

(2015) 06 KL CK 0210

In the High Court Of Kerala

Case No : O.P. (C) No. 524 of 2015

Gbots Software Development Centre Pvt. Ltd. (PCS India)
and Others

APPELLANT

Vs

LBS Software Services Pvt. Ltd.

RESPONDENT

Date of Decision : 02-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 1(r), 115
Constitution of India, 1950 — Article 226, 227
Copyright Act, 1957 — Section 51, 62

Citation : (2015) 3 ILR Ker 377 : (2015) 3 KHC 668

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : P. Santhalingam, Senior Advocate, S. Sindhu and S. Sharan, for the Appellant; E.K. Nandakumar, Senior Advocate, M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas, K. John Mathai, Joson Manavalan and Kuryan Thomas, Advocates for the Respondent

Final Decision : Dismissed

Judgement

B. Kemal Pasha, J—Can an order on which a Civil Miscellaneous Appeal is provided, be challenged under Article 227 of the Constitution of India, without filing an appeal? Whether the matter involved herein is one coming under Section 62 of the Copyright Act? Can the matter involved in the suit be considered as an "excepted matter" from Arbitration? Ext. P5 order passed under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908 (for short "the Code") is under challenge. The brief facts disclose that through a contract entered into between the petitioner and the respondent, vide Ext. P1 agreement dated 01/02/2011, the respondent herein has developed a software as demanded by the petitioner herein. Payments were also stipulated, as per the schedule appended with it. It is alleged that, to the utter dismay of the respondent, the petitioner has stopped payment, thereby the respondent was forced to direct the petitioner to stop further use of their software and they have also stopped

providing man power, by way of service. As the petitioner herein continued to make use of the software as against the ultimatum given by the respondent, the present suit has been filed. The IA has been filed by the plaintiff seeking an order of temporary injunction in the suit thereby restraining the petitioner and their men and agents from using the software in violation of clause 15.3 read with clause 9.1 to 9.3 of Ext. P1. It seems that after hearing both sides, the Court below has chosen to allow the said IA through Ext. 5 order.

2. Heard the learned Senior Counsel for the petitioner Sri. P. Santhalingam and the learned Senior Counsel for the respondent Sri. E.K. Nandakumar.

3. A counter has been filed in the matter by the respondent challenging the maintainability of this original petition. It is contended that the original petition is not maintainable as the petitioner has failed to file an appeal by way of CMA as provided under Order XLIII Rule 1(r) of the Code. It is also contended that the stand taken by the petitioner, that the Court below has no jurisdiction to entertain the matter, as the matter is one coming under Section 62 of the Copyright Act, is also devoid of merits.

4. The learned Senior Counsel Sri. P. Santhalingam has argued that the matters in controversy in the suit are squarely falling within the purview of Sections 51 and 62 of the Copyright Act and therefore, the suit ought to have filed before the District Court, Thiruvananthapuram, which alone has jurisdiction in the matter. It is also argued that the output from the software is a computer product, and it is nothing but an intellectual property, and in such case also the Court below has no jurisdiction to entertain the suit. It is further argued that the matter involved in the suit is not an "excepted matter" from arbitration and therefore, in view of clause 24.5 of Ext. P1, the respondent ought to have made recourse to arbitral proceedings under the Arbitration and Conciliation Act, if at all the respondent is in any manner aggrieved.

5. In order to decide the maintainability of the present OP, it has to be decided whether the Court below has exceeded its jurisdiction or the Court below has committed any jurisdictional error in passing Ext. P5 order. The next question is whether this is a matter coming within the purview of Sections 51 and 62 of the Copyright Act of 1957? It has also to be considered whether a suit of this nature is an "excepted category" from arbitration and whether such exception can be resorted to without specifying an adjudicatory method for settling the matters in controversy in a suit like this.

6. The learned Senior Counsel for the respondent has pointed out that the Copyright Act, 1957 has no application in the matter as the respondent has no case that their copyright over the software has been in any way infringed. Per contra, the learned Senior Counsel for the petitioner has argued that the attempt from the part of the respondent to restrain the continued use of the software by the petitioner can only be treated as an action against the infringement of copyright and therefore, the suit ought to have filed before the District Court,

Thiruvananthapuram.

