

(1985) 08 KL CK 0014
High Court Of Kerala
Case No: S.A. No. 761 of 1979

The Kerala State
Electricity Board

APPELLANT

Vs

Marshall Sons and Co
(India) Ltd., Madras

RESPONDENT

Date of Decision: Aug. 5, 1985

Acts Referred:

- Contract Act, 1872 - Section 213
- Sales of Goods Act, 1930 - Section 4

Citation: (1985) KLJ 930

Hon'ble Judges: P.C. Balakrishna Menon, J; K. Sukumaran, J

Bench: Division Bench

Advocate: T.C.N. Menon and K.P.G. Menon, for the Appellant; P. Gopalakrishnan Nair, for the Respondent

Final Decision: Dismissed

Judgement

Sukumaran, J.

A suit by Marshall Sons & Co (India) Ltd., Madras against the Kerala State Electricity Board for settlement of accounts in respect of transactions relating to the supply of plants and spares and (sand crushing machines) as evidenced by the contracts of the year 1960 and 1961 was decreed concurrently by the courts below. The defendant Board contested the correctness of the decrees in the second appeal. The only questions of law on which notice has been ordered by this court read:

- 1) Whether a suit for settlement of accounts is maintainable as between parties to a contract of sale.
- 2) Whether a suit for settlement of accounts will be against a party who is not under any obligation to render accounts to the plaintiffs, the other contracting party.

On the general question about the circumstances in which a suit on accounts could be instituted, this Court has already spoken on earlier occasions. Iyengar J. rendered the first of those decisions in *A.V. George & Co. Ltd. v. Peter Kuruvilla* (1956 KLT 465). Later came the decision in *Govindan Kartha v. Parameswaran Thampy* (1961 KLT 360) by Raman Nair J. but without noticing the earlier decision. In relation to a suit between a contractor and the Electricity Board itself, the question was considered by Moidu J. in *C. Kamalaswaran v Kerala State Electricity Board* C.R.P. No. 1110 of 1969 dated 3-7-1970;. The decisions of Iyengar J., and of Raman Nayar J., as also other decisions were considered therein. A suit for settlement of accounts was held to be maintainable in the aforesaid decision.

2. In repelling the contentions of the Electricity Board about the maintainability of the suit, the courts below have relied on the decision of Moidu J. (which had been produced as Ext. A20 in the suit). A learned Judge of this Court felt that there was a conflict in the opinions as expressed by Raman Nair J. and Moidu J. The appeal was accordingly referred for consideration and decision by a Bench of this Court. The second appeal has thus come up before this Bench

3. Leaving out unnecessary details (including some strange and curious facts discernible from the records in the case), we may refer to those which are relevant for the consideration of the question involved.

4. The plaintiff had submitted tenders for the supply of three sand crushers with their accessories. In pursuance to the quotation and the letter of the plaintiff respectively dated 14-12-1959 and 19-1-1960, an order was placed by the Board under Ext A3 dated 17-3-1960. The period of delivery of the goods was given therein as "approximately 4/6 months from the date of receipt of the order". Strangely enough the agreement in that behalf was executed only under Ext. A2 dated 27-12-1960 (at a time when the expiry of the period within which the machinery had to be delivered had already expired!). Yet another order was placed on 8-9-1969 as is evidenced from Ext A10, the relative formal agreement, executed only on 31-9-1961, (which again is after the expiry of the period envisaged for the delivery of the goods.) 1 The Board had at one time cancelled the contract on 27-4-1962. Later, on 14-5-1963 an order was placed for the supply of two more plants. It is unnecessary to refer to the shifting stance adopted by the Board from time to time; for it is now not disputed that three of the plants had been supplied to the Board. This is apart from one of or those supplied but had been taken back later. While the plaintiff pressed for balance payments, the defendant raised counter-claims on the ground that delay in the supply of the plants and the defects therein caused damages to the Board. The matters came to a head when the Board did not relent in its stand, despite numerous representations including Ext A1 dated 30-8-1973 filed before Chairman of the Board. The plaintiff would contend that it had on other alternative then than to institute the suit.

5. As noted earlier, apart from pointing out the delay in the performance of the contract and the defects in the machines supplied, and consequent damages suffered by the Board under various heads, the Board had raised the legal contention about the maintainability of the suit in its present frame as one for settlement of accounts.

6. The trial court discussed the issue in the later part of paragraph B of its judgment. It observed:

As regards the amounts due to the plaintiff from the defendant-Board, the same cannot be ascertained at this stage in the absence of sufficient data.

