
(1977) 06 KL CK 0002
In the High Court Of Kerala
Case No : C.P. No. 1859 of 1974-B

Universal Marine Agencies

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 30-06-1977

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 299
Kerala Revenue Recovery Act, 1968 — Section 68(1)
Transfer of Property Act, 1882 — Section 6

Citation : (1977) 06 KL CK 0002

Hon'ble Judges : George Abraham Vadakkal, J

Bench : Single Bench

Advocate : Chacko George and Charles George, for the Appellant; N. Dharmadan, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

George Vadakkal, J.—As per Ext. P-5 notice of demand issued by the Tahsildar, Mangalore, the 1st Petitioner firm was directed to pay a sum of Rs. 24,974?94 which as per that notice was due from the 1st Petitioner by way of rent and other charges in respect of an Ice and Cold Storage-cum-Freezing Plant at Azhikode. Admittedly the Petitioners by executing Ext. P-1 agreement dated 8th May 1970 took on lease the "Ice Plant-cum-Cold Storage-cum-Freezing Plant" at Azhikode for a term of one year. It is the case of the Petitioners that on enquiries they found out that the break-up of the amount was as follows:

Rs. (i) Interest on 2nd instalment for belated remittance 21903 (ii) Cost of repairs 11,00000

(iii) Balance Electricity charge 1-4-1971 to 17-8-1971 1,556?30

(iv) Pay and allowances of operator 8-5-1971 to 11-6-1971 at Rs. 234?75 per month 265?95

(v) Loss of revenue at the rate of next lease (Rs. 60,100 per year) from

8-5-1971 to 17-8-1971 as under 60100 x 102 _____ =16-795
16,795?00 365

(vi) Miscellaneous expenses due to violation of agreement 148?66
_____ Total 29,984?94 Less security deposit 5,010?00
_____ Balance due 24,974?94 This is not disputed on behalf of the Respondents. According to the Petitioners the demand represents only a claim for damages for alleged breach of the terms of Ext. P-1 lease-agreement. It is also necessary to mention here that going by the averments contained in paragraph 14 of the counter-affidavit "the amount shown in the notice" was "properly assessed by the department as the damage sustained to the Government on account of the default of the lessee". The question is whether the Respondents are entitled to invoke the provisions of the Kerala Revenue Recovery Act, 1968, or the Revenue Recovery Act, 1890 (Central) for recovery of the aforesaid sum.

2. Admittedly the amounts mentioned in item Nos. (i), (v) and (vi) mentioned in the preceding paragraph are not covered by any of the specific clauses of Ext. P-1 agreement. The amounts mentioned as item Nos. (ii), (iii) and (iv) are contended to fall within clauses (4) (a) and (3) respectively of the agreement. However, according to the learned Government Pleader all these sums mentioned in item Nos. (i) to (vi) aforementioned would attract Clauses (16) and (17) of Ext. P-1 agreement. On that basis, it is the case of the Respondents, that in view of the provisions contained in clause (16) of Ext. P-1 agreement the Respondents are entitled to resort to the provisions of the Kerala Revenue Recovery Act, 1968 as also of the Central Act aforementioned.

3. Clause 16 of Ext. P-1 agreement reads:

The lessee do further agree that all sums found due to the lessor under or by virtue of this agreement shall be recoverable from the security amount and the balance, if any, shall be recoverable from the lessee and their properties movable and immovable under the provisions of the Revenue Recovery Act for the time being in force as though they were arrears of land revenue or in such other manner as the lessor may deem fit.

This clause makes it clear that the machinery provided by the Revenue Recovery Act be it the State Act or the Central Act, can be resorted to only for recovery of "sums found due . . . under or by virtue of" Ext. P-1 agreement. According to the learned. Government Pleader this clause attracts the 2nd paragraph of Section 68(1) of the Kerala Revenue Recovery Act, 1968, which reads:

All moneys due from any person to the Government which under a written agreement executed by such person are recoverable as arrears of public revenue due on land or land revenue, and all specific pecuniary penalties to which such person renders himself liable under such agreement or contract;

* * * *

may be recovered under the provisions of this Act.

Necessarily, therefore, two questions arise for consideration, viz., whether the sums mentioned above can be said to be "sums found due" or "moneys due"; and (2) whether any such sum, if found due, was so due "under or by virtue of" Ext. P-1 agreement.

4. With reference to an almost similar provision, Clause 18 of the General Terms and Conditions, is a contract wherein it was provided that:

18. Recovery of Sums Due. - Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor**.

the Supreme Court in *State of Orissa Vs. Bidyabhushan Mohapatra*, holding that the words "claim for the payment of a sum of money should be read along with the heading: "Recovery of Sums Due" and that so understood the clause deals with the subject of recovery of sums due, said in paragraph 9 thereof at page 1273:

Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not co instanti incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.

and proceeded to extract a passage from the decision rendered by Chagla, C.J., in *Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros.*, , which reads:

As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The court in the first place must decide that the Defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the Defendant.

