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Ajay Kumar @ Sanjay Kumar Vs. the State of Bihar and ors.

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Court : Patna

Decided On : Jul-19-2007

Judge : Syed Md. Mahfooz Alam, J.

Appeal No. : Miscellaneous Appeal No. 298 of 1996

Appellant : Ajay Kumar @ Sanjay Kumar

Respondent : The State of Bihar and ors.

Advocate for Def. : Shola Sandhwar, Sanjiv Jaiswal and Rajiv Nayan Singh, Advs.

Advocate for Pet/Ap. : Naresh Kumar Malhotra and Anjan Chakrabarty, Advs.

Disposition : Appeal dismissed

Prior history : Syed Md. Mahfooz Alam, J. 1. This Miscellaneous Appeal is directed against the order dated 15.7.1996 passed by the learned District Judge, Gaya in Insolvency Case No. 3/95 whereby the learned District Judge has been pleased to reject the prayer of the appellant for being adjudged as insolvent. 2. The submission of the learned advocate of the appellant is that the impugned order is illegal and against the materials available on record and as such, the same requires interference. 3. Before exami

Judgement :

Syed Md. Mahfooz Alam, J.

1. This Miscellaneous Appeal is directed against the order dated 15.7.1996 passed by the learned District Judge, Gaya in Insolvency Case No. 3/95 whereby the learned District Judge has been pleased to reject the prayer of the appellant for being adjudged as insolvent.

2. The submission of the learned advocate of the appellant is that the impugned order is illegal and against the materials available on record and as such, the same requires interference.

3. Before examining the points with regard to the correctness of the finding of the court below, I would like to state the case of the respective parties.

4. The case of the appellant, in brief, is that in the year 1981 the appellant started a wholesale business of vanaspati and edible oil in the name and style of M/s Sheo Shakti Trading Company and had obtained sales tax and cess tax registration from the Commercial Tax Department. However the appellant sustained heavy loss in the business as a result of which huge amount of sales tax became due with the appellant. As per assessment done for the year 1981-1982 to 1985-86 by the Commercial Tax Department, a sum of Rs. 67,84,850/- besides interest on account of the sale tax became due with the appellant as the appellant was not in a position to pay the tax on account of the heavy loss in the business. After surrender of registration number and on account of heavy loss in the business of vanaspati and edible oil, the appellant closed the said business of Sheo Shakti Training Company and started medicine shop in the name and style of M/s Swastik Medical Hall at Tekari Road. But again the appellant suffered heavy loss in the said business of medicine and then he started a partnership business in the name and style of M/s Swastik Industries with Shiv Prakash Bhadani. Ganesh Kumar and Pradeep Kumar as partners of the said industries. The appellant and other partners of the said partnership industries applied for procuring loan amounting to Rs. 27 lacs from the Bihar State Financial Corporation-respondent 2nd set (hereinafter referred to as 'the Corporation') and the said Corporation sanctioned the loan and accordingly, a sum of Rs. 7.80 lacs was initially released by the said Corporation for installing infrastructure of the

industries but due to some unavoidable circumstances, the said Swastik industries could not see the light of the day and the entire amount released by the Corporation was wasted away and the appellant was put to heavy loss to the extent of his share.

5. After unsuccessful attempt of installing industries the appellant started another business of medicines. This time he started the business in the name of Ajay Kumar which is said to be appellant's alias name. The business was started in the name of Om Agency of which Ajay Kumar was shown as Proprietor but unfortunately, the appellant again incurred heavy loss in this business also. It is stated that due to continuous loss of the business, the appellant could not pay sales tax which was assessed by the Commercial Tax Department with penalty to the tune of Rs. 70 lacs. Likewise, the appellant failed to pay the tax of Bazar Samiti (respondent No. 5) to the tune of Rs. 50,000/- with respect to his business i.e. Sheo Shakti Trading Company for the business of vanaspati and edible oil. It is further stated that due to loss suffered in the partnership business which was started in the name and style of M/s Swastik Industries, the appellant failed to repay loan amount amounting to Rs. 7.80/- lacs to the Corporation which swelled upto Rs. 20 lacs after calculation of interest, however, the liability of the appellant with regard to the said dues is 1/4th to his share i.e. Rs. 5/- lakhs only. However, the case of the appellant is that since the appellant incurred continuous heavy loss in the aforesaid business he was not in a position to pay his debts. The Sales Tax Authority, Gaya respondent Ist Set has already filed a certificate case against the appellant for realisation of the sales tax dues in which warrant of arrest was issued against the appellant and he was arrested on 4.9.1995 but as he was not in a position to pay the debt, as such he filed Insolvency Case before the District Judge, Gaya which was numbered as Insolvency Case No. 3/1995, for being declared as insolvent and the same was finally disposed of on 15.7.1996 by the impugned order holding that the appellant cannot be declared as insolvent.

