
(1976) 08 KL CK 0002
In the High Court Of Kerala
Case No : S.A. 533 of 1975

Hubert Peyoli

APPELLANT

Vs

P.K. Viswan

RESPONDENT

Date of Decision : 16-08-1976

Acts Referred:

Contract Act, 1872 — Section 51, 52

Citation : (1976) 08 KL CK 0002

Hon'ble Judges : K.K. Narendran, J

Bench : Single Bench

Advocate : P.F. Thomas, for the Appellant; P.K. Kesavan Nair and K.N. Narayana Pillai, for the Respondent

Final Decision : Allowed

Judgement

Narendran, J.—The Defendant in O.S. No. 3 of 1970 on the file of the Subordinate Judge, Ernakulam, a chitty foreman, is the "Appellant in this second appeal. The above suit was one for amounts of two prized tickets which the Plaintiff subscribed for in a Chit Fund started by the Defendant. The Plaintiff applied for the prize amounts. He wanted the Defendant to put the same in his name in the Canara Bank, Trippunithura as a fixed deposit and then accept it as security for payment of future subscriptions due from him. The bank also agreed to give a guarantee in case the amount is deposited with them. But the Defendant insisted that the prize amounts can be paid only if the Plaintiff furnished proper and sufficient security. The Defendant wrote to the Plaintiff stating that the fixed deposit receipt also can be accepted as security. The Defendant also pointed out that under clauses 9 and 10 of the Kurivariola contained in Ext. A-1 the Defendant has the right to retain the amounts and the Plaintiff will get 3 per cent interest till the amount is drawn on furnishing proper security. As the Defendant did not accept the Plaintiffs proposal, the Plaintiff filed the suit for the prize amounts with interest at 7 per cent from the date of suit. The trial court came to the conclusion that the Plaintiff cannot compel the

Defendant to part with the money and deposit the same in the bank in the Plaintiffs name without furnishing proper security and found the Plaintiff entitled to a decree for the prize amount on furnishing sufficient security. Interest as per Clause 10 of the Kurivariola also was awarded. Against the above judgment and decree of the trial court the Plaintiff filed an appeal before the court below. The court below held that the Defendant should pay the prize amount with the percentage of interest offered by the Nationalised Banks and deducting the instalments therefrom every month with proportionate costs to the Plaintiff. The court below also left the details to be worked out by the trial court. Accordingly, the judgment and decree of the trial court was set aside and the case remanded for fresh disposal to the trial court in the light of the observations contained in the judgment. The cross-appeal filed by the Defendant was dismissed. It is against the above judgment and decree of the court below that the Defendant has come up in this second appeal. The question that arises for consideration is whether a prized subscriber can compel a chitty foreman to put the prize amount in a bank as a fixed deposit and treat that as security for future subscriptions. A question whether Section 51 of the Indian Contract Act, 1872 has any application in view of Clause 9 of the Kurivariola which insists for the payment of the prize amount on the subscriber furnishing security for the payment of future subscriptions to the satisfaction of the foreman.

2. Clause 9 of the Kurivariola contained in Ext. A-1 reads:

9. The net amount of each instalment will be given to the respective winners of each ticket on their furnishing sufficient security to the satisfaction of the company for the due payment of future subscriptions and they are entitled to receive payment of the prize amount 15 days after the date of the next instalment. The expenses that may have to be incurred for the inspection of the property proposed as security and all charges such as registration, stamp paper cost, etc. have to be borne by the subscribers.

Sections 51 and 52 of the Indian Contract Act, 1872 read:

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

In *Bedford v. Williams* (1872) L.R. 7 Ex. 259 it is said:

The real question apart from all technical expressions is what in each instance is the substance of the contract.

Interpreting Section 51 of the Indian Contract Act the Madras High Court has said in *Cheneravelu Chetty and Sons v. Akaranu Venkanna and Sons* (1924) 49 M.L.J. 300 that a mere demand for delivery of goods without payment or tender is not evidence of the buyer being ready and willing to pay on delivery". In *Indian Contract and Specific Relief Acts, commentary by Pollock and Mulla, 9th Edition* at page 379 under the heading "Simultaneous performance", it is stated:

Performance of one party's promise may have to be completed before he can sue on the others reciprocal promise. In that case it is said to be a condition precedent to the right of action on the reciprocal promise.

In *Achutan v. State Bank of Travancore* 1974 KLT 806 a Full Bench of this Court adverting to the special nature of the relationship between a chitty foreman and a subscriber has said that "special necessity exists justifying stringent provisions being incorporated in a chitty hypothecation bond for the protection of his interest.

3. It cannot be said that Section 51 of the Contract Act is not applicable to the contract contained in Clause 9 of the Kurivariola which insists for the payment of prize amount on the subscriber furnishing security for the future subscriptions due from him. But the question is whether the foreman can be compelled to part with the money before the subscriber actually furnishes security to the satisfaction of the foreman. As stated in Section 52 of the Contract Act even where the order of performance of the reciprocal promises is not expressly fixed

by the contract the promises are to be performed in that order which the nature of the transaction requires. Can it be said that under Clause 9 of the Kurivariola the order of performance is that the foreman should first pay the prize amount and then the subscriber is to furnish the security? Certainly it cannot be in that order. Illustration (b) to Section 52 of the Act also supports this view. Not only that in the case of reciprocal promises can a party who has not performed his promise sue on the others reciprocal promise? At any rate in this case the Plaintiff subscriber who has to receive the prize amount by furnishing security cannot. So it goes without saying that a prized subscriber cannot compel a foreman to deposit the prize amount in fixed deposit in a bank and treat the same as security for payment of future subscriptions. In this view of the matter the conclusions of the court below are not correct.

4. Learned Counsel for the Appellant also contended that the appeal before the court below was itself not maintainable. In this connection reliance also was placed on Smt. Ganga Bai Vs. Vijay Kumar and Others, . Though the trial court gave the Plaintiff a decree the suit was not decreed as prayed for.

As a matter of fact the main contention of the Plaintiff was negatived by the trial court. So the contention that the Plaintiff's appeal before the court below was not maintainable can only be rejected.

In the result the judgment and decree of the court below are set aside. The second appeal is allowed. There will be no order as to costs.