

(2002) 11 KL CK 0019

In the High Court Of Kerala

Case No : A.S. No. 751 of 1992 and Cross Objection and A.S. 328 of 1993

M/s. Popular Automobiles

APPELLANT

Vs

Eddy Current Control India Ltd.

RESPONDENT

Date of Decision : 27-11-2002

Acts Referred:

Partnership Act, 1932 — Section 69(2)

Citation : (2003) 1 CivCC 510 : (2003) 1 KLJ 275 : (2003) 1 KLT 331 : (2003) 1 RCR(Civil) 741

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : C. Varghese Kuriakose, for the Appellant; Markose Vellappally, Joseph Kodianthara and Siri Jagan, for the Respondent

Judgement

P.R. Raman, J.—Appeal A.S. 751 of 1992 arises out of the judgment and decree in O.S. 58 of 1989 and A.S. 328 of 1993 arises out of O.S. 287 of 1987 on the file of the 1st Additional Sub Court, Ernakulam. Plaintiffs in O.S. 287 of 1987 are the partners of M/s. Popular Automobiles, a registered partnership firm. The second plaintiff is representing the other plaintiffs as Power of Attorney holder. M/s. Popular Mill Stores is a proprietorship concern owned by the firm M/s. Popular Automobiles. The first defendant is a public limited company and the other defendants are its officials. The plaintiff in O.S. 58 of 1989 is the firm Popular Automobiles, represented by its partner and the defendant is a public limited company by name M/s. Eddy Current Controls (India) Ltd. with registered Office at Eddypuram, Chalakudy.

2. Both the suits were jointly tried and disposed of by a common judgment. The appellants in A.S. 328 of 1993 are the plaintiffs in O.S. 287 of 1987 and the appellant in A.S. 751 of 1992 is the plaintiff in O.S. 58 of 1989. The cross objectors are defendants in the said suit.

3. The plaint averments briefly stated in O.S. 287 of 1987 are as follows: M/s. Popular Automobiles Limited is engaged in the business of automobiles spare

parts. M/s. Popular Mill Stores is owned by them and carrying on business in mill stores in separate name. Hence the partners of the firm are the proprietors of this business as well. The defendants purchased mill stores items from the plaintiffs on credit basis and an amount of Rs. 24,204.70 is due as per 20 invoices during the period 28-07-1986 to 24-11-1986. An amount of Rs. 557/23 towards prior transaction is also alleged to be due and payable by the defendants. The suit is for realisation of the said amount with 24% interest.

4. The first defendant denied the claim of the plaintiffs. According to him, the transaction was between the first defendant and M/s. Popular Mills Stores which is a different entity. The firm is not duly registered or represented though it is admitted that they are dealing with popular mill stores there was no agreement to pay interest at the rate of 24% as alleged. According to him, as on 30-11-1986, Rs. 11,671.05 alone is due to the plaintiff. Only an amount of Rs. 15,746/- is due with 18% interest. According to the first defendant, amounts are due to him from the plaintiffs. Hence they are entitled to set off against the amount due from the plaintiffs. According to the first defendant, the defendants have supplied rubber headings to the plaintiff and the prices of those rubber beadings with interest is due. As per seven invoices the balance amount said to be due to him after deducting the amount as per credit note issued by him is Rs. 25,941/-. The plaintiffs are also liable to pay interest at 18%.

5. In answer to the counter claim a replication is filed by the plaintiffs. An amount of Rs. 27,704/-, interest and notice charges along with Rs. 8,700/- as charges for storing the defective and unsalable goods supplied by the first defendant till December, 1988 with future compensation at Rs. 300/- per month till the removal of the goods is said to be due from the defendants. It is further contended that the first defendant is liable to remove the rejected goods and to pay the amount for which a separate suit is filed. At any rate, the claim based on bills dated 12-08-1985, 07-09-1985, 14-09-1985, 30-09-1985 and 04-01-1986 are barred by limitation.

