

(2011) 06 MAD CK 0351

In the Madras High Court

Case No : C.M.A. No. 1617 of 2010 and M.P. (MD) No. 1 of 2010

P.R. Pajus (Debtor), Proprietor, P.R. Karuppaiah Nadar and
Co., Trichy

APPELLANT

Vs

P. Uma Maheswaran and Others

RESPONDENT

Date of Decision : 29-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 1, Order 18 Rule 2, 151
Evidence Act, 1872 — Section 101, 102

Citation : (2012) 3 CTC 25 : (2012) 2 MLJ 550

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : R. Anandakumar, for the Appellant; J. Maria Roseline and K. Hema
Karthikeyan, for the Respondent

Final Decision : Allowed

Judgement

Ms. K.B.K. Vasuki, J.—This Civil Miscellaneous Appeal is filed against the order made in I.A. No. 550 of 2010 in I.P. No. 48 of 2004 filed under Order 18 Rule 1 and Section 151 C.P.C. directing the first respondent to begin the evidence. The parties are referred to in the order as per the rank given in the insolvency petition.

The petitioner/creditor filed insolvency petition against the first respondent for declaring him as insolvent and to appoint an official receiver to take over the properties belonging to the first respondent to administer the same. The petitioner has come forward with insolvency application on the ground that the first respondent is indebted to the petitioner and others to the tune of Rs. 2,59,00,000/- as per the particulars contained in "A" Schedule and the first respondent is owning movable and immovable properties worth about Rs. 1,48,85,000/- as per the particulars contained in "B" Schedule and the total liability of the first respondent exceeds the total assets owned by him and he entered into sale transactions with third parties in order to defeat the right of the

creditors and has thus committed an act of insolvent and is hence to be declared as insolvent.

2. According to the petitioner, the other respondents 2 to 15 are the persons to whom the first respondent is alleged to be indebted. The petition is seriously contested by the first respondent by denying creditor and debtor relationship between the petitioner and the first respondent or between either of the respondents 2 to 15 and by denying his liability to pay any money to either of the respondents. The suit filed by the petitioner for recovery of Rs. 5,00,000/- is also being seriously contested by the first respondent by denying the claim made in the suit. Among the so-called creditors arrayed as respondents 2 to 15 in the I.P. two of them died during the pendency of I.P. and others remained ex parte and I.P. was being contested by the petitioner and the first respondent. The petitioner has also during the pendency of I.P. filed I. As seeking order or injunction against the first respondent from alienating the property and ex parte injunction was granted and when the ex parte injunction was in force, the first respondent has also admittedly disposed of the property. While according to the petitioner, the sale transaction is effected during the pendency of insolvency proceedings with an intention to defraud the creditors and to defeat their right and is lacking bona fide, the first respondent has been seriously denying the same.

3. According to the first respondent/debtor the sale transaction is bona fide in nature and without any mala fide intention and it involves no element of cheating or intention to defrauding the creditors. It is his further contention that as the respondents 2 to 15 excluding the respondents who are not alive remained ex-parte there was no other particulars furnished to prove the money transaction between the petitioner and the other respondents 2 to 15 as mentioned in the petition and as the first respondent is allegedly indebted to the petitioner to the tune of Rs. 35,00,000/- and as the property in the hands of the first respondent as per the particulars mentioned in the "B" schedule is to the tune of Rs. 1,48,85,000/-, alienation of property referred to in the petition cannot be said to be to cheat the creditors and in the event of money suit being decreed in favour of the creditor, there are sufficient properties available to realise the money decree and the debtor has not committed any act amounting to act of insolvency and he cannot be adjudged as insolvent. With these pleadings, the petition is taken up for trial and at that time the petitioner/creditor has come forward with an application under Order 18 Rule 1 C.P.C. to direct the first respondent to first adduce his evidence to prove that the properties available in his hands are sufficient enough to discharge his liability if any.

