Jayakumar Vs. Ravindran

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Court : Kerala

Decided On : Aug-25-2003

Reported in : 2003(3)KLT542

Judge : K.S. Radhakrishnan and; Pius C. Kuriakose, JJ.

Acts : Kerala Insolvency Act, 1956 - Sections 5 and 5(1); Code of Civil Procedure (CPC) - Sections 5 - Order - 9, Rules 4 and 8 - Order 43, Rule 1

Appeal No. : F.A.O. (Unnumbered) of 2003

Appellant : Jayakumar

Respondent : Ravindran

Advocate for Pet/Ap. : T.P. Pankajakshan, Adv.

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. This appeal has been preferred under Order 43 Rule 1 (c) of the Code of Civil Procedure against the order in I.A. 312/03 in I.P. No. 2/99 of the Subordinate Judge's Court, Tellicherry. Registry expressed doubt as to whether the appeal is maintainable. Consequently returned the appeal memorandum. Counsel appearing for the appellant submitted that since the impugned order comes under Order 43, Rule 1(c) FAO is maintainable before this Court. Registry again returned the appeal noting the following defects:

'FAO filed against the order passed in petition filed for restoration of the insolvency petition dismissed for default'.

On a request made by the counsel matter has been placed before us to decide the question as to whether this appeal would fall under Order 41, Rule 1(c) of the Code of Civil Procedure.

2. Appellant herein preferred a petition under Section 7 of the Provincial Insolvency Act before the Subordinate Judge's Court, Tellicherry to declare him as insolvent. Insolvency petition was posted for evidence on 25.11.2002. On that day petitioner was absent. Case was adjourned to 28.11.2002. On that day also petitioner remained absent. Consequently that petition was dismissed for default. Petitioner then filed I.A. 312/03 under Order IX Rules 4 and 8 of the Code of Civil Procedure for restoration of the insolvency petition dismissed for default. IA was dismissed holding that sufficient grounds have not been made out, against which this appeal has been preferred.

3. We have already indicated that appeal was preferred under Order 43, Rule 1(c) of CPC which reads as follows:

An appeal shall lie from the following orders under the provisions of Section 104;

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.

Provisions of the Code of Civil Procedure is made applicable to exercise powers of Courts under the Provincial Insolvency Act. Section 5 is relevant for our purpose which is extracted below:

5. General powers of Courts -

(1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

Under Section 5(1) the Insolvency Court is given, subject to the provisions of the Act, the same powers to follow the same procedure under the provisions of the Code of Civil Procedure. Section 5 stipulates that provisions of Code of Civil Procedure are applicable subject to the provisions of the Act. Under Section 5, the provisions of the Civil Procedure Code, including those contained in Order IX, have been made applicable to proceedings under the Act except when they are in conflict with any of the provisions of the Insolvency Act. There is no provision in the Insolvency Act for restoration of an application dismissed for default. Consequently aggrieved party could file petition only under Order IX. In case such a petition is dismissed the aggrieved party could file appeal under Order 43 Rule 1(c). Under such circumstance we are of the view this appeal is maintainable. Number the appeal and post for admission.