Kerala High Court
Zachariah James vs T.H.Bhaderuddin on 20 January, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

AS.No. 543 of 1995()

1. ZACHARIAH JAMES
... Petitioner

Vs

1. T.H.BHADERUDDIN
... Respondent

For Petitioner :SRI.P.R.VENKETESH

For Respondent :T.K.VENUGOPALAN,DINESH R.SHENOY

The Hon'ble MR. Justice A.K.BASHEER
The Hon'ble MR. Justice M.L.JOSEPH FRANCIS

Dated :20/01/2010

O R D E R

A.K.BASHEER & M.L.JOSEPH FRANCIS, JJ.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

A.S.No.543 OF 1995

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Dated this the 20th day of January 2010

JUDGMENT

Basheer, J.

Plaintiff in a "suit on accounts" is the appellant.

2. The court below dismissed the suit, holding not only that the court had no territorial jurisdiction to try the suit, but also that the failure of the plaintiff to produce the books of accounts along with the plaint was fatal to his case. The court below also referred to some other so called "discrepancies" in the accounts, which according to it were suggestive of the fact that the accounts were not true or correct.

3. The averments in the plaint may be briefly noticed:

4. The plaintiff, the proprietor of an industrial unit engaged in the manufacture of polythene films and other allied products, used to supply his product to the defendant who was engaged in manufacture of polythene bags, sheet, etc. Plaintiff alleged that there were reciprocal dealings between him and the defendant and all such transactions were entered in the account books being maintained by him. The account between the parties was open, mutual and current. At the end of the accounting year of 1989, viz. on December 31, 1989 an amount of Rs.66,308.55 was found due from the defendant to the plaintiff. In spite of several demands, the defendant failed to discharge the liability. A lawyer notice issued to the A.S.No.543 OF 1995 :: 2 ::

defendant on January 21, 1992 was returned unserved, since the defendant refused to accept the same. The plaintiff specifically alleged that the transactions took place at Kavalam, where his industrial unit was situated and within the jurisdiction of the Court at Alappuzha.

5. The suit was resisted by the defendant contending that there were no reciprocal dealings between him and the plaintiff. But the plaintiff used to bring plastic granules to his factory at Ernakulam for "converting" them to polythene bags or sheets according to plaintiff's requirement. The defendant used to collect conversion charges from the plaintiff at the rate of Rs.5 per Kg. The defendant asserted that no transaction took place at Kavalam. However he admitted that certain quantity of raw material (granules) brought by the plaintiff was "entangled" in his factory from September 1988. The price of this material was paid by him to the defendant through cash and cheque payments. Seven such payments, last of which being on January 17, 1991 were referred to in the written statement. He further contended that the accounts between him and the plaintiff had never been mutual, open or current. He referred to certain 'conversion jobs' undertaken by him in July 1988 for which charges were collected by him from the plaintiff. According to the defendant, no transaction between him and the plaintiff took place on January 12, 1989 as alleged in the plaint, since the employees of his factory were on strike. He was not able to receive any goods in the factory since August 1988 because of "labour A.S.No.543 OF 1995 :: 3 ::

disturbance". The factory was closed down during March 1989. The defendant further alleged that the plaintiff had received some excess amount from him and when a demand for returning the excess money was made, the plaintiff did not return it and the suit was instituted as a counterblast. Finally, it was further contended that the accounts were fabricated by the plaintiff and the plaint claim was barred by limitation.

6. The court below framed the following issues:

1) Whether this court has territorial jurisdiction to try the suit?

2) Whether the account between the plaintiff and the defendant was mutual, open and current?

3) Whether the accounts produced by the plaintiff is genuine?

4) Was there any transaction on 12-1-1989?

5) Whether the suit is barred by the Law of Limitation?

6) What is the amount, if any, to which the plaintiff is entitled?

7) What is the rate of interest, if any, to which the plaintiff is entitled?

8) What is the order as to costs?

7. The plaintiff was examined as PW1. His accountant was examined as PW2 and Exts.A1 to A12 were marked on his side. The defendant was examined as DW1 and Exts.D1 to D5 were marked on his side.

8. As mentioned earlier, the court below held that the plaintiff was not entitled to get a decree as claimed by him, since the court had no territorial A.S.No.543 OF 1995 :: 4 ::

jurisdiction to try the suit. Not only that, the court further held that the account books produced by the plaintiff were not dependable not only for the reason that there were some discrepancies in them but also since the account books were not produced by the plaintiff at the time of institution of the suit itself as mandated under Order 7 of Rule 17 of the Code of Civil Procedure.

9. It may at once be noticed that the court below did not consider the question of territorial jurisdiction at the threshold itself. The learned Judge proceeded to consider issue No.1 relating to territorial jurisdiction along with issue numbers 2 to 5.

