

(2011) 01 KL CK 0215

In the High Court Of Kerala

Case No : Regular First Appeal No. 616 of 2010

M/s. G.K. Engineering Works

APPELLANT

Vs

St. John The Baptist Church, Aluva and Another

RESPONDENT

Date of Decision : 05-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Limitation Act, 1963 — Section 10

Citation : (2011) 1 KLJ 376

Hon'ble Judges : Thottathil B. Radhakrishnan, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : Daisy A. Philipose, for the Appellant; Paul K. Varghese and Peter Tharakan ., for the Respondent

Final Decision : Allowed

Judgement

Bhavadasan, J,

1. The plaintiff did the work of construction of a school building for the defendants. He claimed amounts in that regard. According to him, as per Ext. A8 document dated 30.5.1991 he had commenced the work. The work commenced on 4.6.1991. The work had to be suspended due to an obstacle, which the school authorities had to clear. That took sometime and that delayed the work. As the delay was due to the inaction on the part of the school authorities, he sought enhancement of rates and according to the plaintiff he was granted 10% increase of rates. He presented a bill for Rs. 4,01,752.18 towards the purchase of steel and cement, that was approved by the School Committee as per the decision dated 20.11.1992. He had then submitted a bill for Rs. 7,32,148.31, which was verified by the second defendant in the suit and approved by the school committee. Another bill for Rs. 1,22,520.42 was also accepted and approved by the school committee. Since the school committee did not have sufficient funds at that point of time, the plaintiff was asked to wait, promising that as soon as funds are made available, the amounts will be paid to him. Ext. A5 is the letter

which acknowledges the liability of the first defendant. Repeated requests thereafter to release the amount did not invoke response and the school authorities kept on saying that funds were not available with them. They however promised that as soon as funds would be available to them, the demand will be met. Surprisingly he received Ext. A4 letter dated 20.6.2003 in reply to his request for release of amount stating that no amount was due to him and in fact amounts were due to the first defendant from him. This turn around on the part of the first defendant was of considerable surprise to the plaintiff and therefore he approached the court for redressal of his grievances. He claimed a sum of Rs. 20,86,913/-with interest at 12%. The first defendant contested the suit. Several contentions were taken, like mis-joinder, non-joinder etc., which are not very relevant in the context. They denied that the plaintiff had done any work for the Church and infact their case was that the claim put forward by the plaintiff is a totally false one. It was a result of the collusion and fraud played by the plaintiff and the second defendant. They denied of having entered into any agreement with the plaintiff. In fact a reading of the written statement would show that except for total denial of all the allegations, nothing more is stated in the written statement.

2. Based on the pleadings available in the case, issues were raised by the court below. The evidence consists of the testimony of P.W. 1 and 2 and documents marked as Exts. A1 to A8 from the side of the plaintiff. First defendant examined D.W. 1 and Exts. B1 to B3 series were marked. The court below on an evaluation of the evidence came to the conclusion that the plaintiff is entitled to the amount claimed by him. However he was non-suited on the ground of limitation. Hence the appeal.

3. The only question that arises for consideration in this appeal is whether the finding of the court below that the suit is barred by limitation is justified in law.

4. Learned counsel appearing for the appellant pointed out that the court below had on an evaluation of the evidence had come to the conclusion that amounts as claimed by the plaintiff is due to him from the first defendant. However, the court below held against him on the ground of limitation. Learned counsel went on to point out that the Church had promised that as soon as funds were available with them, they would pay off the amount due to the plaintiff. Plaintiff kept on making demand for the amount and the defendants replied that they would pay the amount as soon as they have funds with 12% interest. At no point of time, except as per Ext. A4, the school authorities had denied their liability towards him. The Church authorities occupied a fiduciary capacity and it was not possible for the plaintiff to insist immediate payment when the Church, of which he is a member, promised that the amount would be paid to him as soon as they had the requisite funds. According to learned counsel, the plaintiff remained under the bonafide belief that the first defendant would pay off the amount due to him and therefore he did not take any action. It was when he received Ext. A4 that he realised that he had been taken for a ride and that compelled him to

approach the court. According to learned counsel, the first defendant is in the position of a trustee and the amount should be deemed to have been held in trust. If that be so, the finding of the court below that the suit is barred by limitation cannot be sustained in law.

