
(2003) 06 KL CK 0021
In the High Court Of Kerala
Case No : A.S. No. 452 of 1993

R. Rama Iyer

APPELLANT

Vs

P.K. Jacob and Others

RESPONDENT

Date of Decision : 23-06-2003

Acts Referred:

Contract Act, 1872 — Section 56, 72, 74

Citation : AIR 2003 Ker 359 : (2003) 2 KLJ 821

Hon'ble Judges : S. Sankarasubban, J; K.K. Denesan, J

Bench : Division Bench

Advocate : S. Ananthasubramanian, Philip M. Varughese and S. Shyam, for the Appellant; Antony Dominic, A.M. Shaffique and E.K. Nandakumar, for the Respondent

Final Decision : Allowed

Judgement

Sankarasubban, J.—This appeal is filed by the plaintiff against the judgment and decree in O.S. No. 115 of 1988 of the Principal Sub-Court, Alappuzha. The suit was filed for realisation of the balance amount of Rs. 1.5 lakhs with future interest and costs on the basis of an agreement for sale of property. The case of the plaintiff is as follows :

2. The property in Sy. No. 363/8B of Velloor Village in Vaikkom Taluk, which was a coconut grove situate about a furlong east of the Muvattupuzha river, belonged to the father of the appellant who died on 15-11-1984. On the death of the father, it devolved on the members of the family consisting of the appellant and respondents 4 to 7 and the appellant was holding the same as Manager. In 1985, the defendants, who were partners in business approached the appellant for the purchase of the aforesaid property or the soil therefrom for brick making. The first defendant was introduced to the appellant by his brother-in-law as per Ext. A10 letter and the appellant was satisfied as to his credentials and credibility.

3. The appellant and his younger brother entered into an agreement, Ext. A1

with the defendants on 26-10-1985 for the sale of the abovesaid property or the soil therefrom for Rs. 2,75,000/- receiving an initial advance of Rs. 50,000/-. Another Rs. 50,000/- was agreed to be paid within three months and the balance in instalments of Rs. 1 lakh and Rs. 50,000/- respectively. The defendants wanted the agreement to be signed on 26-10-1985 itself as they were in a hurry to commence the work. On the understanding that reasonable reduction in the consideration for deficiency, if any, in the area below 1 acre found on measurement subsequently will be agreed to by the appellant, the defendants were put in possession of the property on 28-10-1985.

4. The appellant being aware of the problem stipulated in Clauses 5 and 7 of the Agreement that no contingency should be pleaded for evading full payment, once the work is commenced after destroying the coconut trees. Other safeguards as to stipulations as to the area wherefrom alone and from what portion the quarrying of soil could be done during the first and second seasons, viz., 25 cents each were also provided for.

The defendants who took possession of the property on 28-10-1985 immediately commenced the work and within a week they rushed back to Alappuzha seeking a correction in Ext. A1. Since the road is on the southern side of the property, they sought permission to commence the quarrying from the north end. Instead of from the south end as stated in Ext. A1. Appellant acceded to their request by Ext. A16 dated 5-11-1985. The defendants reported that the first "choola" of bricks about a lakh was ready on 30-11-1985 and the appellant visited the site, during the Christmas holidays and noticed that the pace of making bricks had been accelerated. They had taken on lease two acres of adjacent paddy fields for drying and stalking bricks. The production was nearly 20,000 bricks per day. The soil had been quarried from more than 25 cents. So the appellant wanted the defendants to advance the dates of the instalments. The promised balance of advance of Rs. 50,000/- was paid in the meanwhile between 26-1-1986 and 11-2-1986 in two instalments of Rs. 25,000/- each.

5. Stating the reasons for advancing the dates of payment and reducing the total consideration to Rs. 2.5 lakhs for the deficiency in extent found, Ext. A2 supplementary agreement was entered into on 11-2-1985. The second defendant gave post-dated cheques. Ext. A3 series are for the balance amount and subsequently the first defendant gave similar cheques, Ext. A4 series.

6. The defendants had quarried soil from an area of 35 cents as admitted by them but the area made use of was 50 cents including the margin at the boundary left to prevent landslide to neighbouring property. All trees excepting 3 coconut trees were cut and made use of for burning bricks. With the profits and proceeds of the first season and leaving the property a barren land used as "Ishtikakkalam" the defendants started another major brick making business in Tamil Nadu denying the legitimate payment due to appellant as is evident from Exts. A11, A12 and A13 replies to appellant's letters. Only 35 cents more could be quarried had the defendants continued the work in the next season.

