

Varkisons Engineers Vs. Kinetic Foundations (P) Ltd.

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Court : Kerala

Decided On : Nov-26-2004

Reported in : II(2005)BC195; 2005(1)KLT264

Judge : R. Bhaskaran and; K. Thankappan, JJ.

Acts : [Partnership Act, 1932](#)

Appeal No. : A.S. No. 232 of 2002

Appellant : Varkisons Engineers

Respondent : Kinetic Foundations (P) Ltd.

Advocate for Def. : Anil S. Raj,; K.N. Rajani,; Radhika Rajasekharan P.

Advocate for Pet/Ap. : Biju Abraham,; K.K. John and; Biju Joseph, Advs.

Disposition : Appeal allowed

Judgement :

K. Thankappan, J.

1. Plaintiff in O.S. No. 586/99 on the file of the Principal Sub Court, Ernakulam is the appellant. First respondent is a firm represented by its Managing Director, 2nd respondent and respondents 3 to 5 are directors. The suit was filed for realisation of Rs. 3,33,926 with 22% interest per annum from 28.2.1998 onwards. As per the

plaint averments, the appellant is a registered partnership firm engaged in the business of supplying metal aggregates under the name and style 'Slabs and Aggregates'. The 1st respondent purchased metal aggregates from the appellant and during the course of the said business transaction the 1st respondent owed a sum of Rs. 5,48,926 on 28.1.1998. On demand, the 1st respondent paid an amount of Rs. 2,15,000 leaving a balance of Rs. 3,33,926. In spite of repeated demands, the 1st respondent did not pay the balance amount and hence, the suit is filed for recovery of the amount.

2. Resisting the suit claim, the respondents had jointly filed a written statement. In the written statement the respondents have contended that the appellant is not a registered firm and respondents 2 to 5, being directors of the 1st respondent firm, are not personally liable to pay the debts to the 'Slabs and Aggregates', a different legal entity. The respondents have also contended that the suit is bad for misjoinder of parties since the appellant has no locus standi to file the suit for realisation of the amount owed to 'Slabs and Aggregates' as 'Slabs and Aggregates' is a different legal entity from that of the 1st appellant. It is also contended that the suit was barred by limitation.

3. Before the Court below PW1 was examined and Exts.A1 to A13 were marked on the side of the appellant. DW1 was examined on the side of the respondents.

4. The Court below mainly framed the following issues for trial:-

- 1) Is the suit bad for misjoinder of parties?
- 2) Whether the plaintiff is competent to sue for the amounts due to M/s. Slabs & Aggregates'?
- 3) Is the plaint claim barred by the law of limitation?
- 4) What is the correct amount due from the 1st defendant company?
- 5) What shall be the chargeable rate of interest?
- 6) Reliefs and costs.

The trial Court after considering the pleadings and evidence adduced dismissed the suit holding that the appellant was incompetent to sue for the amount due to 'Slabs & Aggregates'.

5. The points for consideration are:--

1) Whether the suit filed by the appellant is maintainable.

2) What is the correct amount due from the defendants to the plaintiff.

6. Point No. 1: - The main question to be decided in the appeal is whether the appellant firm is having its legal entity under the provisions of the Partnership Act to file the suit against respondents. Exts. A1 to A4 documents are related to the transaction between the 1st respondent-firm and 'M/s. Slabs and Aggregates'. In Ext.A5 registered notice the appellant firm is shown as the proprietors of 'Slabs and Aggregates'. Ext. A6 lawyer notice was issued on behalf of 'Slabs and Aggregates'. It is in evidence that the appellant has got its own trade names or trade marks and the 'Slabs and Aggregates' is the trade name of the appellant. The appellant also establishes that the business of supply of metal aggregates is under the name and style of 'Slabs and Aggregates'. In all the above exhibits produced by the plaintiff, M/s. Varkisons Engineers is described as the proprietor of Slabs and Aggregates. Learned counsel for the appellant has submitted that the court below went wrong in holding that the appellant is incompetent to sue for the amount due to 'Slabs and Aggregates'. In this context, the learned counsel relied on a decision reported in J.C. Gupta and Ors. v. Wazir Chand Vir Bhan Jullundur, 1967 Punjab Law Reporter 833. In the above decision the Punjab Haryana High Court held that a firm registered under the Partnership Act could carry on business in a trade name. In Ext.A9 reply notice sent on behalf of the defendants it is admitted that M/s. Varkisons Engineers is the proprietors of Slabs and Aggregates. The contention that the defendants have nothing to do with the plaintiff firm and that it had dealings only with Slabs and Aggregates is not correct. So we hold that the appellant need not file the suit in their trade name.

