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Court : Allahabad

Decided On : Dec-06-1929

Reported in : AIR1930All282

Appellant : Krishna Das and anr.

Respondent : Raja Ram Bhatt Lele and ors.

Judgement :

Bennet, J.

1. This is an appeal by a creditor whose application for an order of adjudication of the opposite party as insolvent has been dismissed by the District Judge of Benares. The opposite party are a joint Hindu family consisting of three members Raja Ram Bhatt Lele, Govind Shastri and Gaja Nand Rao. The application was made mainly on the ground that an act of insolvency had occurred by the execution by the opposite party of a fictitious deed of mortgage in favour of a third party Rai Krishnaji for Rs. 35.000 nominally, on 31st August 1927. Within three months of that date this application was made on 28th November 1927. Therefore it would be open to the applicant to have the benefit of Section 54, Provl. Ins. Act, which applies to a transfer of property in favour of any creditor with a view to giving that creditor a preference over the other creditors.

2. The case for the applicant is that this mortgage comes under Section 6(b) or (c) as a transfer of property or part of a property with intent to defeat or delay the

creditors or which would provide as a fraudulent preference if he were adjudged an insolvent. The opposite party filed a written statement stating that the mortgage deeds executed in favour of Rai Krishnaji were in good faith and for consideration of his just dues, that Rai Krishnaji had now taken over the concern and invested further sums in it to carry it on with a provision to allow a share of the profits of the opposite party in order to enable the opposite party to pay up the creditors as well. Further, the written statement alleged that the opposite party was prepared to pay the amount due by monthly instalments and that at present the firm owned properties worth more than Rs. 80,000.

3. The applicant gave his evidence in support of his application and he also tendered a certified copy of a deposition by one of the opposite party in suit No. 92 of 1927(Krishen Das v. Kamala Kalabattu Karyalaya.) The opposite party made a statement through their vakil that they did not desire to tender any evidence. The evidence therefore in the case is complete. The District Judge did not come to any clear finding as to whether an act of insolvency had been committed or not. But he dismissed the application on the ground that he had little doubt that the third party Rai Krishnaji would see to it that the decree was liquidated by payments in instalments, as in the case of other creditors. We consider that the District Judge was wrong in not coming to a definite finding as to whether an act of insolvency had been committed. We also consider that he was wrong in finding that Rai Krishnaji would make payment of this debt when there was no evidence before him of Rai Krishnaji to that effect.

4. The question before us is whether an act of insolvency has been committed. The mortgage of 31st August 1927, for Rs. 35,000 was not for any new consideration, but purported to be entirely on account of the debt then owed by the opposite party and interest on that debt according to the mortgage. Therefore it cannot be said that on that date any new funds were advanced by Rai Krishnaji to the opposite party to enable them to carry on their business. It is true that after the application a further mortgage for Rs. 15,000 nominally has been executed by the opposite party in favour of Rai Krishnaji. No evidence has been tendered in regard to this mortgage, nor is there any proof that Rs. 15,000 was actually advanced for carrying on the business. As is admitted in the written statement of the opposite

party we find it proved that all the property of the opposite party has been handed over to Rai Krishnaji who is now in the position of a secured creditor, whereas the applicant is not a secured creditor. It is clear therefore that the mortgage of 31st August 1927, has the effect of making Rai Krishnaji a creditor with a preference over other creditors and the possession of all the property placed him in an extremely favourable position. The intention of the opposite party in executing that document must have been to give Rai Krishnaji such a preference over other creditors. Therefore that document clearly comes under Section 54, Prov. Ins. Act and therefore its execution by the opposite party amounts to an act of insolvency under Section 6(b), Prov. Ins. Act. We may also state that even on the pleading in the written statement referred to, if this plea were correct it would amount to an act of insolvency under Section 6(a). We consider therefore that an act of insolvency having been committed, and as it is admitted that the applicant is a creditor for more than Rs. 500, his debt amounting to Rs. 500 worth of silver wire, the applicant is entitled to present this application in insolvency. Accordingly we adjudicate Raja Ram Bhatt Lele, Govind Shastri and Gaja Nand Rao insolvents. We fix a period of one year within which the insolvent is to apply for discharge from insolvency. We send this record back to the District Judge to take proceedings of insolvency in regard to creditors proving their debts and appointment of a receiver and all other proceedings. The appellants will be granted costs of this appeal and costs so far incurred in the Courts below.