Philip Vs. Kinhimohammed

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Court : Kerala

Decided On : Oct-19-2006

Reported in : 2006(4)KLT998

Judge : M.N. Krishnan, J.

Acts : Civil Court Act - Sections 13; Court Fees Act - Sections 52; Contract Act; Code of Civil Procedure (CPC) , 1908 - Sections 34 - Order 8, Rule 6A to 6G - Order 20, Rule 19 and 19(2)

Appeal No. : A.S. No. 402 of 1994

Appellant : Philip

Respondent : Kinhimohammed

Advocate for Def. : K. Gopalakrishna Kurup, Adv.

Advocate for Pet/Ap. : Babu Thomas, Adv.

Judgement :

M.N. Krishnan, J.

1. This is an appeal preferred against the decree in O.S.No. 126 of 1990 of the Sub Court, Kozhikode and also as against the counter claim filed by the defendant in the said case. The suit was one for return of advance amount of Rs. 14,000/-

and some other amount due to the plaintiff. It is the case of the plaintiff that defendant agreed to sell a Jeep bearing Regn. No. KED 3290, a 1987 model and therefore he agreed to purchase it for Rs. 1,00,500/-. As per the agreement, an amount of Rs. 14,000/- was paid as advance on the date of agreement. An amount of Rs. 61,000/- was to be paid on 31.1.1990 and the balance amount of Rs. 25,500/- was to be paid on 28.2.1990. As the plaintiff wanted to raise some loan he got the document particulars from the defendant and forwarded to the financier and thereafter the financier informed him that the vehicle was a 1986 model. The plaintiff had entered into an agreement with the defendant bona fidely believing that the jeep is of 1987 model as represented by the defendant and that was the reason for the purchase of the jeep. It is the case of the plaintiff that the defendant has misrepresented and therefore he is entitled to the return of the advance amount paid by him.

2. On the other hand, the defendant would contend that it is not so and the plaintiff has perused the document even before executing the document and there has been no misrepresentation, whereas on the other hand, he had used the vehicle in such a way that it was damaged, the defendant has to pay money and further he had produced the bills for the repairs and there was no misrepresentation or breach of contract. The plaintiff had used the jeep and derived income. He has fled a counter claim for the damages caused to the jeep and also for the deprivation of profit for a long time.

3. In the trial court, PWs. 1 and 2 and DWs 1 and 2 were examined and Exts.A1 to A3 and Exts.B1 to B9 were marked. On an analysis of the materials, the trial court granted a decree for return of advance amount and negatived the prayer for counter claim. It is against that decision the present appeal is filed.

4. Learned Counsel for the respondent had raised a preliminary objection stating that the appeal is not maintainable before this court for the reason that the suit is valued for Rs. 19,000/- and the counter claim is valued for Rs. 25,000/- and the counter claim has to be treated as a cross suit and therefore they are having independent existence and therefore the appeal has to be filed only in the District Court where the jurisdiction is upto Rs. 25,000/- at that point of time. According to

him, Section 13 of the Civil Court Act precludes the defendant from filing an appeal before this court. Under Order VIII Rule 6A(2) 'such counter claim shall have the same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim'. It is also stated under Order VIII Rule 6A(1) proviso that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. Learned Counsel for the respondent had also pointed out to me the provision contained in Order XX Rule 19 of the Code of Civil Procedure. Under Order XX Rule 19(2) any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed. So learned Counsel for the respondent contends that the plaint as well as the counter claim are having independent existence and since a counter claim is filed in the suit itself, according to him, the appeal would lie in a court where an appeal from the suit would lie. The counsel also contends that there have to be two appeals and therefore two appeals have to be filed before the District Court and not a single appeal before the High Court.

