

Alias Vs. Abraham

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Court : Kerala

Decided On : Jul-12-2004

Reported in : AIR2004Ker344; 2004(2)KLT1044

Judge : K.S. Radhakrishnan and; J.M. James, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 120B, 400, 417, 418, 419, 420, 465 and 468

Appeal No. : W.A. No. 933 of 2004

Appellant : Alias

Respondent : Abraham

Advocate for Def. : K.P. Dandapani,; T.M. Chandran,; V. Ajakumar and;

Advocate for Pet/Ap. : Antony Dominic, Adv.

Judgement :

K.S. Radhakrishnan, J.

1. Whether the principle acts curiae nominee gravidity would be applicable to this case, is one of the questions that has come up for consideration in this case. It was contended that the learned Judge would not have rendered the judgment had the court been correctly appraised of the facts after impleading the necessary

parties. Prayer was therefore made to relegate the parties to the same position prevailing before the judgment of the learned single Judge by way of restitution.

2. This Writ Appeal has been preferred with leave of this court. Appellants are aggrieved by the judgment of the learned single Judge in W.P.(C). No. 39626 of 2003 permitting the second respondent to withdraw the amounts lying in the account of the first respondent firm with the State Bank of Travancore without the appellants in the array of parties. Appellants submit that the conduct of respondents 1 and 2 in approaching this court without making them parties to the Writ Petition is an abuse of process of this court and to get over the order in I.A. 2479/03 in OS. 383 of 2003 of Munsiff s Court, Thiruvalla. By virtue of this Court's judgment, the second respondent could release an amount of Rs. 18,66,410/- from the fourth respondent Bank and utilised the same without the approval of majority of the partners of the firm. Respondents 1 and 2 had approached this Court since 4th respondent was reluctant to operate the current account No. 41119 of the firm in view of the order of the civil court.

3. Appellants herein with specific reference to the order passed in I.A. 2479/03 in OS. 383/03 had a sent a registered letter to the Bank informing them as follows:

'Referring to the order of the Hon. Munsiff Court, Thiruvalla as cited above we submit the following:

The firm T.O. Abraham and Company opened and maintains a bank account with your bank. From March 2003 onwards there is a dispute among the partners of the firm and consequently certain suits were filed in the matter of dispute for settlement of accounts, declaration etc. In this connection Hon. Munsiff Court passed the above referred order restraining him from utilizing any funds of the Firm without majority decision of partners of the firm.

Hence in the light of the said order we inform that Sri. T.O. Abraham is not authorized to withdraw any amount on behalf of the firm from the bank account and if you pay any amount against his cheques without consent of majority partners the same will be at your personal risk and the firm will not be responsible for any withdrawal.'

On the basis of the above mentioned letter the 4th respondent Bank informed the second respondent, vide their letter dated 6.12.2003, that they are unable to permit the second respondent to operate the account which reads as follows:

'We are sorry to inform you that we have received a letter from Shri T.O. Aleyas, Partner, Shri Gigy Kuriakose, Partner, Smt. Sheeba Aleyas, Partner, Smt. Thankamma Baby, Partner, Shri. Abraham Baby nominee of T.O. Baby of T.O. Abraham & Company preventing the operation of the account. Besides this we have received an FIR from Sub Inspector of Police, West Police Station, Kottayam in respect of opening this account allegedly.

From the FIR we came to know that one of the partner Mr. Gigy Kuriakose has filed a criminal case under Sections IPC 120B, 400, 417, 418, 419, 420, 465, 468 and 34 against T.O. Abraham and Valsalan, the former of this branch before the Judicial First Class Magistrate Court-3, Kottayam questioning the genuine nature of opening the said account. Moreover, we have also received a letter from Shri. T.O. Aleyas preventing the operation of this account. In these circumstances we assume that you can understand what is our position in this regard and we are bound to freeze this account. We are also informing you that we will keep the account in that status until the dispute is over.'

Respondents 1 and 2 in the above mentioned circumstances, have approached this court and filed O.P.No. 39626 of 2003 for a direction to the Bank to allow the second respondent to operate the Bank account of the first respondent firm. Learned single Judge has passed an order holding that the second respondent is entitled to withdraw the amount pursuant to the order in I.A.No. 2479 of 2003 and it was ordered that the withdrawal of the amount would be covered by security to protect the interest of the Bank. On the strength of this order which was passed without the other partner in the array of parties, the Bank released an amount of Rs. 18,06,410/- ignoring the objection raised by the partners.

