1969 KHC 31
Kerala High Court
V. R. Krishna Iyer, J.

P. M. THANKAPPAN v. MUHAMMED KUTTY AND OTHERS
Parallel citation(s) : 1969 KHC 31 : 1969 KLT 104 : 1968 KLJ 926 : ILR 1969 (1) Ker. 148 : 1968 KLR 796
CaseNo : C. R. P. No. 1184 of 1967
Date : 04/10/1968

Insolvency Act, 1955 (Kerala) -- S.5 -- Power of Civil Court to dismiss a suit under O.9 R.8 can be exercised by Insolvency Court -- There is nothing in S.25 which prevent the Court from relying upon O.9 Civil Procedure Code when creditor or debtor has been guilty of default in appearance -- Civil Procedure Code, 1908, O.9 R.8

Important Para(s):6

Insolvency Act, 1955 (Kerala) -- S.79 -- Order of dismissal default not decree -- Distinction between decision and order -- Test not whether there is an adjudication on the merits determining the rights of parties but whether the order passed is one which affects any right or liability of the parties -- Order passed dismissing main -- Petition appealable under S.79

Important Para(s):8

Practice and Procedure -- Evidence must be taken if case posted for hearing at the evidence stage

Important Para(s):3

Code of Civil Procedure, 1908 -- O.9 R.8 -- Petitioner should not be denied opportunity of a hearing in Court merely because of negligence

Important Para(s):4

Referred: 1953 Kutch 36; Referred to

Advocates:

P. K. Krishnankutty Menon; For Revision Petitions
S. Narayanan Potti; N. K. Varkey; A. N. Kuttan; For Counter Petitioner

ORDER

1. The dismissal of a petition under the Kerala Insolvency Act, hereinafter called the Act or the Insolvency Act, has given rise to this Civil Revision Petition.

2. Has the Insolvency Court, inspite of the provisions of S.5 of the Act, power to dismiss a creditor's petition for default? Is an order of dismissal for default inspite of the provisions of S.79 of the Act, appealable? These two simple questions have to be answered simply in the affirmative, on a fair, commonsense construction of the two relevant Sections already adverted to. Bat does law lose its awe and learned look, if commonsense is used as the compass to guide the Court, unless counsel, as in this case they have done, press precedents into service on the one side and canons of statutory interpretation on the other, to spin out scholarly arguments for and against? How ever, often, as in this case the simple route leads to the same end as the complicated one, although the former is preferable, since a simple presentation of the law will make it more easily understood by the litigating public, to regulate whose rights laws are meant.

3. A few facts first. A firm of five persons (Petitioners 1 to 5 in I. P. No. 10 of 1965) moved the Insolvency Court for adjudging the debtor first counter petitioner an insolvent. Another creditor got himself impleaded as the 6th petitioner, although the provisions of S.16, prima facie, provide for substitution and not addition. This creditor is the revision petitioner before me, the other petitioning creditors having dropped out from the contest. The debtor resisted the petition and the case was posted for evidence on several occasions, each side having contributed its quota of requests for adjournment. The Subordinate Judge, however, ordered, on 26-11-1966, while directing the adjournment to 12-12-1966, that it would be the last adjournment and on 12-12-1966 he kept his word by dismissing the petition by a short order which runs as follows.
"Petitioner absent. Advocates absent. Petition dismissed with costs."
An appeal was duly carried to the District Court and was allowed, because the

learned District Judge took the view that the petition had been posted "for hearing without taking evidence". I do not understand this obscure expression used by the District Judge "for hearing without taking evidence". If a case is posted for hearing and the stage has been reached for taking evidence, the shape that the hearing would take would be the recording of evidence. It is not as if 'hearing" is the antithesis of "taking evidence". We are making a none too simple system of law labyrinthine by these self created verbal refinements which do not have any semantic significance. I have no doubt that when the Court posted the case for hearing after the deck had been cleared for recording the evidence, the parties were expected to be ready with their evidence and if the petitioner defaulted in doing so he should be treated as a defaulting party and not be comforted judicially by being told that it was posted only for hearing and not for taking evidence. What is more, Shri Krishnankutty Menon, learned counsel for the revision petitioner, assures me and this is not contradicted by counsel on the other side that the records bear out his case that the petition was posted for evidence and not, as the learned District Judge misunderstood, "for hearing without taking evidence."

