

(1963) 07 AP CK 0008

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 573 of 1960

Kancherla Achiraju

APPELLANT

Vs

Kusumanchi Rayalu and Others

RESPONDENT

Date of Decision : 17-07-1963

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 99
Provincial Insolvency Act, 1920 — Section 79(2), 8

Citation : AIR 1964 AP 498

Hon'ble Judges : Gopal Rao Ekbote, J

Bench : Single Bench

Advocate : K. Krishnamurty, for the Appellant; Rama Chandra Murthy, for G. Balaparameswari Rao, for the Respondent

Final Decision : Dismissed

Judgement

1. This revision petition arises out of an application filed by the respondent-creditor, K. Rayulu, u/s 9 of the Provincial Insolvency Act, hereinafter called the Act, for adjudicating as insolvents the 2nd respondent herein which is a firm and the petitioner and respondents 3 and 4, who are the partners of the above-said firm. The central facts are as follows:-

It was alleged in the petition that the petitioner and respondents 3 and 4 are the partners of the firm which is the 2nd respondent here. The partners acting on De-half of the firm borrowed for the respondent-firm Rs. 13,000/- on 6-1-1951 and executed a promissory note which was subsequently renewed on 2-1-1954 for Rs. 16,962-9-0. They also borrowed a further sum of Rs. 5,500 on 4-1-54 for which another promissory note was executed in favour of the respondent. The partners did not pay that amount. Several individual acts of insolvency were alleged against the partners and a joint act of insolvency against all the partners in reference to a lorry belonging to the firm. On the basis of these acts of insolvency the respondent prayed that the firm as well as the three partners should be adjudicated insolvents. This petition was resisted by the petitioner and

the 3rd respondent. Respondent No. 4 remained ex parte. The substance of their defence is that they did not commit any act of insolvency within the meaning of the Act. They admitted the allegations made in the petition but stated that they never effected transfers with an intent to defraud or delay the payment of the debt due to the respondent. Their contention was that the transfers were made in bona fide discharge of the antecedent debts.

2. On these pleadings and after recording the evidence adduced by the parties the Additional Subordinate Judge, Kakinada, allowed the petition and adjudicated all the three partners and the firm Insolvent. The learned Subordinate Judge held that the petitioner has succeeded in proving not only the individual acts of insolvency but also the collective act attributed to all the partners in reference to the sale of a lorry belonging to the firm. It was found that these transfers were made with an intent to defraud the creditor-petitioner. Dissatisfied with that order the petitioner went in appeal before the District Judge, Rajahmundry, The 3rd respondent also filed a Memorandum of Cross-objections. The appeal as well as the Memorandum of Cross-objections were heard together. The learned District Judge dismissed the appeal as well as the memorandum of cross-objections concurring with the conclusions of the Subordinate Judge mentioned above. It is this view of the District Judge which is assailed before me in this revision petition.

3. Mr. K. Krishnamurthy, the learned Advocate for the petitioner contends that the firm cannot be adjudicated insolvent and in any case not for the alleged acts of the partners. His submission is that those acts were not enough to adjudicate the firm as insolvent. In support of this contention he relied upon a passage occurring at page 96 of the Law of Insolvency in India by D. F. Mulla, and a decision of the Madras High Court in V. Gopal Naidu Vs. Mohanlal Kanyalal and Others, The passage relied upon from Mulla is as follows:-

"There is no provision in the Provincial Insolvency Act, corresponding to Section 11(d) and Section 99 of the Presidency Towns Insolvency Act It is not clear whether the provision for making rules in Section 79(2)(c) of the Provincial Insolvency Act lets in By implication, in cases under the Provincial Insolvency Act, the provisions of law relating to the adjudication of partners and of firms under the Presidency-towns Insolvency Act. In any case it is desirable to reproduce those provisions in the Provincial Insolvency Act."