10. Paragraph 21 of the impugned judgment deals with the issue relating to territorial jurisdiction. In the course of the discussion of the above issue, the learned Judge noticed that the plaintiff, while being cross examined in court as PW1, had admitted that he had handed over an invoice to the defendant in Ernakulam where the industrial unit of the defendant was situated. It was further noticed by the learned Judge that Ext.B1 letter, written by the plaintiff in 1986, proved that he took delivery of the goods from the unit of the defendant at Ernakulam.

11. In this context, it may be noticed that the specific case of the plaintiff was that the defendant used to purchase plastic granules from him at Kavalam for the purpose of his industrial unit which was of course situated at Ernakulam. The defendant had tacitly admitted that the plaintiff A.S.No.543 OF 1995 :: 5 ::

used to supply granules to him for conversion as plastic bags and sheets for which conversion charges used to be collected by him from the plaintiff.

12. Significantly, the defendant never alleged or proved that no transaction took place between him and the plaintiff at Kavalam at all. Even assuming that on certain occasions the plaintiff used to take granules to the industrial unit of the defendant for conversion as plastic bags and sheets, it did not

mean that the defendant never used to purchase plastic granules from the plaintiff for the purpose of his industrial unit. The evidence clearly indicated otherwise. Significantly, the defendant himself admitted in no uncertain terms that there were several transactions between him and the plaintiff spread over a long period of time. In fact the case of the defendant himself was that he had paid amounts in excess to the plaintiff and that huge amount was due from the plaintiff to him. But strangely in the course of his examination he stated that he did not choose to take any steps for recovery of the amount due from the plaintiff.

13. We have carefully perused Ext.B1 letter sent by the plaintiff to the defendant. By the said communication, plaintiff had placed an order for HM/HD tube rolls weighing 125 kg. The plaintiff requested the defendant to deliver the same on the 12th of June 1986. One sentence in the said communication which might have persuaded the learned Judge to decide the question of territorial jurisdiction read thus: "In this connection we will visit your office to take processed film on 12th afternoon". We are afraid the A.S.No.543 OF 1995 :: 6 ::

learned Judge has egregiously erred in jumping to the conclusion that Ext.B1 letter would conclude the issue of territorial jurisdiction against the plaintiff.

14. On a careful evaluation of the oral and documentary evidence adduced by the parties, we have no hesitation to hold that the case of the plaintiff is more probable and believable. The evidence clearly shows that the defendant had been purchasing goods from the plaintiff at his unit at Kavalam within the territorial jurisdiction of the court at Alappuzha.

15. There is yet another vital flaw in the procedure adopted by the court below while deciding the question of territorial jurisdiction. It is trite that the question of territorial jurisdiction has to be decided at the earliest point of time. It is true that the defendant had raised the question of territorial jurisdiction in the written statement itself. The court below had framed the relevant issue on the basis of the above contention. But strangely the defendant had not taken any steps to see that the above issue was considered by the court below at the earliest point of time. The court also did not bother to decide that question as a preliminary issue. Stranger still, the court below has considered the above issue along with the four other issues as is discernible from the judgment. The learned Judge has devoted a small paragraph for the said issue towards the end of the judgment and that too after considering the other issues pertaining to the nature and genuineness of the accounts, about the credibility of the A.S.No.543 OF 1995 :: 7 ::

accounts, etc. In view of the settled position on the point as laid down in Bahrein Petroleum Co. V. P.J.Pappu [AIR 1966 SC 634], C.M.Muhammed Ismayil V. M/S Malabar Engineering Co. [AIR 2005 Kerala 295] and Ayyappan Pillai V. State of Kerala [2009 (2) KLT 985] etc., we have no hesitation to hold that the court below has fallen in grave error in non suiting the plaintiff on the ground that the court had no territorial jurisdiction. Curiously the court below had not considered the option to be given to the appellant/plaintiff to present the plaint before the proper court by returning the same to him even assuming there was no territorial jurisdiction for the court to try the suit.

16. It is vehemently contended by Sri.T.K.Venugopalan, learned counsel for the appellant that even assuming this court holds that the court below had territorial jurisdiction to try the suit, two other legal impediments loom large. According to the learned counsel, the claim made by the appellant/plaintiff was clearly barred by limitation. The other contention is that the pleadings and evidence on record will not in any way show that the account was mutual, open and current. It is further pointed out by the learned counsel that the court below had not considered the question of bar of limitation at all. It was held that the account was not open, mutual and current.

17. In the preceding paragraph, we have already noticed that admittedly, the plaintiff and defendant had had several transactions between A.S.No.543 OF 1995 :: 8 ::

them over a span of 8 to 10 years. According to the plaintiff, the last of the transaction between him and the defendant, going by the books of account was on March 31, 1989. This contention was vehemently challenged and denied by the defendant. But it can be seen from Ext.A9, invoice book (invoice No.1037) and Ext.A6, ledger that there was one transaction between the plaintiff and the appellant on that day.

18. In this context, it may further be noticed that the defendant had admitted that he had had several transactions with the plaintiff. He conceded that he used to purchase granules from the plaintiff for the purpose of his industry. On certain other occasions, plaintiff used to bring granules for production of high density polythene bags. A perusal of paragraphs 10 and 11 of the written statement will undoubtedly show that several transactions had taken place between the plaintiff and defendant during the relevant period.

