(2017) 11 AP CK 0019

In the Andhra Pradesh High Court

Case No : 847 of 2007

Ponamalla Koteshwara Rao and another — APPELLANT

Vs

A.V.Raja Gopal Rao (died) and others — RESPONDENT

Date of Decision : 13-11-2017

Acts Referred:

Provincial Insolvency Act, 1920, Section 37, Section 47, Section 27, Section 28, Section 43, Section 10(2), <a hre

Citation : (2017) 11 AP CK 0019

Hon'ble Judges : U. Durga Prasad Rao

Bench : SINGLE BENCH

Advocate : K.Aruna, G.Jhansi

Judgement

1. This Second Appeal is preferred by the appellants/respondent Nos.2 and 3 in I.P.No.56/1975 aggrieved by the Decree and Judgment dated 04.06.2007 in A.S.No.7 of 2004 passed by the VII Additional District and Sessions Judge (Fast Track Court), Vijayawada, whereby and whereunder the learned Judge allowed the appeal filed by the petitioners and set aside the order in I.A.No.5079 of 1991 in I.P.No.56 of 1975 on the file of II Additional Senior Civil Judge, Vijayawada, filed for delivery of schedule property.

2. The factual matrix of the case is thus: a) The case of the petitioners in I.A.No.5079 of 1991 before the Insolvency Court is that one Namburi Sridhara Rao was adjudicated as an insolvent in I.P.No.56 of 1975 and his properties were handed over to the Official Receiver, Krishna, Machilipatnam, for administration of estate of the insolvent. The schedule property was sold in public auction on 18.01.1980 subject to two mortgages. In the said auction held by the Official Receiver, A.V.Raja Gopal Raothe 1st petitioner, happened to be the highest bidder and auction was knocked down for Rs.1650/- subject to the above mortgages and he subsequently deposited entire sale consideration and also discharged the above mortgages and the said sale was also ratified by the proceedings of the

Insolvency Court on 14.10.1980

. b) It is the further case of petitioners that whenever 1st petitioner approached the Official Receiver to register the sale deed, he postponed the same on the ground that Urban Ceiling Authority has to accord permission for registering the document as the properties were covered under the agglomeration of Vijayawada Sub-registry and that he applied for permission. However, permission could not be secured as there was no follow-up action by Official Receiver. Subsequently, 1st petitioner suffered heart attack and his boy used to go to the office of Official Receiver and finally he was informed that adjudication orders were annulled under Section 43 of Provincial Insolvency Act (for short the Act) as per the proceedings of the Insolvency Court dated 07.03.1981. Then the 1st petitioner filed two petitions i.e, I.A.No.5660/1989 to set aside the annulment order dated 07.03.1981 and I.A.No.5661/1989 to direct the Official Receiver, Krishna to execute the sale deed and both the petitions were allowed on 26.06.1990 and thereafter the Official Receiver, executed the sale deed and registered on 22.08.1991 in favour of 1st petitioner.

c) It is further contended that on 07.09.1991, respondents 2 and 3 got issued legal notice to the 1st petitioner with all false and concocted allegations alleging that they have purchased 1900 sq.yards of site in R.S.No.14 of Machavaram with an old tiled house belonging to the insolvent from his wife and daughter by a registered sale deed dated 07.12.1987 and that they were in possession of the same since then. It is contended that the alleged sale deeds neither bind the 1st petitioner nor do they confer any rights or title over the schedule property in favour of respondents 2 and 3. Hence, the petition I.A.No.5079/1991.

d) The 1st respondentOfficial Receiver, Krishna filed counter and contended that what all done by him was under due process of law and the sale deed executed by him in favour of 1st petitioner is valid and binding and the sale deeds executed in favour of the respondents 2 and 3 by the wife and daughter of the insolvent were not valid and hence they need to be rejected.

e) The 2nd respondent by filing counter, contended that in I.P.No.56/1975, Namburi Sridhar Rao was adjudged as an insolvent and the said adjudication was annulled without imposing any conditions and without vesting the property to any person and hence the effect of annulling adjudication was to wipe out the effect of insolvency altogether and restoring the prior state and thereby, the property vested in the insolvent with retrospective effect. Sridhar Rao died on 27.10.1983 i.e, long after the annulment of adjudication leaving behind him, his wife Kanakadurga Tayaramma and daughter Dr.Durga Bhramara Voona Kumari. They sold the property on 02.12.1997 in favour of respondents 2 and 3 with a dilapidated thatched house, after obtaining the Urban Ceiling Permission and since then they were in possession and occupation of the same paying taxes and enjoying as their own. Hence, prayed to dismiss the petition.

