(2022) 04 OHC CK 0032

In the Orissa High Court

Case No : A.H.O. No.17 Of 1994

V. Ravi Kumar Gupta And Others — APPELLANT

Vs

A. Subha Rao (Since Dead) Through Lrs And Others — RESPONDENT

Date of Decision : 06-04-2022

Acts Referred:

Provincial Insolvency Act, 1920 — Section 9, 37, 41, 43, 75(3)
Code of Criminal Procedure, 1973 — Order 23 Rule 3

Citation : (2022) 04 OHC CK 0032

Hon'ble Judges : Dr. S. Muralidhar, CJ;A.K. Mohapatra, J

Bench : Division Bench

Advocate : Budhadev Routray, J.Biswal, Sidhartha Mishra

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. This appeal is directed against an order dated 6th January, 1994 of the learned Single Judge of this Court allowing M.A. No.274 of 1983 filed by the Respondents under Section 75(3) of the Provincial Insolvency Act, 1920 (PI Act). The said appeal in turn was preferred by the Respondents herein against an order dated 13th April, 1983 passed by the learned District Judge, Ganjam, Puri in insolvency proceedings.

Background facts

2. The background facts are that insolvency proceedings were initiated under Section 9 of the PI Act on 9th November, 1933 by Shri N. Linga Raju to declare Shri A. Appalanrasayya Chetty (A.A. Chetty) and his son Shri A. Rama Rao as insolvent. The other creditors whose names were disclosed in the proceedings included Shri A. Buchaya Chetty, father of Shri A. Subba Rao (Respondent No.1 herein) who was the Appellant No.1 in M.A. No.274 of 1983. Shri A. Buchaya Chetty was a secured creditor.

3. On 16th August, 1934 Shri A.A. Chetty was adjudged as an insolvent. However, the application against his son Shri A. Rama Rao was dismissed. A vesting order was passed in favour of the receiver Shri D. Rath, Advocate.

4. Shri A.A. Chetty, who had been adjudged as the insolvent did not apply with the Court for an order of discharge within the period specified before the Court as required under Section 41 of the PI Act. Accordingly, the Court passed the order of annulment under Section 43 of the PI Act. A further order was passed by the Insolvency Court under Section 37 of the PI Act to the effect that the properties of the insolvent shall vest with the receiver, who as 'appointee' was to dispose of the same and distribute the sale proceeds among the creditors with the sanction report.

5. Shri A.A. Chetty had, six years before initiation of the above insolvency proceedings, executed a sale deed in respect of certain properties in favour of his wife on 4th October, 1927. In 1933 Shri A.A. Chetty's wife brought forth a suit being O.S. No.58 of 1933 for declaration of title to and possession over the lands and houses conveyed to her under the sale deed. By a judgment dated 4th August, 1942 a Sub-Judge held that the sale deed is not a bona fide transfer for consideration but was a nominal transaction created with a view to defraud the creditors. It was held that the properties continued to belong to Shri A.A. Chetty and his son Shri A. Rama Rao.

6. The appointee in whom the properties had vested under Section 37 of the PI Act applied to the Court in January, 1943 praying that he should be put in possession of the properties covered by the above sale deed as they were vested in him and that he was obstructed from taking possession thereof. This application was allowed by the District Judge. In this application the District Judge ordered that the said 'appointee/receiver' should take joint possession of the property with Sri A. Rama Rao. Some properties which had in the meanwhile been sold in auction or had been mortgaged were left out.

The Patna High Court order

7. Appeal No.31 of 1943 was filed in the High Court at Patna by Shri A. Rama Rao against the above order of the District Judge. The contention was that after the order of annulment the Insolvency Court ceases to operate as such and, therefore, no order of possession could have been passed under Section 37 of the PI Act. The appeal was dismissed by the High Court at Patna by the decision in Atmakuru Rama Rao v. Digambar Rath AIR (34) 1947 Patna 239. The High Court held that Section 37 of the PI Act did not have the effect of continuing the insolvency proceedings for all purposes. However, the appointee under Section 37 of the PI Act had all the powers implied by the vesting order to realize and distribute the debtor's property in accordance with the PI Act, thereby carrying out the directions of the Insolvency Court. Therefore, although by an order of annulment, the receiver had ceased to function as such, the property had legally vested in him and therefore, he was entitled to ask for possession of the

insolvent's property if the insolvent had been deliberately obstructive by some other proceedings.