The question about the maintainability of the suit was then posed.

The trial court took the view that the principles discussed in the decision rendered by Moidu J. (C.R.P. No. 1110/1969) "applied on all fours to the facts of this case". It accordingly passed a preliminary decree for taking accounts.

7. The lower appellate court adverted to the rival contentions of the parties in relation to the performance of the contracts and stated:

Naturally the plaintiff could not sue for an ascertained amount since the deduction to be made by the Board towards the compensation could not be ascertained by the plaintiff. Necessarily plaintiff's remedy was to file a suit for settlement of accounts, Ext B1 file shows that the amount of compensation due to the defendant had not been finally ascertained by the defendant at any time prior to suit. If the defendant had ascertained the amount and claimed the same from the plaintiff at least that could have provided cause of action for the plaintiff to sue for a particular amount. I therefore, agree with the view taken by the lower court that the frame of the suit is proper.

8. On behalf of the appellants, Mr. K.P.G. Menon contended that the contracts were for the supply of the goods at a specified price, and that the relationship between the parties was not one in which a suit for accounts could be posited. This contention does not bear scrutiny when a reference is made to the salient provisions of the contracts in question. We have necessarily to consider all the provisions in the contract, and give full force and effect to all those provisions. The price indicated for one plant in the schedule to the agreement should not therefore be viewed in isolation. It has to be considered along with the purchase order which is treated as part of the agreement, and is also attached along with the agreement. That agreement, among others, contains the statement about the probable amount of the order. More important still is the provision contained in clause 16 of the purchase order which reads:

The materials, if any, supplied after the scheduled delivery period noted in this order will be accepted only on condition that the price of such materials will be fixed taking into consideration the market value of such materials on the date of actual

supply or at the prices noted in this order whichever is lower.

The eventuality visualised under the aforesaid provision was not a mere theoretical one in the present case. As noted earlier, all the supplies were made beyond the scheduled delivery periods. This in a sense would unsettle the fixed price for the goods supplied. Clause 14 of the tender notice which refers to an actual verification of the goods taken to stock before payments are ordinarily made is also relevant in this connection. So also is clause 17 thereof which empowers the Board to take certain steps in the eventuality of the supplies being not made within time. It is sufficient to say that having regard to the totality of the circumstances, it is impossible to proceed on the basis that a specified sum by way of price is due for the goods supplied by the plaintiff to the defendant. Legal and factual aspects have to be considered and evaluated before the actual liability is ascertained. An outright sale which among other things requires a transfer of property in the goods for a price would therefore be absent. (vide Section 4 of the Sale of Goods Act, 1930).

9. The relevance and importance of the element of price in a contract of sale has been noted in statutes and text-books from very early times. A comprehensive survey regarding the concept of sale is seen in *New India Sugar Mills v. Commissioner of Sales Tax*. A.T.R. 1963 S.C. 1207. If the price is left to be agreed upon between the parties, "there will ordinarily be no binding contract,.....unless and until they later reach agreement on a price." (See Benjamin's Sale of Goods, 2nd Edn., Page 102 at Paragraph 184, and the decision in *May & Butcher v. R.* (1934 2. KB 17), where Viscount Dunedin observed:

We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract.)

In the same year, in India, the Allahabad High Court took a similar view. Young J. said:

In a contract of sale of goods, the most essential condition is the price.

It was held " that there was no concluded contract when there was no evidence of the price of the goods, of the; price one party was prepared to pay and at which the other party was prepared to sell. (Vide [Trevellion and Clark Vs. A. Minck](#)).

10. A contract of bailment may arise in such a situation; for, as observed in the same book of Benjamin in paragraph 59 at page 44. A bailment is not inconsistent with the earlier stages of a contract of sale. ".....indeed, it is very common for the owner of goods to bail them to another, with a view to his buying them" Much the same idea is expressed in Chalmers' on Sale of Goods, 18th Edn. at page 157-8 and Halsbury's Laws of England, 4th Edn. Paragraph 743 at page 671.