f) Basing on the above pleadings, the Trail Court framed the following point for determination: Whether the petitioners are entitled for delivery of property as per sale deed executed by the Official Receiver in favour of 1st petitioner and for removing the constructions of the respondents 2 and 3 in the schedule property? g) During trial, PWs.1 to 4 were examined and Exs.A.1 to A.19 were marked on behalf of petitioners. RWs.1 to 3 were examined and Exs.B.1 to B.17 were marked on behalf of respondents.

h) It should be noted that pending I.A.No.5079/1991, the 1st petitioner died and his son was brought on record as petitioner No.2.

i) After hearing both sides, basing on the oral and documentary evidence, the Insolvency Court dismissed the petition on the observation that there was ample evidence on record to show that respondents 2 and 3 were in possession and enjoyment of petition schedule property even prior to Exs.B.1 and B.2registered sale deeds and that they are bonafide purchasers from the legal heirs of the insolvent.

j) Aggrieved, the petitioners filed A.S.No.7 of 2004 before the VII Additional District and Sessions Judge (Fast Track Court), Vijayawada, which was allowed and respondents 2 and 3 were directed to deliver the schedule property to the petitioners. Hence the instant Second Appeal by respondents 2 and 3.

3. While admitting the instant appeal, this Court framed the following substantial questions of law: 1) Whether the lower Appellate Court ought to have seen, once the I.P proceedings are annulled under Sections 43 and 45 of the Act, no subsequent proceedings can be entertained much less an application to set aside the annulment proceedings?

2. Whether the lower Appellate Court ought to have seen that the annulment under Section 37 is complete and property is not vested in any other person and on such annulment the rights over the property stand restored or reverted to the applicant who applied for insolvency?

4. Heard arguments of Sri C.Nageswara Rao, learned Senior Counsel for Smt. K.Aruna, learned counsel for appellants and Sri Bodduluri Srinivas Rao, learned counsel for Smt.G.Jhansi, learned counsel for respondent No.2. Respondent No.1 died vide cause title. Though notice to respondent No.3 was served, there is no representation. 5a. Fulminating the order of the lower appellate Court, learned senior counsel Sri C.Nageswara Rao appearing for appellants would argue when once the Insolvency Court by exercising its power under Section 43 of the Act, annulled the adjudication earlier made by it under Section 28, it will have no power to set aside the annulment on the application of a third party as it did in I.A.No.5660 of 1989. The only remedy for the debtor against whom annulment order was passed is to file a fresh insolvency petition with the leave of the Court under Section 10(2) of the Act. Contrary to it, the Court on the application filed by Raja Gopal Rao, a third party auction purchaser, set aside the annulment in I.A.No.5660 of 1989. Hence, the said order is nonest in the eye of law and annulment shall be deemed to be in force. b) Nextly, he would argue when the

annulment is in force consequences would follow under Section 37 of the Act and thereby, the schedule property which was sold in auction by the Official Receiver to Raja Gopal Rao would revert back to the insolvent Sridhar Rao, as the Court while passing the annulment order, did not make any specific order that the auction sale shall hold good and the property be retained by the auction purchaser. In that view, the sale deeds (Exs.B1 and B2) subsequently executed by the legal heirs of the un-discharged insolvent in favour of the appellants are valid and the appellants get clear title on the property. To buttress his arguments, he relied upon the following decisions.

1. Arora Enterprises Limited vs. Indubhushan Obhan

2. Tukaram Ramchandra Mane vs. Rajaram Bapu Lakule

3. Babu Ram vs. Indrapal Singh c) Finally, he argued the auction was held in 1980 and annulment order was passed in 1981 and thereafter, petition to set aside the annulment was filed by the auction purchaser with a delay of 8 years and in the meanwhile, the appellants have purchased the property in a private sale. Due to inordinate delay also, the auction purchaser do not deserve any relief. Without considering all these aspects the lower appellate Court erroneously allowed the appeal.