Proceedings in the Insolvency Court

8. Shri A.A. Chetty died in 1950. Fourteen (14) years later Shri A. Rama Rao filed a petition to be included as one of the creditors in the schedule of creditors of the insolvent on the strength of a decree that he had obtained in the meanwhile in a suit for partition O.S. No.5 of 1935 in which he had claimed for half share in the property allotted to his father. The Insolvency Court allowed him to be arrayed as one of the creditors. An order dated 31st August, 1966 was passed by the Insolvency Court holding that there were some creditors who were to get the dues from the half share of the insolvent alone and some other creditors who were to get their dues from Shri A. Rama Rao by virtue of some decrees in relation to which execution cases had already been filed.

9. The Insolvency Court directed that from the sale proceeds in the sum of Rs.44,500/- from the two houses forming part of the insolvent's estate, Shri A. Rama Rao was entitled to Rs.22,250/-for his 8 annas share. The remaining half of the sale proceeds was directed to be distributed among the creditors of the insolvent in proportion to their respective claims. This was to take place only after the receiver and Shri A. Rama Rao duly executed and registered the sale deed and reported the fact to the court. By order dated 6th February, 1969 the Court fixed a date for peremptory hearing of the insolvency proceedings as by then it had been pending for 36 years. The Court directed that on the date so fixed the schedule of the creditors as given by the receiver shall be finalized and the dues of the different creditors including Shri A. Rama Rao shall be ascertained.

10. On 19th February, 1969 and 20th February, 1969 the Insolvency Court heard the case and determined the dues of the different creditors. The Insolvency Court did not accept the claim of Shri A. Rama Rao or his argument that the houses were in occupation of his wife Smt. Subhadrama in spite of the decree dated 4th August, 1942 and that she had a prescriptive right over the same.

11. While these proceedings were on, Shri A. Rama Rao and the heirs of A. Buchaya Chetty filed a petition on 6th May, 1969 resolving the dispute through a compromise. There were some absentee signatories who were directed to appear on the following day or file a special vakalatnama for the purposes of passing final orders. On the following day i.e. 7th May, 1969 Shri A. Suvramanium present in the Court filed a petition to compromise the matter on behalf of his minor sisters viz., Chandra Bai, A. Raj Laxmi and his minor brother A. Nuka Raju. A vakalatnama was filed by the lawyer E. Raghunadham for admitting the compromise on behalf of Shri A. Rama Rao. The Court accepted the compromise and passed an order, although the compromise petition was not treated as part of the order. The terms of compromise were acted upon by the parties by entering into various transactions.

Order in the Petition to recall

12. On 8th June 1974 Shri A. Rama Rao filed an application in the Insolvency Court to recall the order dated 7th May, 1969 on the ground that the compromise recorded that day stood vitiated because of a fraud practised on him. It was urged that the Insolvency Court had become functus officio after the annulment order and had no further jurisdiction to record a compromise or issue any direction as has been done in the order dated 7th May, 1969.

13. During the pendency of the above application Shri A. Rama Rao died on 20th April, 1981 and his legal representatives (LRs) were added to the proceedings. The said application came to be ultimately disposed of by the Insolvency Court on 13th April, 1983 holding that it had no jurisdiction to record a compromise or pass any order on the basis thereof. It directed the receiver to distribute the sale proceeds of the properties of the original insolvent amongst the creditors with the sanction of the Court as ordered on 6th February 1941. It is this order dated 13th April, 1983 that was challenged before this Court by the LRs of Shri A. Rama Rao in M.A. No.274 of 1983 in this Court.

Appeal before the learned Single Judge

14. Before the learned Single Judge it was argued on behalf of the Appellants in M.A. No.274 of 1983 that at the time when the order dated 7th May, 1969 was passed by the Insolvency Court, Shri A. Rama Rao was an indoor patient at a hospital in Berhampur for amputation of his leg and that his left thumb impression (LTI) had been obtained on the petition while he was in the hospital; that he was not in a position to understand the contents of the petition; that he was made to understand that some of the properties were made free and had been handed over to him by the receiver; that he was the owner thereof in his own right and that his share was not part of or bound by the insolvency proceedings. According to Shri A. Rama Rao the said petition was fraudulently treated as a compromise petition between him on one hand and the creditors on the other. He accordingly claimed that he was not bound by petition or by the order dated 7th May, 1969 that the said proceedings were without jurisdiction.