11. We consider *Motor Mart Ltd. v. Webb* (1958) N.Z.L.R. 773 as a classic decision on that topic. Turner J. of the Supreme Court of New Zealand traced the legal history of bailment from the days of Roman Law. Pollock and Paton. Story and Street, Bacon

and Winfield, Chalmers, and Halsbury were all referred to in that learned judgment. It was noted that some of the doctrines concerning that concept had been evolved about the year 1602. How in 1703, Lord Holt C.J. found the bailments known to Roman Law as sufficient for his case, was alluded to. The early decision *South Australian Insurance Co. Ltd. v. Randel* (1869) L.R. 3 P.C. 101, and other well-known cases *Lee v. Butler* (1893 1 Q.B. 318), and the one rendered by Lord Goddard in the thirties of the 20th century (*Karflex v. Poole*. 1933 2 K.B. 251), as also decisions in the New Zealand Courts (*Ward J. in re Crawford, Exparte Official Assignee* (1887) 6 N.Z.L.R. 56, and *Woods v. Latham*. (1907) 27 N.Z.L.R 50) were deftly distilled to evolve the judicial principles. Even in 1933 Goddard J. in *Karflex Ltd. v. Poole* supra had observed that doctrines which were applied to ordinary simple bailments in bygone days may not apply to "modern class of bailment which has in it not only the element of bailment but also the element of sale" Much water has flown under the bridges of commercial and banking practice, it was felt. Turner J. thought that under the pressures and stresses of modern legal necessity, some new mutations may burst into flower, of a quality to startle the authors of the Institute (of Justinian). Analysing the agreement before the Court, the learned Judge observed:

The agreement before me, does not in any opinion, constitute the parties, vendor and purchaser; it binds them in contract so that if the conditional purchase carries out the while of his obligations as to payment, and only in that event the property has to pass.

(emphasis supplied)

Ultimately "after much reflection", the Judge concluded:

I therefore hold that the parties thereto, while the agreement subsists and the title is in the possession of the conditional purchaser, and until the last payment is duly made, are bailor and bailee of the truck respectively.

(emphasis supplied)

The decision, with utmost respect, therefore gives a useful pointer about the approach and attitude Courts of Law could usefully adopt in the analysis and assessment of commercial contracts of fast moving modern times.

12. It is only further necessary to note that the English Sale of Goods Act, 1979 by its section 20 expressly recognises the possibility of the seller or buyer to be a bailee of the goods of the other party in the course of a contract of sale. And in cognate situations, a fiduciary relationship would arise, (See *Aluminium Industrie Vaassen B.V. v. Remeipa Aluminium Ltd.* (1976) 1 W.L.R. 676). The moment it is possible to posit a case of bailment, of the existence of a fiduciary relationship, a suit for accounts would lie without doubt.

13. The view of the courts below that in such circumstances a suit for accounts is maintainable cannot, therefore, be held to be erroneous.

14. The finding that the suit as framed is maintainable is perfectly justified, viewed from another angle too. At one time it was thought that a suit on accounts could be entertained only when certain specified jural relationships existed. The view is no longer tenable. During the passage of time, the old notion had to yield to consideration in which equity was assigned a dominant role. The development of law in this regard is perceptible by a close reading of the early English decisions and reference to the views expressed by eminent jurists. It is unnecessary in this case for this Court to assess the development of law on this aspect; to, that had been clearly and exhaustively dealt with by the Supreme Court in [Narandas Morardas Gaziwala and Others Vs. S.P. Am. Papammal and Another](#), . The question involved in that case was whether an agent could sue the principal for accounts. The Supreme Court noted the statutory right of the Principal to sue the agent u/s 213 of the Indian Contract Act. It was observed that the statute was not exhaustive and that the right of the agent to sue the principal is an equitable right arising under special circumstances. A survey of the entire case law was thereafter undertaken. The Supreme Court observed:

Though an agent has no statutory right for an account from his principal, nevertheless there may be special circumstances rendering equitable that the principal should account to the agent.

Various situations which would constitute "exceptional circumstances" were also indicated in that decision.

15. In a similar situation, and years before the Supreme Court rendered its decision. Iyengar J. in 1956 K.L.T 466 supra expressed the principles with admirable felicity in the following words:

The general rule is that the agent is not entitled to an account against his principal. But this rule is however subject to exceptions in cases in which the relation between the agent and the principal is of a fiduciary character or the transactions between the parties are so involved and complicated that the right of accounting will alone serve to administer complete justice and where the accounting sought is ancillary to the main purpose of the action. Therefore, the plaintiff is entitled to frame his suit as one for accounts.

16. It is thus clear that exceptional circumstances of a case could justifiably bring about a situation in which equity would justify the framing of a suit for settlement of accounts.

17. Again, as regards the situations in which the equity could be invoked, the Supreme Court has spoken in the decision reported in [Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi](#), . The Supreme Court observed:

....that equity jurisprudence is flexible and meets the challenge of new situations without the law.