6. Per contra, while supporting the impugned judgment, learned counsel for 2nd respondent would firstly argue that the consequences of annulment have been clearly laid down in Section 37 of the Act as per which, the auction sale held by the Court or Official Receiver will be valid and the auctioned property will not revert back to the insolvent. Therefore, the auction purchaser will get absolute title on the said property. In the instant case, Raja Gopal Raoauction purchaser discharged the debts covered by the auction sale and deposited the balance amount and also stamp duty and there was no delay on his part. However, the Official Receiver postponed the registration of the sale deed on the ground that clearance from Urban Land Ceiling authorities has to be obtained. In the meanwhile, the annulment order was passed by the Insolvency Court. Having come to know it, the auction purchaser filed I.A.No.5660 of 1989 to set aside the annulment and I.A.No.5661 of 1989 to direct the Official Receiver to execute the sale deed. Learned counsel vehemently argued under Section 4 of the Act, the Insolvency Court has wide powers to pass necessary orders to do complete justice and accordingly, the Insolvency Court allowed both the applications. In the entire process there was no delay, muchless wilful delay, on the part of auction purchaser. Pending the above proceedings, the appellants have clandestinely purchased the schedule property in collusion with the legal heirs of insolvent. It was only a private sale which is void and hit by Section 37 of the Act, because, the property was already sold in auction long back and thereby the said property do not revert back to the insolvent or his legal heirs. Consequently, they have no right to execute the sale deeds in favour of appellants. Having known about the collusive sale the auction purchaser filed I.A.No.5079 of 1991 to deliver the property. Though the Insolvency Court erroneously dismissed the

said petition, the lower appellate Court rightly allowed the appeal. He relied upon the following decisions to buttress his argument that auction sale is not hit by annulment. 1. Wazirey vs. Mathura Prasad

2. Nizam Khan vs. Hukam Chand

He thus prayed to dismiss the appeal.

7. Substantial Question No.2: Admitted facts are that in I.P.No.56 of 1975 N.Sridhar Rao was adjudicated as Insolvent under Section 27 r/w 28 of the Act vide Ex.A2 dated 21.09.1978. In the adjudication order the Court while appointing Official Receiver to administer his estate, directed him to apply for discharge within one year. Consequent to adjudication the properties including the schedule property of the insolvent vested in the Official Receiver. Ex.A3sale list would show the Official Receiver sold the schedule property in public auction on 18.01.1980 and A.V.Raja Gopal Rao1st petitioner purchased schedule property in the auction subject to two mortgages. The adjudication was annulled under Section 43 by the Insolvency Court by its order dated 07.03.1981 since the insolvent did not apply for discharge. Thereupon, A.V.Raja Gopal Rao filed I.A.No.5660 of 1989 to set aside annulment order and I.A.No.5661 of 1989 to direct the Official Receiver to execute registered sale deed in his favour pursuant to the auction sale and both the petitions were allowed by the Insolvency Court on 26.06.1990 vide Exs.A6 and A7. Pursuant to aforesaid orders, the Official Receiver executed Ex.A8sale deed dated 22.08.1991 in favour of A.V.Raja Gopal Rao. While so, Sridhar Rao the un-discharged insolvent died on 27.10.1983 and the appellants purchased the schedule property from his legal heirs under Exs.B1 and B2sale deeds dated 07.12.1987. In this back drop, the crux of the case is whether the sale deed obtained by A.V.Raja Gopal Rao in an auction held by the Official Receiver is legally valid or the sale deeds obtained by the appellants in a private sale are valid. The answer to this question has relevance to the substantial questions framed by this Court. In this context Sections 10, 27, 28, 37 and 43 of the Act are germane for discussion. 8 a. Section 10 lays down the conditions on which the debtor may present an insolvency petition. Section 10(2) lays down that when once adjudication has been annulled owing to the failure of debtor to apply for discharge, or due to his failure to prosecute an application for the discharge, he shall not be entitled to present a fresh insolvency petition without the leave of the Court. b) Section 27 says that the Court while making an order of adjudication shall specify in such order the period within which the debtor shall apply for his discharge. Under sub-Section (27), the Court, if sufficient cause is shown, has power to extend the period within which the debtor shall apply for his discharge.

c) Section 28 speaks of effect of an order of adjudication. In substance, on the making of the order of adjudication, the whole of the property of the insolvent shall vest in the Court or in receiver and shall become divisible among the Creditors and thereafter, no Creditor shall, during the pendency of the insolvency proceedings, have a remedy against the property of the insolvent or commence any suit or other legal proceedings except with the leave of the Court. Further, all property which was acquired by or devolved on the insolvent after the date of the order of adjudication and before his discharge, except the property exempted under sub-section(5), shall forthwith vest in the Court or receiver, which can be dealt with under sub-section(2). The order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made.

d) Pursuant to the direction under Section 27, if the debtor fails to apply for discharge, the Court can annul the adjudication under Section 43. This Section lays down that if the debtor either does not apply for discharge within the period specified by the Court or does not appear on the day fixed for hearing his application for discharge, the Court may annul the order of adjudication or make such other order as it may think fit and if the adjudication is so annulled, the provisions of Section 37 shall apply.