5. Per contra, learned counsel appearing for the respondent contended that apart from the fact that there was absolutely no evidence to show that any amount was due to the plaintiff, there is no reason to interfere with the finding that the suit is barred by limitation. It was pointed out that even going by the plaintiff's averments, the amount was due in 1992-93. Even assuming Ext. A5 to be an acknowledgment within the period of limitation, still the suit had to be filed within three years from the date of Ext. A5, but, the suit was instituted only in 2006. According to learned counsel, Ext. A4, which is of the year 2003 cannot be treated as an acknowledgment since the suit was already barred by limitation at the time of issuance of Ext. A4. Again Ext. A4 does not acknowledge any liability at all. It simply informed the plaintiff that he is not entitled to any amount from the first defendant. Learned counsel pointed out that neither Article 18 nor Article 19 of the Limitation Act can come to the aid of the plaintiff. In support of his contention, he relied on the decisions reported in *Sampuran Singh v. Niranjan Kaur* (1999 (2) KLT SN 76 Case No. 83), *Moidu v. Kerala State Electricity Board* (1980 KLT 817) and *M/s. Rudnap Export-Import v. Eastern Associates Co.* (AIR 1984 Delhi 20). Learned counsel therefore contended that there is no merit in this appeal and it is liable to be dismissed.

6. It is pointed out by the learned counsel for the appellant that there was no cross-objection or cross-appeal by the first defendant and therefore he cannot contend that the court below was unjustified in finding that amount was due to the plaintiff.

7. The above contention is only to be rejected in view of Order 41 Rule 22 of Code of Civil Procedure. That provision enables the first defendant not only to support the decree, but also to urge that the finding against him by the court below ought to have been in his favour. In the light of this fact, learned counsel for the respondent can contend that the finding of the court below that the amount as claimed by the plaintiff is justified is unsustainable in law for want of evidence.

8. Even though the first defendant denied of having any transaction with the plaintiff, it has to be said that it was misconceived and ill-advised. Ext. A8, copy of the agreement dated 30.5.1991 produced by the plaintiff shows that the first defendant in the suit had entered into an agreement with him for construction of a portion of the school building. Most of the other documents, Exts. A2, A3, A5 and Exts. B1, B2 and B3 series will clearly show that construction work was in fact done by the plaintiff of the school building for the first defendant. The pleadings and the evidence are to the effect that the supervision was done by the second defendant and under their guidance, the plaintiff had completed the work. It is significant to notice that the amounts claimed by the plaintiff had to

be certified by the second defendant. The evidence adduced by the plaintiff clearly show that the amounts claimed by the plaintiff were in fact certified by the second defendant.

9. The first defendant has no case that no construction of the school building was carried out or it was done by somebody else. The fact remains that there was construction of a portion of the school building. In the absence of any pleading in the written statement or evidence on behalf of the first defendant to show that the work was done by anybody else other than the plaintiff, it is only to be held that it was the plaintiff, who had undertaken the work and completed the same. At the risk of repetition, one may notice that the written statement simply denies every allegation and says nothing more.

10. The plaintiff has produced Exts. A2 and A3 to show the amount due to him. Ext. A2 is a letter addressed to the plaintiff concern, wherein it was acknowledged that the school committee, which had met on 20.11.1992 had approved the purchase of steel and cement for Rs. 4,01,752.18 and payment has been sanctioned. It is interesting to note that the said communication also says that the plaintiff had accepted postponement of actual payment without any interest and therefore the amount would be paid to him as soon as funds are available with the first defendant. It will not be out of place to refer to Ext. A1 also. Ext. A1 is a communication issued by the plaintiff pointing out that he has commenced work on 4.6.1991. The plaintiff points out that a portion of the toilet of the school had to be removed for the construction and steps may be taken by the school authorities to do so. It was also pointed out that the school authorities had asked the plaintiff to retain the toilet until further steps are taken by them. Ext. A3 is copy of the minutes of the meeting held by the school committee. It shows that in the committee meeting held on 20.11.1992, the bill submitted by the plaintiff to the tune of Rs. 7,32,148.32 as certified by the second defendant and another bill for Rs. 1,22,520.42 also certified by the second defendant had been accepted and approved and a decision was taken to pay the amount to the plaintiff as soon as funds are available.

