

State of Kerala and ors. Vs. Universal Marine Agencies and ors.

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Court : Kerala

Decided On : Nov-07-1979

Reported in : AIR1980Ker158

Judge : V.P. Gopalan Nambiyar, C.J. and; G. Balagangadharan Nair, J.

Acts : [Kerala Revenue Recovery Act, 1968](#) - Sections 68(1)

Appeal No. : Writ Appeal No. 3 of 1978

Appellant : State of Kerala and ors.

Respondent : Universal Marine Agencies and ors.

Advocate for Pet/Ap. : Adv. General

Disposition : Appeal allowed

Judgement :

Gopalan Nambiyar, C.J.

1. This appeal is by the State of Kerala and the Director of Fisheries, Trivandrum, against the judgment of a learned Judge of this Court, allowing the respondent's writ petition and restraining the appellants and the Deputy Director, the Assistant Director, the Sub-Inspector of Fisheries and the District Collector, Trichur, from taking steps for the recovery of a sum of Rs. 24,974.94, mentioned in Ext. P5 notice, under the provisions of the [Kerala Revenue Recovery Act, 1968](#) or the

Indian Revenue Recovery Act 1890. The learned Judge's judgment is reported (vide 1977 Ker LT 949). An Ice-plant, Storage and Freezing plant at Azheekode was leased to the writ petitioner under Ext. P1 agreement dated 5-5-1970 for a period of one year. The rent was Rs. 30,001/-. Rs. 15,000/- had been paid on 7-5-1970 and the balance was payable on or before 23-11-1970. It was actually paid on 30-1-1971. Electric charges had to be paid by the lessee. As the charges were not so paid, the electric supply was disconnected on 30-3-1971. On 20-3-1971 by Ext. P2 letter from the 3rd petitioner, (the Managing Director of the 1st petitioner), the Director of Fisheries was informed that the petitioner was unable to continue the lease till the end of the period of agreement, and proposing to hand over the plant at any time before the end of the month. The 3rd petitioner complained of harassment from the local officials. As articles were inside the factory, the 5th respondent (to the O. P.), the Sub-Inspector of Fisheries put a lock on the factory and listed the articles (vide Ext. P3). On 14-5-1971, the writ petitioner and the respondents came to the ice-plant. Rs. 13,194.64 was estimated to be the arrears towards the electric charges and it was agreed that the petitioner would pay the amount. On 28-5-1971 the petitioner actually paid the amount and the electric supply was reconnected. On 4-6-1971 the plant was test-run. The plant had to be rectified. But this was not done. The writ petitioner was issued a notice for the security amount of Rs. 5,010/- and an additional claim of Rs. 5,000/-. The mistakes in the plant were rectified. The factory was re-auctioned for Rs. 60,000/-. On 9-2-1974, the expenses and the loss caused to the Government by not returning the factory on 7-5-1971, were calculated at Rs. 29,974.94. After adjusting the security amount of Rs. 5,000/- a notice was issued for Rs. 24,974.94. Revenue Recovery Proceedings for the said amount were proposed to be taken. By Ext. P4 reply dated 14th Aug., 1973, the writ petitioner had stated that the entire lease amount of Rs. 30,001/- was paid in full and the plant was surrendered on 31st May, 1971, that subsequently the plant was leased out by the Government to another party, and that the security amount of Rs. 5,000/- had not been returned to the writ petitioner. Ext. P5 notice of demand dated 9-2-1974 under the Revenue Recovery Act was issued by the Tahsildar, Mangalore, threatening revenue recovery proceedings for the amount of Rs. 24,974.94 that was due. It was at that stage that the writ petitioner approached this Court for redress. These were the

facts according to the appellants.

2. The learned Judge referred to Ext. PI contract, and in particular to Clause 16 of the said agreement which reads as follows :

'16. The lessee do further agree that all sums found due to the lessor under or by virtue of this agreement shall be recoverable from the security amount and the balance, if any, shall be recoverable from the lessee and their properties movable and immovable under the provisions of the Revenue Recovery Act for ' the time being in force as though they were arrears of land revenue or in such other manner as the lessor may deem fit.'

Before the learned Judge, it was the Government's contention that the above clause would attract. Section 68 (1) of the Kerala Revenue Recovery Act 1968, according to which all monies due from any person to the Government under written agreement, are recoverable as arrears of public revenue due on land, or land revenue, and may be recovered under the provisions of the Act. The learned Judge referred to the decision of the Supreme Court in *Union of India v. Raman Iron Foundry* (AIR 1974 SC 1265), where in respect of a more or less similar clause, it was observed by the Supreme Court:

'Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other ad-indicatory authority. When there is a breach or contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the T. P. Act, which provides that a mere right to sue for damages cannot be transferred-'

The Supreme Court cited with approval a passage from the decision of Chagla, C. J. in *Iron and Hardware (India) Co. v. Firm Shamlal and Bros.* (AIR 1954 Bom 423), where the learned Chief Justice stated thus:

'As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.'

After noticing the above Bombay Judgment, the Supreme Court summed up the position thus:

'This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor'.

