

(1957) 10 MAD CK 0007
In the Madras High Court

S. Basker and Co. by Managing Partner, M.S.P.S.
Sankaralinga Nadar

APPELLANT

Vs

M.T.V. Veerasikku Goundar and Others

RESPONDENT

Date of Decision : 21-10-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Contract Act, 1872 — Section 73
Provincial Insolvency Act, 1920 — Section 12, 34, 46, 9, 9(1)(b)

Citation : AIR 1958 Mad 379 : (1958) ILR (Mad) 404 : (1957) 70 LW 986 :
(1957) 2 MLJ 582

Hon'ble Judges : Subrahmanyam, J

Bench : Single Bench

Judgement

Subrahmanyam, J.—This petition is preferred against the Judgment of the District Judge, Mathurai, in C.M.A. No. 19 of 1954 confirming

the order passed by the Sub-ordinate Judge of Dindigul dismissing I.P. No. 1 of 1952.

2. The petitioner, as creditor of the respondents, filed I.P. No. 1 of 1952 that the respondent be adjudged insolvents. The learned Subordinate

Judge and the District Judge held that the debt due to the petitioner by the respondents was, on the petitioner's own allegations, not a liquidated

sum, and that, therefore, u/s 9(i)(b) of the Provincial Insolvency Act, V of 1920, the petitioner was not entitled to present the petition. The point is

whether the debt on the basis of which the petitioner sought the adjudication of the respondents is not a liquidated sums.

3. Since the issue as to the maintainability of the petition was heard as a preliminary issue in the Courts below, we should assume that the facts

bearing on that issue stated in the petition are true. The facts are these. The

respondents received Rs. 7,500 as advance from the petitioner in June, 1951 and agreed to supply a stated quantity of cardamom at the price stated in the written contract. The deliveries were to be made in November and December, 1951. The advance was to be adjusted towards the price payable for the quantities supplied. Similarly there was another contract entered into between the parties in July, 1951, under which the respondents received Rs. 3000 as advance from the petitioner and agreed to supply the quantity of cardamom stated in the agreement at the price stated in it and further agreed that the advance should be adjusted from time to time against the price of the cardamom supplied. There was no supply of cardamom either in November or December, 1951. In December, 1951, the defendants repudiated the contracts altogether. The defendants thereby broke the contracts and the breach caused the petitioner loss.

These facts stated in the petition, we should assume to be true.

4. We have to consider the question of the rights of the petitioner on the facts assumed to be true. His rights are: (i) to get back the sum of Rs.

10,500 given as advance-under both the contracts and (ii) to recover damages for breach of the contracts. In the petition, the petitioner stated that

the debt which entitled him to file the petition was the sum of Rs. 10,500 which was refundable to him. He said further that he was reserving his

right to recover damages for breach of the contracts. The learned District Judge held that, under Order 2, Rule 2, Civil Procedure Code, the

petitioner could not file two independent suits, one for the recovery of the advance of Rs. 10,500 and another for recovery of damages for breach

of the contracts and that, therefore, the debt due to the petitioner was not a liquidated sum enabling him to present a petition u/s 9 of the Provincial

Insolvency Act. The reading by the learned District Judge, of Order 2, Rule 2, of the CPC was. superficial. Let us assume that the petitioner

instituted, say, O.S. No. 10 of 1957, for recovery of the sum of Rs. 10,500 given as advance under the two contracts and that the petitioner stated

in the plaint in O.S. No. 10 of 1957 that he was reserving his right to recover damages for breach of contract. Could that suit be decreed ? The

answer is, yes. The petitioner may or may not be entitled to damages for breach of contract. He may not institute a fresh suit at all for recovery of

damages. All that the Court decreeing O.S. No. 10 of 1957 has to do is to see

that it does not sanction such reservation. If, after the petitioner obtained a decree in O.S. No. 10. of 1957, he instituted a fresh suit, say, O.S. No. 20 of 1957, for recovery of damages for breach of the contracts, such suit should be dismissed as barred under Order 2, Rule 2. The question whether the petitioner's statement in the Insolvency petition, namely, that he was reserving his right to file a suit for ascertainment of the damages suffered by him by reason of the breach of the contracts, would in fact, save such a suit for ascertainment of damages or would enable the petitioner, in the event of there being an adjudication in the petition, to prove his claim for damages u/s 34 of the Provincial Insolvency Act, did not arise for consideration in determining the petitioner's right to present the petition. Those questions would not arise for consideration until the petitioner filed such a suit or tendered proof. If otherwise the Court found that an order of adjudication should be made, the Court could, by express statement in its order, make it clear that the question, namely, whether the petitioner was precluded from thereafter proceeding to sue the respondents for damages or to prove the claim for damages, would have to be heard and decided when it arose.

5. The petitioner's right to recover the advance of Rs. 10,500 falls under a head of claim totally different from the petitioner's right to recover damages for breach of contract. *Rattamma v. Krishnamurthi* (1927) 54 M.L.J. 40 dealt with a claim for recovery of a sum of money paid as advance by a purchaser to the vendor. The lower Courts found that the transaction fell through owing to the plaintiff's default. There could therefore be no question of the plaintiff being entitled to recover damages. But the lower appellate Court decreed the return of the plaintiff's advance of Rs. 750. The High Court agreed with the lower Court in its view that the plaintiff was entitled to recover the advance paid. Since that was a case in which the plaintiff was himself in breach and could not claim compensation u/s 73 of the Indian Contract Act, the decree for return of the advance was not a decree for compensation for breach of contract. In other words the claim for refund of advance paid under a contract of sale is not a claim for compensation for breach of contract. On that point, that ruling has been followed in *Sundararama Iyer & Co. v. Murugesu Mudaliar* (1957) 1 M.L.J. 221.

