

(2012) 07 KL CK 0297

In the High Court Of Kerala

Case No : Regular Second Appeal . NO. 856 OF 2012

S. Krishnaprasad

APPELLANT

Vs

Udayakumar and S. Biju

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3

Citation : (2012) 07 KL CK 0297

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : C.E. Unnikrishnan, for the Appellant;

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—First defendant in O.S. No.3 of 2005 of the court of learned Second Additional Sub Judge, Thiruvananthapuram is aggrieved by the judgment and decree of learned First Additional District Judge, Thiruvananthapuram in A.S. No.119 of 2010 reversing dismissal of the suit and granting a decree in favour of the 1st respondent- plaintiff. First respondent is a dealer of electrical goods, home appliances, etc., and claimed that the appellant and 2nd respondent-2nd defendant purchased goods from him from 01.07.2002 to 27.08.2002 on credit basis for a total sum of Rs.1,73,564.62, the purchase was and for and on behalf of the appellant who paid Rs.1,01,960/- as per cheque. The 1st respondent sued the appellant and 2nd respondent for the balance amount of Rs.71,604.62.

2. Appellant contended that he has no privity of contract with the 1st respondent and that he had appointed M/s.Keerthi and Bhavana for reconstruction of the hotel building belonging to him. The 2nd respondent was working under the said contractor. The purchases were made by the 2nd respondent with which appellant has no connection.

3. The trial court found that the 1st respondent was not able to prove any privity

of contract with the appellant and consequently the suit ended in a dismissal. On appeal at the instance of the 1st respondent, the first appellate court on a re-appreciation of the evidence came to the conclusion that the version of the 1st respondent that the purchase was made for and on behalf of the appellant is acceptable, reversed the dismissal of the suit and granted a decree in favour of the 1st respondent. That judgment and decree are under challenge in this Second Appeal.

4. Main argument the learned counsel for appellant has advanced is that there is no evidence to show that there is privity of contract between the appellant and the first respondent. It is pointed out that Exts.A2 to A20, vouchers and credit bills produced by the 1st respondent do not even mention name of the appellant, not to say that it did not carry signature of the appellant. It is further contended that the appellant had specifically pleaded that Ext.A21, statement prepared by the 1st respondent in the name of appellant is a fabricated piece of evidence. The learned Additional District Judge has referred to a portion of the evidence of appellant as D.W.1 (which is extracted in the judgment) and concluded that the purchases were for and on behalf of the appellant. It is contended that evidence of P.Ws2 and 3 ought not have been accepted.

5. Exhibits A2 to A20 marked in the proof affidavit of the 1st respondent are duplicate copies of vouchers and credit bills. Learned Sub Judge observed that so far as Exts.A2 and A19 are concerned, being photocopies it is not admissible in evidence. Exhibit A21 is the statement of accounts prepared by the 1st respondent in the name of the appellant (which is disputed by the appellant). Exhibit A22 series are photocopies of notices issued to the appellant and 2nd respondent. Exhibit A23 is a letter dated 05.02.2004 from the appellant to the 1st respondent where appellant took the stand that liability is for the 2nd respondent. It is based on Ext.A23 that the 1st respondent impleaded the 2nd respondent as a party to the suit. Exhibit A24 is a copy of lawyer notice issued to the appellant and 2nd respondent preceding institution of the suit. Exhibits A25 and 26 series are produced to show that issue and service of that notice on appellant and 2nd respondent.

6. The 1st respondent gave evidence as P.W.1 and testified to his case. P.Ws2 and 3 are employees engaged by the contractor for construction work. The trial court observed that P.Ws2 and 3 are neither employees nor agents of the appellant so that their evidence could bind the appellant. Hence the evidence of P.Ws2 and 3 was ignored. First appellate court however referred to the evidence of P.W.s2 and 3 that they made the purchases for and on behalf of the appellant. First appellate court also observed that as against the specific averment in the plaint that the purchases were made for and on behalf of the appellant, there was only an evasive denial which is not the way a specific averment in the plaint is to be denied as provided under Rule 3 of Order VIII of the Code of Civil Procedure. The first appellate court also stated that if the 1st respondent wanted to manipulate records to rope in the appellant also, it was easy for the 1st

respondent to do so, so far as Exts.A2 to A20 are concerned by mentioning the name of appellant therein. But the 1st respondent did not venture to do so. On the other hand, Ext.A21, statement of account is produced by the 1st respondent where it is stated that the purchases were made for and on behalf of the appellant. Certainly that statement must have been made on the strength of the information given by P.Ws2 and 3 at the time of the purchase. True, the appellant has a contention that Ext.A21 is fabricated. But the first appellate court dispelled that contention observing that if the 1st respondent wanted to create document by fabrication, it was possible for him at least to write name of the appellant in Exts.A2 to A20 which he has not ventured to. A further fact the first appellate court noticed is that it is admitted by the appellant that towards part payment of the amount due to the 1st respondent, he has issued the cheques. No doubt, appellant contends that the cheques were issued as directed by the 2nd respondent. But regarding that, what is available is only the interested version of the appellant as D.W.2. The further fact first appellate court noticed is that though appellant claimed that he is an income tax payee and he has submitted returns showing details of whatever purchases he made for construction of the building and that would show that he has not purchased any of the items referred to in Ext.A2 to A20, for reasons known to him he has not produced a copy of the income tax return. These circumstances were taken as corroborating the evidence given by P.Ws2 and 3 that the goods were purchased for and on behalf of the appellant.

7. I must also notice that it is admitted that the electrical equipments purchased from the 1st respondent are all installed in the building of the appellant. The purchase was certainly made for the benefit of the appellant and he has taken the advantage of that. Having regard to the circumstances stated, the first appellate court on a re-appreciation of the facts and materials on record accepted the evidence of P.Ws2 and 3 to hold that the plea of the appellant that there is no privity of contract between him and the 1st respondent cannot be accepted. That is a finding of fact based on the evidence. In second appeal this Court could interfere with a finding of fact only when it is either perverse or not supported by evidence or is against the evidence. I am not satisfied, on hearing the learned counsel and going through the judgment under challenge that any such situation arises in this case so that any substantial question of law is involved.

The Second Appeal is dismissed.

All pending Interlocutory Applications will stand dismissed.