

(2010) 01 KL CK 0102

High Court Of Kerala

Case No: A.S. No. 277 of 2000

Sajan Varghese

APPELLANT

Vs

Kerala State Electronic
Development Corporation Ltd.

RESPONDENT

Date of Decision: Jan. 12, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 6
- Limitation Act, 1963 - Article 1, 14, 19, 20, 18

Citation: (2010) 2 ILR (Ker) 362 : (2010) 1 KLT 801

Hon'ble Judges: Harun-Ul-Rashid, J

Bench: Single Bench

Advocate: P. Gopalakrishnan Nair, for the Appellant; T.P. Kelu Nambiar and M. Gopikrishnan Nambiar, for the Respondent

Final Decision: Allowed

Judgement

Harun-Ul-Rashid, J.

The defendant in O.S. No. 142 of 1994 on the file of the Principal Sub Court, Thiruvananthapuram is the appellant. The appeal is directed against the judgment and decree dated 30.06.1999. The plaintiff Kerala State Electronic Development Corporation Ltd., filed the suit for recovery of Rs. 87,364/- together with interest at 20% due from the defendant. The court below decreed the suit allowing the plaintiff to recover the sum of Rs. 87,364/- with interest at 12%. Aggrieved by the decree and judgment, the defendant had preferred this appeal. Parties hereinafter referred to as plaintiff and defendant.

2. The suit is for recovery of the price of the goods purchased by the defendant. The defendant had purchased 50 colour T.V. Sets from the plaintiff as per invoice Nos. 102189-102194 dated 27.12.1989. The defendant had availed credit purchase facility for Rs. 5,24,475/-. The defendant also purchased one stereo tape recorder for Rs.

1,725/- and a Black and White T.V. Set worth Rs. 2,300/-. It is pleaded that the defendant has been making part payment on various dates till 26.2.1992. The suit was filed for the outstanding balance.

3. The suit is mainly contested on the question of bar of limitation.

4. Admittedly, the defendant purchased T.V. Sets as per six invoices. Ext.A1 series are the invoices. It is admitted that after the purchase, the defendant had been making the payments towards the price of the articles sold. According to the defendant the last cheque payment was made on 15.3.1991. Hence the suit claim is barred by limitation and therefore not enforceable.

5. In Paragraph 11 of the plaint it is averred that the defendant has acknowledged the liability by the part payment on various dates and last such payment was made on 26.2.1992 by remitting Rs. 10,000/-. There is no doubt that the plaint was proceeded on the premise that the suit was barred by limitation but for part payment made on 26.2.1992.

6. The plaintiff produced Exts.A2, A3 and A4, true copies of ledger papers maintained by the plaintiff in the name of the defendant. The part payment made by the defendant is credited to in the accounts. The Trial Court applied Article 1 of the Limitation Act, 1963. Article 1 reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
1. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which last item admitted or proved is entered in the account; such year to be computed as in the account.

7. The court below examined the nature of the transaction and took the view that the transaction is mutual, open and current account. To consider the transaction as mutual, open and current account, where they have been reciprocal demand between the parties, the trial court held that the account maintained by the plaintiff is a running account of which the limitation starts from the close of the year in which the last item admitted or proved. The account shows that the defendant was issuing cheques as well as making cash payments on various dates during the period between December 1989 to February, 1992. The trial court also noted that the last payment was on 26.2.1992. The learned Judge held that the account is carried over from 1989 to 1992, therefore the account is current, open and mutual. The Trial Court observed that if the plaintiff can recover the money based on the

dishonoured cheque, it is still open for him to recover the balance price of the delivered goods. According to the court below the suit is perfectly maintainable and is filed within the period of limitation and the same falls under Article 1 of the Limitation Act.

