

(1968) 01 KL CK 0011

In the High Court Of Kerala

Case No : Second Appeal No. 140 of 1964

Kumaran and Others

APPELLANT

Vs

Cheriyambadan Ayidru and Others

RESPONDENT

Date of Decision : 24-01-1968

Acts Referred:

Provincial Insolvency Act, 1920 — Section 37

Citation : AIR 1969 Ker 211

Hon'ble Judges : Mathew P. Muricken, J

Bench : Single Bench

Advocate : P.C. Balakrishna Menon, for the Appellant; T.S. Venkiteswara Iyer and R.C. Plappilly, for the Respondent

Final Decision : Partly Allowed

Judgement

K.K. Mathew, J.—Defendants 1 and 2 are the appellants. The suit was to enforce a bond executed by the 1st defendant, with 2nd defendant as surety, to the 3rd defendant.

2. The 3rd defendant conducted a kuri. The 1st defendant was a subscriber for one ticket in the Kuri. He bid half-a-ticket and executed Ext. A-1, bond. The 1st defendant committed default in the payment of future instalments on 9-8-1953. Thereafter the Kuri broke down on account of the default of the 3rd defendant. The 1st defendant had subscribed for 43 instalments and it was from the 44th instalment that he defaulted. According to 3rd defendant, an amount of Rs. 742-8-0 (Rs. 742-50) was due to him from the 1st defendant. The plaintiff was also a subscriber in the Kuri conducted by 3rd defendant and for money due to him from the 3rd defendant he filed a suit against the 3rd defendant and obtained a decree and in execution of the decree he brought the right under the bond executed by defendants 1 and 2 and other moveables of the 3rd defendant to sale and purchased them. The 3rd defendant was declared insolvent in I. P. No. 1/54 and the Official Receiver was appointed to administer the estate. Before the Receiver, the 1st defendant filed a petition stating that if an account is taken,

amounts will be due to him from the estate of the insolvent The Official Receiver considered the petition and passed Ext. B-1 order fixing the amount due from the 1st defendant to the estate of the insolvent, at Rs. 57. Subsequently, the order adjudicating the 3rd defendant as insolvent was annulled.

3. In the suit filed by the plaintiff to realise the amount due under Ext. A-1 bond, the 1st defendant contended that the suit is barred by limitation and that not more than Rs. 57 as found by the Official Receiver in Ext. B-1 order can be recovered from him. Both the Courts below found that the plaintiff was entitled to recover Rs. 742-50 with interest and decreed the suit.

4. It was argued that u/s 37(1) of the Provincial Insolvency Act, 1920, Ext. B-1 order was binding on the plaintiff even though the order of adjudication has been annulled and that he can recover only Rs. 57 as found by the Receiver in Ext. B-1. Section 37 of the Provincial Insolvency Act is as follows:--

"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore, done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such condition (if any) as the Court may, by order in writing, declare".

It is clear from Section 33 that all the creditors have to tender proofs of their claims to the Receiver and he has to admit or reject the proofs. u/s 46, what can be recovered by the estate of the insolvent is what is due after setting off the claims due from the insolvent. Section 80 of the Act reads as follows:

"(1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely:--

(b) to frame schedules and to admit or reject proofs of creditors;

X X X

(2) Subject to the appeal to the Court provided for by Section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court".

5. The short question for consideration is whether Ext. B-1 order is an "act" within the meaning of Section 37 of the Act.

6. In *Brandon v. McHenry* 1891-1QB 538 it was held construing the corresponding section of the English Bankruptcy Act, 1869 that when a proof in bankruptcy is rejected by the trustee, and the bankruptcy is subsequently annulled, the rejection of the proof remains valid and that the amount sought to be proved cannot be recovered. Lord Esher M. R, said:

"It seems to me that the rejection of a claim by the trustee is an act done by him within the meaning of the section, and therefore, such rejection holds good after the annulment of the bankruptcy."

7. In "the Law of Insolvency in India", by D.F. Mulla, 2nd Edition, at page 335, it is observed:

"At the same time if a proof was rejected by the Official Assignee or Official Receiver, the creditor cannot, after annulment, enforce the claim, the rejection of the proof being an "act" done by the Official Assignee which is not nullified by the annulment".

8. Mr. Venkiteswara Iyer appearing for the respondent submitted on the strength of the rulings in *Bank of Chettinad v. Saw Yu Byan* AIR 1935 Rang 498; *Official Receiver v. Succa-ram* AIR 1935 Rang 328; *Md. Hussain v. Md. Rowther* AIR 1953 Mad 620 and *Daw Hnit v. Anamalai Chettiar*. AIR 1938 Rang 335 that an order passed by the Court settling a list of the creditors is not an "act" done by Receiver or Court within the meaning of Section 37 of the Provincial Insolvency Act. I do not think that these rulings go to the extent of deciding the question that rejection or admission of proof by the Official Receiver is not an "act" done by him within the meaning of Section 37 of the Act.

9. In AIR 1935 Rang 498 it was observed:--

"Any order setting aside a transfer under either of these sections presupposes an existing insolvency, and as a matter of fact, at the present moment, there is no existing insolvency upon which an order in favour of the receiver or the scheduled creditors as such can be based. The receiver has ceased to exist. The schedule of creditors is waste paper and all the creditors of the insolvents have reverted to their original position as plain creditors and are no longer scheduled creditors in the insolvency. The annulment of the insolvency dates back to the date on which the order of adjudication was passed. The whole insolvency had become null and void. The question of subsequent *res judicata* is not one with which we are primarily concerned."

10. In AIR 1935 Rang 328 it was held:--

"Therefore, the words "all acts theretofore done" mean all acts done with a view to making sales and dispositions of property, including the setting aside of transfers made by the insolvent with a view ultimately of making sales of the property so recovered for the benefit of the estate in his hands and therefore, ultimately for the benefit of the creditors even though the actual final disposal of the property has not been made on the date of the annulment of the adjudication and therefore, the date on which the receiver in insolvency qua receiver ceases to exist".

I think, an order passed by the Insolvency Court or the Official Receiver would be an "act" within the meaning of Section 37 of the Provincial Insolvency Act. I, therefore, hold that Ext. B-1 order was an "act" of the Official Receiver, and

therefore, the order would remain valid even after the annulment of the order of adjudication. If that be so, no other question will arise in this case. Under that order, the plaintiff can recover only the amount as found by the Receiver.

11. Even otherwise, the plaintiff is entitled to recover only the balance of the amount after setting off the amount due to the 1st defendant from the 3rd defendant in the same chitty. The plaintiff is an assignee of the bond and the assignment is subject to the equities which could have been claimed against the assignor. I think, an equitable set off is permissible in this case. But, it is not necessary for me to decide that question.

12. I think, the Courts below were wrong in decreeing the suit. The plaintiff is entitled only to a decree for the amount admitted by the defendants. I pass a decree for the same with interest at 6 per cent, from the date of Ext. B-1 order upto the date of the decree and thereafter, with proportionate costs here and the Courts below. The appellants will get proportionate costs here and in the lower appellate Court.

13. The appeal is allowed to the above extent.