(2014) 10 KL CK 0366

In the High Court Of Kerala

Case No : A.S. No. 533 of 2000

Superintending Engineer, Kottarakkara and Others APPELLANT

Vs

M.P. Varghese RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 34, 34(1)

Citation : (2015) 3 BC 32 : (2015) 1 ILR 450 : (2015) 1 KHC 191 : (2015) 1 KLJ 449 : (2015) 1 KLT 549

Hon'ble Judges : P.D. Rajan, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : M.K. Aboobacker, Government Pleader, Additional Advocate General, Advocates for the Appellant; K.L. Varghese, Senior Advocate and Santha Varghese, Advocates for the Respondent

Judgement

K.T. Sankaran, J.—The question which arises for consideration in this appeal is whether the State of Kerala would be liable to pay future interest on the decree amount above 6% per annum in respect of a contract entered into between the Government and the respondent for the construction work of main canal of Kallada Irrigation Project. The respondent filed the suit for settlement of accounts in respect of the amounts claimed as due from the State. The suit was filed in the year 1982. The Trial Court passed a preliminary decree dated 24/09/1984. The plaintiff was found to be entitled to cost of certain blasting works at certain rates. It was also found that the quantity of the rock blasted below certain level as noted by the expert Commissioner is acceptable. The cost of the quantity of work was directed to be worked out in the final decree proceedings. The respondent/plaintiff was directed to apply for passing of a final decree and for appointment of an expert Commissioner to work out and ascertain the actual amount due to the respondent/plaintiff on settlement of accounts in respect of the work mentioned in the preliminary decree. The respondent/plaintiff was held entitled to proportionate cost on ascertaining the actual amount found due from the defendants. With respect to interest, the preliminary decree also provides thus;

"Interest will be provided in the final decree"

2. The respondent/plaintiff applied for final decree. An expert Commissioner was appointed who filed report and account. Appellants/defendants did not raise any objection against the Commissioner''s report. The Court below passed a final decree dated 22/07/1999 holding that the plaintiff is entitled to realise a sum of Rs. 4,59,455/- with interest at 12% per annum thereon from the date of suit till realisation with costs. The Court below noticed that though the claim of the plaintiff was for granting interest at 19.4% per annum, there is no provision for granting such interest in the preliminary decree. The Court below awarded interest at 12% per annum on the ground that the transaction between the respondent/plaintiff and the appellants/defendants was commercial in nature.

3. The only contention raised in the Memorandum of Appeal is that the transaction between the parties is not a commercial transaction and therefore the Court below was not justified in granting interest at 12% per annum from the date of the suit till realisation.

4. The learned Government Pleader submitted that going by Explanation II to the proviso to Section 34(1) of the Code of Civil Procedure (for short CPC), a transaction can be termed as a commercial transaction, only if it is connected with industry, trade or business of the party incurring the liability. It is submitted that in the present case, the party incurring the liability being the appellants/ defendants, it must be established that the contract awarded to the plaintiff was connected with the industry, trade or business of the appellants/defendants. The irrigation project is not a commercial venture of the Government and therefore it cannot be termed as a commercial transaction. The learned Government Pleader relied on the decisions in M/s. Meenakshi Pharma Distributors, Bangalore Vs. State of Karnataka and Others, , Dena Bank, Ahmednagar Vs. Prakash Birbhan Kataria and others, and A.P. State Trading Corporation Ltd. Vs. G.V. Malla Reddy and Co., .

5. To comprehend the contentions put forward, it would be appropriate to extract Section 34 of CPC. It reads as under:

"Interest.--(1) Where and in so far as decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, (with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum) from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.--In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II.--For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest (on such principal sum) from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

6. In the case of a decree for payment of money, in the absence of a contract between the parties with respect to rate of interest, the Court has jurisdiction to be order interest at such rate as the Court deems reasonable to be paid from the date of the suit to the date of the decree. For the period prior to the suit to the date of institution of the suit, interest can be adjudged on the principal sum at such rate as may be agreed upon between the parties. Further interest can be awarded from the date of decree to the date of payment under Section 34 of CPC at such rate not exceeding 6% per annum as the Court deems reasonable. The proviso to sub-section (1) of Section 34 of CPC states that where the liability has arisen out of a commercial transaction, the rate of further interest may exceed 6%, but shall not exceed the contractual rate of interest; or where there is no contractual rate, the rate at which moneys are lent or advanced by Nationalised Banks in relation to commercial transactions. What is commercial transaction is explained in Explanation II to the proviso.

7. The question which arises for consideration is whether the transaction in question is a commercial transaction as mentioned in the proviso to sub-section (1) of Section 34 read with Explanation II thereof. While explaining what is commercial transaction, it is confined to industry, trade or business and not to profession or service or constitutional or legal duty of the party incurring the liability. Whether a transaction is a commercial transaction or otherwise is determined with reference to the person incurring the liability. In other words, the question is whether the person incurring the liability is involved in industry, trade or business in respect of the transaction in question. It is not sufficient if the person who claims for passing a money decree in his favour is engaged in any industry, trade of business, in order to attract the proviso to sub-section (1) of Section 34 of CPC. Whether or not the person claiming money is involved in any industry, trade or business, but the person incurring the liability is engaged in any industry, trade or business, it can be treated as a commercial transaction within the meaning of the proviso to sub-section (1) of Section 34 of CPC. The

activity of the Government in respect of the contract in question was construction of a canal for Kallada Irrigation Project. The Government was not engaged in any industry, trade or business while establishing the project. There is no case that the Government indulged in the activity in question to make profit. It was part of the duty of a welfare State to provide irrigation facilities to the general public. In implementing such duty, the Government entered into a contract with the respondent/plaintiff for construction of the canal. It may be true that the respondent/plaintiff is involved in industry, trade or business in the matter of execution of the contract. It may also be true that the respondent/plaintiff would be expecting a profit in executing the work. But that is not the test to be applied to ascertain whether the transaction is a commercial transaction within the meaning of the proviso to sub-section (1) of Section 34 of CPC. The question to be answered is whether in the implementation of the project, the party incurring the liability, namely, the Government was involved in any industry, trade or business in respect of the transaction in question. Evidently, the Government was not indulging in any profit making venture in commissioning the project or construction of the canal thereof. Therefore, we are of the view that the transaction in question is not a commercial transaction within the meaning of the proviso to sub-section (1) of Section 34 of CPC giving jurisdiction to the Court to award interest in excess of 6% per annum from the date of the decree to the date of the payment.