In the light of the above principles, the learned Judge took the view that unless there was an appropriate adjudication of liability of the writ petitioner, he cannot be made liable, nor should coercive steps for revenue recovery be set in motion against him. The learned Judge noticed that some of the items of claim were not specifically covered by any clause in Ext. PI agreement. For instance, there was no stipulation in Ext PI for interest on belated remittance of any instalments. The learned Judge also noticed that Department and the writ petitioner were at variance as to the date on which the ice-plant was surrendered back. The appellants herein placed it as on 17-8-1971, and calculated loss of profits on the basis of what the appellants had been deprived of, or the profits that they would have made, had the plant been surrendered on 8-5-1971. The writ petitioner would claim that it was surrendered on 31-5-1971 (vide Ext. P4). The

learned Judge was of the view that the two heads of claim above referred to, can only give rise to a claim for damages for the appellant, which had to be assessed in ordinary modes, and not assessed by the appellants themselves to confront the writ petitioner with. The learned Judge found that there was no provision under the contract to cover the assessment for the items of claim for which demand was raised against the writ petitioner. Reliance was placed by the learned Government Pleader before the learned Judge, (and by the learned Advocate General before us) on the following passage in the Union of India v. Hainan Iron Foundry (AIR 1974 SC 1265):

'Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other ad-judicatory authority.'

Reliance was also placed on a Division Bench ruling of this Court in State of Kerala v. Joseph (1975 Ker LT 551): (AIR 1975 Ker 189). In addition to these, the learned Advocate General drew our attention to the decision in State of Rajasthan v. Raghubrr Singh (AIR 1979 SC 852). This latter decision was under the provisions of the Interests Act and concerned itself with the question as to when a debt can be said to 'arise', or a sum certain can be said to have been stipulated for, or to have materialised. Counsel for the Respondent before us (the writ petitioner) drew our attention to the decision in Achuthan v. State Bank of Travancore (1974 Ker LT 806 para 17) : (AIR 1975 Ker 47) (FB).

3. We may extract the clause in Ext. PI agreement relied upon by the learned Advocate General.

'3. The department will employ one Assistant Operator for the Plant whose pay and allowances sanctioned from time to time by Government including leave salary and pension contribution shall be borne by the lessee.

4. The lessee shall keep the Plant in working order and in good condition meeting the expenses for the proper maintenance and repairs at the lessee s cost and on expiry of the lease period shall return the same in working order and good condition.

16. (quoted at page 5).

17. If any dispute or question shall arise between the lessee and the lessor touching on or relating to any of the matters or things hereinbefore contained the same will be decided by the lessor and the decisions of the lessor shall be final and conclusive and shall be binding on the lessee.

18. The lessee shall be prepared to terminate the lease any time before May One thousand Nine hundred and Seventy-one if so required by the lessor.' It seems to us that Clause 16 and 17 are wide enough to give the lessor the right to recover 'all sums found due to the lessor under or by virtue of this agreement', from the security amount, and the balance if any from the moveable and the immovable properties of the lessee under the provisions of the Revenue Recovery Act. This provision clearly embraces whatever is due to the Government, under or by virtue of Ext. PL

4. We now turn to Clause 17 extracted supra. That gives the Government the right of deciding the amount due to the Government by reason of the operation of the agreement in cases of dispute between the lessor and the lessee as to the said amount. The Government's decision is to be final and conclusive and binding on the lessee. This clause again is wide and comprehensive, and approximates to the clause that was construed by this Court in the Division Bench ruling in *State of Kerala v. Joseph* (1975 Ker LT 551): (AIR 1975 Ker 189). In the presence of this clause, we are not prepared to agree with the learned Judge that there was no provision or machinery provided in Ext. P1 to adjudicate on the amount due by reason of the working of the provisions of the agreement. The learned Judge was inclined to view the clause as acting in terrorem and as penal in nature, in so far as it concedes to one party to the contract a right of deciding against the other. The learned Judge apparently failed to note or to appreciate the ratio of the Division Bench ruling in *Joseph's case* (1975 Ker LT 551): (AIR 1975 Ker 189). That decision construed a similar clause and found it conferred a power similar to what is sought for in this case. The basis of treating as valid the conferral of such a power was explained in detail in the said decision. The learned Judge referred to *General Manager N. E. F. Ry. v. Chakraborty* ((1970) 1 SC WR 392), but an

examination of the decision will show that there was no right on the controller to quantify the liability of the subscriber and seek to deduct the same. In *Mohan Meakin Breweries Ltd. v. Union of India* (AIR 1975 'Delhi 248) (FB) again, referred to by the learned Judge, the relevant clause did not confer a power of adjudication, and was so construed by the Delhi High Court. But in this case we are of the opinion that Clause 17 confers such a power. We are unable to follow the learned Judge's comment that there was no argument before the Division Bench in 1975 Ker LT 551: (AIR 1975 Ker 189) that the power of adjudication was not conferred by the contract. We are afraid the learned Judge has missed the ratio of the decision. In pursuance of the clauses in the agreement the notice dated 26-6-1973 referred to in Ext. P4 had clearly set out the amount due from the lessee. No exception was taken to the adjudication of liability thus made by the Government. There was only a counter-claim that the plant was surrendered on 31st May, 1971 and was leased by the Government to a third party and that the security deposit of Rs. 5,000/- had not been returned. In the circumstances, we cannot agree with the learned Judge that the demand raised by the Government was unjustified and improper and without jurisdiction.

We allow this appeal and set aside the judgment of the learned Judge and would direct that O. P, No. 1859 of 1974-B will stand dismissed. We make no order as to costs.