7. The question remains as to whether the appellant firm is a registered one as per the provisions of the Act. With regard to this, the trial Court held that there was no

evidence to show that the appellant was a partnership firm duly registered under the provisions of the Partnership Act. Learned counsel for the appellant relied on Annexure-A14 and contended that the appellant had taken all legal steps to reconstitute the firm with effect from 5.7.1999. The appellant filed WP(C) No. 3682/2004 praying for a direction to the Inspector General of Registration of Kerala, Registrar of Firms, Thiruvananthapuram to make changes in the constitution of the firm as early as 5.7.1999 that is prior to the filing of the suit. It is in evidence that the suit filed before the Trial Court is on 19.10.1999. The Writ Petition filed by the appellant was allowed by a learned Single Judge of this Court directing the Inspector General of Registration of Kerala to carry out the changes in the constitution of the firm. A copy of the judgment in the above Writ Petition is produced in the appeal as Annexure-A15. In Ext.A15 this Court directed the Inspector General of Registration of Kerala as follows:--

'.....The Registrar is directed to enter the change in the partnership, contained in Ext.P2 with effect from 1.10.1999. This the Registrar shall do, within two weeks from the date of receipt of a copy of this Judgment. A fresh certificate shall be issued to the petitioner after effecting the changes directed above, within two weeks from the date of production of a copy of this judgment'.

It is to be noted that the contentions raised in the Writ Petition are to the effect that the appellant firm had already applied to incorporate necessary changes in the registration of the firm M/s. Varkisons Engineers, Kadayiruppu P.O., Kolencherry. Ext.P2 produced in the Writ Petition was a copy of the application for the same purpose signed by 8 partners of the firm. Exts.P3 and P4 would also indicate that the appellant firm had filed application to carry out changes in the deed of partnership prior to the filing of the suit. It is contended by the learned counsel for the appellant that it was only because of the default committed on the part of the Registrar of Firms that the changes could not be brought in to the deed of partnership. Hence, the learned counsel contend that even prior to the filing of the suit the appellant had taken all necessary steps to carry out the changes in the constitution of the partnership firm so as to make the partnership alive and this fact was not considered by the Court below. Learned counsel appearing for the respondents contended that unless and until the firm recoups its legal personality,

the suit could not be filed for recovery of the amount as claimed by the appellant. To substantiate this point learned counsel relied on a decision reported in *v. Ganapathy Chettiar v. S. Mohamed Abdul Kani Rowther and Bros.*, 1946 Travancore Law Reporter 260, wherein the Travancore High Court observed that registration under the provisions of the Partnership Act of a firm is a condition precedent to its right to institute a suit and a Court has no jurisdiction to proceed with trial of a suit when the condition precedent has not been fulfilled. The subsequent change brought in the constitution as per the provisions of the Registration Act cannot be taken as a ground for treating the suit as validly filed. The learned counsel for the respondents also relied on a decision reported in *Bank of Koothattukulam v. Itten Thomas*, 1955 KIT 108, wherein this Court held that 'the registration of the firm is a condition precedent in its right in institute a suit of the nature mentioned in Section 69(2) of the Indian Partnership Act and that registration after the institution of the suit cannot cure the defect of nonregistration before the date of suit. It follows from this that the Court below was right in dismissing the suit on the ground that the plaintiff-firm was not registered under the Travancore Partnership Act before the suit was instituted'. The learned counsel also relied on a decision of the Supreme Court in *Shreeram Finance Corporation v. Yasin Khan and Ors.*, (1989) 3 SCC 476. In the above cases notice regarding the change of firm to the Registrar was given after the filing of the suit. In this case it was given prior to the filing of the suit. Hence, that decision will not help the respondents.