4. Of course, the learned District Judge has also stated that "the appellant cannot be said to be grossly negligent in prosecuting the petition." It may not be out of place to recall Baron Rolfe who said (Wilson v. Brett (1843 (152) ER 737) "I see no difference between negligence and gross negligence It is the same thing with the addition of a vituperative epithet." To say, therefore, that the party was negligent, but not grossly so, makes sense, legal or other, largely as indicating a lenient disposition. The appellate Court took the view that "in the interests of justice I am of opinion that an opportunity should be given to this appellant to prosecute the petition." I agree with him that one should not be harsh on a petitioner and deny him the opportunity of a hearing in Court merely because of some negligence. Such a drastic step should be taken only where the degree of negligence is such as cannot be condoned. The District Judge, ultimately, allowed the petition on terms and remitted the petition to the lower Court for fresh disposal. The present revision petition challenges this order.

5. Counsel for the revision petitioner urges that an appeal to the District Court was not maintainable since the order passed by the Insolvency Court was one under O.9 R.8, Civil Procedure Code. Such an order does not determine rights of parties judicially and cannot be treated as one coming within the scope of S.79 of

the Act. This contention is countered by counsel on the other side, his argument being that any order passed by a Court, be it determinative of rights or not, is appealable under S.79 of the Act, which is a special provision with a wider amplitude than O.43 C.P.C. Hegoes further and says that the order of dismissal itself was incompetent as, in his view, a creditor's petition can be dismissed only in the manner laid down in S.25 of the Act and not for default under O.9 R.8. For, according to him, the Civil Procedure Code will apply only "subject to the provisions of this Act" and S.25 is a special provision to which O.9 R.8 must be subject. He also suggests that when there are special provisions relating to dismissals of petitions, rules of statutory interpretation lead us to the conclusion that all other grounds of dismissal are excluded. Such, in brief, are the facts of the case and the points in controversy pressed before me.

6. Now to a commonsense solution of the two questions. Here is a petition of a creditor who is in default. What is the Court to do if the petitioner does not take steps to proceed with the matter? He must suffer, by his petition being dismissed. O.9 R.8 states just this rule, to wit, that when the suit is called on for hearing and the plaintiff does not appear, the Court shall have the power to dismiss the suit. This power of the civil Court can be exercised by the Insolvency Court by virtue of S.5 of the Act which clothes that Court with the "same powers" and authorises it to "follow the same procedure as it has and follows in the exercise of original civil jurisdiction". On a plain reading, the power and procedure contained in O.9 R.8 will apply to the Court acting under the Insolvency Act. The second question is as to whether an order of dismissal for default, which admittedly is not appealable under the Civil Procedure Code, is appealable under the Insolvency law. S.5 of the Act subjects the applicability of the Civil Procedure Code to the express provisions of the Insolvency Act and so. it is reasonable to search the provisions of the Insolvency Act first, for a provision enabling appeals. Only if it does not so provide, we have to look for it in the Code. S.79 of the Act, as already indicated, states that:
"A decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court."
From a commonsense angle, the dismissal of an insolvency petition which puts an end to the proceeding altogether is "an order made", if not "a decision come to" and therefore S.79 must confer a right of appeal on an aggrieved party against such an order of dismissal. I hold that the Court acting under the

Insolvency Act has the power to dismiss a petition for default of the creditor and that: such an order is appealable under S.79 of the Act.