6. I hold that the debt on the basis of which the petitioner sought the adjudication of the respondents was a liquidated sum within the meaning of that expression in Section 9(1)(b) of the Provincial Insolvency Act, and that the fact that the cause of action which enabled the petitioner to recover the debt was the same as the cause of action on which he could claim damages for the breach of the contracts did not disentitle the petitioner from maintaining the petition u/s 9(1)(b) of the Provincial Insolvency Act. The learned District Judge's order cannot be supported on the ground stated in his order.

7. In this Court a point not raised in the lower Courts has been taken by the learned advocate for the respondents, on which in my opinion he is entitled to succeed. It will be observed from the statement of facts made above that no debt became due to the petitioner by way of liability to refund the advance which the respondents had received; until after the commencement of November, 1951. The acts of insolvency alleged in the petition were committed in September and October, 1951. The result is that, on the petitioner's own allegations, no obligation on the basis of which a debt could be claimed had arisen or come into being when the acts of insolvency were committed.

8. The learned advocate for the respondents contends that a petition by a creditor cannot be maintained on the basis of a debt which came into being subsequent to the commission of the acts of insolvency alleged in the petition. There is no express statement to that effect in Section 9 of the Provincial Insolvency Act. Nor is there any express statement to that effect in the corresponding section of the English Bankruptcy Act, namely Section 4 of the Bankruptcy Act, 1914. But it has been consistently held in England that a person could not, as a creditor, file a petition for the adjudication of his debtor, unless the debt alleged to be owing to the petitioner had come into existence prior to the date of the commission of the act or acts of insolvency on which the petition is founded.

9. The learned authors of Williams on Bankruptcy (16th Edn., page 48) state: By the so-called common law of bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which the petition is founded.

That is to say, that rule of the Common Law, though not written into the section,

has always been read as part of the section. Since that view held by the Courts in England, namely, that the application of Section 4 was conditioned by the unwritten rule that the debts should have come into existence before the date of the commencement of the act of insolvency, was before the Legislature in India when it enacted Section 9 of the Provincial Insolvency Act and Section 12 of the Presidency Towns Insolvency Act, we should infer that the Indian Legislature intended that Courts in India too should construe those respective sections as conditioned by the same unwritten rule.

10. The learned advocate for the petitioner contends that, although there might be justification in applying that unwritten rule as imposing a limitation

on a creditor's right to present a petition under the Presidency Towns Insolvency Act, there is no warrant for thinking that a creditor's right to

present a petition under the Provincial Insolvency Act is so fettered too. The reason for the difference, according to the learned advocate, is that,

while under the Presidency Towns Insolvency Act as under the (English) Bankruptcy Act, the adjudication relates back to the date of the act of

insolvency, under the Provincial Insolvency Act, the adjudication relates back only to the date of the presentation of the petition. I am unable to see

how that circumstance makes any difference to the application of the rule that the debt should have been in existence on the date of the act of

insolvency. The circumstance that, in an adjudication under the Provincial Insolvency Act, the relation back does not go as far as to cover the

period between the act of insolvency and the date of presentation of the petition, makes it necessary for the Official Receiver to move the Court to

annul alienations made during that period, while under the Presidency Towns Insolvency Act and the Bankruptcy Act, such alienations do not

require to be set aside. But what that has to do with the rule which requires that the petitioning creditor's debt should have been in existence on the

date of the alleged act of bankruptcy it is not easy to see. The argument of the learned advocate for the petitioner might be valid, if it was a rule of

insolvency law in England and in India that no debt incurred after the effective date of adjudication could be proved in the insolvency. In that event,

it could be argued that, because under the Bankruptcy Act and the Presidency Towns Insolvency Act, the effective date of adjudication is the date

of the act of insolvency and because a debt incurred after that date cannot be proved in the insolvency, therefore, there has been evolved a rule that the debt which would entitle a creditor to apply should have been in existence on the date of the alleged act of insolvency. There is obviously no purpose in saying that a man could get a debtor adjudged insolvent on the basis of a debt which he could not prove in the insolvency. But there is no rule of law either in England or in India that a debt which came into existence subsequent to the effective date of adjudication cannot be proved in the insolvency. Under the English Act, a creditor may prove a debt incurred after the date of the act of bankruptcy provided he had no notice of such act. u/s 46 of the Presidency Towns Insolvency Act, even debts incurred subsequent to the date of the presentation of the petition and prior to the date of adjudication could be proved provided that, at the time of the incurring of the debt, the creditor had not had notice of the presentation of the petition. That is precisely the position also under the Provincial Insolvency Act. I am, therefore, unable to see any reason why, on this point as to the need for the debt to be in existence on the date of the act of insolvency, any difference should be made between a creditor presenting a petition under the Bankruptcy Act or under the Presidency Towns Insolvency Act and a creditor presenting a petition under the Provincial Insolvency Act. The principle of justice on which the Common Law of England is founded, that the petitioning creditor should have his debt in existence on the date of the act of insolvency, is as valid in India as it is in England. Its validity has indeed been recognised in *Muthiah Chettiar v. Lakshmi Narasa Aiyar* AIR 1921 Mad. 62 by a Bench decision of this High Court. It is true that the point is not discussed in that ruling. The learned Judges apparently considered the point good beyond discussion. The point is discussed by Bhide, J., who in *Chhibar Singh v. Mrs. Baines* AIR 1936 Lah. 800. followed the ruling of our High Court. I hold that, since the petitioning creditor's debt was not in existence on the dates of the acts of insolvency alleged in the petition, the petition is not maintainable.

11. The Civil Revision Petition is dismissed. The parties will bear their own costs in the Civil Revision Petition.