

(1986) 03 KAR CK 0038
In the Karnataka High Court
Case No : C.P. No. 390/1983

M.N.R. Mallya and Co., and Others

APPELLANT

Vs

Syndicate Bank and Others

RESPONDENT

Date of Decision : 10-03-1986

Acts Referred:

Provincial Insolvency Act, 1920 — Section 28(1)(2)(4)

Citation : (1987) 1 KarLJ 106

Hon'ble Judges : K. A. Swamy, J

Judgement

Swamy, J.-The petitioners are the defendants 1 to 3 in O.S. No. 41/1979 on the file of the Civil Judge at Mangalore filed by the first respondent (Syndicate Bank). Respondents 2 and 3 are the defendants 4 and 5 in the said suit. The first respondent has filed the aforesaid suit for recovery of the mortgage debt from the petitioners (defendants 1 to 3) personally and from the assets of petitioners (defendants 1 to 3). Respondent No. 5 is defendant No. 6. The trial Court has passed the decree in the following terms:

"1. It is hereby declared that the amounts payable by defendants 1 to 3 to the plaintiff is the sum:

a) Rs. 2,76,506.50 together with future interest at 17% p.a. on Rs. 2,72,071.34 from 5-2-1979 (date of suit) till date of realization.

2. And it is hereby ordered and decreed as follows:

i) That the defendants 1 to 3 do pay into Court on or before the 3rd day of August, 1983 or any later date upto which time for payment may be extended by the Court, the said sum decreed in Clause 1(a) and (b) above.

ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such cost of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the first Schedule of the Code of Civil Procedure, 1980 the

plaintiff shall bring into Court all documents in possession or power relating to the charged mortgaged property in the plaint mentioned "A" Schedule property described here below in the hands of Official Receiver 6th deft, and all such documents shall be delivered over to the defendants or to such person as they appoint, and the plaintiff shall, if so required re-convey or re-transfer the said property free from the said mortgage and clear of and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom they claims and shall, if so required, deliver up to the defendants quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in its possession or power-relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs. Charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any shall be paid to the defendants or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of the equitable mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendants 1 to 3 for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such direction as it thinks fit."

2. During the pendency of the suit, the petitioners 1 to 3 (defendants 1 to 3) were adjudicated as insolvents and the 4th respondent herein who came to be impleaded as the 5th defendant in the suit as Official Receiver. As a result of adjudication under the Provincial Insolvency Act (hereinafter referred to as the Act). All the assets of the petitioners 1 to 3 including the assets concerned in the suit came to be vested in the 4th respondent (Official Receiver).

3. A preliminary objection is raised by first respondent-plaintiff that as the decree under appeal is passed against the mortgaged properties belonging to

petitioners-1 to 3 and there is no preliminary decree passed against them personally, as such having regard to the provisions contained in sub-sections (1) (2) and (4) of Section 28 read with Section 59(d) of the Act, it is only the Official Receiver who is entitled to file the appeal and not the petitioners.

4. As per the relevant portions of the decree re-produced above, there is no doubt that the preliminary decree is passed only against the assets of the petitioners 1 to 3 which have vested with the official Receiver. There is no personal decree passed against them. Sub-Sections (1)(2) and (4) of Section 28 of the Act and Section 59(d) of the Act are as follows:

"28(1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver is hereinafter provided and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

(3) xx xx xx

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of Sub-Section (2) shall apply in respect thereof.

xxx xxx xxx

Section 59: Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may-

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

(d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;"

From the aforesaid provision, it is clear that on the making of an order of adjudication, the properties of the insolvent vest with the Official Receiver and the insolvent will not have any right to deal with those properties. It is the Official Receiver who alone will be entitled to deal with those properties and satisfy the creditors either by sale of the properties or from the proceeds of the

properties received by way of income. Section 59(d) of the Act, imposes a duty on the Receiver not only to realise the property of the debtor and distribute dividends among the creditors entitled thereto with all convenient speed, but also empowers them to file a suit on behalf of the insolvent to recover the properties and also to continue the pending legal proceedings. That being so, it is not possible to hold that the insolvent is entitled to file an appeal relating to the properties which are vested with the Official Receiver (See: ILR 1966 Bombay, page 392-Chandulal Laxminarayan Aggarwal v Ramadaya Onkarlal Agarwal), and 1980 (1) Madras Law Journal, page 12-R. Rathnam v R. Kundai Velu).

5. However, Sri P. Viswanatha Shetty, learned Counsel for the petitioners, submits that the petitioners; are defendants 1 to 3 in the suit; and the preliminary decree in question is passed under the Code of Civil Procedure (hereinafter referred to as the "Code"), and it is appealable under Section 96 of the Code. Any party aggrieved by the decree irrespective of the fact whether the properties vest with the Official Receiver or not is entitled to prefer an appeal. It is further submitted that in case the appeal succeeds, to that extent the liability of the insolvent is reduced and the amount or the asset for disbursement among the creditors will increase. At the first blush the argument appears to be attractive, but on a close examination, the acceptance of such contention will lead to conflicting interest. Once the adjudication is made, the person declared as an insolvent, the properties of an adjudged insolvent vest with the Official Receiver who alone is entitled to prosecute the pending proceedings and initiate fresh proceeding, relating to such property or properties Otherwise, it may so happen that the insolvent may collude with the decree-holder in the appeal or with the opponent in any other fresh proceeding and may have the appeal or the fresh proceeding disposed of to the detriment of other creditors. Further, when the properties of the insolvent vest with the Official Receiver, no power is left with the insolvent. It is more so in a case where the decree is against the assets of the insolvent which have vested with the Official Receiver. Having regard to the provisions contained in Section 28(1)(2) and (4) and 5g(d) of the Act, it is not possible to hold that the appellants-who are adjudged as insolvents-are entitled to maintain the appeal.

6. For the reasons stated above, it is held that the appellants-defendants-having been adjudged as insolvents and the decree having been passed against their assets which have vested in the Official Receiver have no right of appeal. Consequently, they cannot also maintain the Civil Petition for permission to prosecute the appeal as indigent persons. It is, accordingly, dismissed.

Petition is dismissed