7. Let us consider whether the elaborate arguments addressed by counsel on both sides lead us to a different conclusion The first point relates to the power of the Court to dismiss a petition for default of the petitioning creditor. If O.9 CPC. applies, as it prima facie does, the dismissal is within the jurisdiction of the Court. S.25 of the Insolvency Act, which also vests the Court with the power to dismiss a petition, enumerates a few specific grounds. The respondent argues that on no other ground a petitioning creditor's petition can be dismissed by the Court. "Any other sufficient cause" mentioned in S.25 will not, according to him, cover a case of default by absence, and since in this case the only ground for dismissal being absence of party and advocate, the order of the Trial Court itself is illegal. But I do not have to consider that aspect of the matter because counsel for the revision petitioner agrees that the order was passed, not under S.25 at all, but under S.5 of the Act read with O.9 R.8 CPC. Shri. Krishnankutty Menon, Advocate for the petitioner, takes up the stand that S.25 does not deal with a situation the like of which we are concerned with in this case but relates to orders to be passed on the merits in relation to the various matters referred to in S.24 of the Act. After a petition is filed and the preliminaries are over, it is posted for hearing. On the day fixed for the hearing on any adjourned day the Court enquires into a few matters referred to in S.24(1) (a), (b) and (c). There is also a provision for examining the debtor in relation to his conduct, dealings and property. S.25, according to Shri Krishnankutty Menon, empowers the Court to dismiss the petition on enumerated grounds which can be directly related to S.24(1)(a), (b) and (c) Of course, there is the general ground covered by the expression "for any other sufficient cause" and this must relate to the conduct, dealings and property of the debtor being such that the petition of the creditor for adjudication deserves to be dismissed. The essential point pressed is that a petitioner's absence results in the dismissal of his petition not under S.25, which really relates to orders on the merits, but under O.9 CPC. The Court is given the power to grant time to the debtor or to the creditor under S.24(3) of the Act. If still no evidence is produced, there may be an occasion to deal with the merits of the matter without such evidence and on such materials as may be available. If there is default even in appearance, the Court is not obliged to hear the matter on the merits, but, as in the case of ordinary suits, can proceed under O.9 CPC. So, the

argument runs that the dismissal of the petition in the present case is ultra vires, only if S.25 is the sole source of power to dismiss a petition under any circumstances. The respondent's contention, that since grounds have been enumerated in S.25 they must be treated as exclusive, and other grounds, which the Civil Procedure Code may provide such as dismissal for default, should be deemed to have been excluded by necessary implication, on the strength of the maxim expressio unius est exclusio alterius has substance only if O.9 R.8 CPC. is inconsistant with S.25 of the Act. T take the view that there is nothing in S.25 or the setting in which it appears to prevent the Court from relying upon O.9 CPC. when the creditor or debtor has been guilty of default in appearance. The ruling relied upon by the respondent is the one" reported in Dharamshi Ambavi v. Vala Veera (AIR 1953 Kutch 36) the other rulings cited before me do not impress me as very relevant. AIR 1953 Kutch 36, on a closer reading, makes it apparent that because S.46 of the Act concerned in that case (The Bombay Agricultural Debtors' Relief Act 1947) had not been made applicable to the State of Kutch, O.9 R.8 CPC. could not be applied to the proceedings; and the Act itself did not provide for dismissals for default. There is, moreover, an express provision in S.36 of that Act that even though a debtor or a creditor has not appeared on the date fixed for hearing, the Court has to proceed ex parte to hear the application. Of course, there is an observation in that ruling that the object of the Act being adjustment of debts, dismissal for default a procedure provided in the Code of Civil Procedure for suits and proceedings is inapplicable to the proceedings under the Act. It is quite conceivable and there are a few statutes proceeding on that basis that even if a party is absent the Court's duty to decide the matter raised by the petition remains and all that the Court can then do is to make the best of a bad job and dispose of it on such materials as are available, instead of dismissing the application solely for absence of a party. We do not have such a statute to deal with and the conclusion reached in AIR 1953 Kutch. 36 does not have to be reached in the present case. On the other hand, quite a few decisions were brought to my notice which proceeded on the footing that O.9 R.2, R.4 and R.13 CPC, apply to insolvency proceedings. Whether the petitioning creditor would be precluded from bringing a fresh petition based on the same act of insolvency if his petition were dismissed for default of appearance and he does not choose to apply for an order to set the dismissal aside does not arise here. The question is whether non appearance can non plus the Court? I take the view that O.9 R.8 CPC. is rendered applicable because of

S.5 of the Act and that S.25 does not stand in the way. Whatever be the effect of the dismissal there is no prejudice to other creditors because they are not precluded from bringing petitions on their own. In this view, I hold against the respondent on the first point.

