

Soman Vs ECE Industries Ltd.

Court: High Court Of Kerala

Date of Decision: Sept. 24, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 16, 17, 18, 19, 19
Contract Act, 1872 â€” Section 49
Suits Valuation Act, 1887 â€” Section 11

Citation: (2012) 4 KLT 930

Hon'ble Judges: Thomas P. Joseph, J

Bench: Single Bench

Advocate: N. Dharmadan, D.P. Renu and M.R. Venugopal, for the Appellant;

Final Decision: Dismissed

Judgement

Thomas P. Joseph, J.

The only question raised by Shri N. Dharmadan, the learned Senior Advocate appearing for the appellant in this

Second Appeal arising from a concurrent verdict for payment of balance purchase price to the respondents is lack of territorial jurisdiction for the

trial court to entertain the suit. The 1st respondent is a Company represented by its Branch Manager, the 2nd respondent. According to the

respondents, the appellant purchased a lift from the 1st respondent as per Ext. A1, agreement dated 14.7.1999 for Rs. 5.5 lakhs. The lift was

meant to be installed in the hotel of the appellant at Kottarakkara. The agreement stipulated that 75% of the purchase price was to be paid in

advance along with the purchase order while 15% was to be paid at the time of delivery of the lift. The remaining 10% was to be paid after

installation of the lift. According to the respondents, earth work and connected works for installation of the lift were to be done by the appellant.

On 14.7.1997, at the time of execution of Ext. A1, agreement the appellant paid Rs. 4,12,500/- being 75 % of the price. Appellant did not make

the site suitable for installation of the lift within time. Though beyond the time, the lift was installed in the hotel of the appellant at Kottarakkara to

his satisfaction. The balance sum of Rs. 1,37,500/- is due to the respondents. In spite of demands, appellant did not pay the amount. Hence the

respondents filed O.S. No. 338 of 2001 in the court of learned First Additional Sub Judge, Thiruvananthapuram claiming that the cause of action

arose within the territorial jurisdiction of that court where the transaction took place.

2. Appellant resisted the suit on various grounds including that learned First Additional Sub Judge, Thiruvananthapuram has no territorial

jurisdiction to entertain the suit. Another contention raised is that the lift was defective, it was not functioning properly and on account of that, the

appellant suffered loss.

3. Learned Sub Judge framed additional issue No. 3 relating to territorial jurisdiction. Neither did the learned Sub Judge decide that issue as a

preliminary issue nor was any request made by any of the parties to do so. The parties went to trial and adduced then-evidence. After the trial was

over, learned Sub Judge heard the parties and decided all the issues including additional issue No. 3 relating to territorial jurisdiction. The issues

were found in favour of the respondents and a decree was granted in their favour.

4. Appellant challenged that verdict in A.S. No. 40 of 1990. Learned Second Additional District Judge, Thiruvananthapuram confirmed the

findings entered by the learned Sub Judge regarding territorial jurisdiction and on other issues. The appeal was dismissed. That dismissal is under

challenge in this Second Appeal.

5. According to the learned Senior Advocate, under Ss. 19 and 20 of the CPC (for short, "the Code"), jurisdiction to entertain the suit was only

with the Sub Court, Kottarakkara where the appellant resides and works for gain and where according to the appellant the transaction took place.

It is argued that no part of the cause of action has arisen within the territorial jurisdiction of the Sub Court, Thiruvananthapuram. According to the

learned Senior Advocate, finding entered by the courts below that Ext. A1, agreement was executed at Thiruvananthapuram is perverse, being not

supported by any evidence and against the evidence let in by the appellant. It is argued that judgment and decree of the courts below work out

injustice to the appellant in that the lift is not functioning on account of its manufacturing defect and he has suffered loss on account of that. Reliance

is placed on the decisions in Sreepathi Hosiery Mills (P) Ltd., Calcutta and Another Vs. Chitra Knitting Co., Tiruppur, , Bloom Dekor Limited Vs.

Subhash Himatlal Desai and Others, and G. Ayyappan Pillai Vs. State of Kerala and Another, .

