

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

WP(C).No. 35579 of 2007 (I)

**AGAINST THE ORDER/JUDGMENT IN CMP 4050/2007 OF
C.J.M.,TRIVANDRUM/SPL.COURT FOR TRIAL OF CYBER CRIME**

PETITIONER(S):

**T.K.VISWAMBARAN, AGED 54, S/O.LATE KUTTY NADAR,
SARADHA NIVAS, THETTIYODE,
AYNGAMAM, PARASSALA, THIRUVANANTHAPURAM.**

**BY ADVS.SRI.THOMAS M.JACOB
SRI.G.RAJAGOPAL**

RESPONDENT(S):

- 1. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT, GENERAL EDUCATION, DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**
- 2. THE MISSION DIRECTOR, I.E, DIRECTOR OF
PUBLIC INSTRUCTION (DPI) THIRUVANANTHAPURAM,
I.T. @ SCHOOL PROJECT, (A GOVT. OF KERALA, PROJECT)
STATE PROJECT OFFICE, SCERT BUILDINGS, POOJAPPURA P.O.
THIRUVANANTHAPURAM 695 012.**
- 3. DEPUTY DIRECTOR OF EDUCATION,
THIRUVANANTHAPURAM.**
- 4. GOVT. VOCATIONAL HIGHER SECONDARY
SCHOOL, KULATHOOR, NEYYATTINKARA,
THIRUVANANTHAPURAM, REPRESENTED BY ITS HEADMASTER
AND PTA PRESIDENT.**
- 5. GOVT.HIGH SCHOOL FOR GIRLS,
DHANUVACHAPURAM, KOLLAYIL, NEYYATTINKARA,
THIRUVANANTHAPURAM, REPRESENTED BY ITS
HEADMASTER AND PTA PRESIDENT.**

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6. GOVT.K.V.H.S., AYIRA, KARODE,
NEYATTINKARA, THIRUVANANTHAPURAM
REPRESENTED BY ITS HEADMASTER AND PTA PRESIDENT.

7. BHARAT SEVAK SAMAJ (BSS), SATBHAVANA
BHAVAN, BRAHMINS COLONY, KOWDIAR P.O.,
THIRUVANANTHAPURAM-695 003, REPRESENTED BY ITS
REGISTRAR, BSS IT MISSION.

8. STATE BANK OF TRAVANCORE,
REPRESENTED BY THE AUTHORISED OFFICER,
CHIEF MANAGER (ADVANCES), STATE BANK OF
TRAVANCORE REGION-II, ZONAL OFFICE, TRIVANDRUM.

R1 TO 6 BY ADV. GOVERNMENT PLEADER SRI.MANOJ P.KUNJACHAN
R7 & R8 BY ADV. SRI.R.S.KALKURA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AD

APPENDIX

PETITIONER'S EXHIBITS

- EXHIBIT P1 : TRUE COPY OF G.O(RT) NO.3031/2001/ G.EDN. DATED 06-08-2001
- EXHIBIT P2 : TRUE COPY OF G.O(RT) NO.448/2002/GL.EDN.DATED 05.02.2002
- EXHIBIT P3 : TRUE COPY OF ORDER NO.NEP-31/9065/02 DPI DATED 15-11-2002
- EXHIBIT P4 : TRUE COPY OF THE PRESS RELEASE DATED 04.03.2006 BROUGHT OUT BY DPI
- EXHIBIT P5 : TRUE RELEVANT EXTRACT FROM THE BOOK CONSTITUTION OF BHARAT SEVAK SAMAJ
- EXHIBIT P6 : TRUE PRINT OUT REGARDING BSS FROM THE OFFICIAL WEBSITE.
- EXHIBIT P7 : TRUE COPY OF ORDER NO.ITS/EMP/2003/536 (2) DATED 31.08.2002
- EXHIBIT P7 (A): TRUE COPY OF GOVERNMENT ORDER NO.G.O(RT) NO.2790/02/GL. EDN. DATED 26.08.2002
- EXHIBIT P8 : TRUE COPY OF AGREEMENT DATED 08.10.2002 ENTERED INTO BETWEEN THE 4TH RESPONDENT SCHOOL AND BSS.
- EXHIBIT P9 : TRUE COPY OF UNDERTAKING DATED 08.10.2002 EXECUTED BY PETITIONER FAVOURING BSS IN RESPECT OF 4TH RESPONDENT SCHOOL.
- EXHIBIT P10 : TRUE COPY OF COMMUNICATION DATED 29.10.2002 ISSUED BY 7TH RESPONDENT TO PARASSALA BRANCH OF 8TH RESPONDENT BANK.
- EXHIBIT P11 : TRUE COPY OF REPRESENTATION DATED 29.08.2005 ISSUED TO THE MINISTER FOR EDUCATION WITH COPIES TO THE CHIEF MINISTER AND MINISTER FOR HARIJAN WELFARE.
- EXHIBIT P12 : TRUE COPY OF REPRESENTATION DATED 02.05.2007 SUBMITTED TO THE 7TH RESPONDENT.
- EXHIBIT P13 : TRUE COPY OF REPRESENTATION DATED 05.09.2007 SUBMITTED TO THE 7TH RESPONDENT.
- EXHIBIT P14 : TRUE COPY OF NOTICE UNDER SEC.13(2) OF THE SECURITISATION ACT.
- EXHIBIT P15 : TRUE COPY OF CMP 4050/2007 FILED BEFORE CJM, THIRUVANANTHAPURAM UNDER SEC.14 OF THE SECURITISATION ACT.

