

Murtaza and Sons and Another

Vs

Nazir Mohd. Khan and Others

Civil Appeal No. 1708 of 1967

(J.C. Shah, K.S. Hegde JJ)

24.11.1969

JUDGMENT

SHAH, J. -

1. This is an appeal against the orders of the High Court of Mysore setting aside an order passed by the District Court adjudication Respondents Nos. 2 to 6 insolvents under the Mysore Insolvency Act. The appeal is filed with special leave.
2. This Court has held in *Pritam Singh v. State*, 1950 SCR 453 at p. 459 : "Generally speaking the Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against". It was also said in that case that the view that once an appeal has been admitted by special leave the entire case is at large and that the appellants is free to contest all the findings of fact and raise every point which could be raised in the High Court is wrong. Only those points can be urged at the final hearing of the appeal which are fit to be urged at the preliminary stage when leave to appeal is asked for. This principle was stated, it is true, in a criminal case but it is of as much significance in civil cases as in the trial of criminal appeals. It is necessary to emphasise this because the learned counsel on behalf of the appellants has attempted to persuade us to reappreciate the evidence and come to a conclusion different from the one recorded by the High Court.
3. The appellants filed an application for adjudication as insolvent Respondent No. 6 which is a partnership of which Respondents Nos. 1 to 5 were alleged to be partners. It was alleged in the application (1) that Respondents 1 to 6 had on February 17, 1962, executed a deed of simple mortgage in favour of the 7th Respondent for a sum of Rs. 50,000 which "constituted an act of insolvency and also a fraudulent transfer made with intent to give the said creditor a preference over the general body of creditors and therefore, the mortgage was void under Section 54 of the Mysore Insolvency Act; (2) that on February 23, 1962 Respondents 1 to 6 made a transfer of their properties to the 7th Respondents under a deed of trust for the benefit of the creditors; the execution of the deed of trust itself constituted an act of insolvency; (3) that the respondents has departed from their place of business and had set up business at another place and that they were generally found absent from their dwelling house and thereby they had prevented all means of communication with them.
4. The Trial Court held that the 1st Respondent was not a partner of the 6th Respondent firm and rejected the application against him by ordered that Respondents Nos. 2 to 5 be adjudicated insolvents mainly on the finding that they had transferred all or substantially all their properties to a third person for the benefit of his creditors generally.

5. In appeal to the High Court of Mysore his finding was reversed and the High Court held that the act of insolvency alleged had not been proved. Prima facie the finding of the High Court is based upon the averments made in the petition and the evidence led before the Court and no substantial question of law arises. There was no averment in the petition filed by the appellants that Respondents Nos. 2 to 6 had made a transfer of all substantially all their properties to a third person nor their any allegation that they had transferred their properties with intent to defeat or delay the general body of the creditors. In view of the defective pleading and the absence of reliable evidence the High Court came to the conclusion that the act of insolvency pleaded under Section 6(a) of the Mysore Insolvency Act was not made out.

6. We do not think that conclusion of the High Court is liable to be challenged in an appeal to this Court with special leave. It is true that there was an averment in the petition that the respondents had shifted their place of business and had prevented communication with them; but the Trial Court rejected that contention and the High Court was not called upon to deal with that question. Mr. Venkataranga Iyengar on behalf of the appellants, contended that in any case there was an averment in the petition that the mortgage, dated February 17, 1962, was executed by the respondents in favour of the 7th Respondents and that mortgage constituted an act of insolvency and also a fraudulent transfer with a view to give that creditor a preference over the general body of creditors. That, according to Counsel, was a sufficient plea which attracted the application of Section 6(a) of the Mysore Insolvency Act. But here, on the other hand, the finding of the High Court, in our judgment, is clear that there is no evidence to support the case made out that the mortgage in favour of the 7th Respondent, dated February 17, 1962, was made with intent to defraud the creditors.

7. The appeal fails and is dismissed with costs.

</html