6. Exhibit A1 is the agreement (a copy of which is given to me for perusal). The place of execution of the agreement is not stated in Ext. A1. The

Branch Manager of the 1st respondent gave evidence as P.W. 1. Contra evidence is given by the Manager of the appellant as D.W. 1. D.W. 1

stated in his proof affidavit that the court having jurisdiction is only the Sub Court at Kottarakkara and that the Sub Court, Thiruvananthapuram has

no jurisdiction to entertain the suit. In cross-examination he stated that Ext. A1, agreement was signed by the appellant and not by him though he

claimed to be a witness to the execution of Ext. A1 according to D.W. 1, at Kottarakkara.

7. The trial court observed that admittedly, the discussions leading to Ext. A1, agreement took place at Pattom (in Thiruvananthapuram) in the

office of P.W. 1. Referring to the circumstances including affixture of the seal by P.W. 1 which indicated that the branch of the 1st respondent was

then functioning at Thiruvananthapuram, the trial court held that the probability is that the transaction took place at Thiruvananthapuram. The first

appellate court observed that in the absence of proof of consequent failure of justice the appellant cannot be allowed to urge the plea of lack of

territorial jurisdiction in the appeal.

8. Section 19 of the Code deals with suits for compensation for wrongs to person or movables and states that where a suit is for compensation for

wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant

resides, carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the

option of the plaintiff in either of the said courts. S. 20 of the Code deals with jurisdiction for institution of suits not falling under Ss. 16 to 19. It is

stated that such other suits could be instituted where the defendant resides or carries on business, personally works for gain or the cause of action

arose wholly or in part.

9. Referring to S. 19 of the Code, this Court in Ayyappan Pillai v. State of Kerala (supra) has said that the expression ""wrong done"" occurring in

S. 19 includes the effect of the act and the resultant damage. That was a case where transit of movables was prevented at one place and the

consequence of that ensued at another place. This Court held that the court having jurisdiction over the area where the consequence ensued has

jurisdiction to entertain the suit.

10. In Sreepathi Hosiery Mills v. Chitra Knitting Co. (supra) in paragraph 2, the effect of Ss. 19 and 20 of the Code is dealt with. It is held that S.

19 is a specific section and that there being no other choice available to the litigant who wishes to seek such compensation, he cannot whittle down

the express prescription in S. 19 of the Code and lay emphasis on the oral evidence casually let in by him so as to create or vest jurisdiction in the

court which has none. The Supreme Court in Bloom Dekor Limited v. Subash Himatlal Desai (supra) in paragraph 28 explained the expression

cause of action"" as meaning, every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a

judgment of the court. It is the bundle of facts which is necessary for the plaintiff to prove in order to succeed in the suit.

11. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, the Supreme Court has held that making of a contract is part of the

cause of action and that a suit on contract can be filed where the contract was entered into.

12. Referring to the evidence on record, the courts below found that in all probability, Ext. A1, agreement was executed at Thiruvananthapuram

within the local limits of the jurisdiction of the Sub Court, Thiruvananthapuram.

13. True that D.W. 1 who gave evidence on behalf of the appellant has stated that the place of execution of Ext. A1, agreement is Kottarakkara.

D.W. 1 is not a signatory in Ext. A1. He is not a witness even in Ext. A1 though he claimed so. The appellant who has signed Ext. A1, agreement

and according to him, at Kottarakkara, has not entered the witness box to state so. In the circumstances the finding of fact entered by the courts

below as to the place of execution of Ext. A1 does not involve any substantial question of law.

14. In Ext. A1, the place of payment of the balance purchase price is not stated. In that situation the principle that the debtor should seek the

creditor should apply. In *Charles Dual & Co. v. Gans & Anrr.* ((1904) 2 KB 685), a Company in London entered into an agreement with the

defendant in New York, there being no express stipulation as to the place of payment for the goods shipped to the defendant. It was held that the

implication which under the circumstances reasonably arose from the contract was that payment should be made in England. Mathew L.J.,

concurring with the view taken by Stirling L.J., held:

Where a contract like that in the present case is made with such a Company, and no place of payment is specified therein, it appears to me that, in

the absence of anything to contrary, the intention may be inferred that the payment should be made to the Company where its office is situated.