6. O.S. No. 58 of 1989 is a suit for realisation of money, instituted by M/s. Popular Automobiles represented by its partner. It is alleged that the defendants supplied rubber beadings of various sizes manufactured by it as a new venture on an experimental basis. There is a specific understanding that defective or non saleable goods shall be returned to the defendants and the defendants undertook to replace them with right quality goods or issue credit notes for the value. Large quantity of rubber beadings were found to be defective and poor in quality and returned by the customers of the plaintiffs are kept in the godown. There was a meeting between the plaintiff and the defendant on 13-01-1986 and the proceedings of the meeting were drawn up and signed by the parties as per which the defendant undertook to take back the rejected goods lying in the godown and replace them with good materials. The defendant took back about 4.110 tones of rejected rubber headings on 12-07-1986 and credit note for Rs. 53,430/- dated 14-07-1986 was issued representing the value of the goods at

the rate of Rs. 13/- per Kg. But in doing so, the sales tax and excise duty were not credited. There are still more quantity of rubber headings lying in the go-down but the defendants did not take it back. The remaining quantity of 2,600 Kgs. are bound to be taken by the defendants and pay the plaintiff the amount due after deducting the value of the goods as per the credit note. The balance amount due to the plaintiff is Rs. 27,704/76 The defendant is also liable to pay 25% interest from 13-01-1986 onwards.

7. In the written statement, the defendants contended that the court has no jurisdiction since the dispute is a subject matter of Chalakudy Jurisdiction. There is no cause of action for the plaintiff to file the suit. The suit is barred by limitation. There is no contract to return the goods purchased and only quality products are supplied to the customers. The defendant took back some of the goods sold purely as a gesture of goodwill to facilitate good trade relationship. After a joint inspection by the representatives of the plaintiff and defendant and credit note was issued and there was no dispute at that time regarding quality. The plaintiff is not entitled to demand repayment of tax and duties paid by the defendant to the Government. There is no agreement to pay interest.

8. The claim in O.S. 287 of 1987 is one for realisation of the plaint amount based on 20 invoices. Ext. A2 series are those invoices. Goods were sold as per these invoices is not in dispute. Ext. A3 is the ledger maintained in the course of business by the plaintiffs. The defendant relied on Exts. A4 and A5 and contended that the amount as claimed is not due from him, but only an amount of Rs. 11,671.05 is admitted as liability. Ext. A4 is a letter dated 22-01-1987 sent by the defendant confirming the amount due to the plaintiffs as Rs. 11,671.05/- and Ext. A5 is the reply by the plaintiff to the defendant. In Ext. A5 the plaintiff never raised any objection regarding the amount alleged to be due as shown in Ext. A4 is the contention of the defendant. The court below found that Ext. A4 is not a statement of account. Reliance was also placed by the court below on the deposition of DW. 1 who conceded that Ext. A4 is not a statement of account, but is a letter prepared based on examination of the account. The evidence of DW.1 would show that there was some discussion between one of the plaintiff's officials who agreed the amount mentioned in Ext. A4 to be the correct balance. PW. 2 is the said official who denied having taken place any such discussion regarding the balance due to the plaintiff as on that date. His evidence shows that he had routine visit to the defendant's company to accelerate the payment. It is also a fact that the dispute did not arise between the parties at that time to workout the balance.

9. A reading of Ext. A4 would show that it was an assurance by the defendants to pay an amount of Rs. 4,310.35 due to the plaintiff till 17-10-1986 which was to be paid by the first week of February, 1987 and the balance amount of Rs. 7,367/70 against the supplies made by the plaintiff in November, 1986 would be paid by the third week of February, 1987. There is nothing to show that there was any settlement of accounts between the parties or that Ext. P4 was prepared