6. All the three sets of respondents have contested the claim of the appellant by filing rejoinder. In nutshell, the case of all the three respondents is that the appellant possessed sufficient movable and immovable properties to clear the entire dues. Further case of the respondents is that the appellant is a member of

the joint family which includes his father and other brothers. His elder brother Jai Prakash was Karta of the family who was running the family business in different names including in the name of the appellant. The appellant's name was Sanjay Kumar but in order to defraud his creditors he has started business in the name of Ajay Kumar. It is stated that the appellant has intentionally concealed the book of accounts as the production of the same would have proved that the appellant is financially sound and he is capable of paying loan and other dues. The appellant had intentionally changed his address in order to defraud his creditors. It has specifically been stated by the respondents-2nd set that after taking loan from the Corporation for starting industry, the appellant constructed structures and fixed machineries etc. but after sometime the appellant and his partners of M/s Swastik Industries removed all fixtures and fittings including the machineries from the site for which a criminal case was also lodged against the appellant and his partners. The specific case of the respondent No. 2 is that the appellant comes from a business community and the occupation of his family is business. The appellant is a member of Joint Hindu Family and all the business in his family is joint family business. Ganga Ram the father of the appellant, is the Karta of the family constituting himself his sons including the appellant. The said joint family is governed by Mitakshara school of Hindu Law. Jai Prakash elder brother of the appellant is the de facto karta and his father is the de jure Karta. The whole game and modus operandi of the family of the appellant is to do business in different names to evade sales tax and finally when the heavy amount of tax becomes outstanding then to close the business. The appellant has not submitted any account of his business from its inception to closure to prove that he had suffered heavy loss in the business and became insolvent. It is further stated that earlier business run by the appellant in the name of Sheo Shakti Trading bearing registration No. GY 817/(R) was also run by the joint family and when huge amount of tax became due then that business was closed and new firm in the name of M/s Annapurna Bhandar was opened but again the said business was closed as the appellants evaded to pay the tax which became due against the said firm. Thereafter the appellant and his family members again constituted a firm in the name of M/s Kashi Bishwanath Trading. After closure of the firm M/s Annapurna Bhandra and opening of firm M/s Kashi Bishwanath Trading, an

enquiry was conducted by the Commercial Tax Department and during the enquiry it was revealed that all the business was actually run under the control of Jai Prakash who was the own brother of the appellant and was de facto karta of the joint family. It was also revealed that the old business was closed with a view to defraud the public exchequer and to evade tax. After conducting enquiry, the Deputy Commissioner, Commercial Taxes, Gaya Circle passed an order on 16.11.1993 to cancel the registration certificate of M/s Kashi Bishwanath Trading and held that all the business belonged to joint family business run and controlled by Jai Prakash the elder brother of the appellant. It is stated that the order of the Deputy Commissioner, Commercial Taxes dated 16.11.1993 was challenged in C.W.J.C. No. 10710 of 1994 but the same was dismissed on 2.2.1995. The respondent No. 2 has placed documentary evidence to prove that Sheo Shakti Trading Company was a joint family business of the appellant as Jai Prakash had himself received the statutory form under his signature. The fact that all the business of the family of the appellant is joint business of the family stands proved from the fact that Jai Prakash the own brother of the appellant is guarantor in all the loans taken in the name of the aforesaid business. It has been stated that all these facts establish beyond doubt that the appellant and his family possessed sufficient movable and immovable property to repay the loan and sale tax amount and as such, the appellant cannot be declared as insolvent.