**EXHIBIT P16 : TRUE COPY OF REPRESENTATION DATED 22.11.2007 SUBMITTED
BY THE 7TH RESPONDENT BEFORE THE 3RD RESPONDENT.**

EXHIBIT P17 : TRUE COPY OF MEDICAL CERTIFICATE DATED 22.10.2007

RESPONDENT'S EXHIBITS

NIL

//TRUE COPY//

P.A. TO JUDGE

AD

K.VINOD CHANDRAN, J.

W.P.(C).No.35579 of 2007

Dated this the 18th day of August, 2015

JUDGMENT

The petitioner claims to have imparted computer education, to the students of respondents 4 to 6 Government Schools, as part of IT @ School Project formulated by the Government. The above writ petition was filed in the year 2007, when the petitioner was proceeded against for recovery of debts due to the 8th respondent-Bank, which debt the petitioner claims; accrued on the loan availed by the petitioner, to carry out the computer education as per the aforesaid programme.

2. The reliefs sought for by the petitioner was to direct respondents 1 to 7 to pay amounts due to him, directly to the respondent-Bank or to the 7th respondent, whose "Authorised Training Partner" the petitioner claims to have been. The petitioner also prayed for a stay of dispossession from the property. As an interim measure, this Court granted a conditional stay which condition, the

petitioner could not comply with. The petitioner is said to have been dispossessed from the property and also said to have suffered a heart-attack and eventually as matters now stand the loan is satisfied. The petitioner's claim is confined to the amounts due from the respondents 4 to 6.

3. The background facts to be noticed are that the Government as per its IT @ School Project, was unable to generate funds to carry on the programme. In pursuance of revenue generation; by Ext.P1, on the basis of the recommendation of a Committee of Secretaries in the Government, it was decided to collect additional fee of Rs.25/- per student per month for 10 months. The SC/ST students were exempted from such additional fees, which component the Government was to pay proportionately to the Schools. The facilities so brought in, were also permitted to be commercially exploited; outside the school hours. The decision so taken at Ext.P1 was implemented through Ext.P2 by which the Schools were directed to open an account in the joint names of the Head Master and the PTA President in any nationalised bank.

4. Having introduced IT as a compulsory curriculum subject from January 2003 onwards, the Government decided to have 'Empanelled Agencies' for carrying on the said programme, with the empanelled agencies remunerated from the additional fees collected from the students, and also the commercial use to which the facilities could be put to, after school hours. The SC/ST department by Ext.P4 was also directed to pay an amount of Rs.25/- per SC/ST student to the respective Schools.

5. The 7th respondent, a society registered under the Societies Registration Act, 1860 and constituted at the instance of the Planning Commission, Government of India was accorded sanction as an 'Empanelled Agency' of the IT @ School Project by Ext.P7. The empanellment was done after wide publicity inviting expressions of interest, by persons who satisfied the eligibility criteria and other terms and conditions stipulated by the Government. The 7th respondent was one such empanelled agency, who entered into an agreement with respondents 4 to 6 schools; one of which is produced at

Ext.P8.

6. The petitioner's claim is based on Ext.P9, which is an agreement entered into between the 7th respondent and the petitioner, by which agreement, the petitioner is said to have been appointed as an 'Authorised Training Partner'. The petitioner claims to have carried out the training programme as stipulated under the project. Ext.P9 agreement between the petitioner and the respondent stipulated payment of non-refundable annual registration fee of Rs.5,000/- to the 7th respondent by the petitioner and also agreed to concede 10% of the total fees collected from the Schools and 20% of the total fees from income generating programmes outside the School, to the 7th respondent on a monthly basis. The petitioner admits having received some payments from the 7th respondent but however, later on default occurred for reason allegedly of the 7th respondent being not paid by the respondents 4 to 6.