based on any discussion nor can it be said that it is a statement of account. As rightly stated by PW.2 when he visited to accelerate the payment in confirmation thereof, the defendants have agreed to pay the amounts mentioned in Ext. A4 on or before the date mentioned therein. Ext. A5 is the reply and the plaintiffs have understood Ext. A4 as a request for time for payment. The plaintiffs have stated that they can give time for payment only after the defendants agreed to pay interest at 25% per annum for all the bills from 30 days of supply to the date of payment. There is nothing mentioned in Ext. P5 admitting that the amount shown in Ext. A4 is the only amount due or payable by the defendants to the plaintiffs. When amounts are outstanding due and payable from the defendants the defendants were seeking time for payment of the said amount and the plaintiffs have understood that letter only in that way requesting for time. So much so, the court below is perfectly justified in holding that Exts. A4 and A5 in no way will show that there was any statement of account agreeing the amounts mentioned in Ext. A4 as the only amount due or payable by the defendants. Admittedly, the defendants have not taken any steps to produce their books of account maintained in the course of business on the pretext that the account books were destroyed by fire which story was not believed by the court below. There was no independent evidence to support the execution raised in the written statement of a partial discharge. The burden being on the defendants to prove their case and having failed to establish the plea of discharge and plaintiffs having proved their case by producing their account books and also by examining the witnesses in the case and in the absence of any dispute regarding the acceptance of the goods as per the invoices referred to in the foregoing paragraphs, the court below found that the amounts claimed in O.S. 287 of 1987 of an amount of Rs. 27,704/76 is due to the plaintiff. The court below found that in the absence of any specific agreement between the parties, regarding the rate of interest, plaintiff is also entitled to interest at 18% per annum. These findings are not seriously in dispute.

10. The defendants raised a contention regarding the set off of an amount of Rs. 25,941/79. This amount is covered by seven invoices Ext. B2 to B8. Though the plaintiff has filed a replication, the contention raised in the replication are those contained in the plaint claim in O.S. 58 of 1989. As such the counter claim, its reply and the suit claim in O.S. 58 of 1989 are inter-linked. O.S. 58 of 1989 is a suit for realisation of an amount of Rs. 27,704.76. This figure is arrived at as per a statement of account of the plaintiffs themselves contained in the lawyer notice issued by them evidenced by Ext. A21 dated 13-12-1988. That suit notice is the basis for the suit O.S. 58 of 1989. In para 5 of the suit notice a statement of account is given by the plaintiffs as follows:

Value of 2600 Kgs of rubber beedings

11. An amount of Rs. 25,941.76 is deducted as amounts due to M/s. Eddy Current Controls (India) Ltd. for striking a balance due at Rs. 27,704/76. This amount of Rs. 27,704.76 is the amount claimed by the defendant as set off in

the counter claim in O.S. 287 of 1987. Therefore, the only question is as to whether the plaintiff in O.S. 58 of 1989 is entitled to succeed in that suit and whether they are entitled to claim the value of 2600 kgs. of rubber headings rejected by them and whether they are also entitled to get credit towards sales tax and excise duty if it is found that the plaintiff in O.S. 58 of 1989 is entitled to claim the value of 2600 kgs. of rejected rubber headings lying in their go-down. When the plaintiff having instituted the suit only for the balance amount after giving credit to the amount covered by seven invoices issued by the defendants there will be hardly anything to consider by way of counter claim in A.S. 287 of 1987 since the very suit O.S. 58 of 1989 is after adjusting such amount as claimed by the defendants by way of counter claim.

12. According to the plaintiff, the rubber headings supplied by the defendants was on an experimental basis and they have agreed to take back the defective goods or goods which were rejected by the clients for which reliance is placed on Ext. A9 minutes of the meeting held between the parties. Ext. A9 is signed by representatives of both the plaintiffs and defendants. It is dated 13.1.1986. As per the minutes recorded, it was decided by the defendants to replace the whole quantity of rejected beedings lying in popular go-down and popular had agreed that point. The exact weight was to be assessed by Popular Automobiles and inform. It was as also agreed to make a trial testing with the new beading before starting the replacement. The new samples would be supplied to popular Trichur and Ernakulam. 50 meters each immediately for testing and approval.

