

(1990) 08 KL CK 0029
In the High Court Of Kerala
Case No : A.S. No. 225 of 1985

Managing Director, Kerala State Small Industries Development and Employment Corporation Ltd. APPELLANT

Vs

Canara Bank and Another RESPONDENT

Date of Decision : 27-08-1990

Acts Referred:

Contract Act, 1872 — Section 51, 52, 53, 54

Citation : (1991) 70 CompCas 437

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : M.A. Manhu, for the Appellant; P.V. Jyothi Prasad, P. Bhavadasan for Respondent No. 1, K.P. Dandapani and K. Jaju Bahu, for the Respondent

Final Decision : Dismissed

Judgement

S. Padmanabhan, J.—The provisions of Sections 51 - 54 of the Indian Contract Act, 1872, embody a code of principles about contracts involving reciprocal promises. Section 52 only postulates that if the order of performance is fixed in the contract itself, such order has necessarily to be followed because that is the order which the parties wanted and agreed to be followed. If no such order is fixed, the reason of the thing or the nature of the transaction shall furnish the guidelines regarding the order of performance. Section 54 deals with the effect of default as to that promise which should be first performed in contracts consisting of reciprocal promises. If the promises are such that one of them cannot be performed or its performance cannot be claimed until the other has been performed and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim performance of the reciprocal promise and he must make compensation to the other for all loss that the other party may have sustained by the non-performance of the contract. It is not every breach that will entitle a promisor to be excused from the performance of his own promise. The promisee's default should be such as goes to the whole of the transaction.

Further, if a promisor or promisee seeks equity, he must also do equity. These are the principles relied on by the first defendant who is the appellant. By virtue of Section 4 of the Transfer of Property Act, the chapters and sections thereof which relate to contracts are to be taken as part of the Indian Contract Act. If obligations are to be performed in a certain sequence, one of the parties cannot require compliance with the obligations by the other without, in the first instance, performing his own part which is performable earlier (*Nathulal Vs. Phoolchand*,).

2. The appellant is the Kerala State Small Industries Development and Employment Corporation Ltd. (for short "the corporation") which was established to promote small scale industries. The corporation established industrial estates in various places for starting, small scale industrial units. In the estate started at Edavanna, the second defendant started a plastic unit with the help of the appellant. Machinery purchased for that unit was installed by the second defendant in his unit. He then hypothecated it to the plaintiff-Canara Bank. After four years, the machine developed some complaints. That had to be replaced or repaired by the manufacturer. Entrustment for repairs or replacement was possible only if the security was released by the bank. The appellant, therefore, entered into exhibit A-3 agreement with the bank by which the bank released the security in consideration of the appellant agreeing to pay the amount with interest within three months from the date of exhibit A-3. The suit was filed since the amount was not paid in spite of demand and notice. Decree is only as against the appellant.

3. Before the trial court several grounds of defence were taken up by the appellant. But before me, the only contention was that, on the basis of the provisions of exhibit A-3, the plaintiff-bank did not release the hypotheca and hence the appellant is not bound to perform its part of paying the amount. The appellant thought of the availability of such a contention only from the wording in some letters including exhibits A-4 to A-6 sent by the plaintiff-bank. In those letters, references are there about the release of the hypotheca on payment of the amount. Therefore, it was argued that, in spite of the wording of exhibit A-3, the bank admitted that the hypotheca was not released for being entrusted for repairs or replacement. But those letters were in reply to some other letters of the appellant. Those letters show that the idea of the appellant was to shirk responsibility by finding out a new entrepreneur to take up the machinery and relieve the second defendant. It was for such a course that the plaintiff insisted on payment.

4. The machinery was in the premises of the second defendant on whose behalf the appellant took up the responsibility. Plaintiff-bank was not having physical possession or custody of the machinery. It had only a charge or a lien on the basis of the hypothecation. It was that charge which necessitated its release in order to enable the machinery to be handed over to the manufacturer for repairs or replacement. By Clause (1) of exhibit A-3, in consideration of the appellant

agreeing to pay the amount with interest due from the second defendant on the basis of the hypothecation, the bank released the machinery from the charge created by the hypothecation and by Clause (2), in consideration of the bank releasing the machinery from the charge, the appellant bound itself to pay the amount unconditionally with interest within three months from the date of exhibit. A-3. Under exhibit A-3 there was nothing further to be done by the bank to perform its promise. The promise of the bank was only to release the security. That promise was already performed and nothing remained to be performed. There is thus no question of any reciprocal promise on the part of the bank on the performance of which alone the obligation of the appellant to perform his part of the promise will arise. Under exhibit A-3, what remained to be done was only performance on the part of the appellant of its promise to pay the amount. The question of application of Section 52 or 54 of the Contract Act does not arise. The suit was, therefore, rightly decreed.

5. The appeal is dismissed with costs.