8. In Ext.A5 it is stated that the appellant firm is the proprietary concern 'Slabs and Aggregates', though 'Slabs and Aggregates' have maintaining separate books of accounts of business of their own. Ext.A7 cheque issued by the 1st respondent in the name of 'Slabs and Aggregates' is also taken as a ground for the proprietorship of the appellant firm. Exts. A10 and A11 are the documents which would show that the appellant firm had got registration from 1966 onwards and it was in existence. The mere fact that the change brought in the constitution of Ext. A11 partnership deed has not brought into the records of the Registrar of Firms cannot be taken as a ground to conclude the nonexistence of the legal entity of the appellant firm. The stand taken by the respondents that they had no transaction with the appellant firm is also not correct as it is stated in Ext.A5 notice that Slabs

and Aggregates is a proprietary concern of the appellant firm. It is also to be noted that during the pendency of the appeal the appellant had taken efforts to make the appellant firm alive. Annexure-A14 letter sent to the Inspector General of Registration of Kerala would clearly indicate that even prior to the filing of the suit the appellant firm took all precautionary steps to make the firm alive or to bring the changes effected in the partnership firm. It is also to be noted that as per Annexure-A15 judgment, on getting the reference relating the application of the firm for making changes for the partnership deed, this Court directed the Registrar of Firms to make immediate steps to incorporate the change effected in the partnership firm as per the application dated 6.10.1999.

9. The question to be considered is with regard to the correct amount due to the plaintiff. In the written statement, the defendants contended that an amount of Rs. 3,31,508.60 was due from the 1st defendant to M/s. Slabs and Aggregates as on 28.12.1998. After the suit was initiated, a sum of Rs. 25,000/- was paid to M/s. Slabs and Aggregates by demand draft and another sum of Rs. 50,000/- was paid by demand draft on 25.11.1999. It is also contended that a further sum of Rs. 25,000/- was paid by cheque. Therefore, the 1st defendant has paid a total sum of Rs. 1,00,000/- and the balance amount will be only Rs. 2,31,508.60 and the 1st defendant is liable to pay interest only at the rate of 12% per annum. When the accountant-cum-manager of the 1st defendant was examined as DW1, he admitted that as per the settlement, the total amount due was 5,46,508.60 out of which Rs. 2,15,000/- was paid on various dates and the balance amount payable was Rs. 3,31,508.60. He also stated that Rs. 25,000/- was paid by demand draft and Rs. 50,000/- was paid by pay order and Rs. 25,000/- was paid by one Sasankan. He admitted that there is no document to show that an amount of Rs. 50,000/- was paid by pay order and nothing was produced in Court and there was also no evidence to show that a cheque for Rs. 25,000/- was paid. PW1 has admitted receipt of 2 demand drafts of Rs. 25,000/- each along with Ext.P9 reply. Therefore, out of the total amount of Rs. 3,31,508.60, an amount of Rs. 50,000/- has to be deducted. It is settled law that when the defendant claims discharge and the liability is otherwise found on the basis of the account books produced by the plaintiff and the admitted case of the parties, the burden is on the defendant to prove discharge. Therefore, the plaintiff is entitled to get a decree for Rs.

2,81,508.60. The rate of interest claimed at 22% per annum is also excessive and the plaintiff is entitled to get interest at 12% per annum.

10. In the result, the appeal is allowed and the plaintiff is granted a decree for Rs. 2,81,508.60 with 12% interest from the date of decree till realisation with costs of the appellant.

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