The Supreme Court ultimately said:

This statement in our view represents the correct legal position and has our full

concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor.

5. I will have to approach the questions raised in this case in the light of the principles laid down by the Supreme Court in the aforementioned case. In so far as, as earlier pointed out, in paragraph 14 of the counter-affidavit it has been categorically admitted that the amount shown in the notice represents damages sustained by the Government as assessed by the Department, it appears to me that the learned Counsel for the Petitioner is well-founded in his argument that unless the Petitioners liability for loss, if any, sustained by the State is competently decided and damages ascertained in accordance with the legal principles governing the same, it cannot be said that the said amount for which the demand has been made as per Ext. P-5 notice is a "sum found due" or to borrow the language of the Supreme Court, a "sum presently due and payable" by the 1st Respondent firm or any of the Petitioners.

6. The sums mentioned as items Nos. (i), (v) and (vi) in paragraph 18 of the Petition are not sums in respect of which Ext. P-1 by any specific clause deals with. This is not disputed before me. There is no stipulation in Ext. P-1 agreement for interest on belated remittance of any instalment, and therefore the Respondents can have a claim for interest only by way of damages. The first item claimed is interest on the second instalment which, according to the Respondents, was not paid in time. There is dispute between the parties as to when the lessee surrendered possession of the plant to the lessor. It is the Respondents' case that it was only on 17th August 1971 that the plant was surrendered back. The sum of Rs. 16,795 mentioned as item No. (v) represents the loss of profit to the lessor on account of the lessee's alleged failure to give possession of the plant on the expiry of the term on 8th May 1971 calculated on the basis of the rent agreed upon by the next lessee of the plant. Here again the Respondents can have only a claim for damages. Item No. (vi) is miscellaneous expenses incurred by the lessor for breach of the lease agreement; this amount also, is claimed by the Respondents as damages.

7. It is submitted that under Clause 4 of Ext. P-1 agreement "the lessee shall keep the plant in working order and in good condition meeting the expenses for the proper maintenance and repairs at the lessee's cost" and for that reason the sum of Rs. 11,000 mentioned as "cost of repairs" in item No. (ii) referred to above would be a sum presently due from the Petitioners. It is contended on behalf of the Petitioners that it is one thing to say that there is an obligation on the part of the lessee to keep the plant in working order and good condition, and quite another, to say that that provision in the agreement was broken by him by not keeping the plant in working order and good condition. Therefore he is liable for damages for breach of a stipulation. On that basis it is further contended that the liability, if any, for breach of contract is only in the region of claim for

damages and not for any debt or sum found due in presenti. It appears to me that there is force in this contention.

8. As regards the sum of Rs. 1,556?30 mentioned as item No. (iii) under the caption "Balance Electricity charges 1st April 1971 to 17th August 1971" it is argued on behalf of the Respondents that Clause 9 of the agreement as per which "the lessee shall pay the electricity and water charges and all other charges incidental to the working of the machine" would be attracted. Here again it appears to me that the contention advanced on behalf of the Petitioners by their learned Counsel that if the said condition contained in Ext. P-1 agreement was broken by the Petitioners, their liability would only be for damages, has to be accepted.

9. There remains only one more item to be dealt with and that is item No (iv): "Pay and allowance of Operator - 8th May 1971 to 11th June 1971 at Rs. 234-75 per month - Rs. 265?95". Clause 3 of Ext. P-1 agreement enables the Government to employ an Assistant Operator for the plant and provides that the lessee shall be liable for the pay and allowances sanctioned to such Assistant Operator as sanctioned from time to time by the Government. It should here be noticed that the claim for the pay and allowances of the Operator in question is for the period 8th May 1971 to 11th June 1971, that is to say, for a period after the term of the lease had expired on 7th May 1971. It is contended on behalf of the Petitioners that the pay and allowances of the Assistant Operator up to and inclusive of 7th May 1971 had been paid by the Petitioners and this is not disputed before me. On that basis it is submitted that the sum mentioned as item No. (iv) as pay and allowances of the operator is really by way of damages. At any rate it is contended that in so far as in paragraph 14 of the counter-affidavit it has been admitted that the whole amount demanded as per the notice represents damages sustained by the Government, it has to be assumed that this amount also is claimed by the Respondents by way of damages. Here again I am of the view that the contention is forceful and has to be accepted.

10. Has the liability of the Petitioners for damages for breach, if any, of the terms of Ext. P-1 agreement been decided, and the quantum of damages ascertained in accordance with law governing the same, is the next point that arises for consideration. The learned Government pleader invited my attention to Clause 17 of Ext. P-1 agreement and relying on that clause submitted that the Government itself has been constituted the adjudicating authority so far as the determination of the liability for damages and the quantum thereof are concerned. Relying on the passage in *Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros.,* .

Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority.

It is contended by the learned Government Pleader that the amount demanded is the amount "properly assessed by the department as the damage sustained by

the Government on account of the default of the lessee", by virtue of the power conferred on them by agreement of parties. The learned Government Pleader also relied on *State of Kerala v. Joseph* 1975 KLT 551. It is necessary to read Clause 17 of Ext. P-1 agreement:

If any dispute or question shall arise between the lessee and the lessor touching on or relating to any of the matter or things here in before contained the same will be decided by the lessor and the decisions of the lessor shall be final and conclusive and shall be binding on the lessee.

I do not think that the aforesaid clause constitutes the Respondents or any one of them any adjudicatory authority so far as determination of the liability of the lessee for damages is concerned and quantification thereof.

11. Award of damages or compensation to indemnify loss suffered by a party to a contract owing to its breach by the other, which is founded on the principle that the injured party should be put as nearly as possible in the same position, so far as money can do it, as if the contract has not been broken, is the function of an authority empowered in that behalf by statute or by agreement of parties. Parties to a contract can invest such power on one of them, and no legal principle stands in their way in so agreeing. Statutory provisions constituting one of the disputants like the Government the adjudicatory authority as regards its claim against the other are common, and such provisions are not bad or hit by the rule: One cannot be the judge in his own cause. Likewise parties can agree that one of them can decide the liability to him of the other in case the latter fails to perform the contract, and determine the amount of compensation due to the former. When such power is vested in one of the contracting parties, and in exercise of such power that party takes upon itself the role of a Judge in his own cause what law requires is that he should exercise that power, though not adhering to the elaborate procedure governing a judicial enquiry and though not with as much exactitude as a court would decide the matter, with care and diligence, approaching the problem and applying his mind to it with certain amount of fair play. Adjudication of damages involves a decision as regards the liability of the party stated to be in default, a decision dependant upon the answers to two questions: (i) is he in default, and (ii) has the claimant suffered any loss thereby, and requires determination or quantification of loss, if any, arising from the breach of the contract applying two rules; (i) it (loss) should be reasonable and direct, and not remote or indirect, and (ii) take into account the means the claimant had to mitigate the loss. When it is contended that parties to a contract have by agreement constituted one of them the arbiter on these matters, in the absence of a stipulation clear enough or from which by necessary implication it can be inferred that the parties intended so, one ought to be averse to counterance such a plea, for, at any rate, and in all cases, a decision by one in his own favour will seemingly, if not actually, be interested, and such a power is likely to be characterised as penal in nature intended to frighten and intimidate performance. Therefore Clause 17 should receive strict construction. Thus it is

necessary to examine whether the parties anticipated breach of contract and provided for consequences thereof, so that a dispute as regards liability for damages and about quantification of loss suffered by the lessor by breach of the terms of the agreement by the lessee, can be said to be one "touching on or relating to any of the matters or things hereinbefore contained" in Ext. P-1 agreement. Admittedly there is no provision or term on this. No doubt, the lessee would, if he is in default, be liable in law for damages but the question here is whether the parties have provided for in the agreement, so that it is a matter mentioned therein. The parties appear to have not expressed their mind on it thereby leaving it out of the scope of the agreement to be dealt with in the normal manner as in ordinary cases of alleged breach of contract by the courts of the land.

12. Construing Rule 1341 of the Railway Provident Fund Rules whereunder,

* * * Deductions may be ordered therefrom:

(i) by the President * * * * in other cases:

* * * *

* * * *

(ii) by the controlling officer, of any amount due under a liability incurred by the subscriber to the Government * * * *

the Supreme Court in *General Manager, N.E.F. Railway v. D. Chakraborty* (1970) 1 S.C.W.R. 392 said as follows:

Under that rule the Controlling Officer is empowered to deduct any amount due under a liability incurred by the subscriber to the Government. Therefore before any deduction can be made, it must be established that under a liability incurred by the subscriber the amount in question is due to the Government. In the instant case, the Respondent has disputed his liability. His contention is that he was not responsible for the loss in question under the Provident Fund Rules, no authority is constituted for deciding any dispute that might arise between the subscriber and the Government as regards any alleged incurring of liability nor as regards its quantum. Therefore the only forum in which these disputes can be decided is the civil court. The Government cannot be a judge in its own cause in the absence of any statutory provision empowering it to act as such. Hence the High Court was right in its conclusion that the action taken by the Government is an arbitrary one.

It appears to me that the same could be said of Clause 17 in Ext. P-1 agreement with much more force.

