

(1980) 08 KL CK 0001

In the High Court Of Kerala

Case No : Civil Revision Petition No. 1623 of 1978-G

Raman Pillai Arjunan Pillai

APPELLANT

Vs

Ponnayya Chettiar Chellaswamy Chettiar and Another

RESPONDENT

Date of Decision : 21-08-1980

Acts Referred:

Kerala Provincial Insolvency Act, 1956 — Section 9(1)
Limitation Act, 1963 — Section 29(2), 4

Citation : AIR 1981 Ker 15 : (1980) 2 ILR (Ker) 663

Hon'ble Judges : G. Viswanatha Iyer, J

Bench : Single Bench

Advocate : P. Krishnamoorthy, for the Appellant; M. Krishnan Nair, N.A.
Augustine and B. Gopakumar, for the Respondent

Final Decision : Dismissed

Judgement

G. Viswanath Iyer, J.—This revision petition is filed against the concurrent orders passed by the subordinate courts dismissing the petitioner's petition to adjudicate the first respondent an insolvent. The application was filed under Sections 7 and 9 of the Insolvency Act 2 of 1956. The act of insolvency alleged is a transfer of the A Schedule property by the first respondent debtor to the second respondent on 26-12-1974. The petitioner is a creditor of the first respondent under a kuri transaction. The first respondent defaulted the payment of future subscriptions and instalments due from 1-9-1974 was in arrears. The intention of the first respondent in executing the sale deed is stated to be to defeat and delay the realisation of the debt due to the petitioner. Passing of consideration is also denied and the transaction is stated to be one in fraud of creditors and without any legal effect. Originally the petition was filed before the Munsiff's Court on 13-3-1975. As that court found that it was not competent to entertain the petition it ordered on 9-4-1975 to return the petition for presentation before proper Court, on 9-4-1975. The petitioner got back the petition on 11-4-1975 and filed it in the Sub-Court on the same day. Though the first respondent had entered appearance he did not actively take part in the

proceedings. It was the second respondent who was contesting the petition. According to him the first respondent had pattuvaravu dealings in textiles and fairly large amount was due to him. In discharge of a portion of that debt the plaint property was sold to him on 26-12-1974. He was not aware of the existence of any debt to the petitioner and the transaction was not a fraudulent one to delay or defeat the creditors. He also contended that as the petition is filed beyond three months prescribed u/s 9 (1) (c) of the Insolvency Act the petition is not maintainable. The Sub-Court and the District Court on appeal accepted both these contentions of the second respondent and it is against that this revision petition has been filed.

2. The first point argued by the petitioner's counsel is that the lower courts are incorrect in their view that the provisions of Section 14 of the Limitation Act are not applicable to the petition filed for adjudication if that petition is filed beyond three months of the act of insolvency alleged. According to him Section 9 (1) (c) of the Insolvency Act prescribes a special period of limitation for a creditor to file a petition for adjudicating a debtor as insolvent and Section 29(2) of the Limitation Act 1963 will apply to such a case and under the latter provision Sections 4 - 24 inclusive shall apply as they are not expressly excluded by the Insolvency Act. According to the respondent Section 9 (1) (c) of the Insolvency Act is not a period of limitation, but a condition to be satisfied by the creditor to file a petition for adjudication. In this connection it will be useful to read Section 9 of the Insolvency Act :--

"9. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless--

(a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to give hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) The act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition:

Provided that where the said period of three months referred to in Clause (c) expires on a day when the Court is closed, the insolvency petition may be presented on the day on which the Court reopens.

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor."

The marginal note given to the section speaks of conditions to file an insolvency

petition and Section 9 (1) (c) speaks of act of insolvency having occurred within three months before presentation of the petition; In one sense a period of limitation is as much a condition precedent for enforcement of remedies in a court of law, but it does not cease to be a period of limitation. But the language of Section 9 (1) (c) conveys a different idea. The section itself says that a creditor shall not be entitled to present an insolvency petition unless the act of insolvency has occurred within three months before presentation of the petition. The petitioner-creditor must, on the day when he presents his petition have in view some act of insolvency which the debtor has committed within the preceding three months. In other words on the date he files a petition he has to see what acts of insolvency are available to him and he cannot make use of any act of insolvency which has been committed outside the period of three months as that ceases to be an act of insolvency. The rigour of this provision is relaxed only to a limited extent by the proviso which states that if the three months expire on a holiday the petition can be presented on the next day the court re-opens. This is because if the forum before which the petition can be filed is closed that is a situation over which the creditor has no control. However much he may be careful he will not be able to present the petition. So to that extent the condition is relaxed by the proviso. Further if Section 9 (1) (c) prescribes a period of limitation, by virtue of Section 29(2) of the Limitation Act. Section 4 of the Limitation Act will serve the purpose of the proviso to Section 9 (1) (c) and the proviso would have been redundant. A separate provision like the proviso suggests that Section 9 (1) (c) does not prescribe a period of limitation but a condition to be satisfied to enable a creditor to apply. Therefore there is no scope for the application of the provisions of the Limitation Act to a petition for adjudication filed by the creditor, I am supported in this conclusion by the decision of the Madras High Court in Trasi Deva Rao alias Ananthaya Vs. Pandit Parameshwaraya and Another, , Chenchuramana v. Arunachalam AIR 1935 Mad 857 and V.R.K.M. Kumarappa Chettiar Vs. K.M.V.R. Chidambaram Chettiar and Another, , by the Calcutta High Court . in Muradan Sardar Vs. Secretary of State, and by the Nagpur High Court in AIR 1948 385 (Nagpur) . In Chenchuramana v. Arunachalam AIR 1935 Mad 857 the principle is stated by Beasley, C. J. thus :--

"On the other hand, I am of the view that Section 9 (1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, On the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that only, what acts of insolvency are available to him; and he cannot make use of any act of insolvency which has been committed outside the period of three months, as that ceased to be an act of insolvency."

In this view the petitioner is not entitled to exclude the period during which the proceeding was pending in the wrong court. If that is not included the petition filed in the Sub-Court on 11-4-1975 is beyond three months of the alleged act of insolvency. The lower courts are therefore right in holding that the petition is not

maintainable.

3. For one more reason the petition filed by the petitioner to adjudicate the first respondent is challenged. The act or insolvency alleged is that the first respondent has transferred his property with intent to defeat or delay his creditors. He has not alleged in the petition that besides himself there are other creditors. A transfer of the property by the debtor to defeat a single creditor will not come u/s 6 (b) of the Act. After the evidence and at the hearing the petitioner sought to rely on another act of insolvency, namely, that the transfer is a fraudulent preference. It is doubtful whether the petitioner can rely on a different ground than that alleged in the petition to sustain the petition. No doubt the Andhra Pradesh High Court in Pydimarri Venkateswarlu Vs. Pydimarri Jalamma, held that the court is empowered u/s 6 to consider other provisions of law to sustain the petition. The burden of proof to make out a ground to adjudicate a debtor insolvent is on the creditor and it is a serious matter so far as the debtor is concerned. So unless the grounds alleged in the petition are comprehensive enough to cover one or other of the grounds, it will be highly improper to permit the creditor to rely at the hearing of any ground not alleged. Anyhow as the petition is liable to be dismissed on the first ground I do not want to express finally on this matter.

4. In the result the Revision Petition is dismissed, but there will be no order as to costs.