7. From perusal of the record of this appeal it appears that in support of their respective cases both the parties adduced oral as well as documentary evidence and it appears that after considering all the oral and documentary evidence, the learned court below by the impugned order dismissed the application of the appellant and held that the appellant is not entitled to be declared insolvent.

8. The only question for consideration before me is whether on the basis of the materials available on record, the appellant can be adjudged as insolvent. Admittedly, there is no dispute that while the appellant was running business of vanaspati and edible oil in the name and style of M/s Sheo Shakti Trading Company, he did not pay sales tax from the year 1981-82 to 1985-86. The said amount of sales tax for the above period with penalty was assessed at Rs. 70,00,000. It is also admitted case that the appellant had also failed to deposit Rs.

50,350/- as tax realised from the customers in the name of Bazar Samiti. It is also admitted that the appellant has also failed to repay the loan to the Bihar State Financial Corporation to the tune of Rs. 20,00,000/-. Thus, the total dues against the appellant comes to Rs. 90,50,350/-. The question is whether the appellant can be declared insolvent as he has not possessed the property sufficient to repay the above amount.

9. It appears from perusal of the impugned order that the learned court below after discussing the oral as well as documentary evidence brought on record on behalf of the parties has dealt with this question whether the appellant has possessed sufficient property to repay the abovementioned dues at paragraph 16 of its order. According to the finding of the court below, all the properties including business standing in different names of the appellant's family members belonged to joint family property and these are sufficient to clear the dues. For better appreciation of the point in issue, I would like to quote paragraph 16 of the impugned order which is as follows:

One question also arises that whether the firm run by this applicant was a firm of joint family business or it was his separate business. Both parties have adduced evidence and much time and energy has been consumed on this issue. But from the consideration of the entire evidence, it is evident that in each cases of loan taken by this applicant, his brother Jai Prakash is a guarantor. Ext. F shows that Sanjay Kumar possesses properties worth Rs. 40.50 lac. Here it is worth considering his own evidence on this point. In para 24 of his cross-examination as A.W.1 he has stated that while taking loan from the financial corporation he had given no statement of his properties which is palpably false in view of Ext. F. But in para 36 he has admitted that while taking loan from Bihar State Financial Corporation he had given his financial position. In the next breadth he has changed his statement by saying that the details of the properties (worth Rs. 40.50 lac) given by him belong to his mother. If this statement is taken together with the fact that in all the business in which loans were sanctioned to his brother Jai Prakash was the guarantor and even road permits were taken from the sales tax department by Jai Prakash on behalf of the applicant, it goes to show that it was a joint family business run in the name of a coparcener. As such, I am of the view

that this was a joint family business run by the applicant. This finding gets further corroboration from the evidence of A.W.7 Brajendra Kumar who is none-else but the bahnoi of the applicant. He is completely silent on the point whether the business run by Sanjay Kumar was separate or not. He has simply stated that the financial condition of the applicant is not good and is unable to pay rupees five or ten lac. In cross-examination he has admitted that his father-in-law, the father of the applicant, is a business man and the family is a business family. He has further stated that there has been no partition in between the father and his sons. He has never stated that any of his sala was running a separate business. This is a very material thing missing from the evidence of this witness which goes to show that all the business concern run by this petitioner was a joint family business.

10. From perusal of the abovementioned paragraph, it is clear that the finding of the learned court below is based on the oral and documentary evidence adduced on behalf of the both the parties. The fact that all the business and properties standing in the name of different members of the appellant's family are joint family business and properties of the appellant's family has been brought on record through the evidence of O.P.W.1 Mohan Prasad Singh, O.P.W.2 Harendra Singh, O.P.W.5 Banigas Kujur. Assistant Sales-tax Commissioner, O.P.W.6 Surendra Prasad Singh. O.P.W.7 Ariun Prasad Sinha and O.P.W.8 Arun Kumar Kesari. All the aforesaid witnesses have also deposed that the appellant is financially sound and he is capable of being paid all the dues.