4. We may before examining the legality of the judgment rendered by this court, refer to few essential facts. Appellants and second respondent along with others constituted a partnership firm styled as M/s. T.O. Abraham and Company for the purpose of execution of work contracts of various types. It was stated in the

partnership deed Ext. P13 that the Managing Partner of the firm would be Sri. T.O. Abraham the second respondent herein. Further it is also stated that the bank accounts would be opened in the name of the firm and would be operated by the managing partner and the net profit or loss of the firm would be shared between the partners at the percentage enumerated in that document. Later some of the partners retired and the firm was reconstituted by another document Ext. P14 dated 29.5.1990. There was yet another reconstitution of the firm by Ext.P15 dated 3.3.1993 followed by an amendment deed dated 1.4.1996. Parties are by and large close relatives. Due to various reasons partners fell apart which led the parties approaching the civil court as well as the criminal court. Third and fourth appellants along with another filed O.S. 74 of 2003 before Sub Court, Thiruvalla for a prohibitory injunction. They also moved I.A. 8846/03 for temporary injunction restraining the second respondent herein from collecting any money from the Kerala Water Authority or any other department with which the firm is having contractual relationship and spending that amount without the written consent of the majority of the partners of the firm. That application was however dismissed noticing that another suit O.S.383/03 is pending before Munsiff's Court, Thiruvalla. Reference was also made to the judgment of this Court in W.P.(C). 39156/03 filed by some of the appellants and others for similar direction. This court disposed off W.P. No. 39156 of 2003 directing the parties to agitate their arievances in OS. 383/03 pending before the Munsiff Court, Thiruvalla. The court also ordered that the Water Authority would abide by the civil court orders in the matter of payments due to the firm for the work done.

5. The second appellant herein following the orders passed by this court in WP(C). 39156/03 and civil court in IA 846/03 in O.S. 74/03, filed I.A. 2479/03 in O.S. No. 383 of 2003 before Munsiff's Court Thiruvalla for an order of injunction restraining the second respondent from receiving any money from the Kerala Water Authority and utilizing the same without the approval of the majority of the partners. In that I.A. respondents 1 and 2 herein and other partners were made parties. Civil court heard the matter at length and passed the following order dated 18.11.2003.

'In the result, the petition allowed in part restraining the counter petitioners 1 to 4 plaintiffs from spending any money of the firm or from removing or disposing any

vehicles as well as machineries of the firm from the yard or site, without the majority decision of the partners mentioned in the reconstituted partnership deed dated 1.4.96. It is also made clear that the injunction granted will not in any way affect, the 1st plaintiff firm's right to receive payments from authorities or to acquire assets in the name of the firm. The majority decision is required only for the utilization of assets and funds. Considering the nature and circumstances of the petition, there is no order as to costs.'

The order passed by the civil court was duly informed by the appellants herein to 4th respondent bank. As we have already indicated that the Bank was reluctant to release the amounts lying in the account of the firm because majority of the partners objected to the utilization of funds. Above mentioned facts would indicate that the parties are seriously litigating the matter before civil court, this court and also before the magistrate court. Without making the appellants and other partners in the array of parties, Writ Petition was preferred by respondents 1 and 2 and got the amount released and utilized the same without obtaining approval of the majority of the partners.

6. Counsel for the appellants Sri. Antony Dominic submitted the filing of the Writ Petition without making them parties is an abuse of process of court and attempt is to circumvent the order of the civil court. Counsel submitted no decision has been taken by the partners as to how the amount has to be utilized. Counsel submitted an amount of Rs. 18,66,410/- has already been received from the 4th respondent bank by second respondent on the strength of the learned single Judge's judgment and utilized the same without decision of the majority of the partners at the whims and fancies of the second respondent. On the strength of the judgment third respondent Bank is continuing to receive and utilize the same without the approval or knowledge of the remaining partners.

7. Sri. K.P. Dandapani, counsel appearing for respondents 1 and 2 submitted that since the Bank has freezed the account the functioning of the firm came to a stand-still. Further he has also stated that sufficient safeguards have been made by this court to protect the interest of the bank and if at all appellants have any claim they may proceed against the bank and recover the same. Further it is also

stated for releasing the amount he has given his residential house as security and that the bank has released the amount on production of proper security. Counsel also made reference to the counter affidavit filed in the appeal. Though in paragraph 5 of the counter affidavit it was stated that the money released from the Bank was due to him personally, counsel later retracted from the stand and admitted that it was money due to the firm.