11. The main objection taken to Ext. A3 is that it is only a photostat copy and it cannot be relied on. It is interesting to note that there was another suit between the parties and Ext. A3 was produced in the said suit. It is significant that the first defendant does not deny Et. A3 as such. But his objection is only that the original has not been produced. Well, the original was with the first defendant himself and it was on the failure of the first defendant to produce the same that the plaintiff was compelled to produce copy of the same, which was produced in another case.

12. Ext. B1 series of receipts are said to have been issued by the plaintiff to the first defendant. However, the first defendant has no case that those amounts said to have been received by the plaintiff was towards discharge of any of the amounts mentioned above as approved by the school committee and directed to be paid to the plaintiff. One may here recollect that the stand of the first

defendant is one of total denial. No explanation whatsoever is offered for the various documents produced by the plaintiff.

13. When the plaintiff was examined as P.W. 1, the suggestion to him was that he had colluded with the then Manager of the School, one P.C. Mathew and had created documents. In the written statement, the contention is that the plaintiff and the second defendant had colluded together and had made the claim. P.W. 1 does admit that there were disciplinary proceedings against P.C. Mathew, who was the then Manager of the School. It is to be noticed that P.W. 1 too was a member of the school committee at the relevant time. P.W. 1 states that he commenced the work on 4.6.1991 and speaks about the various steps taken by him. He categorically says in his affidavit in chief that the amounts made mention of earlier were due to him and that he was told that amounts will be paid to him as soon as funds were available with the first defendant. P.W. 1 states that he honestly believed that he would be paid the amounts. It was only when he received Ext. A4 he realised that the first defendant disowned any liability towards him. He also mentioned that he had repeatedly requested for the disbursement of the amount.

14. In the cross-examination of P.W. 1, there was no suggestion at all to the effect that the claim was made on the basis of collusion by the plaintiff with the second defendant. Shockingly enough there is a suggestion that Ext. A8 is manipulated by the plaintiff. It is admitted by him in cross-examination that he was a member of the school committee. But he denies that he had misused his position as a member of the committee and with the aid of the then Manager of the school, namely, P.C. Mathew, he had created documents to claim amounts from the first defendant.

15. P.W. 2 examined on behalf of the plaintiff at the relevant time was the Secretary and Treasurer of the school committee. He asserts that the work was given to the plaintiff and he had completed the same. He also identifies his signature on Ext. A8 document.

16. D.W. 1 was examined on behalf of the first defendant. He would say that even though earnest efforts were made to find out the original of Ext. A8, they could not do so. He says that the plaintiff is not entitled to claim any amount from the first defendant and even if any amount was due, that was barred by limitation. However, he stated that Exts. B1 to B3 series were documents issued by the plaintiff for having received amounts on various counts.

17. In cross examination, this witness pleaded ignorance regarding the various aspects and he says that his knowledge about the whole issue is confined to the documents available in the office. He however says that there are accounts in the Church to show the cost of construction etc. He is unable to give the details of the various aspects regarding the construction. He also states that he had not bothered to look into the documents produced by the plaintiff. The claim of the first defendant that the plaintiff had not worked and no amount is due to him

cannot be easily accepted. Ext. A1 is the agreement by which the plaintiff had commenced the work. He has produced various documents, which would show that he had carried out the work. Interestingly enough the defendants themselves have produced Exts. B1 to B3 series, which would show that amounts had been received by the plaintiff on various counts. The evidence of D.W. 1 also shows that the first defendant has got documents to show the details of the construction and the first defendant had kept accounts for the same. Well, if that be so, nothing prevented them from producing the same by pointing out that the plaintiff had no case at all.

18. One cannot omit to notice that the first defendant has no case that no construction as alleged by the plaintiff was carried out or that the construction was done by any other person. The case set up at the time of evidence regarding the collusion between P.C. Mathew and the plaintiff does not find a place in the written statement. The written statement on the other hand sets up a plea, that plaintiff had colluded with the second defendant. The allegation in the plaint and the evidence of P.W. 1 is to the effect that the architect and engineer of the work was the second respondent and it was under their supervision that the work was carried out. This was not seen disproved. P.W. 1 has categorically stated that all the bills were duly approved by the second defendant. There is no case for the first defendant that the claim of the plaintiff that the second defendant was the architect and engineer is incorrect. In Ext. A4 document, the first defendant not only denied liability towards the plaintiff but also pleads that amounts are due from the plaintiff. There is no such plea in the written statement. Even at the time of evidence D.W. 1 had no Case that any amount is due from the plaintiff. Learned counsel appearing for the respondent in this appeal was unable to show any document or evidence to the effect that amounts were infact due from the plaintiff on any count.