It approvingly adopted the observation contained in the Current Legal Problems, 1952 Vol. 5 at Page 1 reading:

New days may bring the people into new ways of life and give them new out looks: and with new rules of law.

The Supreme Court further clarified that:

Equity is not penalty but justice and even where neither party..... is at fault, equitable considerations may shape the remedy.

The Court was categorical.

In short, our equitable jurisdiction is not hidebound by tradition and blinkered by precedent, though trammelled by judicially approved rules of conscience.

Viewed in the above background, we are clearly of the view that in the circumstances such as those as present in this case, the suit for accounts as framed by the plaintiff is maintainable. The finding of the courts below that the suit is maintainable does not suffer from any legal error.

18. The earlier decisions of Indian High Courts have to be understood in the background of the evolvement of the new principles, by the Supreme Court in [Narandas Morardas Gaziwala and Others Vs. S.P. Am. Papammal and Another](#), , and other decisions already alluded to.

19. The view in Narmada Charan v. Maharaj Bahadur Singh Dugar ILR (1937) 2 Cal. 259 that an agent had no right to claim an account from his principal is no longer good law in the light of the decision of the Supreme Court in [Narandas Morardas Gaziwala and Others Vs. S.P. Am. Papammal and Another](#), . The general observations contained in Kanhayalal v. Hiralal, AIR 1947 Bombay 255 which had placed considerable reliance on the Calcutta decision, have to be viewed in that background. That is the case as regards the observations contained in Chikka Venkatappa v. Hanumanthappa, 1970 (1) Mys. L.J. 296. The decision of the Jammu and Kashmir High Court reported in Triloki Nath v. Dharmarth Council, AIR 1975 J. and K. 76 (FB) is one where the Court found "that the plaintiff knew as to what was the amount outstanding. He only pretended to know nothing about the matter and there clothed his suit with a prayer for rendition of accounts although the sum was ascertainable and could be ascertained from looking into the accounts maintained by him." The situation in the present case is entirely different. NO reliance can be placed on the aforesaid decision to force a dismissal of the suit as framed is the present case.

20. In the light of the above discussion, we are clearly of the view that the suit as framed is maintainable.

21. It is now necessary only to refer to a minor contention as reflected in the cross-objections filed by the plaintiff. The trial court while passing a preliminary

decree directing the taking of accounts, entered a finding that the defendant would be entitled to claim damages against the plaintiff but limited to the sum of Rs. 7,887.51. The lower appellate court, however, referred to various contentions of the Board claiming a higher amount by way of damages. That Court held that it would be open to the defendant to put forward all the claims in the present suit without any ceiling being set for such claims. We do not think that there is anything wrong in the above direction. The apprehension, however, appears to be about the discussion of various heads of claims as made by the defendant and based on the records discernible from Ext. B1. We would clarify that any calculation or unilateral stipulation by the Board as regards its claim for damages as contained in the file will not in any way be final or conclusive. It is not necessary at this stage to express any opinion on the various heads of claim. No oral evidence has been given in the case and no explanation is attempted in respect of various actions and omissions of the parties. If at one stage the Board had cancelled the contract, it had soon restored it. If at one juncture, it had indicated a large number of defects, at another, it had stated that "the defects noticed in the two sand processing plants supplied by Messrs. Marshall Sons & Co (India) Ltd. as per the above orders have since been rectified by them, and the machines are not working satisfactorily." (vide letter dated 28-11-1962 of the file Ext. B1 at page 39) The paucity of any correspondence for long spells of time, such as for example between 1964 and 1966, 1966 and 1970, and 1970 and 1975 when the suit was ultimately instituted, may also have to be properly considered by the trial court in the course of the passing of a final decree. It is difficult to divine the possible reasons or motivations for the various actions and omissions of the parties at this stage. The validity of the claim for damages will certainly depend upon the factual details and the legal principles applicable thereto. Whether one of the parties to the contract could take any unilateral decision or act arbitrarily or irrationally, and whether the damages claimed are lawful and allowable, or are remote and unreasonable, are all matters which will have to be duly considered at that stage. We direct that the monetary quantification of the rights and liabilities of the parties will be done by the trial court uninhibited by the relative observations of the trial court or of the appellate court. The fact that the plaintiff company has yet to have a final accounting for the realisation of money due to it in respect of goods supplied a quarter of a century back is indeed disturbing and distressing. The trial court will therefore assign priority for the disposal of the suit, and will dispose it of, before the year is out. In the result, we dismiss the second appeal with costs.