

(1956) 01 KL CK 0011

In the High Court Of Kerala

Case No : C.M.A. No's. 31 and 43 of 1955

Mohammed Kasim Haji Ahamed Kunju

APPELLANT

Vs

Sree Hanuman Industries

RESPONDENT

Date of Decision : 02-01-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Cochin Municipal Act, 1086 — Section 48
Contract Act, 1872 — Section 28

Citation : (1956) 01 KL CK 0011

Hon'ble Judges : Koshi, C.J.; Joseph Vithayathil, J

Bench : Division Bench

Advocate : K.K. Mathew, for the Appellant; V. Parameswara Menon, for the Respondent

Judgement

Koshi, C.J.—These two Civil Miscellaneous Appeals arise from two suits instituted before the Quilon District Court by two different persons doing business at Quilon against a Calcutta Firm, Shree Hanuman Industries. In April 1951 a travelling representative of Messrs, M.K.A. and Co. Madras (agents of the Defendant firm) obtained two separate orders from the Plaintiffs in the two suits for the Calcutta Firm to supply each of them 75 dozens of C.I.R. buckets.

Pursuant to these orders, on 13th May 1951 the Defendant Firm shipped the goods from Calcutta to Cochin by s.s. "Patheron". The relative shipping documents together with demand drafts for the value of the goods were sent to the buyers through their respective bankers at Quilon, with instructions to pay the value of the goods when the banks presented the documents for payment. These communications were sent on 21-5-1951 and both the Plaintiffs got the shipping documents from their bankers after due payment of the amounts as per the respective bills.

Meanwhile, as ill-luck would have it, on 20th May 1951 s.s. "Patheron" went ashore near Bavanapadu, north of Vizagapatam and the ship owners abandoned

the vessel with all the cargo. Salvage operations by the Salvage Company did not prove successful. As the Plaintiffs did not get the goods, they sued the seller, the Defendant Firm for the amounts paid towards the price, interest and other incidental expenses.

The Defendant Firm entered appearance in the two suits through the manager of Messrs. M.K.A. and Co., Madras and contended inter alia that the Quilon Court had no jurisdiction to entertain these suits. This contention was based on Clause 6 of the terms of the order to supply the goods. The said clause reads: "All disputes arising from this contract are to be settled at Madras either by arbitrator or in any Court of law."

Without any enquiry the Additional District Judge of Quilon, before whom the suits came up for trial, accepted the contention and directed the plaintiffs to be returned for presentation to the proper Court. Against those orders the Plaintiffs preferred Civil Miscellaneous Appeals to this Court. In those appeals this Court set aside the order of the learned Additional District Judge and directed him that before he decides the question of jurisdiction he should examine whether there was any valid contract between the parties and whether Courts in Madras had jurisdiction to entertain the claims put forward in the two suits for adjudication.

In the revised orders passed by the learned Judge he found that there were valid contracts between the parties and that Courts in Madras had jurisdiction to entertain these suits as the Defendant Firm was carrying on business at Madras through their Agents Messrs. M.K.A. and Co.

Accordingly he repeated his former orders to return the plaintiffs for presentation to the proper Court. The two Plaintiffs have therefore again preferred appeals to this Court, C.M.A. 31 being the appeal by the Plaintiff in O.S. 68 of 1952 and C.M.A. 43" by the Plaintiff in O.S. 152 of 1951.

2. On the former occasion the direction to enquire whether there were valid contracts was necessitated on account of the fact that the "Plaintiff in either case had averred in the plaint that there was no acceptance of the order before 21-5-1951 when the shipping documents and the demand drafts were despatched from Calcutta and that as by that time the goods had got lost no contract was ever made or that if any had been made, it had become void.

The Court has now found that the Defendant Firm had sent letters of acceptance in respect of both the orders as early as 6-4-1951 and accordingly held that either order had matured into a contract. This point was also sought to be impugned in the appeal.