8. The learned Counsel for the appellant/defendant contented before this Court that Article 14 is squarely applicable in this case and that Article 1 cannot have any application. The scope of Article 1 of the Limitation Act and its distinguishing characteristics are examined by a Division Bench of this Court in *Union Bank Ltd. v. N. Raghavan Nair* 1958 KLT 706. This Court held that the distinguishing characteristics of a mutual account are (1) that there should be two sets of independent transactions between the parties in one of which one of the parties should hold the position of debtor and the other that of creditor, and in the other, the reverse position; (2) that the dealings should disclose independent obligations on both sides, and not merely obligations on one side, the acts done by the other being merely discharge of such obligation and (3) that each party must be able to say to the other "I have an account against you". The first requirement as laid down by this Court is that there should be two independent transaction between the parties. Admittedly, there is only one transaction in this case. The plaintiff sold a few articles to the defendant on credit basis and the defendant made part payments towards the said transaction. The plaintiff has no case that there are two independent transaction between the parties by which one of the party should hold the position of a debtor and the other that of a creditor and in the other, the reverse position. The second requirement as held by this Court that the dealings should disclose independent obligation on both sides and not merely obligations on one side, the acts done by the other side being merely discharge of such obligation. I do not find that there is any independent obligation on both sides. The acts done by the defendant is only discharge of his obligation to the plaintiff i.e. to discharge the amounts payable under the sale transaction. Going by the dictum laid down by this Court, and a reading of Article 1, I find that the findings of the learned Judge that this is a case where Article 1 has application cannot stand.

9. Admittedly, the suit is for recovery of the price of goods purchased by the defendant. Under Article 14 of the Limitation Act, the cut off date for starting the period of limitation is the date of purchase or delivery of the goods by the defendant on credit. This is a simple suit for recovery of the price of goods sold and not a suit for accounts. Therefore the findings and reasons of the learned Judge are unsustainable. The further question to be examined is the effect of payment on account of debt. The learned Counsel for the plaintiff/respondent strenuously contented that there is sufficient pleadings in the plaint which would go to show that the defendant has acknowledged the debt by making part payment on various dates and the last such payment was made on 26.2.1992. Since the last payment was made within the period of limitation by issuing a cheque it was argued that Section 19 is applicable and therefore the decision of the court below decreeing the

suit has to be sustained. Section 19 of the limitation Act, 1963 reads as follows:

Effect of payment on account of debt or of interest on legacy.-Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation.- For the purposes of this section,-

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) "debt" does not include money payable under a decree or order of a court.

10. The learned Counsel for the plaintiff brought to my attention Exts.A5 and A6 documents produced in support of his claim for exemption from limitation. Ext.A5 is the cheque receipt dt. 26.2.1992 issued by the plaintiff to the defendant acknowledging the receipt of the cheque. Ext.A6 dated 14.5.1999 is the certificate issued by the UCO Bank to the plaintiff. Ext.A6 certified that the cheque for Rs. 10,000/- was cleared through Indian Oversees Bank, Thiruvananthapuram. On the basis of these two documents, learned Counsel for the respondent/plaintiff contented quoting Section 19 that the plaintiff is entitled to the benefit of a fresh period of limitation. The cheque dated 26.2.1992 is the document relied on by the plaintiff in order to save the suit from the period of limitation. The payment specified in Ext.A5 and A6 was not endorsed by the defendant and the plaintiff has not summoned the cheque issued by the defendant in support of his case of fresh period of limitation. To attract Section 19 of the Act the acknowledgment of payment shall be in the handwriting or is a writing signed by the defendant making the payment. In a similar situation, the Apex Court in [Sant Lal Mahton Vs. Kamala Prasad](#), examined the question of limitation in the background of Article 19 previously, (Article 20) of the Limitation Act. That was a case where there was admission in the written statement filed on behalf of the defendant 1 to 3 whereby the defendant admitted not only that the payment specified in the plaint were actually made on the respective dates but also asserted that there were other payments made besides these, which reduce the debt still further and for which the plaintiff did not give any credit to the defendants. The Trial Judge in that case relied on the above said statement in the written statement held that since the written statement was signed by the defendant, it would fulfill all the requirement of a signed acknowledgment as contemplated by the proviso to Section 20.

11. The Apex Court in para. 10 of the judgment observed that the written acknowledgment should be made prior to the expiry of the period of limitation, it is, in our opinion, essential that such acknowledgment whether made before or after the period of limitation must be in existence prior to the institution of the suit, that whether the suit is time barred or not has to be determined exclusively with reference to the date on which the plaint is filed and the allegations made therein. It was also observed that if the plaintiff's right of action is apparently barred under the statute of Limitation Act, Order 7 Rule 6 of CPC makes it his duty to state specifically in the plaint the ground of exemption allowed by the Limitation Act, upon which he relies to exclude its operation and if the plaintiff has got to allege in his plaint the facts which entitle him to exemption, obviously these facts must be in existence at or before the time when the plaint is filed, facts which come into existence after the filing of the plaint cannot be called in aid to revive a right of action which was dead at the date of the suit.