19. It is not clear from the evidence as to whether the amounts covered by Exts. B1 to B3 series were paid towards the three bills presented by the plaintiff and approved by the school committee for payment. The evidence of D.W. 1 is not at all satisfactory in this regard. The court below has considered this matter in considerable detail. As rightly noticed by the court below, there is nothing to show that Exts. A1, A2 and A3 as well as Ext. A8 are concocted documents.

20. As already noticed, the main attack of the first defendant is that all these documents are; concocted with the aid of P.C. Mathew, who was the manager of the School at the relevant time and a member of the school committee. There is absolutely no evidence in this regard at all. Obviously, there would have been other members in the school committee apart from P.C. Mathew and the plaintiff. Then, since the construction is admitted, the first defendant must have accounts for the same. It is here one has to notice that P.W. 2, who was the Secretary and Treasurer of the school committee at the relevant time, supports the plaintiff. His evidence could not be effectively impeached. There is no reason as to Why he should speak falsehood. As already noticed, the story of collusion with P.C.

Mathew finds no place in the written statement. There is also no challenge to the claim made by the plaintiff as per Exts. A2 and A3.

21. It was based on the above materials that the court below had come to the conclusion that the amount as claimed by the plaintiff was infact due to the plaintiff.

22. It is true that Exts. B1, B2 and B3 series of documents were claimed to have been issued by the plaintiff for having received various amounts like purchase of materials, labour charges etc. But there was no attempt from the side of the first defendant at ell to show that those payments were made towards the amount now claimed by the plaintiff in the plaint as well as in his evidence. Again, having asked the court to accept Exts. B1, B2 and B3 series, it escapes one's understanding as to how the first defendant can contend that the plaintiff had not done any construction work. The finding of the court below is that the plaintiff has done the construction for the school does not call for any interference. -

23. After having found that the plaintiff is entitled to the amount claimed by him, the court below chose to non-suit him on the ground of limitation. The court below treated Ext. A5 as an acknowledgment and that is dated 12.4.1995. According to the lower court at best the plaintiff could get 3 years therefrom and no more. The court below refused to accept the plea made by the plaintiff, the period begins to run from Ext. A4 dated 20.6.2003; Holding that time begins to run from 12.4.1995, the plea of limitation was found against the plaintiff.

24. Learned counsel appearing for the appellant pointed out that the lower court has missed certain vital aspects in the case. According to learned counsel Ext. A5 document accepts the liability and promises to pay the amount as soon as funds are made available. Ext. A3 also would indicate the same fact. The plaintiff was also a member of the school committee and he was a parishioner of the church. When the church authorities assured that these amounts would be paid, he reposed confidence in them and trusted that they would honour their word. It is pointed out by the learned counsel that frequent demands were made and on all those occasions there was no denial of liability, but only promises of paying the amount as soon as funds were available. It was a case of trust and confidence reposed in the first defendant. Therefore the learned counsel would point out that the first defendant occupied a fiduciary status and the amounts in the hands of the first defendant payable to the plaintiff is in the nature of a trust. If that be so, the question of limitation does not arise for consideration.;

25. Learned counsel appearing for the respondent pointed out that by no stretch of imagination Ext. A4 could be treated as an acknowledgment either u/s 18 of Section 19 of the Indian Limitation Act. The acts necessary to constitute an acknowledgment under these two provisions will have to be done within the period of limitation. The communication prior to Ext. A4 between the parties is Ext. A5, which is dated 12.4.1995 If the plaintiff did not get amount thereafter, it

was for him to approach the court within three years therefrom and by no means known to law he gets time beyond three years from that date. Further, it is contended that Ext. A4 denies any liability towards the plaintiff and by no stretch of imagination it could be treated as an acknowledgment.

26. At the outset itself, it may be noticed that the plaintiff does not plead for reliefs based on Section 18 or Section 19 of the Indian Limitation Act. Therefore the contention of the learned counsel for the respondent on this behalf and the decisions relied on by him in support of his contention with reference to Sections 18 and 19 of the Limitation Act have no relevance.

27. The question that needs examination is the contention raised by the appellant that the first defendant occupies a fiduciary status and that the amount that is due to the plaintiff from the first defendant and held by the first defendant is in the nature of a trust.