15. Before the learned Single Judge the Respondents argued that prior to filing of the appeal, leave had not been obtained either of the District Court or the High Court. However, the impugned order after noting that the appeal had been filed in 1983 and the petition for leave had been kept pending since 1986 against which no objection had been filed, granted leave and rejected the preliminary objection. The learned Single Judge also rejected the plea that the impugned order was not appealable under Section 75(3) of the PI Act.

Impugned order of the learned Single Judge

16. The learned Single Judge addressed the sole question whether order dated 7th May, 1969 passed by the Insolvency Court was without jurisdiction? Referring to Sections 37 and 43 of the PI Act, and the decision of the Patna High Court in

Atmakuru Rama Rao v. Digambar Rath (supra), it was concluded that where an adjudication was annulled by reason of default of the insolvent, while the insolvent would lose the benefit of insolvency, he would not be benefitted by the annulment. The annulment was not for his benefit but for the benefit of the creditors. Accordingly, the properties vested with the appointee under Section 37 of the PI Act could be dealt with by the appointee "as if it has been dealt with in the insolvency proceedings."

17. Referring to the decision of the Lahore High Court in Nizam Khan v. Hukum Chand AIR 1941 Lah 316, it was held by the learned Single Judge that where an adjudication is annulled under Section 43 of the PI Act, the Insolvency Court continues to have jurisdiction in the matter of distribution of assets of the insolvent, the Official Receiver being the proper person to take control of any remaining estate. The learned Single Judge also referred to the decisions in J.N. Mundara v. Nemsi Rajpal and Co. AIR 1939 Nagpur 246 and Smt. Sarjubai v. Cooperative Society, Nanpa AIR 1949 Nagpur 39. On the other hand, it was contended by the Respondents before the learned Single Judge that as per the decisions in Sheo Shankar Lal s. Debi Dayal AIR 1945 Oudh 319, Order XXIII Rule 3 of the CPC is not applicable to insolvency proceedings and therefore, the order dated 7th May, 1969 was thoroughly misconceived. The Full Bench decision of Madras High Court in Moturi Veerayya v. P.V. Sreenivasa Rao AIR 1935 Madras 826 was also referred to.

18. On perusing the record the learned Single Judge noted that the order dated 7th May, 1969 was not an order disposing of the proceedings or part thereof by way of compromise in the terms of Order XXIII Rule 3 CPC, but was an order passed in exercise of the jurisdiction retained by virtue of the power of the Insolvency Court under Section 37 of the Act and in the matter of distribution of the assets of the debtors. It was held that the order dated 7th May 1969 was an order in furtherance of the directions contained in the order passed by the Insolvency Court under Section 37 of the PI Act. Several parties had acted on the said order. Shri A. Rama Rao had sold certain properties which had been registered in his favour in terms of the said order. In the circumstances, entertaining an application which was filed more than five years later for recalling that order would affect a large number of persons. Accordingly, it was held by the learned Single Judge that the order of the Insolvency Court passed on 13th April, 1983 recalling the order dated 7th May, 1969 cannot be sustained in law.

The present appeal

19. While the present appeal was filed on 16th February, 1994 it was admitted on 11th October, 1995 and notice was directed to be issued to the Respondents. On 8th January, 1996 an interim order was passed restraining the Respondents from alienating the properties described in the schedule to the application i.e. Misc. Case No.245 of 1995 without leave of the Court. On the same date in Misc. Case 268 of 1995 an interim order was passed that E.P. Case No.1 of 1992 pending in the Court of learned District Judge, Ganjam would continue but possession of the

property in question would not be delivered without leave of the Court. It was clarified that the said order was being passed without prejudice to the rights and contentions of the parties.

20. At one stage, the present appeal was dismissed for non-prosecution but was restored on 25th August, 1998. On 11th February, 1999 status quo in respect of the property was directed to be maintained till further orders. On 14th December, 2000 in Misc. Case No.9 of 1999 and 8 of 1000 a detailed order was passed vacating the status quo order passed on 11th February 1999 since the property in respect of which such interim order was passed was not a part of the insolvency proceedings out of which the present appeal arose.

21. Thereafter the appeal has been kept pending for substitution of the deceased parties with their LRs. There is substantial representation of the parties and on that basis the Court proceeded with the hearing of the appeal.

Submissions of counsel

22. The Court has heard the submissions of Mr. Budhadev Routray, learned Senior Counsel along with Mr. J. Biswal, learned counsel on behalf of the Appellant and Mr. Sidhartha Mishra, learned counsel for the Respondents.

