefore what is to be seen in this case is whether this notice is in conformity with old Section 6(i) or new Section 6(2) of the Act. Under the said provisions to constitute an act of insolvency service of Insolvency Notice and non-compliance thereof must be proved. A notice that has got to be issued in order to fall within the said provisions is that a creditor must call upon the debtor to comply with the terms thereof which shall not be less than one month. Month is not defined under the Act. But the same is defined under Section 3(35) of the General Clauses Act and Section 3(22) of the Karnataka General Clauses Act to state that a month shall be reckoned according to British Calendar. A calendar month is reckoned by looking at the calendar, and not by counting days. In computing a calendar month it is sufficient to go from one day in one month to the numerically corresponding day in the next, and to exclude from computation the day from which the month is calculated. In the ease of *Lakmayya v Harichandra* 1974 (2) Kar.L.J. 369 an order was made by the court that the rent due shall be paid within a period of one month from the date of the order. The order was made on the last day of September 1972 and the payment was made on the last day of October 1972. The Court held that the payment was within the time because the month expired only on the last day of the next month. Therefore the prescription of the period of 30 days in the notices in this case falls short of a month and in this view of the matter notices issued in this case are not in conformity with old Section 6(i) or new Section 6(2) and (3). The only act of insolvency complained of in this case is the non-compliance of the notice issued under old Section 6(i) or new Section 6(2) of the Act. Therefore there is great force in the contention raised by the petitioners that there is no act of insolvency on their part. Realising the difficulty of contending that the notice issued in this case, which is the foundation of action, is not in conformity with the provisions in that regard in the Act, the learned counsel for the respondent contended that: (i) invalidity of the notice, if any, can be raised only on grounds enumerated in the Act, and the debtor cannot raise any ground of invalidity other than enumerated in the Act; (ii) previous proceedings in I.C. 48/79 will operate as *res judicata*, and (iii) conduct of the petitioners in not raising such a ground in those proceedings will amount to a waiver or acquiescence in the jurisdiction of the court to disentitle them raise this ground.

It is contended by the learned counsel for the respondent relying on the decision

in the case of *Champalal v L.I.C.* AIR 1984 Cal 158 that a notice requiring payment of debt within a period of one month as provided under the Act could not be invalid as the shortness in the length of notice is not a ground provided in the Act for setting aside the notice. The ground for setting aside the notice, as slated earlier, is as provided under old Section 6A of Rule 5(9) of the old Rules or Section 6(5) of the new Act. But to attract the invalidity of the notice as stated in the provisions of the Act referred to by me earlier, the notice must be a valid notice issued under the provisions of the Act. When the condition precedent for the attraction of the said provisions of the Act is the issue of a notice which provides for compliance within a period of "not less than one month" having not been fulfilled such a notice cannot be read as a notice which requires to be invalidated under Section 6(5). Such a notice itself is inherently defective and cannot be treated as a notice as provided under the said provisions of the Act. Moreover the insolvency court cannot adjudge a debtor an insolvent unless he has committed an act of insolvency. When the notice issued is not in conformity with the provisions of law, non-compliance of such a notice cannot be the basis of action and the court has a duty to dismiss such a petition. Therefore with great respect to the learned Judge of the Calcutta High Court, I cannot agree with the reasoning that merely because the shortness of the length of notice is not mentioned as a ground in the Act to invalidate a notice, such a notice could become foundation to constitute an act of insolvency and I reject the first contention of the learned counsel for the respondent.

6. The learned counsel for the respondent next contended that, inasmuch as, in I.C. 48/79 the proceedings stood terminated in relation to notice, any invalidity of the notice cannot be now raised as the proceedings in that case would operate as *res judicata*. In order to constitute an act of insolvency the foundation for the action is issue of a proper and a valid notice which is not complied with by the debtor. But if there is a defect which is inherent in the notice itself the defect does not get absolved merely by earlier proceedings coming to an end. Moreover in those proceedings this question had not been adjudicated at all and therefore the earlier proceedings cannot operate as *res-judicata*. Hence the decision in *Ittyaviru v Varkey* (Sic) has no application to the facts and circumstances of the case.

7. It was lastly contended for the respondent that petitioners are estopped from raising this contention, inasmuch as such a contention has not been raised in I.C. 48/79 and the order passed in I.C. 48/79 was appealable and appeal not having been preferred on the same, it is not now open to the respondent to raise this contention.

When the validity of the notice had not been questioned on the ground of the inherent defect in the notice earlier either under old Rule 5(9) or under new Section 6(5) of the Act it cannot be held that such a conduct on the part of the debtor would amount to waiver or acquiescence for the court to found its jurisdiction on the act of insolvency.

The petition for adjudication of a debtor as an insolvent could be founded only upon act of insolvency and in finding out whether there is an act of insolvency on the part of the debtor or not it is certainly open to the court to look into the question whether the notice issued by the creditor or at his instance was valid one or not in circumstances not covered by Section 6(5) or Section 6A read with Rule 5(9) of old Rules. Therefore, I find no substance in the contentions raised on grounds of res judicata, waiver, acquiescence or estoppel.

This ground of invalidity of notice is sufficient to set-aside the order under revision and it is unnecessary to deal with the other contentions raised by the petitioners.

7. In the result, this revision petition is allowed.