7. The first cheque was due for payment on 20-5-1986. The defendants pleaded time till 30-6-1986 for payment and subsequently till 30-6-1986 (sic) and so on. Ext. A11 dated 23-7-1986, Ext. A12 dated 19-8-1986 and Ext. A13 dated 14-10-1986 are letters of the first defendant containing requests for Lime and promising payment. Since there was no payment but promises only after much waiting one of the cheques each from Exts. A3 series and A4 series were presented in the Bank and they were dishonoured. Suit notice Ext. A10 was issued to the defendants on 16-6-1988 and that too did not yield any result and so the suit was filed for realisation of the balance amount of Rs. 1.5 lakhs with future interest and costs.

8. The defendants resisted the suit contending that the agreement is vitiated by misrepresentation and fraud and is not enforceable that it was frustrated due to impossibility of performance. They were prohibited from quarrying in 1985-86 by Velloor Mulakkulam Development Authority since the land was notified as controlled area under the Town and Country Planning Act, 1120 and the agreement was not for sale of land but one basically for sale of earth from the land for making bricks. The defendants did not and could not do any brick work at all. They did not abandon the work but were forced to discontinue the work. They are entitled to get back Rs. 1 lakh paid. The appellant has not suffered any loss or damage. In any case, their financial liability was limited to the payment of amount required to restore the quarried portion of the property to its original condition. The suit is not maintainable and is liable to be dismissed.

9. As many as 8 issues were raised and at trial witnesses P.Ws. 1 to 6, P.W. 1 being the appellant, were examined and Exts) A1 to A18 series were marked on the side of the plaintiffs. For the defendants, first defendant got himself examined as DW-1 and Exts. B1 and B1(a) were marked. Exts. C1, C1(a) and C1(b) are commission report, mahazar and plan respectively. The Court below found that Exts. A1 and A2 agreements were executed with due consent between the parties. It further held that the appellant committed fraud in bringing about Exts. A1 and A2 by suppressing important notifications, Exts. B1 and B2 and the agreements are hit by Section 17 of the Contract Act since, they are forbidden by law by the applicability of the Government notifications. It is found that the suit for balance sale consideration is not maintainable in view of Section 56 of the Contract Act. It also held that the appellant has no cause of action to file the suit since Exts. A1 and A2 are void documents to the knowledge of the plaintiff. Accordingly the suit was dismissed.

10. We heard learned Counsel for the appellant Sri. S. Ananthasubramanian and learned Counsel for the respondents Sri. Shaffique.

11. Learned Counsel for the appellant argued that the Court below was not correct in holding that the contract was frustrated and has become impossible for performance. It is true that there is a clause in the notification which requires permission from the Authorities for excavation. The plaintiff did not commit any fraud on the mere fact that the removal of soil was to be with the permission of

the Authorities, it cannot be said that the agreement for the excavation of soil was invalid. The defendant could very much obtain permission from the Authorities for removing the soil. Further in this case, it has come out in evidence that major portion of the soil has been excavated and bricks have been made from the property. Thus, the defendants have made profits out of excavation of the soil. In the circumstances, the defendants cannot say that the agreement is void and it is hit by Section 56 of the Contract Act. Learned Counsel for the appellant submitted that the appellant is entitled to get back the amount for which soil was sold.

12. On the other hand, learned Counsel for the respondents submitted that the plaintiff was aware of the fact that permission was necessary from the Authorities for removing the soil. Such a permission was not obtained. The defendants have not quarried any earth for manufacturing any bricks from the property. The defendants are entitled to get back the advance paid by him. There is no availability of water in the property. It is because of this, the defendants have to abandon the work. The plaintiff was aware of this. Hence, the Court below is correct in dismissing the suit.

13. The following points arise for consideration : (1) Whether the contract has become impossible for performance ? Whether Exts. A1 and A2 are void ? (2) Whether the plaintiff is entitled to recover any amount as per the contract.

14. Before we go into the points for determination, we will peruse the agreement executed between the parties. Exts. A1 is the agreement executed between plaintiffs 1 and 2 and defendants 1 to 3. It is with respect to excavation of soil from the property of the plaintiffs. It is dated 25-11-1985. By this agreement, the first defendant is allowed to excavate soil at a cost of Rs. 2.75 lakhs. Giving credit to the advance already paid, the balance 2.25 lakhs was to be paid in three instalments. The first instalment of Rs. 50,000/- was to be paid within three months and the second instalment of Rs. 1 lakh was to be paid on or before 26-10-1986 and the final instalment of Rs. 75,000/- was to be paid on or before 26-10-1987. Postdated cheques were issued to the plaintiff. On the basis that the three instalments will be paid by the first defendant within time, the first defendant was allowed to excavate the soil from southernmost area of 25 cents. Permission was only given to excavate the soil and nothing else. After payment of the second instalments on or before 26-10-1986, the first defendant is entitled to excavate the soil from the property lying adjacent to the balance 25 cents. If any instalment is broken, the excavation has to be stopped. The balance amount was to be paid on 26-10-1987 with interest at 18% per annum. This agreement was corrected by Ext. A16 dated 5-11-1985. Instead of excavating the soil from 25 cents from the northern end of the property, the excavation has to be made from the eastern end. There is another correction made in the agreement by Ext. A2. It was found that the area was less. So, the amount was reduced from 2.25 lakhs to Rs. 2 lakhs. Out of the initial advance of Rs. 50,000/- the first instalment was paid on 20-5-1986, the second instalment was to be paid on