28. It cannot be disputed that the liability arises under a contract. Normally in the case of a contract only rights in personam are created. Unlike in the case of a trust there are also other marked features of contract which need not be highlighted in the present context. Going by the pleadings and the evidence in the case, a definite sum was due from the first defendant to the plaintiff and as rightly pointed out by the plaintiff till Ext. A4 dated 20.6.2003 was issued, the first defendant had never disputed the liability towards the plaintiff. The consistent stand taken by the first defendant was that they did accept the liability to the plaintiff, but only wanted time to effect the payment on the ground that there was paucity of funds. It has been recognized that to certain extent the law of trust and law of contract overlap. A contract can create a trust in certain circumstances. Of course, the essential characteristics of a trust will have to be satisfied. It is not unknown to law that even between a creditor and debtor there may be instance of creation of trust. It depends upon the facts of each case. It is clear from the records available in the case that till Ext. A4 was issued, the first defendant had the intention to pay the amount due to the plaintiff and the only hindrance was that they were short of funds.

29. Considering the fact that the first defendant is a Church and the plaintiff is a parishioner of that Church and also that he was a member of the school committee, the contention put forward that there was fiduciary relationship cannot be ignored. Obviously the authorities of the first defendant must have had considerable amount of influence over the plaintiff. Ext. A5 very clearly shows that the first defendant was aware of the liability and their only request was that he may wait till the funds were available to the Church. It is interesting to note that the first defendant offers to pay interest at 12%. In the case on hand an implied trust emerge in the circumstances of the case, giving rise to an equitable right for the plaintiff to make the first defendant liable for the amount due to him. The concept of trust has quite often imported into the field of contract to get over the plea that only a party to the contract can sue upon it. Whatever that may be, the enquiry in such cases involves the interpretation of

the contract, the special circumstances of the case and the positions occupied by the respective parties.

30. Applying the above principles, it can be seen that in the case on hand, learned counsel for the appellant is well founded in her submission that the money due from the first defendant to the plaintiff was held in the nature of a trust and since there is a fiduciary relationship, there is an obligation on the part of the first defendant to discharge the liability due to the plaintiff. If that be so, Section 10 of the Limitation Act is attracted to the facts of the case and it could not be said that the suit is barred by limitation.

31. One cannot find fault with the plaintiff if he reposed confidence in the first defendant when it was represented that the amount due to him would be paid as soon as funds were available. Ext. A4 takes a totally different stand. It is for the first time in Ext. A4 there is a total denial of liability and also an assertion that money is due from the plaintiff to the first defendant. But there was no attempt from the side of the first defendant to establish the above fact. It was on receipt of Ext. A4 that the plaintiff was, for the first time, given to understand that the first defendant was disputing the liability. Till then, he had reposed confidence in the first defendant and believed that they would discharge the liability. The relationship between the plaintiff and the first defendant was one of trust and confidence. The plaintiff reposed absolute faith, confidence and trust on the first defendant. The first defendant was in a dominant position, and it is clear that the plaintiff was accustomed to repose confidence in the first defendant. The transaction between the plaintiff and the first defendant was one built on mutual trust. It is a case of ascendancy and dependence. The first defendant had taken advantage of its superior position and had given an impression to the plaintiff that amounts would be paid as soon as funds were available. It is a clear case wherein first defendant had dominated and influenced the mind of the plaintiff and made him accept that he would receive the amounts due to him at a later stage. There was clearly a duty arising out of a fiduciary relationship between the plaintiff and the first defendant whereby the first defendant had a legal obligation to pay the amount due to the plaintiff. In this case equitable doctrine of trust and confidence comes into play. After having obtained the trust and confidence of the plaintiff and after having given him the impression that the amounts due to him would be paid in due course of time, it comes with little grace from the first defendant now to say that no amount is due to the plaintiff or that the claim is barred by limitation. Considering the facts and circumstances of the case, it is felt that the plaintiff is entitled to relief in the suit.

In the result, this appeal is allowed, the judgment and decree of the court below are set aside and a decree is passed in the following terms:

- i) The plaintiff is entitled to realise a sum of Rs. 13,82,062.90 with interest at 6% from 20.8.2001 till realisation from the first defendant and its assets.
- ii) The court fee payable both before the court below and before this court shall

be realised from the first defendant.

iii) The plaintiff will be entitled to his costs throughout.