3. The more important question for decision is whether the finding that Courts in Madras had jurisdiction to entertain these suits is correct. It is settled law that where two Courts have jurisdiction to try a case, there is nothing contrary to law in an agreement between parties that disputes between them should be tried at the one Court rather than the other - see Pollock and Mulla's Indian Contract

Act, 7th Edition, page 211 and Mulla's CPC (12th Edition) page 128.

This Court has accepted this view in the cases reported in - "Orient Ship Supply Co. v. Kalamarsand Co. AIR 1951 KER 1 (V 38) (A) and - Kaliyappa Chettiar v. Currimbhoy Laljee Sajun and Co. AIR 1954 KER 461 (V 41) (B). A recent decision of the Madras High Court by Rajamannar C.J. and Venkatarama Iyer J. (as the latter then was) reported in - "H.K. Dada (India) Ltd. v. M.P.S. Mills Co. Ltd. AIR 1954 Mad 845 (V 41) (C) has exhaustively reviewed the Indian case-law bearing on the point and also the principles applicable for a true construction of Section 28 of the Indian Contract Act relating to agreements in restraint of legal proceedings.

It is equally well settled that parties cannot by agreement, oust the jurisdiction of any Court; nor vest jurisdiction in a Court otherwise not competent. It was in recognition of this principle that on the former occasion this Court directed the lower Court to enquire into the question whether a Madras Court could entertain these suits.

4. Mr. K.K. Mathew, who appeared for the Plaintiffs-Appellants and Mr. V. Parameswara Menon, who represented the Defendant Firm argued this point elaborately before us and at the conclusion of the hearing we more or less indicated our view that in the absence of documentary evidence to show what functions Messrs. M.K.A. and Co. discharged in Madras for and on behalf of the Defendant Firm, we may not be able to uphold the lower Court's view that a Madras Court had jurisdiction to entertain the two suits.

5. The question whether these suits could be filed before a Madras Court must necessarily depend on whether it can be said of the Defendant Firm that it "carries on business" at Madras within the meaning of that expression in Section 20(a), Code of Civil Procedure.

Admittedly no part of the cause of action for these suits arose in Madras. The orders were booked at Quilon by a travelling representative of Messrs. M.K.A. and Co., the acceptance was at Calcutta, the goods were shipped from Calcutta and the payment of the price by the buyers and the delivery of the shipping documents to them were at Quilon. Beyond dispute, a Quilon Court or a Calcutta Court will certainly have jurisdiction to entertain a claim by either of the contracting parties against the other with respect of these contracts.

Admittedly the Defendant Firm has no office (sic) Madras and Messrs. M.K.A. and Co.'s office is their own and not in any sense one subsidised by the Defendant Firm. The only ground on which the lower Court found that Courts in Madras were competent to entertain these suits is that the Defendant Firm "carries on business", in Madras through, Messrs. M.K.A. and Co. Indeed it is on that ground alone that the learned Counsel for the Respondent sought to support the lower Court's orders.

6. As already indicated, we are afraid materials are wanting to hold that the

Defendant Firm carries on business at Madras through their so-called agents Messrs. M.K.A. and Co. All that the written statements in the two cases state is that Messrs. M.K.A. and Co. are the agents of the Defendant Firm who secure orders from parties and send the same to Defendants for execution.

Reading the two written statements it would appear that, to deprive the Quilon Court of jurisdiction, the Defendant Firm was depending entirely on Clause 6 printed in the order forms as one of the terms of the sale, that all disputes arising from the contract are to be settled at Madras either through arbitration or through Courts of law there.

In his examination D.W. 1, the manager of Messrs. M.K.A. and Co. admitted that there was an order appointing Messrs. M.K.A. and Co., as agents of the Defendant Firm, but that order has not been produced in the case. Instead what we have on the record is a power of attorney granted by the Defendant Firm to D.W. 1, authorising him to defend O.S. 152 of 1951 instituted against them by A. Abdul Majid before the Quilon District Court.