13. By Ext. A10 letter dated 21.6.1986, the plaintiff Popular Automobiles wrote to the defendant M/s. Eddy Current Controls (I) Ltd. bringing to notice that large quantity of the beedings as much as 4 tones approximately, was found to be defective and unfit for use or sale. It was also pointed out in the said letter a previous agreement of the defendants to take back the entire defective supply to be replaced. This was more in the form of a reminder sent after Ext. A9 minutes referred to earlier. It is in reply thereto that by Ext. A12 dated 2.7.1986 the defendants reiterated their demands to collect the rubber headings and to issue credit note to the plaintiffs. Thereafter, a quantity of 4.110 tons of rubber headings were taken back by the defendants and credit note for an amount of Rs. 53,430/- was also given in favour of the plaintiff as evidenced by the credit note dated 14.7.1986, Ext. A14. In Ext. A16 dated 19th July, 1986, the plaintiff acknowledged the receipt of the said credit note for Rs. 53,430/- but wrote to inform the defendants that excise duty and General Sales Tax chargeable on the items returned were not found adjusted in the credit note and requested the latter to issue credit notes towards those amounts also. It was further mentioned in the said letter that large quantity of various kinds of glass headings are still lying in the Popular Automobiles which were not fit for use or sale and requested the defendants to arrange for the collection of the entire quantity and to issue credit note for the same as those defective headings occupy considerable storage space of their show room and godown and immediate action was requested for. Exts. B2 to B8 were issued by the defendants and by letter dated 9.5.1987-Ext.

B12 sent by registered post with acknowledgement due, the defendants reminded the plaintiffs to settle the outstanding bills. In Ext. B12 the total bill amount for Exts. B2 to B8 is shown totalling to Rs. 79,371.79 and after deducting an amount of Rs. 53,430/- for which credit note was issued in favour of the plaintiff the balance struck as Rs. 25,941.79. It is in reply to Ext. P12 that the plaintiff sent their letter dated 22.5.1987 and referred to the discussion held on 13.1.1986 and the agreement of the defendant to take back the entire stock of defective goods and to replace the same with good quality. It was acknowledged that 4.110 tons of defective goods were taken back by the defendant but pointed out that the remaining are still lying in the godown and their reminder dated 19.7.1986 was also made mention of once again in this letter. It was also pointed out that while sending the bills, the defendants should have taken back the defective goods and issued credit notes for the same. After Ext. A9 meeting between the parties, the defendants took back 4.10 tons of the defective headings. This acknowledges the fact that there was an agreement between the parties on 13.1.1986. Even in the subsequent letters written by the defendants they have not disputed the agreement to take back the defective goods. It is relevant to note that in the minutes of the meeting produced as Ext. A9 the quantity is to be assessed by the plaintiff and inform the defendant. Therefore, it was left to the discretion of the plaintiffs to assess as to what is the quantity of the defective materials and it is agreed by the defendant to take back the whole of such defective headings. What was sent earlier is only portion of such goods as already referred to above, the plaintiffs have in their letter repeatedly stated that goods are still lying in their godown which are defective and the defendants are bound to take it back. Nowhere it is disputed by the defendants that the remaining quantity is not to be taken back by them. If as a matter of fact, the defendant had any dispute regarding the remaining quantity of the goods said to be defective as contended by the plaintiffs, then the defendant would have certainly raised an objection thereto. On the other hand, the plaintiffs had a consistent case that there were still balance quantity lying in their godown which are defective and they have repeatedly requested the defendants to replace them with good materials or to give credit with the same. Thus, the obligation of the defendants to replace the defective materials of a quantity as assessed by the plaintiffs having been accepted in Ext. A9 minutes of the meeting. In the absence of any dispute even thereafter, the contention of the defendant that there is no agreement to take back the goods which are defective has only to be rejected. The balance quantity according to the plaintiff is 2600 kgs. and the value calculated on it is not disputed.