5. On the other hand, learned-Counsel for the appellant would argue that the suit and the counter claim in a proceeding wherein Order VIII Rule 6A is involved are a unified proceeding and therefore when the unified proceeding is disposed of, the subject matter of appeal would be the combination of suit plus counter claim and therefore the appeal would be perfectly maintainable before the High Court. The counsel also would contend that under Order VIII Rule 6A what is contemplated by the Code is to dispose of the matter pronouncing a single judgment. Similarly what is to be drafted is a single decree wherein mention will be made of regarding the suit claim as well as the counter claim. Now I will refer to a decision 'of this court reported in A.Z. Mohammed Farooq v. State Government : AIR1984 Ker126 where incidentally the question arose and mere was a preliminary point raised regarding the maintainability. But in that case the subject matter of the counter claim was above Rs. 10,000/- and therefore the court did not decide the question, but had made references to the point at issue. The Full Bench of this court considered the implication of Order VIII Rule 6A to 6G and in paragraph 17 refers to the fact that the counter claim should be treated as a plaint and governed by the rules applicable to plaints. In paragraph 18 this court observed that 'having regard to the

aforesaid provisions, it is possible to hold that the 'subject-matter' of the suit would be the aggregate of the amounts claimed on the plaint and in the written statement by way of counter-claim'. But did not proceed to decide the same on the ground that the counter claim itself exceeds Rs. 10,000/-. So the subject matter of an appeal to be preferred under Section 52 of the Court Fees Act, would be the aggregate of the amounts claimed on the plaint and written statement. It is this 'subject matter' that will govern the jurisdiction. Whether suit claim and counter claim are independent proceedings or unified proceedings had been considered by the Madras High Court in T.K.V.S. Vidyapoornachary Sons v. M.R. Krishnamachary : AIR1983 Mad291 , which reads as follows:

Order 8, Rule 6-A speaks of a counter-claim as a plaint in one place and as across claim in another place. Nevertheless, in its most operative provision, it lays down that the court shall pronounce a single judgment in the suit, both on the original claim and on the counter-claim. The susceptibility of a counterclaim to be dealt with in a single judgment along with a suit claim, runs counter to the idea of the two being regarded as things apart. It is not merely that the Code provides for a single judgment to dispose of, at one stroke, the suit claim as well as a counterclaim, like hitting two birds with one stone. But Rule 6-C specifically lays down a special procedure to separate the suit claim from the counter-claim, wherever the separation is called for. This provision emphasises by implication that as a general rule a suit claim and a counter-claim ought properly to be regarded as constituting a unified proceeding. The rule, however, makes for an exception, and it is this; should the plaintiff in a given case desire that the counter-claim filed by the defendant in answer to his suit claim be dealt with as a separate suit in itself he ought to apply for that relief before the trial court and it should be done before the issues are settled. On his application for amending his suit claim and the counter-claim, the court will have to consider whether the counter-claim should be dealt with as part and parcel of the suit or whether the defendant should be referred to a separate suit. These exceptional provisions in Rule 6-C only illustrate the homogeneity of the suit claim and the counterclaim as a single proceeding.

6. The learned Judge found that the suit claim and the counter claim are only one single proceeding. In paragraph 6 of the judgment the learned Judge held that 'these exceptional provisions in Rule 6-C only illustrate the homogeneity of the suit claim and the counter-claim as a single proceeding'. When the homogeneity of this amounts to a single proceeding or a unification of the proceeding then necessarily, when that matter is decided and it goes to the higher forums it is that single proceeding which is being challenged before the appropriate forums. There may be cases where the plaint is dismissed and counter-claim is allowed and the plaintiff need challenge only the counter claim. In such circumstances, it depends upon the valuation of the counter claim that may decide the jurisdiction. But in the case on hand, the plaint is for realisation of Rs. 19,000/- and the counterclaim is for realisation of Rs. 25,000/-. When they are consolidated, it will be Rs. 44,000/-. In this case the plaint claim is allowed and the defendant's claim is disallowed. So, it became necessary for the defendant to challenge both the findings which according to him is unified proceeding. So, when it is taken as a unified proceeding then as rightly argued by the counsel for the appellant, the subject matter of the appeal would be the subject matter of the suit plus the counter-claim. In this case, it comes to Rs. 44,000/- and at that point of time the jurisdiction of the District Court was only Rs. 25,000/- and since the claim is above Rs. 25,000/- the appeal is maintainable before the appellate court. So the question of jurisdiction is decided in favour of the appellant.