12. To claim exemption u/s 19 of the Limitation Act it is mandatory that the plaintiff must be in a position to allege and prove the part payment and that such payment had been acknowledged in writing in the manner contemplated by the section. In the plaint itself there must be pleadings and the plaint shall also be supported by proof showing that such payment had been acknowledged in writing in the manner contemplated by Section 19. In this case, the pleadings is incomplete. The pleadings only state that the defendant has acknowledged the debt by making part payment. The pleadings does not contain averments that such payment had been acknowledged in writing or the acknowledgment of payment appears in the hand writing signed by the person making the payment. Therefore the pleadings are not complete. More over the plaintiff did not produce the proof in support of acknowledgment. The pleadings and the proof at the time of filing the suit is mandatory because whether the suit is time barred or not is to be determined exclusively with reference to the date on which the plaint is filed and the allegations made therein. Section 3 of Limitation Act mandates that the court shall dismiss the suit which is brought after the period prescribed under the schedule of the Limitation Act. Therefore it is the duty of the plaintiff to state specifically in the plaint the ground of exemption allowed by the Limitation Act, whether it is under Sections 18, 19 or 20 as the case may be. The further condition to attract the provision relates to exemption is that if the plaintiff wanted to allege facts which entitle him exemption obviously these facts shall be pleaded at the time when the plaint is filed. Section 3 r/w Section 19 of the Act therefore make it clear that the plaint shall not only contain the pleadings but also shall be supported by documents which shall be produced at the time of the filing of the suit in order to enable the court to satisfy as to whether the suit is filed within time.

13. The Apex Court in the said case held that to claim exemption u/s 20 of the Limitation Act, (presently Section 19) the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the

principal, but that such payment had been acknowledged in writing in the manner contemplated by that section, that the ground of exemption is not complete without the second element, that unless both these elements are proved to exist at the date of the plaint the suit would be held to be time barred.

14. In the decision *Vijayakumar Satischandra & Co. v. Rajgopal Badrinarayan Malpani* 1996 AIHC 4163 a Division Bench of Bombay High Court held that the suit for recovery of the price of goods purchased by the appellants, Article 14 of the Limitation Act is the article to be applied and further held that the cut off date for starting the period of limitation is the date of purchase or delivery of the goods by the appellants/defendants on credit.

15. The case on hand is a simple suit for recovery of balance amount due towards the price of goods supplied by the plaintiff to the defendant and is not a suit for accounts. In such a situation, the article applicable is Article 14 of the Limitation Act subject to acknowledgment if any, u/s 19 of the Act. The essential requirement in order to attract Section 19 of the Limitation Act is that the acknowledgment must be in existence prior to the institution of the suit. In this case, as observed earlier the pleadings in the plaint are insufficient in order to satisfy the requirement of pleadings to attract Section 19 of the Limitation Act. I also find that there is no proof adduced by the plaintiff at the time of filing the plaint in order to claim the ground of exemption. Since Ext.A5 and A6 are not either acknowledged nor signed by the defendant, Section 19 of the Act cannot have any application. To claim exemption u/s 19 of the Limitation Act, the plaintiff must be in a position not only to plead but also to prove that there was part payment of debt; that such payment had been acknowledged in writing or signed in the manner contemplated by the said section. The suit is of the year 1994. The proceedings of the suit continued in appeal till date i.e. for the last more than 14 years. Since the plaintiff failed to take any steps to summon the cheque issued by the defendant in order to claim exemption u/s 19, the suit has to fail.

16. Learned Counsel for the appellant defendant also invited this Court's attention to the decision reported in *K.C. Pangunni v. The Official Liquidator, Wandoor Jupitor Chits (P) Ltd.* in ILR 1981 Ker. 420. The Division Bench of this Court held that u/s 19 of the Limitation Act it is not every part payment that would save limitation but only payment the acknowledgment of which appears in the handwriting of, or in writing signed by the person making the payment.

In the result, judgment and decree passed by the court below are set aside. Appeal allowed. The suit stands dismissed. There will be no order as to cost.