26-10-1986 and the third instalment was to be paid on 20-3-1987. Thus, these are the agreements executed between the parties. It is seen on the basis of the agreement that the first defendant entered into the property and started excavation. According to the first defendant, he could not excavate the soil because there was no water in the pond. Further, there is condition as per the order of the Government that permission from the Government will be necessary.

15. But from the evidence, it is seen that the case set up by the defendants is not true. After the period of three instalments were over, the plaintiff informed the first defendant about the dishonour of the cheques when presented for payment. Hence, the letter Exts. A6 and A7 were sent informing the defendant to return Rs. 1.5 lakhs with interest at 18%. For this, a reply was given by the first defendant by Exts. A11 to A13. In Ext. A11, the first defendant has stated that there was some delay in the work due to severe wind. When there is wind, bricks could not be burnt. Further, it is stated that he has not received any amount from the contractor and that he will pay the amount as soon as it is obtained. Ext. A11 is dated 23-7-1986. It is stated that the first "choola" has been burnt. But some excuse is given to say that there is a loss to the tune of one lakh bricks. In this letter he promised to pay the amount. Similar is the case with regard to Ext. A12. Thus, it can be seen that from the reply letter given by the first defendant himself, he has stated that he has excavated the soil to some extent. Ext. C1 report shows that the soil has been excavated from the 35 cents of land and there bricks have been made. The evidence of P.Ws. 2 and 3 also shows that soil has been excavated and bricks have been made. Thus, we come to the conclusion that as per the agreement at least from an extent of 36 cents, soil had been excavated. It is also seen from the mahazar that an amount of Rs. 40,000/- is necessary to restore the land to its original position.

16. The question that arises is whether there is frustration of the contract because of the fact that as per the orders of the Government, permission has to be obtained for the purpose of removing and excavating the soil. According to us, there is no frustration in the contract in the present case insofar as the first defendant had already excavated the soil to some extent. In any event, the first defendant has enriched himself by excavating the soil.

17. In *Augusthy Jose Vs. State of Kerala and Another*, it is held that the "plaintiff is not entitled to invoke the doctrine of frustration to get rid of his obligation under the Abkari Rules in the light of the contract entered into by him. Moreover, the plaintiff having taken advantage of the contract and having derived benefit from the contract by conducting the trade throughout the Abkari year for which he bid the right, he is not entitled to raise a contention that there was a partial frustration of the contract and consequently he is not liable to meet his obligation arising under the contract. In a case where the plaintiff pleads some sort of partial frustration, he would not be entitled to get rid of his obligation to pay under the contract especially when it is not shown that the contract is distinctly severable". In *Fibrosa v. Fainbairn* (1942) 2 All ER 122 it is held that in a case

where the plaintiff pleads some sort of partial frustration, he would not be entitled to get rid of his obligation to pay under the contract especially when it is not shown that the contract is distinctly severable. Moreover, a frustrated contract is discharged as to the future, releasing both the parties from further performance. In the present case, admittedly, an extent of 36 cents has been excavated. Further, it is not seen that the contract was frustrated because of any prohibition from the Authorities. It cannot be said that the contract is frustrated. But it is now clear u/s 74 of the Contract Act that the plaintiff will be entitled to recover only such amount as for which the soil has been excavated and any loss suffered by him. From the Commission report, it can be seen that the total extent of property is 85 cents. In this case, initially an advance of Rs. 50,000/- was made. Then the defendant entered into the possession of first 25 cents and another Rs. 50,000/- was paid. As per the agreement, when the defendant enters to the next 25 cents after quarrying the first 25 cents, he has to pay Rs. 50,000/-. The Commissioner found that the total extent of the property excavated was 33.2 cents. Thus, as per the agreement, another Rs. 50,000/- had to be paid when the defendant excavated the property covering the next 25 cents. The Commissioner has found that an amount of Rs. 40,000/- has to be spent to restore certain property to its original position. Thus, according to us, the plaintiffs are entitled to a total compensation of Rs. 90,000/- to be recovered from the respondents.

18. In the above view of the matter, the judgment and decree of the Court below are set aside. The appeal is allowed and the suit is decreed. There will be a decree enabling the plaintiffs to recover an amount of Rs. 90,000/- with interest at 6% per annum from the defendants and their assets from the date of suit till date of realisation. No costs.