e) Then Section 37 speaks of consequences of annulment which is pertinent in this case. This Section reads thus: Section 37. Proceedings on annulment. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor, who was adjudged insolvent, shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the Official Gazette and in such other manner as may be prescribed.

f) A close scrutiny of this Section would show, the sub-section (1) contains two limbs. The first limb would manifest that despite an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done, by the Court or receiver, shall be valid. The second limb lays down that subject to the first limb, the property of the debtor, who was adjudged insolvent, shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions as the Court may, by order in writing, declare. Therefore, under first limb, all the acts done by the Court or the receiver prior to the annulment, such as sales, dispositions of the property and payments duly made, shall hold good and they are valid and they will not be set at naught on the annulment order passed by the Court. Subject to the validity of the aforesaid acts done under first limb, the remaining properties of the debtor shall vest either in the person whom the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his right on such condition as the Court may, by order in writing declare. Thus, if the Court or receiver dealt with any of the properties of the insolvent between adjudication and annulment, such transactions shall stand valid irrespective of subsequent annulment of adjudication. The remaining properties are concerned, they vest in such person depending on the order of the Court and if no such order is passed, such property shall revert to the debtor to the extent of his right on such conditions as the Court may by order in writing, declare. The above are the consequences of annulment of adjudication. This legal position is discussed in many cases.

9 a. In Wazireys case (4 supra), it was held thus: The annulment of the adjudication under the conditions defined under Section 43, Provincial Insolvency Act, is intended as a punishment to the insolvent and cannot be used in his favour. The protection conferred on him by reason of adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. Where therefore insolvents property is sold by receiver with the sanction of the insolvency Court before the order of adjudication was annulled, the receiver has power to execute the sale deed even after the annulment.

b) In Nizam Khans case (5 supra), on a creditors petition, one Mehndi Khan was adjudicated as insolvent on 07.10.1936 and he was directed to apply for discharge within one year. On 12.01.1937, the official receiver filed a petition, in which he asserted that the alienation in question amounted to a fraudulent preference of the creditors in whose favour it had been made and he requested the Court to annul the transfer under Section 54. While-so, the insolvent had applied for discharge but on 09.2.1938, when the matter came up for hearing, he was absent and the Court thereupon annulled the adjudication under Section 43 of the Act but at the same time directed that his estate should continue to vest in the official receiver for the benefit of the creditors and the proceedings initiated under Section 53 should be continued. The transferees of the property effected by the proceedings under Section 53 contended that on annulment, proceedings under Section 53 could not be continued. Referring the various decisions, the Court ultimately held that the insolvency Court continues to have jurisdiction in this matter, the official receiver being the proper person to take control of any remaining estate where an adjudication is annulled under Section 43.

The above decision would thus show that with the annulment of the adjudication under Section 43, the properties would not automatically revert back to the insolvent as sought to contend by counsel for appellants in the instant case. On the other hand, the sales and dispositions already made by the Court or the receiver shall stand valid and in respect of the other properties, the Court order will prevail. Even the citations of the Apex Court relied upon by the appellants would in fact, more or less confirm the same position.

c) In Arora Enterprises Limiteds case (1 supra), the Apex Court no doubt held that the effect of annulling the adjudication is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. However, it should be noted that from the facts of the said case, it does not appear that the disputed property was already sold in auction either by the insolvency Court or by the receiver between adjudication and annulment. The facts would also do not disclose whether the insolvency court while annulling the adjudication passed any specific order in terms of Section 37 to the effect that the property be retained by the official receiver. In the absence of either prior sale or a specific order by the Insolvency Court, naturally the property will revert back to the insolvent with retrospective effect and there is no demur in it. This appears to be one of such cases.

d) In Tukaram Ramchandra Manes case (2 supra), the insolvent at first executed mortgage by conditional sale dated 22.01.1962 in favour of the appellants/ creditor. Thereafter on 08.01.1963, he executed a regular sale deed in favour of appellant/creditor. While-so, one of the creditors of the insolvent filed an insolvency petition against the insolvent and he himself also filed an insolvency application. The court adjudicated him as insolvent on 08.01.1965. In an application filed by official receiver, the Court declared that the sale deed dated 08.01.1963 was a collusive one. While-so, by an order dated 26.06.1971, the Insolvency Court passed order of annulment.