In the other suit, O.S. 68 of 1952 no such authority even is seen produced. D.W. 1 admitted that Messrs. M.K.A. and Co. had no authority to accept orders placed for execution by the Defendant Firm. The solitary statement in his examination-in-chief in relation to this matter was that Messrs. M.K.A. and Co. were working in Madras in the business of the Defendant Firm. What that work consisted of is to be understood in the light of the case put forward in the two written statements.

No doubt when pressed in cross-examination he referred to some other activities also as being carried on by his firm on behalf of the Defendant Firm, but in the absence before us of the order of appointment or the agreement, if any, constituting, them as agents to do business at Madras on behalf of the Defendant Firm we feel loath to act upon the statements made by him in cross examination and referred to by the learned Judge in his order.

D.W. 1 said that his Firm was the sole agent in Madras of the Defendant Firm and that they can accept payments on behalf of the latter, but he had to admit that even letters of acceptance of orders canvassed by them are not communicated to them.

7. There is plenty of authority for the position that a Firm cannot be said to carry on business where it has only canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business and that the business of the Firm will be taken to be as being carried on where the contracts relating to the business are entered into or wherefrom effective control is exercised.

Whether a Firm or a person carries on business at a particular place or not is a question of fact. So early as 1865 a Division Bench of the Bombay High Court held in - "Framji Kavasji Marker v. Hormasji Kavasji Marker" 1 Bom HOR 220 (D)

that where that which is the essential ingredient in a perso is business does not take place within the local limits of the jurisdiction of a Court, it cannot be said that that person has been carrying on business within the limits of that Court, even though he may have an agent there for certain purposes connected with his business.

The Defendant Firm manufactured and sold, among other things, G.I.R. buckets and they can, therefore, be said to carry on their business in a place or places where the manufacture or the sales take place.

In - "Firm Hira Nand Murli Dhar v. Firm Gurmukh Rai Radha Kishen AIR 1923 Lah 427 (V 10) (E) the Defendants carrying on business at Calcutta sold goods to the Plaintiffs who carried on business at Amritsar. They consigned the foods to themselves at Amritsar, and endorsed the Railway Receipt in favour of a Bank at Amritsar, instructing the latter to realise the price of the goods from the Plaintiff before handing over the Railway Receipt to them and endorsing it in their favour. The Plaintiffs sued Defendants to recover damages for non-delivery of some of the goods and the suit was instituted at Amritsar. It was found that the Defendants had a travelling agent at Amritsar who secured orders for them and forwarded them to the Head Office at Calcutta. He had, however, no power to enter into any contracts or to receive any monies on behalf of the Defendants.

It was held that it could not be said that the Defendants carried on business at Amritsar within the meaning of Section 20 of the Code of Civil Procedure. The facts in the present case are very similar and the mode of despatching goods and the arrangements to recover the price followed here are similar to those in that case. No doubt it is mentioned that the agent had authority to receive money on behalf of his principal, but we have said that in the absence of documentary evidence to support him we are not prepared to accept the evidence of D.W. 1 that he was authorised to receive payments on behalf of the Defendant Firm.

Other cases that we cite here will show that even authority to receive money by an agent not authorised to make or vary or enter into contracts is not a material circumstance to decide whether the principal "carries on business" at any place through an agent.

8. In - J.D. John and Others Vs. Oriental Government Security Life Assurance Co. Ltd., it was held by Kumaraswami Sastri J., that a Life Assurance Company having agency in Madras, but the agency does nothing but act as a Post Office forwarding proposals and sending monies and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, it does not carry on business in Madras.