4. The petition is seriously contested by the first respondent on the ground that it is for the petitioner/creditor to establish the existing debt between the petitioner and the first respondent and the commission of any act of insolvency on the part of the first respondent and the genuineness of his claim and unless petitioner/creditor makes out any strong case, the first respondent cannot be

called upon to disprove the case as mentioned in the main petition. The trial Court arrived at a conclusion that the first respondent borrowed money from the petitioner/creditor and he has effected sale transaction and the burden is hence upon him to prove that remaining properties in his hands are sufficient enough to discharge his debt and accordingly directed the first respondent/debtor to get into the witness box first and lead the case. Hence this appeal before this Court.

5. Heard both sides.

6. In order to decide the issue in hand the relevant provision of law to be looked into Order 18 Rule 1 C.P.C. which is a composite provision dealing with the right to begin a case in general, the Division Bench of our High Court in the judgment in *Bajaj Auto Ltd., Bombay v. TVS Motor Company Ltd., Chennai 2010 (6) CTC 225 : LNIND 2010 Mad 4331*, while dealing with the scope of order 18 Rule 1 and 2 C.P.C. has held that the right as defined in Rule 1 of Order 18 would not be a "right" and is essentially a legal obligation to prove the case. As per the interpretation given by the Division Bench of our High Court, the legal obligation to begin is upon the person who should prove the case. It is further observed therein that the general rule is the plaintiff should prove and should begin his case. The Division Bench of our High Court has in the same judgment proceeded to deal with the distinction between burden of proof and onus of proof and has held as follows:

"Burden of proof generally lies on a party who asserts a particular fact. In other words, It would be on a party whose suit would fail, if no evidence was let in. Onus of proof by a party would cease the moment opposite party admits the transaction. Burden of proof on the pleadings of a party, never shifts to the other party. The initial burden of proving a particular fact is always on the party who asserts it. When he produces evidence in support of his statement, onus would shift on the opposite party to adduce rebutting evidence to meet the case made out by the other party. In Civil cases, onus of proof is never fixed permanently, but it would fluctuate very frequently.

There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof.... It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

7. The Division Bench of our High Court, in the same judgment, in paragraph No.

31 referred to the judgment of the Supreme Court in Anil Rishi Vs. Gurbaksh Singh, wherein the Supreme Court has in paragraph 7 of that judgment held as follows at p. 35 of MLJ:

"7. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side."

8. In para 32 of the same judgment, the judgment of the Supreme Court in Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, is referred to, wherein the Supreme Court has in Paragraph 12 of its judgment held that "burden of proof lies upon the person who has to prove the fact and it never shifts, but the onus of proof shifts".

9. The other case Anil Rishi v. Gurbaksh Singh (supra) is also referred to in paragraph 34 of its judgment by the Division Bench of our High Court wherein the Supreme Court is of the view that elementary Rule u/s 101 is inflexible. In terms of Section 102, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the relief sought for by him.

10. The general principal as observed in Para 52 of the judgment of our Division Bench is that the plaintiff should win or lose his case on the basis of the case set up by him. The defendant got a right to insist that he should not be compelled to disclose his evidence first as otherwise the plaintiff would tune his case accordingly. When there is a deviation from the normal rule, naturally, it would result in injustice.

11. The facts involved in the present case is hence to be appreciated in the light of the above legal background. The petitioner/creditor has in his main petition come forward with the specific case that the first respondent is indebted to her to the tune of Rs. 35,00,000/- and he committed act of insolvency by effecting sale transaction only in order to cheat and to defeat and deprive the creditors of their right to realise the debt from the first respondent and the value of his assets is not sufficient enough to discharge his liability due to the petitioner and the respondents 2 to 15. The petitioner has filed the main petition along with two schedules "A" and "B". "A" schedule consists of the particulars regarding the borrowings of the first respondent from the petitioner and from the respondents and "B" schedule consists of the particulars about the movable and immovable properties owned by the first respondent and its value. As already referred to,

other respondents remained absent. The petitioner has except the particulars given in "A" schedule not produced any other evidence to prove the creditor and debtor relationship between other respondents on one hand and the first respondent. Insofar as her claim is concerned, the same is also now being seriously contested by the first respondent.

