IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 4TH DAY OF JUNE 2015/14TH JYAISHTA, 1937

RFA.No. 36 of 2011 ( )

(AGAINST THE ORDER/JUDGMENT IN OS 401/2008 of I ADDL.SUB COURT,ERNAKULAM DATED 28-10-2009)

APPELLANT(S)/DEFENDANT:

AUSTIN BENNAN,AGED 46 YEARS,
S/O.BENNAN, PROPRIETOR, M/S.AB ENTERPRISES,
RESIDING AT AYYATHU BUNGALOW, VADAKUM BHAGAM,
NEAR TALUK OFFICE, KOLLAM.

BY ADVS.SRI.T.M.RAMAN KARTHA
SMT.MANJULA NAIR

RESPONDENT(S)/PLAINTIFF:

M/S. VIDEOCON INDUSTRIES LTD.
SYDA BUILDING, IIND FLOOR, KALOOR-KADAVANTHARA ROAD,
KALOOR, KOCHI-17, REP. BY ITS DULY CONSTITUTED
POWER OF ATTORNEY HOLDER SRI.AJITH KUMAR K.V.
AGED 35, S/O.MUKUNDAN MENON.

R-R1 BY ADV. SRI.P.CHANDRASEKHAR
R-R1 BY ADV. SRI.M.A.JOSEPH MANAVALAN
R-R1 BY ADV. SRI.SOORAJ T.ELENJICKAL
R-R1 BY ADV. SRI.P.K.ABDU RAHEEM

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 22-05-2015, THE COURT ON 4/6/2015 DAY DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.

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R.F.A. No. 36 OF 2011

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Dated this the 4th day June 2015

JUDGMENT

<u>Sunil Thomas, J</u>.

The sole defendant in O.S.No.401 of 2008 of the Sub Court, Ernakulam which is a suit for recovery of money, aggrieved by the judgment and decree dated 28.10.2009 has preferred this appeal.

2. The case of the plaintiff before the court below was that it was a company incorporated under the Companies Act with its Corporate Office at Ourangabad and branches at various places. Plaintiff had entered into dealership with the defendant who was the proprietor of M/s.A.B. Enterprises. It was agreed that he would be given products of the company on credit and the value of it would be paid within a period of two weeks from the respective date of purchases. It was *inter alia* agreed that default would carry 24% interest. The defendant

was not regular in his payment and the liability accumulated to Rs.39,02,967/-. The matter was mutually settled between the company and the defendant where upon a remission of RS.17,00,000/- was granted to the defendant. It was agreed that the outstanding liability would be settled by the defendant at Rs.22,00,000/-; out of which Rs.15,00,000/- was paid on 24.04.2005 by demand draft. Towards the remaining liability, 7 cheques of Rs.1,00,000/- each of M/s.AB Trade Links, a sister concern of M/s.AB Enterprises were also issued. It was further agreed that in case of default by the defendant, the whole amount with 24% interest would be recoverable from the defendants. The cheques were returned dishonoured and consequently, a notice was issued. Since the defendant committed a breach of the condition, he was liable to pay the entire amount of Rs.39,02,867/- and after adjusting Rs.15,00,000/- paid, amount due was Rs.24,13,488/-. The plaintiff sought a decree for the above amount with 24% interest.

3. The defendant appeared and filed written statement contending that he was not a party to the agreement. It was

contended that the agreement was void and not enforceable under law. The defendant was presently not the proprietor of M/s. AB Enterprises and that it was not in existence. The agreement created a monetary liability and hence, liable to stamped under the provisions of the Stamp Act. The agreement was not executed at Ernakulam and hence the courts in Ernakulam had no territorial jurisdiction to try the matter. Defendant had not received the lawyer notice and there was no cause of action. Plaintiff was also not entitled for 24% interest as sought.

4. On basis of the above pleadings, both sides adduced evidence. On an evaluation of the available materials, court below held that plaintiff was entitled for a decree as prayed for with pendente lite and future interest @ 6%. This is assailed in this appeal. Heard and examined records.

