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Court : Rajasthan

Decided On : Sep-19-1983

Reported in : 1983WLN408

Judge : K.S. Lodha, J.

Appeal No. : S.B. Civil Misc. Appeal No. 125/83

Appellant : Babulal and ors.

Respondent : Otmal

Disposition : Appeal dismissed

Judgement :

K.S. Lodha, J.

1. The alleged debtors Babulal and others have filed this appeal against the order of the learned District Judge, Jalore, dated 26-2-83, directing the return of the application of the creditor for adjudicating the appellants insolvents, for proper presentation.

2. This case had a chequered history and had been pending before the learned District Judge, Jalore, for a considerable long time and had also travelled up to this Court on question of jurisdiction itself when it was remanded to that court. After the remand, the order under appeal has been passed.

3. I have heard the learned Counsel for the parties, it is agreed by them that the apnea may finally be disposed of at this stage and for that purpose, the record would not be necessary. I have, accordingly, proceeded to hear them.

4. Two contentions have been raised before me by the learned Counsel for the appellants. The first contention is that there is no provision under the Provincial Insolvency Act there in after called 'the Act') for return of the application and therefore, the order of return of the application by the aid of Section 5 of the Act passed by the court below was wrong. The second contention is that while returning the application for proper presentation, the court improperly left the parties to bear their own costs whereas it should have awarded costs to the appellants.

5. So far as the first contention goes, the learned Counsel has strenuously urged that under the Act, the only provision for disposing of an application is under Section 25 and that does not envisage a return of the application. He also contended that the provisions of Order 7, Rule 10 CPC would not be applicable to an application under the Act with the aid of Section 5 of the Act. In this connection, he has placed reliance upon a few authorities to which I presently refer. He also specifically drew my attention to Section 12, 14, 18, 19 and 27 of the Act. In my opinion, the contention of the learned Counsel for the appellants cannot be sustained. Section 5 of the Act clearly provides that subject to the provisions the 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. Then Section 12 of the Act provides for the verification of the insolvency petition in the same manner as is prescribed by the Code of Civil Procedure for signing and verifying plaints. This, therefore, goes to show that an application under the Act is almost akin to a plaint although strictly speaking it may not be a plaint and by virtue of Section 5, all procedural matters for which no specific provision has been made under the Act, shall be governed by the provisions of Civil Procedure Code. The authorities relied upon by the learned Counsel do not as a matter of fact, directly relate to a situation like one under consideration before me. In *Madanlal v. Ruler of Rampur State* AIR 1940 Cal. 244, the matter was with regard to the applicability of Section 86 of the Code of Civil

Procedure. The Court found that this provision of the Civil Procedure Code was not a matter of procedure and, therefore this section would not be applicable to proceedings under the Act. In *P. China Viravya v. T. Gopalkrishna Rao* AIR 1957 A.P. 603, it was held that the provisions of Order 1, Rule 10 CPC would not be applicable to the facts and circumstances of that case in as much as under the provisions of the Act itself, there was a specific provision for the matter. It may be mentioned that under the Act, notice to all the creditors has to be published & on such publication, any of the creditors could have applied to be impleaded by the Court and this was done in that case. In *Gupteshwer v. Chaturanand* : AIR1950 Pat309 and *Nur Mohmed v. Molvi Jamil Ahmed* AIR 1819 Allah. 213, the matter related to the provisions of Order 33, Rule 8 CPC. These cases are, therefore, distinguishable because of the presence of Section 5 under the Act so also is the case of AIR 1933 Hyderabad 515. which was in respect of filing of an award by arbitrator. It needs hardly to be mentioned that at that time, the matter of arbitration was governed by the provisions of Civil Procedure Code itself and the Arbitration Act had not come into force and, therefore, this authority also is not of much consequence. Section 25 contemplates final rejection of the application on merits or on non-service of the debtor, while Section 27 speaks of adjudication. They do not deal with the question of jurisdiction. Section 18 and 19 also do not relate to jurisdiction.

