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(1974) 11 AP CK 0012

In the Andhra Pradesh High Court

Case No : A.A.O. No. 612 of 1972

T. Kuppuswamy APPELLANT

Vs

Meer Husafar Hussain and Another RESPONDENT

Date of Decision : 12-11-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 5
Provincial Insolvency Act, 1920 — Section 28(4), 59

Citation : AIR 1975 AP 212 : (1975) 1 APLJ 68

Hon'ble Judges : S. Obul Reddi, C.J;Madhusudan Rao, J

Bench : Division Bench

Advocate : T.H.B. Chalapathi, for R.V. Subba Rao and R. Prasad, for the Appellant; A. Gangadhara Rao, for the Respondent

Final Decision : Allowed

Judgement

S. Obul Reddi, C.J.—This civil miscellaneous appeal is directed against the order of the Principal Subordinate Judge, Kurnool, in O. P. No. 63 of 1971 refusing to grant leave to the appellant to file a suit against the respondents in forma pauperis. The ground on which the application was dismissed is that an undischarged insolvent has no locus standi to file a suit and that the official Receiver alone is the competent person to sue in view of Sections 28 and 59 of the Provincial Insolvency Act.

2. The case of the appellant is that he moved the Official Receiver (2nd respondent) to file a suit on his behalf against the Ist respondent; but the Official Receiver had refused to move in the matter. He was, therefore, left with no other alternative but-to file the application for permission to sue the Ist respondent in forma pauperis.

3. The defence of the Ist respondent is that the proposed action is barred under Order 33, Rule 5 (d-1).

4. What Order 33, Rule 5 (d-1) lays down is:--

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"The Court shall reject an application for permission to sue as a pauper where the suit appears to be barred by any law."

5. Section 28 of the Provincial Insolvency Act deals with the effect of an order of adjudication. Section 28(4) says:

"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."

The effect of an order adjudicating a person insolvent is, he ceases to have any right over his properties. The whole of his property vests in the court or in a receiver as provided and shall become divisible among the creditors. Sub-section (2) of Section 28 divests him of his rights to deal with his own property, the object being to prevent unnecessary interference with the work of the Insolvency Court and realisation of the assets of the insolvent.

6. The short question here is whether the action proposed to be brought by the appellant is in respect of ''Property'' which he claims to have acquired after he was adjudicated insolvent.

7. The expression ''property'', as defined in Section 2(d), includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. In his plaint, the appellant referred to an agreement with the Ist respondent. The Ist respondent approached the appellant, who has some experience in the building works, and asked him to undertake construction of certain portions of his house which required demolition and reconstruction. The Ist respondent asked him to reduce the cost of construction, and at the same time, to provide modem amenities so that the building may get good rents. It is averred by the appellant that he gave certain ideas and advised him to construct a double-storeyed modern type of building. His suggestions were accepted and he was asked to undertake the construction work, after getting the estimates prepared. The agreement was that the Ist respondent should provide him with funds to an extent of Rs. 73,000/- and the appellant was to buy the necessary material ana supervise the construction. The building was estimated to cost Rs. 1,24,450/-. The agreement between them was that the difference between the amount expended on the works and the amount estimated should be shared equally between the appellant and the Ist respondent. He, therefore, demanded his half share which worked out to Rs. 25,725/-. The Ist respondent evaded to comply with the demand and, therefore, the appellant issued a notice demanding the payment and, thereafter, filed the application under Order 33, Rule 1. In the reply by the Ist respondent to the notice of the appellant, he denied that there was any such agreement between him and the appellant or that he promised to pay any daily wages to the appellant. This alleged agreement is stated to be after the appellant was adjudicated insolvent.

8. What is now contended on behalf of the appellant is that the allegations in the

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plaint would show that the appellant is only asking for the remuneration payable to him for the services rendered by him under the terms of an agreement and a suit for recovery of wages or remuneration is not barred by the provision of Sections 28(4) and 59(d) of the Provincial Insolvency Act.

9. In Sriramulu Naidu v. Andalammal (1907) ILR 30 Mad 145, a Division Bench of the Madras High Court consisting of Arnold White, C. J., and Subrahmania Ayyar, J., held that an undischarged insolvent has, in respect of after acquired property, movable and immovable, a right against all the world except the Official Assignee and may sue to recover such property if the Official Assignee does not intervene.

10. In Dandamudi Ramarayudu Vs. Dandamudi Sitalakshmamma and Another, Varadachariar and Pandurang Rao JJ., held that, in a case where there was a personal decree against A with a charge on the property held by him his declaration as an insolvent during the pendency of the suit did not debar him from filing an appeal against the decree. The objection raised u/s 59 of the Act was held to be not well founded.

11. In Subbaiah Goundan Vs. Ramasami Goundan and Others, , Subba Rao, J. (as he then was of the Madras High Court) expressed the opinion that the Act does not affect the capacity of the insolvent to enter into contracts.

12. Therefore, on the facts of this case, it cannot be said that the mere claim for remuneration or payment in terms of a contract set up by him is the ''Property'' which he acquired as contemplated under Sub-section (4) of Section 28 so as to divest him of all rights.

13. Section 59 deals with duties and powers of receiver. Under Clause (d) of the said section, a receiver is empowered to institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent. There is no prohibition for a suit being filed by an insolvent in respect of properties which have not vested in the receiver. All that is necessary is that the receiver should be made a party to any such suit or proceeding. This is a case, as already noticed, where the receiver was also moved to file a suit for recovery of the sum claimed by the insolvent under the terms of an alleged contract. It is only in the event of a decree being passed in favour of the undischarged insolvent that the decretal amount will vest in the receiver under Sub-section (4) of Section 28.

14. In Abdul Rahman Vs. Nihal Chand, , Sulaiman, C. J. speaking for the Full Bench, held that, in a case where an insolvent filed a suit for money lent by him after adjudication and where the receiver had not intervened, that suit cannot be thrown out on the mere ground that the plaintiff is an insolvent.

15. The right of the insolvent in a case like this to institute a suit cannot cause any prejudice to the rights of the creditors or to the proceedings of the Official Receiver, for in the event of a decree being obtained, it is Official Receiver that would be entitled to execute the decree, for the ''property'' acquired under the decree vests in the official Receiver u/s 28(4).

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16. We, therefore, see no legal bar to a suit being filed by the appellant, an undischarged insolvent, in forma pauperis, more so when the Official Receiver had declined to discharge his duty under Clause (d) of Section 59.

17. In the result, we set aside the order of the Court below and allow the civil miscellaneous appeal, but in the circumstances without costs.

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