7. On going through the rival contentions, this Court is of the view that none of the parties have taken the stand that this is a case wherein the copyright has been infringed. The suit proceeds on the basis that it is a breach of contract committed by the petitioner. The contract is one for supplying software, and service accompanied with it. When payments were not made as stipulated, according to the respondent, the respondent was forced to stop their continued service and also to direct the petitioner to stop making use of the software. It seems that the respondent has no case that the petitioner has in any way supplied the software to any other person. The respondent has also no case that the petitioner was making use of the said software as their own, thereby infringing the copyright of the respondent. The plaint averments reveal the continued use of the software by the petitioner as continued breach of the contract.

8. So far, the question of authorship in the matter also is not a matter in controversy in the suit. It seems that the said question was not at all mooted before the Court below. Before the Court below, the petitioner had no case that the petitioner is the author of the software, which is an intellectual property. The petitioner had no case before the Court below that the matter involved is an infringement of copyright.

9. The learned Senior Counsel for the petitioner has pointed out that the question as to whether the jurisdiction of the Court below is barred under Section 62 of the Copyright Act, 1957, is a question of law, the said question can be mooted at any stage. There is no quarrel with regard to that proposition of law. Only facts need to be pleaded, and law need not be pleaded. At the same time, in order to attract the provisions of a particular enactment, at least bare facts or fundamental facts or basic facts to invite the application of such law or Statute, have to be made out in the pleadings. It is a fact that has to be pleaded before the Court below that the petitioner is either the author or the petitioner has got the right to infringe the copyright in respect of the software, in case where the petitioner has got such a case. It seems that the Senior Counsel has gone to the extend of arguing that the petitioner can claim authorship over the software as the petitioner has provided man power for assisting the respondent in the matter. Strangely enough, those facts have not been pleaded before the Court below in the matter. When those pleadings on facts are not there, it cannot be said that the Copyright Act has any application in the matter. As rightly pointed out by the learned Senior Counsel for the respondent, as things stood before the Court below, the matter is not one relating to the infringement of copyright and therefore, Section 62 of the Copyright Act, 1957 has no application in the matter.

10. In order to decide the question whether this Court can exercise its supervisory jurisdiction under Article 227 of the Constitution of India in this case, by exercising superintendence over the Court below, the question that has to be decided is whether the Court below has committed any jurisdictional error in the

matter. When the matter is not one coming within the purview of the Copyright Act, 1957, by highlighting Section 62 of the Copyright Act, the petitioner cannot contend that the Court below has lacked jurisdiction in the matter. Of course, the question whether this suit is barred under the Arbitration and Conciliation Act, will be dealt with later.

11. The learned Senior Counsel for the petitioner has relied on the decision in *Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil*, (2011) 1 CTC 854 : (2010) 7 JT 529 : (2011) 1 RCR(Rent) 1 : (2010) 7 SCALE 428 : (2010) 8 SCC 329 : (2010) 8 SCR 836 : (2010) AIRSCW 6387 for canvassing the argument that this Court is duty bound to exercise its jurisdiction under Article 227 of the Constitution of India in the matter. The principle enunciated by the Apex Court in *Surya Dev Rai's* case, so far as it relates to Article 226 of the Constitution of India, in the matter of issuing writs of certiorari, as against orders passed by Subordinate Courts, is no longer good law in view of the decision rendered by the Larger Bench of the Apex Court.

12. Paragraph 49 of *Shalini Shyam Shetty* (supra) says:

"On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of Tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or Tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* (supra) and the principles in *Waryam Singh* (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh* (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the Tribunals and Courts subordinate to it, "within

the bounds of their authority".