7. The 7th respondent is said to have raised the issue of such default with the Deputy Director of Education- the 3rd respondent claiming Rs.4,40,520/- from

the 4th respondent, Rs.1,63,100/- from the 5th respondent and Rs.42,725/- from the 6th respondent by Ext.P16 dated 22.11.2007. The 7th respondent admittedly had not pursued the matter after that. The petitioner however , threatened with recovery by the 8th respondent was before this Court. Essentially, against the recovery but also claiming payments from the respondents 4 to 6.

8. The learned Counsel for the petitioner would contend on the basis of Section 70 of the Indian Contract Act, 1872, that the petitioner having imparted training to the students, the petitioner has a right to claim the amount due from the respondents 4 to 6. The respondents 4 to 6 very well knew that the training so imparted was not a gratuitous act; and the students having obtained such benefit, the respondents 4 to 6 are liable to make good such amounts to the petitioner, argues Counsel. The said contention is raised as a pre-emptive argument against the contention of the Government, revealed in the counter affidavit that, the petitioner has no privity of contract with the Government. The learned Counsel would also rely on the decisions

reported in **1994 (2) KLT 713 Abu Mohammed V.Mohammed Kunju Lebba, 1999(6) SCC 104: AIR 1999 SC 2544 K.S.Satyanarayana V. V.R Narayana Rao, 1985 KLT 169 Haji Adam Sait Dharmasthapanam V. Hameed.**

9. The defence of the State in its statement is that no amounts are due and that the project itself was stopped in the year 2004 in the 4th respondent school and in 2007 in the 5th and 6th respondent schools. The petitioner would refute such contention with reference to the documents produced along with the reply affidavit, which, according to him indicate that the project was carried on later to the year specified by the Government. Quite understanding the difficulty of urging contentious issues in a petition under Article 226, the learned Counsel for the petitioner would contend that he would rather request that Ext.P16 request made by the 7th respondent be directed to be considered by the 3rd respondent, since the said officer is styled a sole arbitrator, in so far as any disputes arising under the agreement at Ext.P8.

10. The decision placed before this Court at

Sections 70, according to this Court does not at all come to the aid of the petitioner. The obligation of a person, who enjoyed benefit of an admitted contract, though not reduced to writing, as per Section 70, is :

- (i) when a person lawfully does something for another person or delivers in terms of such agreement,
- (ii) not intending so to do, gratuitously and
- (iii) the other person enjoys the benefit of the work done or goods delivered.

The one who received the benefit or accepted delivery would definitely be bound to make compensation, when such benefit had been enjoyed notwithstanding the technical defects in a written contract, or even an absence of a contract reduced to writing. The necessary components hence are that, there should be a legal obligation between parties, though not reduced to writing and notwithstanding a technical defect. The party who agrees to do something or delivers something to the other, should prove such act or delivery having been effected and the benefit having been enjoyed by the other party in its full and as contemplated by the terms and

conditions which would have to be gathered from the facts and circumstances.

11. The said concept cannot be imported herein since admittedly there are separate agreements between the respondents 4 to 6 and the 7th respondent, in which the petitioner is not a party. Neither the project which is implemented as per Ext.P1 to Ext.P4 nor the agreements entered into with the 'Empanelled Agencies' of the Government; sanction the work to be handed over to another agency or partner. The project or the agreement also does not permit a separate agreement or appointment of an 'Authorised Training Partner'; by way of an agreement or otherwise. The activity was to be carried on only by the 'Empanelled Agency' and there could have been no further authorisation to carry out the contract; which if entered into would not at all bind the other party; being the Government School.

12. **Haji Adam Sait Dharmasthapanam V. Hameed** (Supra) was a case in which the tenant had made constructions to the tenanted premises, challenged by the landlord in a suit for injunction and later settled on

mediation accepting enhanced rent for the construction made. A subsequent suit for arrears of rent was contested with a counter-claim of reimbursement of amounts expended for the additional construction. Section 70 was found to aid the counter-claim, on facts, since the enduring benefit of the construction enured to the landlord; despite no subsisting contract. **Abu Mohammed V.Mohammed Kunju Lebba** (supra) again was a case in which there was no contract. A marriage proposal resulted in the bride's people advancing money to the groom's family to spruce up the latter's house. The marriage having not materialised the bride's father sued the groom and his family for return of the money advanced. The payment having been proved and the defendant having failed to prove the same to be a gift, the decree for recovery was confirmed.