7. Let me consider the merits of the case. Learned Counsel for the appellant very vehementally argues before me that under ordinary circumstances, a person will not purchase a vehicle without perusing the document. The contention of the plaintiff cannot be accepted for the following reasons. A perusal of the agreement would reveal that there is a stipulation to hand over the document at a later point of time. Further PW2 a witness to the transaction had been examined. The trial court has found that he had deposed before court that documents were not available at the tenure of the agreement and therefore there was no possibility for the plaintiff to peruse the document. The lower court has observed that in spite of searching cross examination nothing has been brought out in evidence to discredit the testimony of PW 2. When it is so, it has to be held that the plaintiff was not aware of the fact that jeep was 1986 model. If really, the documents were

available at the time of execution of the agreement and it had been perused, nobody would have written in the agreement that the vehicle was 1987 model. So far as movables are concerned, especially vehicles, the resale value of vehicle depends much on the model of the vehicle. Even if the difference is of one year it may affect the resale price. Considering the model as 1987, an amount was fixed for sale of the vehicle. Therefore the factum of nondisclosure of the real model to the plaintiff certainly entitles him to get away from the contract.

8. Learned Counsel for the appellant then argues about the counterclaim that he had expended money for repairing the vehicle and that the plaintiff had been unduly enriched by the receipt of the money during the time when he was in possession of the jeep and that he had incurred other expenditure for getting the vehicle roadworthy and in a plyable condition. There is a case for the plaintiff that the defendant had taken away the vehicle from the workshop. But the defendant's case is to the effect that the plaintiff had abandoned the vehicle in the workshop and the defendant was forced to effect the repair to make it in a roadworthy condition. The trial court found that the bills produced by the defendant does not contain the seal of the workshop and therefore did not accept it. If the vehicle is taken by the defendant from the workshop it is clearly against the terms of agreement. There is an agreement for sale whereby the possession of the vehicle is handed over to the plaintiff. There are recitals in the agreement itself regarding the mode of getting damages by the parties when there is a breach by the opposite party. One cannot without resorting to the legal procedure take away the vehicle from the workshop and contend otherwise. So the majority of the contentions in the counter claim are without basis. The trial court granted a decree in favour of the plaintiff, for the return of the advance amount paid by him. Admittedly the plaintiff was in possession of the jeep and using that jeep for a period of 36 days. Admittedly it was not a private jeep and it was used as a taxi. Even if there is a breach of contract committed by the defendant in the form of misrepresentation, the plaintiff is not entitled to appropriate whatever he got. He has been using the vehicle for 36 days. The defendant would contend that the plaintiff had received an amount of Rs. 13,600/- during that period. But there is no evidence to prove the same. Under the provisions of the Contract Act, the law takes specific care to prevent unjust enrichment of a party. Therefore this is a fit

case where at least an amount of Rs. 100/- per day has to be given to the defendant for the plaintiffs possession and user of the jeep for 36 days. If that amount is deleted the plaintiff will be entitled to Rs. 10,400/-. The trial court has granted interest at 12% from the date of suit till realisation, which is strictly in confirmity with Section 34 of the Code of Civil Procedure in the absence of any term in the agreement which stipulates 12% interest. When it is so, the amount that can be realised will be Rs. 10,400/- with 12% interest from the date of suit till date of decree and at the rate of 6% from the date of decree till realisation.

The appeal is disposed of and modified the decree passed as stated above. Parties are directed to bear their respective costs. An amount of Rs. 5,000/- deposited by the appellant herein before the trial court can be withdrawn by the decree holder towards the satisfaction of the decree debt.