(f) In order to ensure that law is followed by such Tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of Tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the Tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any Statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in *L. Chandra Kumar v. Union of India* and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the Tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public

interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

(Emphasis supplied)

13. Based on the said decision, it is true that the High Court can interfere in the orders of subordinate Courts and Tribunals in exercise of its power of superintendence, when there is a patent perversity in the orders of Tribunals and Courts subordinate to the High Court or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

14. In order to maintain the present OP under Article 227 of the Constitution of India, the petitioner has to show any of the aforesaid aspects. In paragraph 49(c) of the decision noted supra it has been made clear that "nor can it, the High Court in exercise of this power under Article 227 of the Constitution of India, act as a Court of appeal over the orders of the Court or Tribunals subordinate to it." It is further made clear that in cases where an alternate statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of the powers by the High Court under Article 227 of the Constitution of India. The question is whether an appeal has been provided in the matter or not and further whether there is apparent perversity in Ext. P5 order passed by the Court below or whether there is a gross and manifest failure of justice on account of Ext. P5 order.

15. The next question is whether any principles of natural justice has been flouted by the Court below. According to the respondent, when payments were stopped abruptly, the respondent was forced to recall their services that was being rendered and further, they were forced to call upon the petitioner to stop using their software. The petitioner has no case that any of the principles of natural justice have been flouted by the Court below. There is no case that the order passed by the Court below is perverse. The limited aspect pointed out is that the Court below has committed gross jurisdictional error in dealing with the matter in the light of the Copyright Act as well as Arbitration and Conciliation Act. Therefore, the question mooted by the learned Senior Counsel for the petitioner for inviting the jurisdiction of this Court under Article 227 of the Constitution of India is with regard to the so called jurisdictional error committed by the Court below in passing Ext. P5 order.

16. The learned Senior Counsel for the petitioner has relied on the decision in State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and Others, (2003) 4 JT 605 : (2003) 4 SCALE 629 : (2003) 6 SCC 641 : (2003) 1 SCR 130 Supp : (2003) 2 UJ 1233 wherein it was held in paragraph 28:

"Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate Tribunal's within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate Courts and Tribunal's within the bounds of their authority and not to correct mere errors. Further, where the Statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised "as the cloak of an appeal in disguise."

17. The Apex Court has made it clear in unequivocal terms that it is a settled law that the jurisdiction under Article 227 of the Constitution of India could not be exercised as the cloak of an appeal in disguise. Therefore, the question to be looked into is whether the present exercise is equal to a cloak of appeal in disguise. Admittedly, it seems that Ext. P5 order has been passed by the Court below by invoking its power under Order XXXIX Rule 1 of the Code. As per the statutory provisions contained in Order LXIII Rule 1(r) of the Code, an appeal will lie on the said order.

18. The learned Senior Counsel for the respondent has relied on the decision in *Radhey Shyam and Others Vs. Chhabi Nath and Others*(2015) 3 AD 73 : (2015) 2 RCR(Civil) 606 : (2015) 3 SCALE 88 : (2015) 5 SCC 423 : (2015) 3 SCJ 552 : (2015) 1 UPLBEC 646 rendered by a three Judges Bench of the Apex Court. The Apex Court in the decision noted supra has relied on the decision in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, (2003) 1 ACC 33 : (2003) ACJ 505 : AIR 2003 SC 1561 : (2003) 6 JT 126 : (2003) 1 SCALE 739 : (2003) 3 SCC 524 : (2003) 1 SCR 567 . In paragraph 16 of the decision in *Radhey Shyam* (supra), it was held "where the statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution of India." By way of illustration, it has been further held:

"Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a Trial Court in a civil

suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution."

19. It goes without saying that even when there is a remedy available under Section 115 of the Code, in such case also the parties cannot have recourse to Article 227 of the Constitution of India, in such a matter. By relying on *Shalini Syam Shetty (supra)* the Apex Court has in *Virender Jain Vs. Alaknanda Cooperative Group Housing Society Limited and Others*, (2013) 9 JT 92 : (2013) 2 RCR(Civil) 980 : (2013) 6 SCALE 571 : (2013) 9 SCC 383 held that in cases where alternate statutory mode of redressal has been provided, that would operate as restrain on the exercise of the powers of the High Court under Article 227 of the Constitution of India.