It is true that there is no specific provision in the Act corresponding to Section 11(d) and Section 99 of the Presidency Towns Insolvency Act. Section 79(2)(c) of the Act however provides for rules being made by the High Court as to the procedure to be followed where the debtor is a firm. In pursuance of the power vested as above Rule 28 appears to have been framed which is as follows:-

"28.(1) When any petition, notice or other document is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall and also his own signature in the following manner, "B and Co., by A. B., a partner in

the said firm."

2. Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the Partnership business there.

3. When a firm of debtors files an insolvency petition, the same shall contain the names in full of the individual partners, and, unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

4. When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

5. An order of adjudication shall be made against the partners individually.

6. The debtors shall submit a schedule of the partnership affairs and each debtor shall submit a schedule of his separate affairs."

4. This rule if compared with Sections 11(d) and 99 of the Presidency-towns Insolvency Act, it will be seen that the rule does not cover the ground mentioned in the above-said two Sections of the Presidency-towns Insolvency Act. Whereas Section 11(d) says that the Court shall not have jurisdiction to make an order of adjudication unless in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits, there is no such condition precedent for the exercise of jurisdiction under the said rule. Section 99 merely states that any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against in the name of the firm.

In the absence of provisions on the lines of Sections 11(d) and 99 a doubt is legitimately created as to whether an insolvency petition can be tiled by or on behalf of the firm as such. That doubt to some an extent is removed by Sub-rules 3 and 4 of Rule 28 extracted above. These provisions say what should be mentioned when a firm of debtors tiles an insolvency petition or when a creditor files such an insolvency petition against a firm. These provisions imply therefore on the lines of Section 99 that proceedings under the Act can be taken in the name of a partnership firm. When that is so, why should Sub-rule (5) of Rule 28 say that an order of adjudication shall be made against the partners individually? Does it imply that the partnership firm as such cannot be adjudicated insolvent? I do not think the implication of Sub-rule (5) is that a firm cannot be adjudicated insolvent. Not only such a construction is against the clear language of Sub-rules (3) and (4) of Rule 28 but it goes contrary to Section 8 of the Provincial

insolvency Act. That Section is in the following terms:

"No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force."

If the Legislature wanted that no insolvency petition can be filed against a partnership firm registered under the Partnership Act, there was no difficulty in mentioning it along with the corporation or associations or company specifically mentioned in Section 8. By necessary implication therefore it has to be inferred that the Legislature did not think such a prohibition necessary in case of partnership firms. As stated above partnership firm can be proceeded under the Act and petitions can be filed by or against a firm under Rule 28. I am not therefore prepared to say that Sub-rule (5) of the Rule 28 prohibits in any manner the adjudication of the firm as insolvent. Interpretation of Rule 28(5) contrary to the one stated above will immediately raise a question as to whether Rule 28(5) is not inconsistent with Section 8 of the Act and that it transgresses the limits set down in Section 79(2)(c) of the Act as it would not be a procedural matter to say that a firm cannot be adjudged insolvent. It would amount to legislate on the lines of Section 8 of the Act which cannot be said to be the function of a delegated legislator authority.

I need not express any concluded opinion on this aspect as in my judgment the true interpretation of Rule 28(5) is that its effect is not to prohibit the Court from adjudging a Firm as insolvent. As correctly observed by the learned author, Mulla, at page 96 extracted above, Sub-rule (5) of Rule 28 is ambiguous and it would be better to clarify, the position making it clear that a firm also can be adjudicated insolvent as is contemplated both under the Presidency-towns Insolvency Act as well as the Provincial Insolvency Act.

This construction of law, as I comprehend it, is not in any manner inconsistent with the decision cited by the learned Advocate for the petitioner. What the decision cited above decides is that the principle of Insolvency Law was that in order to adjudicate a man insolvent, the act of insolvency relied on must be some act which can be definitely brought home to him. An act of an agent, authorised by the principal and of which he has cognizance, can also bind the principal; but it cannot be laid down that in all circumstance the act of an agent closing down the principal's place of business should be treated to be the act of the principal. The decision in this respect must depend on the particular facts of each case.