12. It is the definite case of the first respondent that he is not indebted to other respondents and the promissory note which is the subject matter of the suit filed by the petitioner/creditor is not supported by any consideration and pending suit no decision can be arrived at about the indebtedness of the first respondent either towards the petitioner or other respondents. The Insolvency Court has directed the first respondent/debtor to go into the witness box first on the basis that there is money transaction between the petitioner and the first respondent and the first respondent has sold his property before discharging his liability and hence the first respondent is to get into the witness box to prove that the remaining properties in his hands is sufficient enough to discharge his liability.

13. As rightly argued by the learned counsel for the first respondent/appellant, pending civil suit between the parties and pending-consideration of his defence on merits the insolvency Court ought not to have accepted the case of the petitioner that the first respondent is indebted to the petitioner to the tune of Rs. 35,00,000/- and the first respondent has sold his property and the remaining properties are not sufficient enough to discharge his liability. Before the first respondent is called upon to prove whether the properties available in his hands are sufficient enough or not to discharge his liability, there must be material to show that he is indebted to the petitioner and other third parties and the value of the debt is more than the value of his assets and inspite of the same he effected transactions with non-petition third parties and the same is not bona fide and with an intention to defraud the creditors.

14. In this case on hand though it is averred so in the petition, the pleadings so raised does not amount to evidence or proof as such, initial burden is always upon the petitioner to get into the witness box to speak about the money transaction between the petitioner and the first respondent about the liability and quantum of liability of the first respondent and to produce prima facie evidence to prove the same. The initial burden is certainly upon the petitioner to prove that any transaction effected by the first respondent is lacking in bona fide and the properties in his hands are (sic) not sufficient enough to satisfy his liability and only when the initial burden is discharged, the first respondent can be thereafter called upon to make out his case.

15. Here in this case, even according to the pleadings raised in the petition the first respondent is indebted to the petitioner only to the tune of Rs. 35,00,000/- whereas the value of the assets is nearly Rs. 1,50,00,000/- as such even without any evidence on the part of the first respondent it can be easily presumed that the same is sufficient enough to satisfy the liability of the petitioner. Viewing from many angle, the initial burden is upon the petitioner to get into the witness

box to prima facie make out his case as pleaded in the petition.

16. As a matter of fact our High Court in the judgment in Jaisankar v. Ramadevi 2010 (2) CTC 565 : LNIND 2009 Mad 2283 : (2010) 5 MLJ 248 under similar situation held that the petitioner/creditor should prove that the debtor has departed from dwelling house or usual place of business to invoke 9(1)(d)(ii) of the Presidency Towns Insolvency Act, 1909 and mere oral evidence that debtor was not available in her dwelling house or place of business whenever visited is not sufficient to invoke such provision and when the petitioning creditor not adducing evidence to prove that debtor had transferred her property with intent to defeat or delay her creditors, petition is liable to be dismissed and the petitioning creditor will have to necessarily make out a very strong case.

17. Applying the same view, this Court is of the considered opinion that in this case mere averments in the petition that he has transferred the property with intent to defeat the creditors is not sufficient enough to invoke the provision. It is for the petitioner to get into the witness box and to make out prima facie strong case in support of the averments so raised in the petition and as laid down by the Supreme Court in the judgments referred in the Division Bench of our High Court and in the judgment of the brother judge in the authority cited above. In that event, the order directing the first respondent to get into the witness box to begin the evidence is factually and legally unsustainable and the insolvency Court in doing so pre-judged the issue that there is money transaction between the petitioner and the first respondent and the first respondent has effected transaction with intent to deprive and delay the petitioning creditor, which is at this initial stage without any basis and without any evidence on the part of the petitioner and the same has resulted in injustice and is hence set aside. In the result, this civil miscellaneous appeal is allowed by setting aside the order dated 31.8.2010 made in I.A. No. 550 of 2010 in I.P. No. 48 of 2004 on the file of the Additional District and Sessions Judge (Fast Track Court No. 1), Tiruchirappalli. Further direction is issued to the Insolvency Court to dispose of the insolvency petition within three months from the date of receipt of the copy of this order. No Costs. Consequently, connected miscellaneous petition is closed.