In *Bobey Co. v. The Snaefell Mining Co. Ltd.* (20 QBD 152) an action was brought by the plaintiffs, engine makers in England for the price of

machinery erected by them in the Isle of Man for the defendants, a Company carrying on business in that Island. There was no agreement as to the

place of payment. It was held that it must be taken to be part of the contract that the plaintiff should receive the payment in England.

15. The above principle is contained in S. 49 of the Indian Contract Act. The said provision reads:

49. Place for the performance of promise, where no application to be made and no place fixed for performance.- When a promise is to be

performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the

promisee to appoint a reasonable place for the performance of the promise, and to perform it at such a place.

The rule as to the place of performance of the contract whether it is for payment of money or any other mode of performance is to be determined

by S. 49 of the Contract Act. The rule applies to promises for payment of money and promise for delivery of goods (See also Ramasubramonian

v. Ranganathan (1978 KLT 906).

16. Exhibit A1, agreement is silent as to the place of payment of the price for the lift delivered to the appellant. The 1st respondent during the time

of Ext. A1 and institution of the suit had a branch office at Thiruvananthapuram within the territorial jurisdiction of the Sub Court,

Thiruvananthapuram. In the absence of any contract to the contrary, the price of the lift purchased by the appellant was payable at that place. The

appellant had to seek the 1st respondent and pay the balance price at its branch office at Thiruvananthapuram. That payment was not made.

Hence the Sub Court, Thiruvananthapuram had the jurisdiction to entertain the suit.

17. It is apposite to refer to S. 21 of the Code as well. There, it is stated that no objection as to the place of suing shall be allowed by any

Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest opportunity and in all cases where issues

are settled at or before such settlement, and unless there has been a consequent failure of justice.

18. The appellant has raised objection regarding territorial jurisdiction in his written statement but he has participated in the trial and adduced

evidence on all issues. He addressed arguments in the trial court on all issues and has invited findings on all those issues. It is not shown that

institution of the suit in the Sub Court, Thiruvananthapuram has resulted in any failure of justice so far as the appellant is concerned. The policy of

the legislature, as could be seen from S. 21 of the Code is to treat objection as to territorial and pecuniary jurisdiction as purely technical. The

Supreme Court has observed in Kiran Singh and Others Vs. Chaman Paswan and Others, :

With reference to objections relating to territorial jurisdiction, S. 21 of the CPC enacts that no objection to the place of suing should be allowed by

an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in S. 11 of the Suits

Valuation Act with reference to pecuniary jurisdiction. The policy underlying Ss. 21 and 99, C.P.C. and S. 11 of the Suits Valuation Act is the

same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on

technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both

territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits...

In Manappa Manikappa Sheded and Others Vs. Bhaskhrappa A. Bhasana and Others, it is pointed out in paragraph 5:

Even otherwise, objection as to territorial jurisdiction cannot be allowed by the appellate Court unless such objection has been raised in the trial

court before the issues were settled and unless it was shown that there has been a consequent failure of justice. That is the requirement of S. 21 of

the Civil P.C. The defendants' objection as to jurisdiction was rejected by the trial Court. They have adduced evidence on all the issues. They

have not shown in the appellate Court how they have been prejudiced in the trial Court. In the absence of such prejudice which must result in

failure of justice, the appellate court cannot interfere with the decision of the trial Court on the ground of want of jurisdiction.

19. The appellant has not shown any failure of justice consequent to the Sub Court, Thiruvananthapuram entertaining the suit. Hence the contention

regarding lack of territorial jurisdiction could not be raised in the first appellate court or this Court. In the above view of the matter, the contention

of the appellant that the finding regarding the place of suing and territorial jurisdiction involve substantial question of law has to be rejected.

The Second Appeal is dismissed.

All pending Interlocutory Applications will stand dismissed.