

**(2003) 01 KL CK 0120**  
**In the High Court Of Kerala**  
**Case No : A.S. No 199 of 1998 (D)**

P.M. Davis and Others

APPELLANT

Vs

V.I. Kuruvilla and Another

RESPONDENT

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**Date of Decision :** 07-01-2003

**Acts Referred:**

**Citation :** (2004) 1 KLJ 99

**Hon'ble Judges :** Hariharan Nair, J

**Bench :** Single Bench

**Advocate :** N. Subramanian and M.S. Narayanan, for the Appellant; M. Unnikrishna Menon and C. Chandrasekharan, for the Respondent

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## Judgement

M.R. Hariharan Nair

1. The challenge in the appeal by defendants 2 to 6 (sic) regard to the final decree passed in O.S. No. 120 of 1991, which was a suit for (sic) solution of partnership firm and for settlement of accounts. The St. Syriac Tile Works was owned by a firm consisting of four partners, who were all children born to one and the same parents. Of the partners, plaintiff and defendants 1 and 2 were alive and defendants 3 onwards are the children of the deceased partner by name Baby. Preliminary decree dissolving the firm w.e.f. 31-01-1991 which was the date of suit was passed on 08-02-1995 and a Receiver was appointed to take stock of the assets and liabilities of the erstwhile firm. Based on the report so filed, final decree was passed on 16-01-1998. In the meantime, there was an application filed for appointment of a Receiver for running the factory and the order passed by this Court in C.M.A. No. 8 of 1992 was taken up before the Apex Court, which made an additional provision as follows while disposing of SLP No. 6827 of 1992 on 06-11-1992.

It is clarified that the respondent who has been appointed as receiver will deposit a sum of Rs. 20,000/- in Court every month. If he fails to do that, he may be removed as the receiver by the Court concerned. Apart from this, the terms and

conditions laid down by the High Court will continue to be operative.

It is stated that pursuant to this order the second defendant, who was appointed as receiver for running the factory, had been depositing amounts at the rate of Rs. 20,000/- p.m. right from January, 1991 till July, 2001. According to the learned counsel for the appellants, the Court, while passing the final decree, has misread and misinterpreted the scope of submissions made based on a statement filed by defendants 2 to 6 before Court on 13-01-1998. According to him, when the Commissioner's report regarding demarcation of shares came up for consideration it was submitted by the plaintiff that he was prepared to take the site of the factory etc. at a valuation 40% in excess of that fixed by the commissioner for allotment of the same to defendants 2 to 6. It was then submitted by the counsel for defendants 2 to 6 that those defendants will have no objection in the plaintiff and the first defendant taking the entire assets viz. the land, factory and machinery, provided, half of the total value of the assets as enhanced by 40% was paid by the plaintiff and first defendant to defendants 2 to 6 in cash i.e. without factory or any land being allotted to defendants 2 to 6. This was reiterated in a statement filed before this Court on 13-01-1998. Allotment of the factory building to the plaintiff and the first defendant jointly and allotting 1 acre and 84.5 cents of land alone to defendants 2 to 6 is improper. No request was even made by defendants 2 to 6 for grant of 1.84 Acres.

2. Yet another submission is that the judgment under appeal has failed to take into account the liability incurred on various heads which were not actually included in the accounts filed by the Advocate Receiver. In this regard it is pointed out that there was arrears of income tax payable for the period from 1989-90 as also arrears of sales tax due from 1995-96. There (sic) also liability towards gratuity, E.S.I. contribution etc. in respect of the employees of the factory. It is argued that these liabilities should be fastened on the group of plaintiff and first defendant, to whom the factory as such is allotted under the decree.

3. The appellants also contend that out of the amounts deposited by the second defendant pursuant to the order of the Apex Court, some amounts have already been paid to the Santhi Kuries (P) Ltd. Trichur, who is a creditor, as also to the Sale Tax department towards sales tax for the year 1993-94. Yet another submission is that provision has to be made for payment of dues to the creditors of the factory as revealed by the balance sheet for the period ending 31-12-1997, viz. Rs. 8,74,425.90.

4. In the memo of cross objections the plaintiff also contends that there was error committed by the trial court in properly appreciating the concessions made before it. It is pointed out that at the time of assuming receivership by the second defendant there was huge stock of tiles manufactured in the factory for which bank guarantee was offered and there was no mention in the final decree with regard to the stock value. It is also pointed out that the details placed before the Court through I.A. 3305 of 1995 filed seeking removal of receivership

were not taken into account by the trial court while passing the final decree though the facts and figures contained therein were material.