8. The conduct of the respondents 1 and 2 in filing Writ Petition 39626/03 without impleading the appellants and other partners in the party array has to be deprecated. Parties are hotly contesting the matter before the civil court, criminal court and earlier before this Court. The second appellant herein with the other partners in the array of parties has obtained an order in I.A. 2479/03. Attempt of respondents 1 and 2 was evidently to get over the order passed by the civil court through the medium of this Court, which in our view, nothing but an abuse of the process of this court. Counsel could not show us any decision of the majority of the partners for utilisation of the funds received from the Water Authority. The 4th respondent bank was well aware that appellants and others are objecting to the release of the amount. Appellants had made known to the bank about the civil court's order in I.A.2479/03 in O.S.383/03 of Munsiff's Court, Thiruvalla. Bank was specifically informed that second respondent was not authorised to withdraw the amount from the bank account without the majority decision of the partners of the firm. Bank was informed by the appellants that if the bank is permitting the second respondent to withdraw the amount that will be at the bank's risk. Under such circumstance bank was reluctant to release the amount which is evident from the communication dated 6.12.03 as well. But for this court's judgment parties would have been governed by Ext.P4. By virtue of that order the second respondent could have utilised the amount received from the Bank only with the approval of majority decision of the partners. We have therefore no hesitation to say that the conduct of respondents 1 and 2 is nothing but an abuse of process of this court and the judgment under appeal cannot be allowed to stand and is accordingly set aside and the appeal would stand allowed.

9. Counsel appearing for the appellants submitted this court should relegate the parties to the same position as they were before 16th December, 2003, the date of

this court's judgment. Counsel reminded us the maxim acts curiae nominee gravity. Counsel also submitted this Court should direct respondents 1 and 2 to redeposit the amount released from the bank from the firm's account and parties should be directed to be governed by the order of the civil court Ext.P4. We find justification in the said plea.

10. The doctrine of acts curiae nominee gravity is a maxim founded upon justice and good sense and affords a safe and certain guide for the administration of the law. Apex Court had occasion to consider the above maxim in Karnataka Rare Earth v. Senior Geologist Dept. of Mines & Geology. (2004) 2 SCC 783. Apex Court placing reliance on the earlier decision of the Apex Court in South Eastern Coal Fields Ltd. v. State of M.P. (2003) 8 SCC 648 held as follows:

'The doctrine of acts curiae nominee gravity is not confined in its application only to such acts of the court which are erroneous; the doctrine is applicable to all such acts as to which it can be held that the court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the court to pass an order which at the end is held as not sustainable has resulted in one party gaining an advantage which it would not have otherwise earned or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. The successful party can demand: (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost.'

The principle laid down by the Apex Court in South Eastern Coal Fields' case and Karnataka Rare Earth's case, in our view, would be squarely applicable to the facts of this case and applicable to final judgments rendered by courts. Respondents 1 and 2 without making the appellants parties to the Writ Petition got an advantage which they would not have got on the basis of Ext.P4 order. Ext.P4 order specifically says that the funds could be utilised only after getting majority

decision of the parties. Admittedly such a decision has not been taken by the majority of the partners. But for this court's judgment respondents 1 and 2 could not have utilised the amount without a decision of the majority of the partners. Bank was informed of Ext.P4 order by the appellants. Bank also understood without majority decision the amount could not be utilised. Bank would not have released the amount, but for the judgment of this court in W.P.(C) 39626/03 which was rendered by this court without appellants in the array of parties. We are of the view the doctrine of acts curiae nomine gravidity would squarely apply to the facts of this case since this court would not have so acted had it been correctly appraised of the facts by the respondents 1 and 2. Under such circumstance the parties should be placed in the same situation that we got before the passing of the judgment by this court on 16th December, 2003.

11. We therefore direct respondents 1 and 2 to re-deposit the amount received by them from the third respondent bank in the account of the firm within a period of three weeks from today and the amounts lying in the account of the firm could be utilised only with the approval of the majority of the partners as ordered by the civil court. Judgment of the learned single Judge is set aside and the parties would be governed by Ext.P4 order of the civil court unless varied in the appeals pending before the District Court. We make it clear that we are not expressing opinion on the merits of the case since the matter is seized before the civil court.