

(1935) 02 MAD CK 0056
In the Madras High Court

Thangatur Ramayya

APPELLANT

Vs

Katta Venkattannagari Sreenivasayya and Others

RESPONDENT

Date of Decision : 18-02-1935

Acts Referred:

Provincial Insolvency Act, 1920 — Section 25, 4

Citation : AIR 1935 Mad 634 : (1935) 42 LW 27

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This second appeal is from the decree of the Subordinate Judge of Ananfcapur dated 15th March 1929 in appeal from the decree of the District Munsif of Penukonda dated 25th January 1928 in a suit for establishing the plaintiff's right to attach certain properties in execution of the decree in O.S. No. 1051 of 1926, on the ground that the sale of those properties in favour of defendants 1 and 2 are void as being intended to defraud creditors. The suit was resisted on several grounds but the decision of both the Courts below was based entirely on the preliminary ground that the main question raised in the suit, namely whether the sales in favour of defendants 1 and 2 were intended to defraud creditors was res judicata by reason of the order dismissing I.P. No. 3 of 1925 in which the plaintiff was the petitioner and defendants 1 and 2 were respondents 4 and 5. In that petition the petitioner, the plaintiff in the present suit, sought to adjudicate defendants 3 to 5 in the present suit as insolvents, the acts of insolvency alleged against them being the sales of the plaint properties by them in favour of defendants 1 and 2. That petition was dismissed as the insolvency Court held that the sales could not be said to be fraudulent as the intention to defraud creditors was not established. It was contended that this order dismissing the petition in accordance with the finding that these alienations were not proved to be fraudulent prevents the plaintiff from raising the same question in the present suit against the same parties. This contention was accepted by both the Courts below and the suit was dismissed.

2. In this second appeal the only point that is argued is that the decision of the Courts below that the question whether the sales were fraudulent or not is res judicata is not correct, and that the decision of the insolvency Court on a petition for adjudication has not the force of res judicata in a suit of this kind. I have no doubt, and the point is not in dispute, that, if the decision of the insolvency Court is one that falls within the purview of Section 4, Provincial Insolvency Act, such decision would be res judicata as Sub-section 2 of that section clearly states that such a decision shall be final and binding for all purposes as between the debtor and the debtor's estate on the one hand and all claimants against him or it and all persons claiming through or under them or any of them on the other hand. The question is now raised as between persons claiming under a debtor and a person claiming against a debtor. The question however is whether the decision in the present case, namely the order dismissing the petition for adjudication, is a decision which falls within the purview of Section 4. It is clear from Section 4 that it relates only to decisions on questions which arise in a case of insolvency. Prima facie, there can be no case of insolvency unless there is an adjudication. At the stage when an application for adjudication is tried questions of title to property as between the debtor and others do not arise for determination. It is clear from Section 25, Provincial Insolvency Act, that where, as in this case

a petition is presented by a creditor, and the Court is not satisfied with the proof of his right to present the petition, or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor, that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

3. In the present case the Court was not satisfied with the proof of the alleged acts, of insolvency and it was for this reason that the petition was dismissed.

4. No doubt some of the alleged acts of insolvency were the fraudulent alienations pleaded in the petition. But it is one thing to say that the Court is not satisfied with proof of the fraudulent nature of the alienations, and another thing to say that the Court has decided that they were not fraudulent alienations. The question whether any alienation by a debtor is fraudulent or not is not one that has to be, or can be decided by the insolvency Court before adjudication. That question can be decided only after adjudication, and that too, only on application of the Official Receiver or when the Official Receiver is unwilling to act, of a creditor, or other person who is authorized by the insolvency Court to do so. The incidental determination of this question for the purpose of deciding whether adjudication should be ordered or not cannot be regarded as a final determination.

5. A considerable number of authorities were cited in the course of argument and it is perhaps necessary that I should make a brief reference to them. The case reported in *Narayana v. Hardeth Rai* 1920 Nag 97 which is no doubt in point, proceeds entirely on the basis of the decision in the earlier case, *Ram Narain v. Durga Dat* (1912) 55 PR 1912; the latter however was a case to which the

Insolvent's Debtor's Act (11 and 12 Vic, Chap. 21) applied, and there was in that case an order of discharge discharging the debtor from all his liabilities, and that order was certainly a decision which would fall within the purview of Section 4, Provincial Insolvency Act, and would therefore be final. On the other hand, the decisions contra are those in *Ketokey Charan v. Sarat Kumari Dabee* 1917 Cal 39, in which a Bench of three Judges held that though the adjudication involved a decision about the claim of the petitioning creditor such decision was not a final decision and the Official Assignee could go behind it; (2) *Chithammal v. Ponnusamy* 1926 Mad 363, in which it was held that a decision u/s 56(3) of the Act would not be res judicata. As regards *Pita Ram v. Juhar Singh* 1918 All 346, what is relied upon is only an obiter dictum which was doubted in the later case in *Irshad Hussian v. Gopinath* 1919 All 229, and also in *Beni Madhab v. Abdul Razack* 1933 Cal 673.

6. The ruling in *Lalji v. Bansidar* 1933 Nag 373 is not of much assistance because that is merely to the effect that a decision u/s 4 of the Act is res judicata. Considerable reliance has been placed by the appellant's advocate on the observations contained in the case reported in *In Re Vitoria Ex Parte Vitoria* (1894) 2 QBD 387. These observations show that the jurisdiction of the adjudicating Court is only to decide whether a case has been made out for adjudication, and that the decision on a petition for adjudication does not conclude the matters in dispute between the petitioning creditor and debtor.

7. After careful consideration I am of opinion that the decision now relied upon, namely, the order dismissing I. P. No. 3 of 1925, does not constitute res judicata in the present suit and that it is not therefore a bar to the hearing of the suit on its merits. It follows from this that the appeal must be allowed and the decrees of the Court below set aside and the suit remanded to the trial Court for disposal according to law on the merits. The appellant is entitled to his costs in this Court and in the Court below from the contesting respondents 1 and 2. He will be entitled to refund of the court fee paid on the memorandum of second appeal. Costs in the trial Court will abide the event and be provided for in the revised decree of the trial Court.