14. According to the court below, there is an agreement in Ext. A9 to take back the entire quantity of rejected goods and the entire quantity has been taken back by them. This conclusion is not supported by evidence in the case. When 4.10 tons of rejected goods were taken back by the defendants the plaintiff has clearly stated that it is only an approximate quantity. So long as the quantity is not mentioned in Ext. A9 and the weight of the rejected goods has to be assessed by

the plaintiff as agreed to by the defendants, there need not be a separate agreement as Ext. A9 itself entitles the plaintiffs to inform the quantity of the defective goods and the defendants have agreed to take the entire quantity back. Hence the finding of the court below regarding the balance quantity of 2600 kgs. that there cannot be any agreement to take it back is contrary to the understanding between the parties as contained in Ext. A9 agreement.

15. As already stated above, if the defendants had a dispute regarding the quantity, at least immediately or any time whereafter Ext. A9 was concluded, they could have raised an objection to take back the balance quantity which is not seen done. It is true that subsequent dealings were there between the plaintiffs and the defendants. That is only consistent with the agreement contained in Ext. A9. When the defendants have agreed to take back the entire defective goods, the relationship was cordial and the defendants used to supply goods even thereafter. Since in no way the conduct of such subsequent supply could be taken as a fact to deny the contention of the plaintiff that out of the earlier supplies there was a quantity of 2600 kgs. which were either defective or rejected by the clients, the court below has already found that the plaintiffs are entitled to the sales tax and excise duty. Since the plaint claim in O.S. 58 of 1989 is only for the balance amount after giving credit to the bill amount in Ext. B2 to B8 I find that the defendants are not entitled for any further deduction by way of set off of account of their claim. I find that the plaintiffs are entitled for a decree for the amount claimed in O.S. 58 of 1989. I find that the plaintiff is entitled for the amount claimed in O.S. 58 of 1989.

16. It is contended by the respondent defendants that the suit is not maintainable. As far as the suit O.S. 287 of 1987 is concerned, the specific averment in the plaint is that the plaintiffs are the partners of the firm M/s. Popular Automobiles Ltd. which also carries on business in Mill store items under the name Popular Mill Stores and the plaintiffs are proprietors of the business. These averments are not specifically denied in the written statement except to say that the firm is not duly registered and represented. So long as there is no dispute that the plaintiffs are the partners of the firm which owns the "Mills Store" there is no legal infirmity in the suit as framed. The partners are the owners of the "Mills Stores" which have no separate legal entity as such it is only a trade name. In the suit O.S. 58 of 1989 it is averred that the plaintiff M/s. Popular Automobiles is represented by one of the partners. This is not denied in the written statement. As such there is no merit in the contention that the suit is not maintainable. Though the counsel for the respondent raised a contention based on Section 69(2) of the Partnership Act, the same is not raised before the court below. As per Section 69(2) of the Act, no suit to enforce any right arising from any contract shall be instituted by or on behalf of the firm unless the firm is registered and the persons suing is shown to be in the Register of firms are partners. I have already found that the averment that the plaintiffs in O.S. 287 of 1987 are partners is not denied. In the second suit the firm is represented by a partner which is also not in dispute. The plaintiffs also produced a photostat copy

of the extract of the Register of firm of M/s. Popular Automobiles issued by the Registrar of firms containing all the details, before the trial court, though not specifically marked. Following the decision reported in Balakrishna Trading Corporation v. Krishna Kurup (1969 KLT 855), I have to hold that the contention raised belatedly without proper pleading is unfounded. In the facts and circumstances as stated above. In modification of the decree passed by the court below, O.S. 58 of 1989 is decreed for a sum of Rs. 27,704/- against the defendants with proportionate cost with interest as 18% from the date of suit till decree and at 9% interest from the date of decree till realisation and suit O.S. 287 of 1987 is decreed for Rs. 24,761/93 with interest at 18% from the date of the suit till decree and thereafter at 9% till realisation with cost. The cross objection is dismissed.

The judgment and decree of the court below to the extent is modified and both the suits are decreed as above.