5. With regard to the interpretation given by the trial court on the concessions made, it is argued that what was actually offered by the plaintiff, when the matter was considered by the trial court on 08-01-1998, was that the plaintiff would be prepared to take the machinery available in the factory alone at a price 40% over what is fixed by the Advocate Receiver with the aid of Engineer and that there was no offer at all for taking the land at a price 40% over what was mentioned in the receiver's account. It is also contended that the liabilities which were created by the appellants during the regime of the 2nd defendant are to be paid up by him only and that there is no scope for mulcting the plaintiff with liability for any part of such liabilities. As regards the liability towards sales tax, income tax, provident fund, E.S.I., contribution etc. it is argued that these were all liabilities incurred at a time when the second defendant was in management though as Receiver and that as such the estate should not be made liable for such dues and that the liabilities of the plaintiff should be restricted to the dues as revealed by the balance sheet submitted by the partnership at the time of the second defendant's assumption of charge as receiver. It is also pointed out that there is default on the part of the second defendant in making deposit of the sum directed by the Apex Court in the judgment in SLP No. 6827 of 1992 for the period from July, 2001 and that such payment has to continue until he is discharged from Receivership.

6. One of the main aspects arising for consideration is the interpretation given by the trial court with regard to the submissions made before it by the parties when the question of accepting the report filed by the Advocate Receiver was taken up by the court on 08-01-1998. I have perused the said order. It will be (sic) quote the said order written in the Order sheet of the trial court for a proper appreciation of the respective contentions with regard to what actually happened in court and as to the basis for offering 40% over the value fixed in the Receiver's report. The said order reads as follows:

The official receiver has filed a detailed report. Both sides have filed objections. The assets of partnership firm is calculated by the receiver and found worth Rupees One crore twenty six Lakhs seventeen thousand and nine hundred. He has also given detailed report regarding the liabilities. Defendants 2 to 6 are allotted 2 acre 07 cents valuing Rs. 88,02,100/- whereas the plaintiff and 1st defendant are given 1 acre 84.5 cents worth Rs. 38,15,800/- as per report. In order to equalize share they have to give Rs. 24,93,150/- to the plaintiff and first defendant as per report. One of the main objections of plaintiff and defendant No. 1 is that the factory building and land allotted to share of defendants 2 to 6 by receiver would fetch substantially higher price than the value fixed by the receiver. They would contend that they are ready to take that share for a price 40% above the value fixed by the commissioner. The defendants 2 to 6 are directed to file a statement whether they are ready to offer value 40% above the

value for the share set apart to them by the receiver in the report. For statement adj. to 13-1-98. (emphasis supplied)

7. It is with reference to the said order that the statement was filed by the defendants 2 to 6 on 13-01-1998 wherein it was re-iterated that the offer made on 08-01-1998 during hearing was that the plaintiff and the first defendant would take the factory and the land at a price 40% over Rs. 88,21,000/- as fixed by the receiver, i.e. at a cost of Rs. 1,23,20,000/- and that when this is taken into account the group of defendants 2 to 6 would be entitled to get Rs. 86,67,900/-.

8. The question arises whether the trial court went wrong in understanding and appreciating the submission made by the counsel for the plaintiff and the first defendant when the question of making alterations to the report of the receiver was taken up by the Court on 08-01-1998. First of all, what was actually intended is clear from the record of the court itself, which has been quoted above viz. that it is not only with regard to the factory building, but with regard to the building and that part of the land allotted to the share of defendants 2 to 6 together, that the higher price was offered. The words "ready to take that share for a price 40% above the value fixed by the commissioner" has to be read in conjunction with the previous sentence that the factory building and land allotted to the share of defendants 2 to 6 was capable of fetching higher price than the value fixed by the Receiver.

9. Thus there cannot be any doubt at all that the statement called for from defendants 2 to 6 as per order dt. 13-01-1998 was on the question whether they were ready to offer 40% above the value for the share set apart for them by the commissioner in the report. That was not (sic) the value of the machinery, but included the land and factory building as well. (sic) of the statement filed on 13-01-1998 also makes the position clear. The present contention of the plaintiff raised in para 5 of the Cross Objection that the offer was only in respect of machinery is hence an after thought and has to fail in view of the clear statements in the order narrated above.

10. It is not open to the plaintiff and first defendant to wriggle out of the offer made before the court. They cannot approbate and reprobate. As regards what happened before the court on 08-01-1998 the record of the court reveals the final position and the plaintiff cannot be heard to contend that what was submitted was different from what is recorded by the court in its order sheet. This is a well settled position. In this regard reliance may also be placed on the observations contained in the decisions in *Smt. Chithra Kumari v. Union of India* (para 34) (A.I.R. 2001 s.c. 1237), *D.P. Chadha v. Triyugi Narain Mishra* (A.I.R. 2001 S.C. 457) (para 13) and *D.P. Chadha v. Triyugi Narain Mishra* (para 18) (2001 (2) M.L.J. 9). The trial court, in these circumstances was right in taking into consideration the offer made by the plaintiff and in fixing the share the way it did in the impugned order. Neither party can go back from it.