5. The point that arises for consideration is whether the judgment and decree of the court below is legally sustainable.

6. One of the main contention of the defendant was that he was not a party to Ext.A2 agreement and also that the first

party to the agreement was a company other than the plaintiff. Defendant even contended that he had no transaction with the plaintiff company. Ext.A2 discloses that the agreement was executed between the defendant and M/s. Electrolux Kelvinator Ltd. In Ext.A3 notice, which was sent on behalf of M/s. EKL Appliances Ltd., it was specifically mentioned that previously the company's name was M/s. Electrolux Kelvinator Ltd., which was later changed to M/s. EKL Appliances. Thereafter, another company by name M/s. Electrolux India Ltd. amalgamated with M/s. EKL Ltd. and the name was changed to M/s. EKL Appliances. In para 1 of the plaint also the above incorporation, devolution, and amalgamation of the companies is pleaded. This not denied in the written statement. PW1 has deposed in terms of the above. Ext.A6 is a copy of the order of the Hon'ble High Court of Bombay in Company Petition Nos.315/2006 and 431/2006 by which the the scheme of amalgamation of the above companies were approved by the Hon'ble Court. Hence, the contention of the defendant that Ext.A2 agreement was with Electrolux Kelvenator Ltd. and the present plaintiff has no authority to institute the suit, is not legally and factually sustainable.

7. It was further contended that the defendant had no transaction with the plaintiff company and that he was wrongly arrayed as the sole defendant in his personal capacity. It was contended by the defendant that Ext.A2 transaction was with M/s.AB Enterprises. The present suit was laid against the defendant in his individual capacity. In the plaint, defendant was arrayed by name and he was designated as the proprietor of M/s. AB Enterprises. There was a specific pleading in the the plaint that the defendant was the proprietor of M/s.AB. Enterprises. In the written statement, though he has referred to his status vis-a-vis M/s. AB Enterprises, he has not specifically stated that M/s.AB Enterprises was not a proprietary concern. He had no case in the written statement that M/s.AB Enterprises was a partnership firm. He had also no case that other partners were not impleaded and the suit was bad for non joinder of parties.

8. In this regard, it is essential to refer to specific pleadings in the written statement which are sufficient to clinch the issue.

It is stated therein that:

> "the defendant is not now the proprietor of AB Enterprises. The alleged defendant M/s.AB Enterprises is not in existence and the defendant Austin Bennan does not represent the erstwhile M/s, AB Enterprises. .... The said Austin Bennan was mere a representative of M/s. AB Enterprises. The plaintiff is not having the right to sue against the said Austin Bennan in his personal capacity. ....
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> 9. The defendant is not the proprietor of the M/s.AB Enterprises. Such firm named M/s. AB Enterprises is not in existence now and the plaintiff is well aware of it.............."

9. The above pleadings conclusively show that he admits his jural relationship with AB Enterprises and contends that he is not the proprietor "at present". Evidently, it indicates that he, at one point of time, was the proprietor of M/s.AB Enterprises. In the cross examination, DW1 feigned ignorance as to whether M/s.AB Enterprises was a registered firm. He admitted that the partnership had an account. To a specific question as to whether

the accounts were audited, he replied that the firm was established for a brief period and thereafter it was stopped. He could not recollect as to till when the partnership continued its business. Towards a specific question as to whether Ext.B1 firm was dissolved, he again feigned ignorance.