13. Obviously no such contention was advanced before the Supreme Court in *Union of India v. Raman Iron Foundry* AIR 1954 Bom 423 with reference to Clause 18 of the General Terms and Conditions examined by that court in that case. However, such a contention was raised with reference to that very clause in

Marwar Tent Factory Vs. Union of India and Another, but it was repelled, the court holding that Clause 18 "does not carry by implication, a right or power for the purchaser to authorise it to quantify the damages, if the contractor disputes the claim raised against it". Clause 18-A:

1.8-A. Setoff: Any sum of money due and payable to the contractor * * * may be appropriated by the purchaser or Government * * * and set-off against any claim of the purchaser or Government * * * for payment of a sum of money arising out of or under any other contract made by the contractor with the purchaser or Government * * *

was also held to be conferring no right of adjudication on the purchaser, in that case. This decision was approved by a Full Bench of that court reported in Mohan Meakin Breweries Limited Vs. Union of India and Others, .

14. The Delhi decisions above mentioned were rendered before this Court reversed the decision in Joseph v. State of Kerala 1973 KLT 366 by the Division Bench decision in State of Kerala v. Joseph 1975 KLT 551 and have referred to the learned Single Judge's decision as an instance where no power has been conferred by the contracting parties on one of them to adjudicate the question of damages arising out of breach of contract. In Joseph v. State of Kerala 1973 KLT 366 Narayana Pillai, J. said:

No doubt that (the clauses considered there) provides for recovery of loss or damages consequent on any act or omission on the part of the Petitioner. But there is no indication anywhere in the contract as to how the Government would fix the extent of the liability. In the contract the Government has not been made an arbitrator and no power is conferred on the Government to fix the liability. The liability for damages and the power to fix the extent of the damage are entirely different things. Consequently on the strength of the provisions of the contract alone it is incompetent for the Government to take a one-sided decision and fix the liability of the Petitioner.

4. That no man can be a Judge in his own cause is a rule of natural equity which has to be held sacred. In a dispute about a contract a person cannot be both a party and a Judge. If he is a party he cannot sit or act as a Judge and if he does so the whole decision is vitiated.

Before the Division Bench there appears to have been no contention that power has not been conferred by the clause in question on the Government to decide the liability of the contractor for damages and to quantify the loss sustained by the Government. The only contention appears to have been that despite such power, the decision of the Government on liability of the Petitioner for damages and the determination of the amount of loss were vitiated, as such decision and determination were by one in his own cause. The Division Bench did not agree with this contention and held:

In the light of these principles we have little hesitation in holding that clause (4)

to Ext. P-1 was valid and does not contravene the principles of natural justice that no one shall be a Judge in his own cause.

With respect, the Delhi decisions do not appear to proceed on the basis that a term in a contract empowering one of the parties thereto to decide the questions of liability for damages and quantum thereof is bad, but the clauses in question do not so empower one of the parties, and therefore, a decision on these questions by one of the parties would amount to one rendered without authority. There is no conflict with the views expressed by this Court in *State of Kerala v. Joseph* 1975 KLT 551 and those given in the Delhi Cases mentioned above, as suggested by the learned Government Pleader.

15. It was contended on behalf of the Respondents that the Petitioner's rights are contractual rights and therefore, Article 226 is not available to them. Reliance is placed on *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, There that court reiterated the rule that contractual rights cannot be enforced by invoking writ jurisdiction. But here the Petitioners do not seek to enforce their rights emanating from Ext. P-1 agreement. Their complaint is: without any right and power - contractual or otherwise - they are threatened with deprivation Rs. 24,794?94 by an executive fiat, and this offends their fundamental right guaranteed by Article 19 (1) (f) of the Constitution. Ext. P-1 agreement is referred only to substantiate their contention that the agreement does not empower the Government to decide on the question of liability for damages nor about the determination of the loss, and that the claim is for damages and not for any amount presently due. There is no substance in this contention.

16. I should here notice that the learned Counsel for the Petitioner has a case that Ext. P-1 agreement though executed by the 2nd Respondent has been executed as contemplated by Article 299 of the Constitution of India which provides that all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State as the case may be. It is pointed out in that context that Ext, P-1 agreement has been made expressing the same to have been made by the Governor who as per Ext. P-1 agreement is the "lessor" mentioned on the first part in Ext. P-1 agreement. The contention is that for that reason the Governor or at any rate only the Government and not the department can, if at all, determine the liability of the Petitioners for damages for breach of all or any of the conditions of Ext. P-1 agreement. In the light of what is stated above it is not necessary to consider this contention.

17. In view of what is stated above the Petitioners are entitled to the reliefs sought for. The Original Petition is allowed. In restrain the Respondents from taking steps for recovery of the sum of Rs. 24,974?94 mentioned in Ext. P-5 notice invoking the provisions of the Kerala Revenue Recovery Act, 1968 or of the Indian Revenue Recovery Act, 1890. No other directions are called for in this Original Petition. The Original Petition is allowed to the above extent. There will be no order as to costs.