This case followed the decision of Beaseley J. in - "Bombay Co. Ltd. v. Municipal Council, Dindigul" reported in the same Volume AIR 1929 Mad 146 (2) (V 16) (G) and the appellate decision there on reported at page 409 as - "Municipal Council, Dindigul v. Bombay Co. Ltd." AIR 1929 Mad 409 (V 16) (H). In - "Pachai Animal v. Hindustan C.I. Society" AIR 1941 Mad 270 (V 28) (I), Leach

C.J. delivering the judgment of himself and Horwill J. said:

... What is meant by carrying on business has been the subject of much judicial discussion and it must now be regarded as settled that a company only carries on business where" it enters into contracts relating to its business not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business.

Among other cases the learned Chief Justice cited with approval the three decisions of the Madras High Court referred to above.

9. To the same effect are to be found decisions of the Sind judicial Commissioner's Court. The relevant portion of the head-note in - "Fleming Shaw and Co. v. Bahadur and Co." AIR 1936 Sind 121 (V 23) (J) may usefully be quoted here:

... If the firm has only an office where business for the firm is done by an agent, the question whether it is "carrying on business" at the place, where it has its office depends upon the powers and authority of the agent. The expression does not apply to an agent who is a mere post office for bringing about contracts or Carrying on business through an agent means carrying on business properly and strictly so called under his effective control. He must have power to conclude binding contract on his own initiative on behalf of his firm.

Rupchand Bilaram A.J.C. who gave the decision in that case repeated the same view in - "Hasi v. Industrial and Prudential Assurance Co." AIR 1937 Sind 17 (V 24) (K).

10. The cases so far cited where the meaning of the expression "carries on business" or expressions similar thereto such as "transacting business" came up for consideration, in our opinion, unmistakably show that the kind of connection which Messrs. M.K.A. and Co. at Madras had with the Defendant Firm at Calcutta is hardly sufficient to make the latter to be considered as carrying on business at Madras.

To repeat what we have said earlier, in coming to this conclusion we take into account only the statement as to their relations in the written statements filed in the two suits on behalf of the Defendant Firm and not matters that D.W. 1 thought fit to introduce into his evidence as the result of after-thought.

Some of the decisions we have referred to were considered by the Cochin High Court in - "Municipal Council, Mattaneheri v. Asiatic Steam Navigation Co. Ltd." 34 KER LR 157 (L). In that case though there is an attempt in the judgment to whittle down the rule that the test was where the contract was made or wherefrom effective control came the learned Judges concluded the discussion as follows:

It is not necessary that all the acts incidental to carrying on the trade should be done where the tax is levied. It would be enough if the transactions within the

Municipality are carried on as part of the business ... In the present case such of the transactions as are carried on within the Municipality form an essential and considerable part of the business carried on by the Plaintiff company. We accordingly hold that the Plaintiff company would come within the terms of Section 48 (Cochin Municipal Act, XI of 1086) and the assessment levied on them was perfectly legal.

There, as in the case of the two decisions of the Madras High Court relating to Bombay Company, the question was as to the legality of the levy of company tax and the expression that came up for consideration was "transacting business."

Even judged by the test laid down in the Cochin decision we cannot say that a firm having a mere canvassing agent at a place different from their headquarters can be said to be "carrying on business" or "transacting business" at the place where that agent functions.

11. We will now refer to the cases relied upon by Mr. Parameswara Menon in his attempt to support the lower Court's finding that the Defendant Firm was carrying on business at Madras through Messrs. M.K.A. and Co. He first invited our attention to - Janoo Hassan by his Agent Ahmad Esa Vs. Batchu Kamandu and Another, There the question would appear to have been whether the expression "carrying on business" occurring in Clause 12 of the Letters patent of the chartered high Court applied to foreigner.

The doubt arose on account of a decision of the Bombay High Court which was passed in 1888. The answer given in the Madras case, was in the affirmative and the decision also held that carrying on business would include carrying on business through an agent. It is unnecessary to dispute this proposition in the abstract; it all depends on what the nature and the authority of the agent is.