8. The further question is whether an appeal lies from such an order. O.43 R.1 of the Code provides for appeals from specified classes of orders only and O.9 R.8 orders are outside its purview. An order of dismissal for default is expressly excluded from the definition of a decree and is therefore not appealable as a decree. Does S.79 of the Act render the order appealable? It can; provided we can describe the order in question as "a decision come to or an order made in the exercise of insolvency jurisdiction". It looks as if the Section makes a distinction between a decision and an order. The word 'decision' has an element of finality so far as the Court making it is concerned and perhaps imports consideration of the merits. An interlocutory order may not perhaps be properly described as a decision of the Court While no technical or artificial meaning, so as to truncate its scope, should be imputed to the word "decision" it is not proper to include within its scope minor decisions as to details of procedure, admissibility of evidence and what not. Similarly, if the effect of a decision is not to terminate the litigation, so far as that Court b concerned, but to dear the ground for adjudication of rights, such as by overruling a preliminary objection it is not such a decision or order as S.79 of the Act contemplates. But where the rights of a party cannot, in consequence of a decision or order, be further agitated in that Court and in that proceeding, its impact affects the rights of parties and such an order must be treated as one coming within the scope of S.79 of the Act. The crowd of precedents cited before me under the Insolvency Act as well as under other statutes with similar provisions reveal a broad consensus of judicial opinion, with some discordant notes though, that though the word "a decision" or "an order" may be very wide they do not include purely interlocutory orders which are merely procedural and do not affect the rights or liabilities of the parties. Orders in pending proceedings "regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date for hearing and the admissibility of a document or the relevancy of a question" are examples of interlocutory orders, because they are "steps taken towards the final adjudication and for assisting the parties in the prosecution of

their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties". While allowing a right of appeal against such orders would result in harassment and delay there is no prejudice due to the denial, because "it is open to any party to set forth the error, defect or irregularity, if any, in such an order as a ground of objection in his appeal from the final order in the main proceeding." I was excerpting from the ruling in The Central Bank of India Ltd. v. Gokal Chand (AIR 1967 SC 799). which, in turn, has relied upon the one reported in Shankarlal Aggarwala v. Shankarlal Poddar (AIR 1965 SC 507). In the latter case, the Court had to ascertain the amplitude of the right of appeal under S.202 of the Indian Companies Act, 1913 "from any order or decision made or given in the matter of the winding of a company by the Court." Their Lordships, agreeing with the Bombay High Court, ruled that the words used though wide, "would exclude merely procedural orders or those which do not affect the rights or liabilities of parties." In that case, the right of appeal was upheld by the Supreme Court. The test, in my view, as decocted from the various decisions referred to, is not whether there is an adjudication on the merits determining the rights of parties but whether the order passed is one which affects any right or liability of the parties. Of course, a decision of rights on the merits is appealable; even as a purely interlocutory order, ancillary to the further progress of the case does not have any direct impact on the rights of parties and is not, therefore, appealable. When an order is passed dismissing the main petition itself, be it for default or for other reason, it affects rights and liabilities and therefore is an order appealable under S.79 of the Act. The circumstance that an application for restoration could have been filed is not decisive of the question as to whether the order dismissing for default affects the rights of the parties. This conclusion means that the order in question is appealable. That however, does not dispose of the matter finally. The learned District Judge misdirected himself by assuming and proceeding to decide on that assumption that the posting was not for evidence but for hearing. But, of course, he has also stated that some indulgence must be shown to the party and an over strict approach is wrong. His exercise of discretion has been influenced by his erroneous conception about the posting. I, therefore, direct the appellate Court to consider the matter de novo and pass an order affirming the dismissal or setting, it aside. It will be open to the petitioning creditor to explain why he was absent and I need hardly say that a liberal approach is the just course when a party's right to be heard on the merits is being considered.

I therefore allow the revision petition and remit the matter back to the District Court; no costs.