19. However, according to the learned counsel for the defendant, going by the averment in the plaint, the last transaction was on January 12, 1989. Suit was instituted only on December 19, 1992 after expiry of three years from the day of the last transaction. Of course the above contention will carry some weight, if it is found that the last transaction was on January 12, 1989.

20. In this context, learned counsel for the appellant has invited our attention to Article 1 in the Schedule of the Limitation Act which provides A.S.No.543 OF 1995 :: 9 ::

that:

> a suit for the balance due on a mutual, open and current account where there has been reciprocal transaction between the parties, has to be instituted "within a period of three years from the close of the year in which the last item admitted or proved is entered in the account."

21. It came out in evidence particularly from the account books (ledgers) and Invoice, Bill Book (Exts.A6 and A9 respectively) that the last transaction between the plaintiff and defendant was in fact on March 31 1989 and that the account between the plaintiff and defendant was mutual, open and current. The accounting year ended on December 31, 1989. If the period of limitation is reckoned on the basis of the accounting year, the suit was well within the period of limitation, as

contended by learned counsel for the appellant/plaintiff. The evidence of DW1 will clearly indicate that he had had regular transactions with the plaintiff. According to the defendant, large amounts were due from the plaintiff towards conversion charges; but he did not choose to proceed against him, since he thought it may not be easy for him to recover it from the plaintiff.

22. It is also pertinent to note that in paragraph 9 of the written statement, the defendant admitted that he had issued two cheques in favour of the appellant/plaintiff towards the price of the raw material supplied by the latter. The first of the two cheques was admittedly encashed by the plaintiff on January 10, 1992 and the second cheque a little later. But A.S.No.543 OF 1995 :: 10 ::

according to the defendant, the above raw material was "got entangled in his factory because of labour problem, and he made the above payments realising plaintiff's difficulty".

23. Still further, in paragraphs 10 and 11 of the written statement, the defendant had referred to several payments (not less than ten) made by him to the plaintiff. But according to him, all these payments were towards the price of raw materials (granules) brought by the plaintiff for "the purpose of conversion into sheets etc." These raw materials, according to the defendant, got "entangled" in his factory and therefore the plaintiff could not take them back. All the payments made by him were only towards the value of the raw materials left behind by the plaintiff.

24. Having carefully perused the oral testimony of the plaintiff and the defendant and the documents produced by both sides, we have no hesitation to hold that the account that was being maintained by the plaintiff was mutual, open and current and therefore the plea of bar of limitation raised by the defendant is without any merit especially in view of the admission made by the defendant that he made a cheque payment to the plaintiff in January 1992. We hold so.

25. As regards the question whether the plaintiff had succeeded in proving his case on the basis of the documents produced by him before the court below, it can be seen that the evidence of PW1 and PW2 clearly revealed that the plaint claim was supported by the entries in the account A.S.No.543 OF 1995 :: 11 ::

books and other related documents produced by the plaintiffs. PW2, the accountant, had explained all the transactions with specific reference to the relevant entries made in relation to the claim in the suit.

26. As has been mentioned earlier, the defendant had no case that he had never had any transaction with the plaintiff, on the contrary he tacitly admitted that he had had transactions with the plaintiff. In fact the case of the defendant was that the plaintiff owed some money to him. Still further though the defendant had faintly alleged in the written statement that the books of accounts were fabricated, no such allegation or suggestion was made when the plaintiff was in the box. Having carefully perused the oral and documentary evidence adduced by the parties, we are totally satisfied that the court below was not justified in assuming that the books of accounts were fabricated.

27. What persuaded the court below to assume that the books of accounts might have been fabricated is the alleged failure of the plaintiff to produce the books of accounts along with the plaint. The learned Judge proceeded to hold that going by the provisions contained under Order 7 Rule 17 of the Code, plaintiff ought to have produced books of accounts along with the plaint itself. But the plaintiff had explained before the court below that the books of accounts were not produced along with the plaint, since they were with his Chartered Accountant. He had produced those books later after taking them back from the Chartered Accountant. PW2, the A.S.No.543 OF 1995 :: 12 ::

accountant, had spoken about the entries in the account books. In our view, even assuming there was failure on the part of the plaintiff to produce books of accounts along with the plaint, the court below was not justified in jumping to a conclusion that the books of accounts were fabricated or not genuine. Rule 17 does not enable the court to draw such a presumption. Of course the court can assess the credibility and genuineness of the accounts depending on the attendant facts and circumstances in each case. In the case on hand, we are totally satisfied that the plaintiff had established his case.

28. Therefore, the decree and judgment passed by the court below are set aside. The suit is decreed in terms of the plaint claim for a sum of Rs.89,918/- with 6% interest thereon from the date of suit till the date of realisation from the defendant with cost throughout.

Appeal is allowed.

A.K.BASHEER, JUDGE M.L.JOSEPH FRANCIS, JUDGE jes