11. In view of the position aforementioned the contention of the appellant in para 4 that the court misread the scope of the statement dt. 13-01-1998 has to fail. Ofcourse, it is clearly mentioned in the statement of defendants 2 to 6 that they would be prepared to take 1 acre and 84.5 cents of plain land along with the owelty amount but what is revealed from the statement enables only such a conclusion, because the consequence of giving the share including plant and machinery and the site of the factory to the plaintiff and first defendant at a price 40% over what was fixed by the Engineer and the Advocate Receiver would be the allotment of the rest of the land viz. 1 acre and 84.5 cents of plain land subject to payment towards owelty to defendants 2 to 6. Hence the contention in para 4 of the appeal memorandum fails; For the same reasons the contention in para 5 of the cross objection also fails.

12. It is not very clear from the observation of the Apex Court mentioned in one of the earlier paragraphs as to whether the sum of Rs. 20,000/- p.m. directed by the Apex Court was a payment to be made after meeting all the expenses for the running of the factory and only for the period when the factory worked. It appears to me that the payment was intended to be provisional but certainly after meeting the liabilities arising from the functioning of the factory as well. That is a personal liability of the second defendant for permitting him to take over the estate as Receiver and appears to be intended as a safeguard to ensure that he does not attempt any kind of mis-management Admittedly the 2nd defendant has stopped making payments for the period from July, 2001 onwards and in the absence of any motion made before the Apex Court or before the trial court he is bound to make the payment and hence direction "G" in the impugned judgment is perfectly justified. It is out of such remittance that provision has to be found to meet liabilities not covered by the judgment of the trial court towards tax, insurance, provident fund, gratuity, bonus and other (sic) benefits due to employees in respect of periods after the second defendant took over Receivership. Since the schedules appended to the impugned judgment do not cover such further dues that is certainly a defect in the impugned order and provision has to be made to cover such payments also.

13. The second defendant has a case that the directions contained in the order of the Apex Court has been complied with for the period till July, 2001 and that thereafter it could not be paid for the reason that the factory has become non-functional and no income is received therefrom. It is pointed out that I.A. No. 421 of 1997 filed for exemption from making further payments is pending and that necessary orders are to be passed therein. On the other hand, the contention of the appellant is that the liability to make the payment is not related to the derivation of income and that as long as the second defendant continues as Receiver and undischarged he is liable to make the payment. The direction to make the payment was not there in the order in C.M.A. No. 8 of 1992. That was a direction of the Apex Court and it is to be read as it is. On a reading of the order what is evident is that the payment is related to the appointment as Receiver and that failure to make the payment would result in the removal from

receivership.

14. In the particular case, the receiver himself has filed an application for removal from receivership and as such, prima facie, it would appear that the liability would cease once the second defendant is discharged from receivership. As a necessary corollary it would follow that the liability will continue unless and until removal from receivership takes place. It may be mentioned here that as per the order passed by this Court in C.M.P. No. 5022 of 2001 in C.M.A. No. 8 of 1992, C.M.P. 5022 of 2001 was directed to be withdrawn with liberty to file appropriate petition before the II Additional Sub Court, Trichur, which was found to be the proper forum for considering the question of removal of receiver appointed pursuant to the decision in C.M.A. No. 8 of 1992. When the question of discharge is considered, the court will certainly take note of the liability arising under the decision of the Apex Court in SLP No. 6927 of 1992 as well. There is no case for the second defendant that the said contingency he would be liable to make the payment. In any case, this is a matter for the trial court to consider when the relevant application is taken up for disposal.

15. It is pointed out by the learned counsel for the second defendant that until dissolution of the firm took place on 03-04-2002 the debts of the firm have to be paid from the assets of the firm including the factory and machinery and that only for the liabilities that arose after 08-04-2002 the second defendant can be made liable. This is also a matter which is to be considered by the trial court and necessary provision included in the final decree.

16. As far as the prayer for conducting auction of the property, I am of the view that the question is no more left open. The solemn submission made by the plaintiff before the trial court, which is (sic) by the Court and the acceptance of the offer to take the land and factory at a price 40% above the value fixed by the Commissioner is final and not open to review. There is no question of putting the factory and the premises to sale as desired by the plaintiff.

17. The second defendant has pointed out that cases are pending before the District Labour Officer with regard to payment of gratuity and that it may be necessary that a final decision is taken by the Labour Court. In the final decree, necessary provisions have to be made covering such liabilities due to the workmen as well. It is pointed out by the second defendant that there exists various liabilities towards income tax, sales tax, bonus due to the workmen etc., which had not been considered by the trial court. It will be for the second defendant to file separate statements showing the liabilities in respect of each of such items in two parts, the first covering the liabilities for the period before the dissolution of the firm and the second for the period thereafter when the second defendant was in management. Necessary provision will be made in the final decree with regard to all such dues also.

In the circumstances the appeal and the cross objection are disposed of confirming the direction contained in clauses (a) to (e), (k) and (1) of the

decretal portion of the final judgment and remitting the matter to the trial court for passing fresh orders with regard to other items contained in the final judgment, which are hereby set at naught. The parties are directed to appear before the trial court on 24-02-2003 without further notice. The Court shall make an earnest endeavour to dispose of the matter afresh with utmost expedition.