10. To prove that defendant was not a proper party to the proceedings and that the suit will not lie against him in his individual capacity, he relied on Ext.B1 deed of partnership dated 11/10/1999 under the name and style of of M/s AB Enterprises. Evidently it relates to a partnership business. The defendant is referred to as its managing partner. However, it is pertinent to note that in Ext.A2, which was executed much later, he is designated as the proprietor of M/s, AB Enterprises. Specific wording in Ext.A2 is "AB Enterprises propriety ship/firm represented by the managing partner". In Ext.A2 itself there is an indication that it was a proprietary concern. In the evidence, as mentioned above, DW1 admitted that the firm had stopped its business. He did not disclose as to when it was stopped. It is also not pleaded as to whether it was prior to Ext.A2. If

partnership business had stopped its activities prior to Ext.A2, definitely in the light of the subsequent agreement in the nature of Ext.A2, the contention of the plaintiff that the defendant was the proprietor of the firm appears to be sustainable. Since the details regarding the constitution of the firm were within the exclusive knowledge of the defendant and he failed to disclose it, he cannot turn round and contend that he does not personally represent the firm.

11. The defendant further relied on Ext.B3 to contend that it evidences that on the strength of same transaction, an earlier suit was instituted by the plaintiff against M/s. AB Enterprises, designating it as a partnership firm and arraying the partners as defendants. Ext.B3(a) shows that the suit was dismissed for default. The contention of the defendant was that since a suit was instituted designating M/s. AB.Enterprises as the firm, a subsequent suit on same transaction designating the same concern as a proprietary concern and proceeding against the defendant alone in his individual capacity, is not maintainable. It appears to be not sustainable for more reasons than one.

Ext.A2 indicates that the defendant represents the firm. DW1 had admitted that partnership firm had stopped business. It is also pertinent to note that by Ext.A2, the defendant has undertaken the entire liabilities to the exclusion of all other defendants in Ext.B3 suit. It shows that the defendant was thereafter carrying on business as a proprietary concern. In the absence of clear evidence from the defendant to the contra,, we are inclined to believe the version of the plaintiff.

12. The present suit is based on Ext.A2. Even according to the defendant, pursuant to Ext.A2, seven cheques were given to the plaintiff which were dishonured. The cause of action arose on the date of Ext.A2 document, which is specifically pleaded in para 8 of the plaint. Hence, the cause of action cannot be related back to a transaction antecedent to Ext.A2. The execution of Ext.A2 agreement and existence of liability, as disclosed from Ext.A4 statement of accounts, is proved through PW1. In the written statement, the defendant had no case that Ext.A2 was not executed and that he was not liable to pay any amount. The defendant also did not have a case that amount covered by

Ext.A2 was paid. There was no plea of discharge also. In the course of cross examination, DW1 admitted the signature in Ext.A2. He further admitted that a sum of Rs.15 Lakhs was given as one time settlement. He also admitted that he had given seven cheques towards the discharge of liability arising out of Ext.A2. His only contention was that the above seven cheques given were not even presented by the plaintiff, which evidently indicates the existence of liability, execution of Ext.A2 and partial discharge of liability under Ext.A2 and the liability to pay balance .

13. The defendant had a case that the suit was not maintainable in the light of Ext.B3 and B3(a). The contention that was set up was that, the present suit was hit by Order 9 Rule 9 CPC. There is no pleading in the written statement that the previous suit was between the same party and on the same set of facts and that the present suit was hit by order 9 Rule 9 CPC. It is true that plaint in the previous suit discloses that it related to the liability arising out of the same transaction. However, the liability culminated in the execution of a fresh

contract by which the defendant herein undertook to discharge the liability of Rs. 22 Lakhs. The cause of action for the present suit is based on ExtA2, to which the defendant alone is a party. Hence, even assuming that both the suits relates to a same transaction, factually the present suit is laid on the basis of Ext.A2, which substituted the earlier contract and the defendant undertook the liability to discharge the debt. Hence, the defence under Order 9 Rule 9 of CPC is not legally sustainable. In the light of the above conclusion, it is only to be held that the judgment and decree of the Court below is legally sustainable and the conclusions arrived at by the court below are also sustainable. Point answered.

In the light of the above findings, we find no merit in the appeal and it is accordingly, dismissed with costs to the plaintiff.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge
Sd/-

SUNIL THOMAS
Judge

dpk

/True copy/ PS to Judge.