23. Mr. Biswal, learned counsel for the Appellant submitted that the Insolvency Court had no jurisdiction to record the compromise since its power ceased after the order of annulment was passed. The Insolvency Court according to him only had the power to give directions in connection with the realization and distribution of the properties. Reliance is placed on the decision in Smt. Sarjubai (supra) and Sheo Shankar Lal (supra). It is contended that the properties in question are outside the scope of the suit and cannot be included in the compromise petition and that the order in such petition is a nullity. The compromise petition in respect of the outside properties can at best be said to be an agreement between the parties and the parties can file a suit to give effect to such agreement. Reliance is placed on the decision of Bombay High court in Shri Changadeo Sugar Mills Ltd. v. Belapur Sugar & Allied Industries Ltd.,AIR 1986 Bombay 112.

24. Mr. Sidhartha Mishra, learned counsel appearing for the Respondents on the other hand supported the impugned order of the learned Single Judge. He pointed out that the attempt at reversing the order dated 7th May, 1969 passed by the Insolvency Court was made belatedly by the predecessor of the present Appellant five years later on 8th June, 1974. In the meanwhile, several transactions had taken place on the basis of the order dated 7th May, 1969. Shri A. Rama Rao himself sold some of the properties. Therefore, it was too late in the day for such an application to be entertained by the Insolvency Court.

Analysis and reasons

25. The above submissions have been considered. It is a settled legal position that once an Insolvency Court passes an annulment order the receiver earlier

appointed can continue to deal with the properties for benefit of the creditors although not for the benefit of the defaulting insolvent. This has been settled in the insolvency proceedings by the Full Bench decision of Madras High Court in Moturi Veerayya v. P.V. Sreenivasa Rao (supra) which held as under:

"…the Insolvency Court retains full power to give directions under S. 37 as to the realization and disposal of the debtor's assets. That power should not of course, be used arbitrarily, but should be used in the interests not of this or that individual creditor, but of the whole body of creditors, which means in other words that the only proper order for the Court to pass is that the appointee should continue to realize and distribute the debtor's property in accordance with the provision of the Insolvency Act.

This opinion however does not involve our acceptance of the second view, for that clearly ignores altogether the meaning of the word "annul". The fact that not only the Official Receiver but any other person may be appointed under S. 37 is against the view that an order under S. 37 continues the insolvency proceedings for all purposes. The person appointed under S. 37 has no longer by the mere fact of his appointment, the powers which a receiver has under the Act. He has only such powers as are necessarily implied by the vesting order which are, as we understand them to carry out the directions of the Court and those directions, as we have said, should, so far as the realization and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act."

26. Following the above decision, the Patna High Court in Atamkuru Rama Rao (supra), which incidentally was in these very proceedings, held as under:

"…an order under S.37 has not the effect of continuing the insolvency proceedings for all purposes, but the person appointed under S. 37 has such powers as are necessarily implied by the vesting order and as may be necessary to carry out the directions of the Court in connection with the realization and distribution of the debtor's property in accordance with the Insolvency Act."

27. It is interesting that the compromise petition was in fact not made a part of the order of the Insolvency Court. In that view of the matter, the order dated 7th May, 1969 could not be taken as order in a compromise petition filed under Order XXIII Rule 3 CPC. It was an order passed by virtue of the powers of the Insolvency Court under Section 37 of the PI Act as it was for distribution of the assets of the person declared insolvent.

28. The reliance by the Appellant on the decision in Shri Changadeo Sugar Mills Ltd. (supra) is misplaced since the order dated 7th May, 1969 cannot be viewed as including properties which were not part of the suit properties and forming part of the compromise. Even if the compromise petition has referred to 'outside properties' the Insolvency Court did not pass an order specifically on that petition. Consequently, the above decision of the Bombay High Court is distinguishable on facts.

29. There is no valid explanation given for A. Rama Rao going back to the Insolvency Court five years after the order dated 7th May, 1969 and seeking to recall the said order. In the meanwhile, the parties, including Shri A. Rama Rao himself, had acted on the said order dated 7th May, 1969 and changed their position. This was lost sight of by the Insolvency Court when on 13th April, 1983 i.e. nearly 14 years after the order dated 7th May, 1969 it recalled that order. Such an exercise of recall power of the Insolvency Court is without the authority of law and has grave consequences as has rightly been noted by the learned Single Judge. Consequently, the Court is of the view that the learned Single Judge committed no legal error in setting aside the order dated 13th April, 1983 passed by the Insolvency Court recalling its earlier order dated 7th May, 1969.

30. There is no merit in the present appeal and stands dismissed as such, but in the circumstances, with no order as to costs.

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