In *Siva Reddi v. Official Receiver, Bellary* AIR 1937 Mad 13 the facts were that three brothers formed a partnership firm. The eldest brother was in complete charge of and had the full and exclusive control over the business of the firm. The eldest brother was adjudged insolvent and subsequently along with him the remaining two brothers were also adjudged as insolvents. The District Judge found that all the three brothers were in partnership and that the firm of which

they were the members was liable to be adjudicated insolvent. In the appeal the decision of the District Judge was questioned. While dismissing the appeal their Lordships observed that the eldest brother became the agent of his two brother-partners who became his principals within the meaning of Section 6, Explanation. Explanation to Section 6 of the Act makes it clear that for the purposes of that Section, the act of an agent may be the act of the principal.

The decision of the Madras High Court cited by the learned Advocate for the petitioner in support of his alternative submission is not inconsistent with the Explanation to Section 6. In order to find out whether the act of agent can be considered in matters of insolvency as the act of principal, it will have to be determined keeping in view the facts of each case. In this case there are two types of acts alleged against the firm, and its partners. One set of acts is the individual acts of the partners not in reference to the transactions connected with the firm but connected with the individual property. But the act of the transfer of a lorry is a joint act and is connected with the property of the firm. The individual acts of the partners therefore can be taken into consideration in order to consider whether the partners individually can be adjudicated insolvent, or not. But the joint act can certainly be taken into account when we consider the question whether the firm should be adjudicated insolvent.

Both the Courts below have found not only the individual acts as satisfactorily proved but the joint act also has been established. The contention of Mr. K. Krishna Murty is that on the basis of the individual acts which are not connected with the firm, the firm cannot be adjudicated insolvent. I consider this argument as free from any flaw. It is not, however, disputed that the partners can be adjudicated insolvent even on their individual acts of insolvency unrelated to the property of the firm, in this case however there is a joint act of all the partners in regard to the sale of the lorry. Mr. Krishnamurty submits that this act is not an act of insolvency because the purchaser who was made a party to the suit was subsequently abandoned. This does not appear to be so from the record. From the order sheet it is manifestly clear that in the petition the trial Court deleted the names of respondents 5 to 7 as they were found to be unnecessary parties. There is no question of abandonment as far as the transferee of the lorry is concerned.

5. Secondly it is argued that the total indebtedness and the assets of the firm were not taken into account, in order to find out whether the transfer of the lorry was made with an intent to defraud or delay the payment to the creditor. The trial Court has taken into account this also. It was found that the firm is indebted to the tune of Rs. 65,000/-, its assets being only of the order of Rs. 35,000/-. That apart, the appellate Court has gone into this question elaborately and has found that in transferring the lorry the partners intended to defraud the respondent herein. This finding being of fact I am not expected to revise it in revision. Even otherwise I am satisfied from the conduct of the partners that the lorry was transferred with a clear intention to defraud the creditor. The sale of

the lorry was not specifically denied in the counter. During the course of examination before the Court the attitude adopted by the partners was curious. It was neither specifically admitted that the lorry is sold, nor it is stated in the counter that the lorry is still with the firm.

In the absence of any explanation on the part of the partners as to what exactly has happened to the lorry and in case it is sold what has happened to the amount received, and in view of other evidence, the lower Courts were, in my opinion, not wrong in coming to the conclusion that the transfer of the lorry was made with an intent to defraud the creditor. I am therefore satisfied that a firm can be adjudicated an insolvent and that on the ground that individual partners have committed acts of insolvency they can be adjudicated insolvents and on the ground of joint act of insolvency of the partnership in relation to the partnership property the firm also can be adjudicated insolvent. Consequently the adjudication order passed by both the Courts below against the Firm as well as the partners will stand. This revision petition therefore is dismissed with costs.