6. On the other hand, we have a clear authority of the Calcutta High Court reported in *Esther Kiron v. Franklin Promod Koron* : AIR1983 Cal56 which, of course, is not under the Act but it would be very much nearer to the present case on account of the fact that a provision similar to Section 5 of the Act was under consideration before that Court, namely, Section 45 of the Indian Divorce Act and it was observed by a Full Bench of that Court as under:

As under Section 45 of the Indian Divorce Act the provisions of the Civil P.C. apply to proceedings Under the Indian Divorce Act we find ' that the petition under Section 10 of the Indian Divorce Act filed by the petitioner should be returned under Order 7, Rule 10 of the Civil P.C. for presentation in the Court having jurisdiction to entertain the same.

I may, of course, state that the question has not been discussed in great detail in that authority but it clearly appears that by virtue of Section 45 of the Indian Divorce Act, the provisions of Order 7 Rule 10 CPC were made applicable even to applications and not plaint, under the Divorce Act.

7. The learned Counsel for the respondent also brought to notice a few other authorities by which various procedural provisions of the Code of Civil Procedure had been applied to applications under the Act and, in my opinion, a brief reference to those authorities would suffice. In *Bhagwan Das v. Chuni Lal* AIR 1930 Lahore 996, the provisions of Order 9 CPC were applied to an application under the Act. In *Ishar Das v. Mst. Fatima Bibi* AIR 1934 Lahore 468, the Court went to the extent of saying that the Court while dealing with an application under the Act can exercise its inherent powers under the Code of Civil Procedure, and it can pass all orders necessary for the ends of justice. In *Parma Lal v. Abdullah* AIR 1933 Allah. 117 the provisions of restitution under the Civil Procedure Code were applied to proceedings under the Act. In *Rvmpratap v. Lachman* AIR 1940 Patna 623, also the provisions of Order 9 Rule 13 CPC were applied to proceedings under the Act. *Criramggn Chottiar v. Soranam Pillai* : AIR1955 Mad202 Order 6 Rule 17 CPC was applied to proceedings under the Act and in *Kishnaram v. Ramakrishnan* AIR 1935 Tra. Co. 49, the powers of review under the Civil Procedure Code were made applicable to proceedings under the Act.

8. From this, it clearly appears that the procedural provisions of the Code of Civil Procedure would be applicable to proceedings under the Act unless there is any specific provision in respect of that matter under the Act itself. There is no clear provision akin to Order 7 Rule 10 CPC under the Act and, in those circumstances, the Court under the Act can apply the provisions of Order 7 Rule 10 CPC to an application under that Act by virtue of Section 5 of the Act, in this view of the matter, I do not find any ground for interfering with the order passed by the learned District Judge so far as the return of the application is concerned.

9. Now coming to the question of costs, the learned Counsel for the appellants has urged that of course, costs are left to the discretion of the Court but normally the costs must follow the event and if an order in contravention of this principle is

passed, the Court must indicate its reasons. Reliance has been placed upon *Umedsingh v. Kalulal* 1950 RLW 102 and *Kali Prasad v. Ram Prasad* : AIR 1974 SC148 . It may at once be stated that so far as the provisions of Section 35 of the Code of Civil Procedure is concerned the position is as contended by the learned Counsel for the appellants. Sub-section (1) of Section 35 gives a discretion to the court in respect of the costs but Sub-section (2) of that section acts as a rider to that discretion as it provides that where the Court directs that any costs would not follow the event, the Court shall state its reasons in writing. The position under the Act is a little different. Under Section 76, the discretion has been left with the Court but there is no rider as is contained by Sub-section (2) of Section 35 of the Civil Procedure Code and, therefore, this discretion appears to be unfettered. Again in the circumstances of this case, the order passed by the learned District Judge cannot be said to be altogether wrong, illegal or perverse in as much as the proceedings have dragged before that court on the question of jurisdiction itself for a long period and both the parties had been responsible for this. In these circumstances, the Court was justified in leaving the parties to bear their own costs. In the circumstances pointed out above, the authorities relied upon by the learned Counsel for the appellants are not of much help.

10. The result, therefore, is that this appeal fails and is hereby dismissed. The parties are left to bear their own costs in this court.