11. I would like to refer the evidence of some of the witnesses. The evidence of O.P.W.5 Banigas Kujur. Assistant Sale-tax Commissioner is that the appellant comes from a business family. He was running a business in medicine in the name and style of 'Om Agency'. He has further said that on enquiry he found that the appellant had evaded payment of sales tax. The evidence of O.P.W.6 Surendra Prasad Singh, the Sales-Tax Officer, Gaya Circle is that the licence of Kanshi Vishwanath Traders was cancelled on account of sales tax evasion and he learnt that Sheo Shakti Trading Company and Kashi Bishwanath Traders are being run at the same place. His further evidence is that in the abovesaid business of two firms appellant's brother Jai Prakash was a guarantor who was the real owner of the abovementioned firms, namely, Kashi Bishwanath Traders and Sheo Shakti

Trading Company. His further evidence is that actually Jai Prakash was doing business in the name of the appellant and all the business were joint family business. This witness has also proved that at least seven applications were filed before the Sales Tax Officer (Exts. E to E/6) which show that all the applications were signed by Jai Prakash, the brother of the appellant. O.P.W.8 Arun Kumar Kesari who is an employee of the Bihar State Financial Corporation, has also stated that at the time of sanction of loan from the Financial Corporation, the appellant has shown sufficient property valued at Rs. 40.50 lac as per Ext. F. Thus, from the evidence of the abovesaid witness with reference to Ext. F it is established beyond doubt that all the business in the name of the family of the appellant are joint family business and the same are not separate business of the appellant. It is further established that the joint family of the appellant is financially sound and is possessed with sufficient property and business to repay the loan. Under such circumstances, the finding of the lower court that the appellant is not entitled to be declared insolvent seems to be correct on facts and in law and I do not feel any necessity to interfere with the above finding.

12. Before concluding my judgment I would like to point out this fact that from the admitted facts it has come on record that in between 1981-82 to 1985-86, the appellant was dealing in vanaspati and edible oil in the name and style of M/s Sheo Shakti Trading Company but he did not pay commercial tax to the tune of Rs. 70 lacs with respect to the said business to the Commercial Tax Department and closed the said business. It has further been established that the appellant started another business in the name and style of M/s Swastik Medical Hall but on the pretext of loss he again closed the said business and then he started another business in the name of M/s Swastik Industries after taking loan of Rs. 7.80 lacs from the Bihar State Financial Corporation which was also closed on the pretext of suffering loss. Lastly, the appellant started another business of medicine in the name of Om Agency and this business was opened in the name of Ajay Kumar. Thus, it is established that the appellant was in the habit of usurping the loan amount taken by the financial institutions in the name of starting, a new business. It is also established from the record that practically in all the transactions his own brother Jai Prakash was the guarantor or signatory which has established beyond doubt that all the abovementioned business were not individual business of

appellant but they were the joint family business. No document has come on record to show as to how the income from the abovesaid business/firm evaporated or the appellant suffered loss in the business. Under such circumstance, I am of the view that all the assets, business, firm and properties standing in the individual name of the appellant as well as in the name of joint family are liable for attachment in order to recover the loan and to realize dues towards non-payment of commercial tax and non-deposit of Bazar Samitee fee etc.

13. It appears from perusal of the record of this court that unfortunately by order dated 6.8.1996 this Court has stayed the operation of the order dated 15.7.1996 passed by District Judge, Gaya in Insolvency Case No. 3 of 19('5 which gave opportunity to the appellant to utilise the benefit of evasion of tax and non-payment of loan. There appears another possibility that during this period, the appellant might have started another business in another fake name in order to avoid payment of loan as well as tax. Under this circumstance, it is desirable that the order dated 6.8.96 be vacated with direction to the Certificate Officer, Gaya to immediately attach all the assets/properties/business/firm of the appellant in his individual name and in the name of the joint family in connection with Certificate Case No. 8 of 1990-91. The Certificate Officer is further directed that if the appellant has started any new business from the income of the firm and business mentioned in the insolvency case then those properties should also be attached. The stay order dated 6.8.1996 stands vacated.

14. In the result, I do not find any merit in this Miscellaneous Appeal and as such, the same is hereby dismissed with the above observations.

15. Let a copy of this order be at once sent to the Certificate Officer, Gaya for its immediate compliance.

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