Subsequently, the undischarged insolvent filed Civil Suit 62/76 for redemption of mortgage on the ground that the subsequent sale deed executed by him was held to be sham. He also filed a petition under Maharashtra Debt Relief Act, 1975 for the relief of extinguishment of the mortgage debt. The appellant contested the suit and the said petition but they were allowed and debt was wiped out. The appellant went to the Supreme Court, wherein his main contention is that with the annulment of adjudication under Section 43, the sale deed executed by the insolvent revived and therefore, the debtor-creditor relationship was no more in existence and hence the question of debt being wiped out under Debt Relief Act does not arise. This argument was not found favour with the Apex Court which observed thus: Para 13: xx xx xx.We are afraid, the argument is not quite correct. In the instant case, the effect of the declaration (that the sale is collusive) was that the property vested in the Receiver because the order of appointment of Receiver was very much there. If no order was passed by the Court directing the property to continue to vest in the Receiver or if there was no other order passed by the Court directing the property to vest in any other person, the third result contemplated by said clause (1) is that it would revert back to the debtor. That means it would vest back in the debtor. The incident of vesting is not mentioned in the order because there is no order passed in that behalf. It could be, therefore, legitimately argued that it would vest in the debtor entirely.

The Apex Court dismissed the appeal.

e) Thus the ratio in the above decision is to the effect that the sales, dispositions and acts done by the Insolvency Court or the receiver shall stand valid despite the subsequent annulment of the adjudication. In that view, the declaratory order passed by the Insolvency Court prior to the annulment to the effect that the sale deed was a sham, stood valid despite subsequent annulment.

f) In Babu Rams case (3 supra), the Apex Court observed thus: Para 35: Summarising the legal position, the position is as follows. In the case of an annulment under Section 37 read with Section 43 of the Act, where the property is not vested in any other person and no conditions are imposed by the Insolvency Court, the property and rights of the insolvent stand restored or reverted to him with retrospective effect from the date of the filing of the insolvency petition and the insolvency gets wiped out altogether. All acts done by the undischarged insolvent between the date of the insolvency petition and the date of annulment get retrospectively validated. However, all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or Receiver, will remain valid.

It was clearly held that the effect of Section 37 r/w Section 43 is that where the property was not vested in any other person and no condition was imposed by the Insolvency Court, the property and rights of the insolvent stand restored or reverted to him with retrospective effect from the date of the filing of the insolvency petition and the insolvency gets wiped out altogether. However, all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or Receiver, will remain valid. Therefore, the dispositions and sales held by the Court or receiver before the annulment shall remain valid.

g) Applying the above precedential jurisprudence on the effect of Section 37 r/w Section 43 of the Act, it is clear that the in the instant case, auction sale held by the official receiver in favour of A.V. Raja Gopal Rao stood valid despite the subsequent annulment of the adjudication. Merely because the registered sale deed was executed by the official receiver sometime later, will not vitiate the auction sale in view of the clear legislative mandate shall be valid employed in Section 37(1) of the Act. Registration is only a consequential act. Further, in view of Section 47 of the Registration Act, 1908, the registration shall relate back to the date of auction. In that view, Exs.B.1 and B.2sale deeds obtained by the appellants are not legally valid for the reason that as discussed supra, even though annulment order was passed, the auction sale conducted by the official receiver stood valid and the schedule property did not revert back to the undischarged insolvent as contended by the appellants. Hence neither himself, nor his LRs could have executed sale deeds in favour of appellants. Thus, substantial question No.2 is answered accordingly against the appellants.

10. Substantial Question No.2: The auction purchaserA.V. Raja Gopal Rao filed I.A.No.5660/1989 to set aside the annulment order dated 07.03.1981 and I.A.No.5661/1989 to direct the official receiver to execute the sale deed in his favour and both the petitions were allowed on 26.06.1990. I.A.No.5660/1989 is concerned, in my view, the said order is bad at law because neither Section 43 nor any other provision of the Act empowered Insolvency Court to set aside the annulment on the request of a third party. The remedy against annulment is provided to the debtor in Section 10(2) of the Act. Hence the order in

I.A.No.5660/1989 cannot be sustained. Sofaras order in I.A.No.5661/1989 is concerned, the same is well within the powers of the Court in terms of Section 37 of the Act which says that despite the annulment, the sale held by the Court or official receiver shall be valid. Therefore, the Court was well within its power to direct the official receiver to execute sale deed in favour of A.V.Raja Gopal Rao. Accordingly, this substantial question is answered.

11. In the result, this Second Appeal is dismissed confirming the judgment and decree dated 04.06.2007 passed by the first Appellate Court in A.S.No.7 of 2004. No costs. As a sequel, miscellaneous applications pending, if any, shall stand closed.