13. **K.S.Satyanarayana V. V.R Narayana Rao** (supra) was a case in which a land owner entered into an agreement of sale with another and also authorised that other person to sell the property to a third party, by a separate communication. The other person

entered into an agreement of sale with a third party and both he and the land owner received one lakh each as advance consideration. The sale having not materialised the third party sued both, for return of money with interest to the extent each were liable. The landlord though accepting the receipt of money, denied his signature in the suit document as also the vakalatnama and the written statement. The Hon'ble Supreme Court found the landlords conduct be an apparent effort, in futility, to somehow escape the liability. The finding of the Courts below that there was no privity of contract was held to be unfortunate and by reason only of the "Courts below were not attentive to the procedural laws and their duty to do substantial (sic substantive) justice in the case".

14. Apposite also would be the following interpretation of Section 70 in ***Mulamchand V.State of M.P (AIR 1968 SC 1218: 1968 ALL LJ 745)***

"The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no

contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under S.70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution."

15. Relevant also would be the extract from

Suchand Ghosal V.Balaram Mardana, I.L.R. 38

Calcutta I referred to in the **Haji Adam Sait**

Dharmasthapanam V. Hameed (Supra):

"The terms of Section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

16. The present case is not one in which there is an absence of contract. The petitioner specifically claims under his contract with the 7th respondent and under a contract between the 7th respondent and the respondents 4 to 7, to which he is not a partner. The petitioner essentially, with his contentions based on Section 70

attempts to circumvent the enforcement of the terms of the contract he entered into with the 7th respondent.

17. Ext.P9 agreement, entered into between the petitioner and the 7th respondent, the 'Empanelled Agency', is alien to the project itself. Though the petitioner would have imparted the computer education in pursuance to the IT @ School Programme in the respondents 4 to 6, neither the Government nor the Schools were at any time informed that the petitioner was not a part of the 'Empanelled Agency' and a separate entity authorised by a separate agreement entered into by the 'Empanelled Agency'. In fact even the letter issued by the 7th respondent to the 8th respondent-Bank, for the purpose of availing finance, produced at Ext.P10, would indicate that, the petitioner was described as the 'Programme Manager BSS'. The authorised training partnership conferred on the petitioner by the 7th respondent was hence not disclosed to any other parties in the deal and the same was entered into behind the back of the Government and behind the back of the Schools; which were a part of the IT @ School

Programme. It is also to be noticed that the writ petition itself had as its cause of action the recovery steps initiated by the 8th respondent-Bank which prompted the petitioner to make a claim for amounts due from the respondents 4 to 6, despite the petitioner having no claim to demand such amounts from either of the respondents 4 to 6.

18. The relief sought for by the petitioner as is noticed above, are for payments of amounts in terms of a contract with the 7th respondent which contract was entered into in pursuance of another; the 7th respondent entered into with respondents 4 to 6. The mere fact that the respondents 1 to 7 would be authorities coming under the definition of State under Article 12 of the Constitution of India would not by itself commend the invocation of the remedy under Article 226, when contentious issues are involved and the question of contractual relationships are also to be resolved.

19. The documents produced by the petitioner along with the reply affidavit, being those obtained under the Right to Information Act, 2005 disclose that computer

education was imparted to the students of the respective schools. But the terms of the agreement has to be looked into to compute the actual amounts due. By Ext.P8 the empanelled agency was permitted to undertake income generating activities outside school hours (clause 2.3); 15% of which was to be conceded to the school by way of deduction from monthly charges payable (clause 3.29). The petitioner does not reveal any accounting of such amounts in the writ petition. Clause 3.6 also provided that no equipment set up in the computer lab shall be removed by the empanelled agency without concurrence of the school Head Master and President. The reply at Ext.P19, by its last statement clearly discloses a violation of such condition. The terms in the contract to this limited extent, is noticed by this Court only to highlight the nature of the issues that crop up; which are contentions in nature. All the decisions cited by the learned Counsel in aid of the contention under Section 70 arose from a civil proceeding instituted by either of the parties. Factual adjudication is imperative due to the issues arising herein and there can be no invocation of the extraordinary

remedy under Article 226.

20. The petitioner ought to have pursued his remedies before the appropriate civil forum; which remedy also may not be available at this point of time by reason only of limitation having operation against such claim. But that alone is not a reason to invoke the extraordinary remedy under Article 226 in matters which would require an adjudication after adducing evidence.

The writ petition would stand dismissed leaving the parties to suffer the respective costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

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