20. The next question remains to be considered is whether the contents of Clause 24.5 in Ext. P1 can be treated as contracting out or whether the suit of the present kind is an "excepted item" from the purview of Arbitration and Conciliation Act. It seems that the parties have willingly executed Ext. P1. As per Clause 24.5 of Ext. P1:

"Arbitration. Except for claims seeking injunctive relief or relating solely to a monetary obligation, any dispute arising out of this Agreement or the subject-matter herein shall be resolved by the parties through negotiations involving senior management, failing which the same shall be submitted to binding arbitration by one (1) independent arbitrator pursuant to the Indian Arbitration and Conciliation Act, 1996. The arbitrator shall be experienced in computer technology, the travel industry and intellectual property law matters. The arbitration shall be conducted in the English language and held at Trivandrum, India."

It seems that the arbitration clause is limited to matters other than "injunctive relief or relief on monitory obligations". It is not a case wherein a separate monitory claim alone is excepted. All monitory claims between the parties have been excepted as not matters for which parties could have recourse to arbitration. It seems that the parties have chosen to go by the general law in all matters of monitory claims. If a particular monitory claim alone is excepted, it could be stated that it is not an "excepted matter". Further, with regard to the injunctive relief also, parties have decided that all types of injunctive reliefs should not be matters for arbitration. That is why those two items have been excluded. Now regarding contracting out, this Court is of the view that the said provision excepting matters relating to injunctive reliefs and of monitory claims

are not contracting out. There is no law which says that the parties have to agree for arbitration in all such matters. When it is not a contracting out, it cannot be said that the parties are bound by the provisions contained in the Arbitration and Conciliation Act in matters of dispute relating to injunctive reliefs and monitory claims also.

21. The learned Senior Counsel for the petitioner has relied on the decision in Tata Consultancy Services etc. Vs. State of Andhra Pradesh, (2001) 2 CompLJ 217 : (2001) 74 ECC 521 : (2001) 129 ELT 3 : (2001) 249 ITR 99 : (2001) 3 JT 488 : (2001) 2 SCALE 417 : (2001) 4 SCC 629 : (2001) 2 SCR 359 : (2001) 122 STC 198 : (2001) 115 TAXMAN 478 : (2001) AIRSCW 1065 : (2001) 2 Supreme 301 wherein it was held in paragraph 4:

"It is specifically stated that once these drawings, etc. were put on the diskettes it would enhance the value of those goods and adopted the reasoning set out in Advent Systems Ltd. v. Unisys Corpn. that computer programs are the product of an intellectual process, but once implanted in a medium they are widely distributed to computer-owners though the program can be copyrightable as intellectual property it does not alter the fact that once in the form of a floppy disk or other medium the program is tangible, moveable and available in the market place and, therefore, would amount to "goods". The fact that some programs may be tailored for specific purposes need not alter their status as "goods"."

22. According to the learned Senior Counsel for the petitioner software being a computer programme would amount to "goods". In such a case, there cannot be any dispute that the provisions of the Sale of Goods Act is applicable in the matter. Is it not a case wherein the respondent herein, who is an unpaid seller, exercising the lean on the subject-matter? As those aspects have not been so far pointed out, this Court is presently not making any exercise to bring those materials. From the discussions made above, it cannot be said that this is not a matter in which an appeal has been provided. On the contrary, a statutory appeal has been provided in the matter as per Order LXIII Rule 1(r) of the Code. As the matter does not involve infringement of copyright, Section 62 of the Copyright Act has no application in the matter. As rightly pointed out by the learned Senior Counsel for the respondent, this is nothing but a continued breach of contract. When, as against the directions of the respondent, the petitioner is continuing to make use of the software, developed and provided by respondent, as per the specific terms of Ext. P1 contract, it is a matter that invites relief of injunction. If continued breach is there, the parties who suffer the breach can have recourse to the provisions of Order XXXIX Rule 1 of the Code. When it relates to goods, unpaid seller has lean over the goods, when the payments are abruptly stopped. On a scrutiny of the impugned order, this Court does not find any jurisdictional error committed by the Court below. Over and above it, there is no manifest injustice in the matter and further the Court below has not violated the principles of natural justice. There is no compelling circumstance that invite the supervisory

jurisdiction of this Court under Article 227 of the Constitution of India. Matters being so, this Original Petition is only to be dismissed, and I do so.

In the result, this Original Petition is dismissed. In the nature of this original petition, there is no order as to costs.

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