8. In Dena Bank, Ahmednagar Vs. Prakash Birbhan Kataria and others, , Dena Bank granted loan to the respondent for the purpose of constructing a hospital and for purchasing machinery and equipments for the hospital. The bank filed suit for realisation of amounts due as per the loan account. The suit was decreed. However, interest was granted at the rate of 6% per annum from the date of the suit till realisation. Dena Bank filed appeal and contended that the transaction was a commercial transaction and therefore the proviso to Section 34(1) of CPC would apply. The Bombay High Court held thus:

"In view of this, "profession" will have to be treated as different from "industry", "trade", and "business". There is a clear distinction between the profession on one hand, and industry, trade and business on the other. While dealing with the ''commercial transactions'' for the purpose of Section 34, CPC, the Legislature has not used the word "profession" along with the words, "industry", trade, or "business". The commercial transactions which are strictly connected with the industry, trade or business alone are included for the purposes of Section 34, CPC as provided in Explanation II. Though the "commercial transaction" is inclusive of "industry, trade and business", but it is exclusive of "profession". The fact that the Legislature has not included the word "profession" along with the words, "industry, trade and business" to specify the "commercial transaction" cannot be ignored. The proviso to Section 34, CPC, will, therefore, not govern the cases where the loan is advanced for the "profession" or for "professional transactions"."

9. In M/s. Meenakshi Pharma Distributors, Bangalore Vs. State of Karnataka and Others, , the State of Karnataka purchased medicines from the plaintiff for the purpose of distribution among Government hospitals. The parties agreed that rate of interest will be 15% per annum on the amount due. In the suit filed by the supplier of medicines, the Trial Court awarded interest only at the rate of 6% per annum from the date of suit till the date of realisation. Challenging the same, the plaintiff (supplier) filed appeal. Dismissing the appeal, the Karnataka High Court held thus:-

"the definition of the commercial transaction has to be taken in conjunction with the person against whom the liability has arisen. The person who has incurred the liability is not the person who is the claimant of the money or interest. It means when we have to judge the commercial transaction, it has to be looked into whether the person incurring the liability under the transaction has incurred the liability in the context of trade or business or industry. The respondent in this case purchased medicines from the plaintiff - appellant and incurred the liability for sums claimed. In ordinary course, Government purchases medicines for being distributed among the Government Hospitals. In Government Hospitals, the medicines are provided to the ordinary people, common people as well as to those who are down-trodden and for the betterment of the people. By examining the nature of transaction it cannot be said to be connected with any industry, trade or business of the party who has incurred the liability, and cannot be said to be commercial transaction as the Government''s Health Department purchased the same to supply the medicines to various Government Hospitals for the benefit of citizens and to be provided to common persons subjected to various ailments.

Therefore, in my opinion, this transaction cannot be termed as a commercial transaction. In this view of the matter, the proviso of Section 34 will not be applicable to the present transaction because when the medicines have been purchased by the Government, it is nobody''s case that they were purchased to sell. It is no doubt that Government purchases medicines to provide them to the Government Hospitals for the welfare of the people as it is the duty and responsibility of the Government to ensure public health i.e. the duty of the State under the Constitution of India."

10. In A.P. State Trading Corporation Ltd. Vs. G.V. Malla Reddy and Co., , the Supreme Court held thus:

"The award of the Arbitrator is governed by the Arbitration Act, 1940. This Court has been consistently taking a view that in the absence of any specific contract in regard to rate of interest, pendente lite and future interest should not normally exceed 9% per annum. (See State of Rajasthan and Another v. Ferro Concrete Construction Pvt. Ltd., 2009 (12) SCC."

11. In The Hubli-Dharwad Municipal Corporation Vs. Ravi P. Tiwari, , the Municipal Corporation entered into a contract with a private party for

construction of residential house for persons belonging to economically weaker section. The Municipal Corporation had to supply cement to the Contractor for execution of the work. The Municipal Corporation failed to supply the same and the Contractor procured the cement from private party. The question whether the Contractor was entitled to interest above 6% from the date of decree was considered by the Karnataka High Court and it was held that the Contract does not relate to trade or business. It was held:

"It is the duty of the State authorities, including the State to see that people may get the shelter or roof to save their self from hot sun, from the rains and the vagaries of nature as well. But it cannot be said to be business of the corporation. Their duty is to provide cheap cost house. So this is a welfare activity, it cannot be said to be trade or industry or business."

The aforesaid decisions would support the view which we have taken in paragraph 8 of this judgment.

We are of the view that interest at 9% per annum could be awarded against the appellants/defendants from the date of the suit till the date of the decree, and at 6% per annum from the date of decree till realisation, on the principal amount of Rs. 4,59,455/-. Accordingly, the appeal is allowed in part and the final decree passed by the Court below is modified as follows.

The respondent/plaintiff is granted a decree for realisation of Rs. 4,59,455/- together with interest thereon at 9% per annum from the date of the suit till the date of decree and at the rate of 6% per annum from the date of decree till realisation. No order as to costs.