In the next case,- Kanshi Ram v. Dule Rai and co." AIR 1933 Lah 11 (V 20) (N) the Defendant who had their head office at Bombay had suboffice at Amritsar and the question was wheather a suit for rendition of accounts against them was properly instituted in the Amritsar Court. It was held that the Amritsar Court had jurisdiction, but the judgment shows that the decision turned on the fact the Branch had effective control over its activities on behalf of the Defendants.

Likewise in - Guardian Assurance Co. Ltd. Vs. Thakur Shiva Mangal Singh Calcutta Courts were found to be Courts competent because Messrs. Andrew Yule and Co. were virtually running a branch office, as it were of the Guardian Assurance Co. Ltd., in Calcutta and as authorised agents under a duly executed Power of Attorney they had full authority to act on behalf of their overseas principals.

Almost similar were the facts of the next case - Smt. Brindarani Debi Vs. Co-operative Assurance Co. Ltd., . There the Calcutta agents of the Defendant company which had its head office at Lahore were found to be not merely a post office or conduit pipe through which communications might be sent to the

company but that they did a considerable amount of business on behalf of the company in which they were allowed a certain amount of discretion.

12. D.W. 1 in his evidence, no doubt attempted to bring in elements to justify the application of some of these cases to the two suits before us, but we have more than once said that for valid reasons we were for discountenancing that effort on his part.

The last of the cases cited by the Respondent was - "Annammah v. Bharat Insurance Co. Ltd." 39 Cochin LR 312 (Q). In that case the Cochin Court was found to be competent to entertain the suit against a foreign Insurance Company doing business in Cochin through a Branch Office established, in Cochin. The decision as to the jurisdiction did not depend upon the nature of the work conducted by or through the Cochin Office; the mere establishment of an office of business and getting itself registered under the Company's Act were taken to constitute the Branch Office a principal place of business in the State. That case cannot, therefore, in any way, help the Respondent.

13. We are, therefore, for reversing the lower Court's finding that Courts in Madras were competent to entertain these suits. Clause 6 of the terms of the contract as printed on the order forms had originally named Calcutta as the place where the disputes arising out of contracts made with the Defendant Firm should be settled.

It goes without saying that if "Madras" had not been substituted for "Calcutta", the lower Court's orders would have had to be confirmed. Having found that "no Court in Madras was competent to entertain these suits we have to give effect to the rule that parties cannot vest jurisdiction in a Court otherwise not competent. Their freedom is only to choose one among two or more competent Courts.

The passages referred to from Pollock and Mulla's Contract Act and Mulla's Code of Civil Procedure, the two decisions of this Court and the Madras decision cited at the beginning of the judgment as also the other Indian authorities referred to in the Madras case clearly show that an agreement seeking to invest a Court which has no jurisdiction with authority to try disputes arising out of a contract is void and cannot be pleaded as a bar to a suit brought in violation of that agreement - see also - "Crawley v. Luchmee Ram" 1 Agra HCR (Civ.) 129 (R) and - "West Coast Agencies Ltd. v. Textile Industrial Trading Agency, Bombay" 38 KER LR 208 (S).

14. A word has to be said here about the evidence relied upon by the learned Judge below to hold that the Defendant Firm had accepted so early as 6-4-1951 the offers the Plaintiffs in these two cases made to buy goods from them.

It is Ext. II, an order acknowledgment book, kept by the Defendant Firm at Calcutta that the learned Judge utilized to find acceptance, but it is the Madras man (D.W. 1), who had nothing to do with that book who sought to prove it. We do not know how he was competent to prove that book. Indeed he had himself

admitted that he had nothing to do with that book before.

15. The appeals have to be allowed; we set aside the lower Court's orders ordering the two complaints to be returned for presentation to the proper Court and direct that Court to proceed with the trial of the suits on the merits and dispose of them according to law. The Respondent will pay each Appellant his costs in the appeal.

16. Ordered accordingly.