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Firos vs State Of Kerala (2006)

Firos vs State Of Kerala [AIR 2006 Ker 279, 2007 (34) PTC 98 Ker

Honorable Kerala High Court

JUDGMENT J.B. Koshy, J.

1. Appellant/petitioner approached this Court for declaring that Section 70 of the Information Technology Act, 2000 (hereinafter referred to as 'the Act') is unconstitutional and unenforceable and also for issuance of a writ of certiorari to quash Ext.P10 notification issued by the Government of Kerala under Sub-section (1) of Section 70 of the Act (Central Act No. 21 of 2000). According to the appellant, while disposing of the Writ Petition, the learned single Judge did not enter into any finding regarding the constitutional validity of Section 70 of the Act though it upheld ExtP10 notification issued by the State Government. The learned single Judge also directed to withdraw the suit for declaration of copyright and for injunction filed against the petitioner though the learned single Judge held that the suit is maintainable. The court also directed respondents 1 to 4 to withdraw the criminal complaint filed against the petitioner if the petitioner accepts the judgment and informs the same to the second respondent in writing within a period of one year from the date of judgment. The petitioner did not accept the judgment, but, challenged the same before this Court.

2. The facts of this case are as follows: Government of Kerala, as part of IT implementation in Government departments, conceived a project idea of "FRIENDS" (Fast, Reliable, Instant, Efficient Network for Disbursement of Services). The project envisaged is development of a software for single window collection of bills payable to Government, local authorities, various statutory agencies, Government Corporations etc. towards tax, fees, charges for electricity, water, etc. A person by making a consolidated payment in a computer counter served through "FRIENDS" system can discharge all his liabilities due to the Government, local authorities and various agencies. The first respondent Kerala State Government entrusted the work of developing the "FRIENDS" software with the fourth respondent. Fourth respondent is a registered society under the control of Government as the Total Solution Provider (TSP). The fourth respondent, in turn, entrusted the work of development of pilot project to be set up at Thiruvananthapuram to the petitioner. The application-software "FRIENDS" was first established at Thiruvananthapuram, free of cost, and since the project was successful, Government decided to set up the same in all other 13 district centres. By Ext.P6, fourth respondent entered contract with the petitioner for setting up and commissioning "FRIENDS" software system in 13 centres all over Kerala for providing integrated services to the customers through a single window for a total consideration of Rs. 13 lakhs. Pursuant to Ext.P6 agreement, petitioner set up FRIENDS service centres in all the 13 centres and they were paid the agreed remuneration. After successful completion of the project, there was a subsequent agreement between the fourth respondent and the petitioner (Ext.P9 for continued technical support and for maintenance of system) : Extended period was over. Disputes arose between the petitioner and Government with regard to Intellectual Property Right (IPR) in the software developed, namely, FRIENDS. There is no dispute that IPR software is recognised in law that copyright can be claimed for IPR in the software in view of the amendment in the Copyright Act, 1957 in 1994. When respondents 1 to 4 arranged to modify the software "FRIENDS" to suit its further requirements through another agency, petitioner alleged violation of copyright and petitioner filed criminal complaint against respondents 1 to 4 which was later referred. A counter case was filed by the State and fourth respondent against the petitioner and charge sheet was issued and a crime was registered as Crime No. 119 of 2003 and is pending before the Additional Chief Judicial Magistrate's Court, Thiruvananthapuram. Petitioner filed an application for copyright before the Registrar of Copyright and the first respondent filed a suit before the District Court, Thiruvananthapuram under Sections 60 and 61 of the Copyright Act against the petitioner alleging infringement of copyright and for declaration and injunction. Since the suit is pending in the civil court, the Registrar of Copyright left the matter to be decided by the civil court and rejected petitioner's application for registration of copyright in the "FRIENDS" software applied for by him leaving freedom to any party to apply for registration of copyright after the civil court decides the issue. First respondent, State of Kerala, also issued separate notification, Ext.P10, under Section 70 of the Act declaring, among other items, that the "FRIENDS" software installed in the computer system and computer network established in all centres in Kerala as a 'protected system' for the purpose of the said Act. It is true that the criminal case against the petitioner is pending before the Chief Judicial Magistrate's Court, Thiruvananthapuram and suit filed by the first respondent against the petitioner is pending in the District Court, Thiruvananthapuram. This Writ Petition was filed challenging Section 70 of the Act. It is also contended that Ext.P10 circular issued is arbitrary, discriminatory and violative of Article 19(1)(g) of the Constitution of India and against the statutory right conferred

under Section 17 of the Copyright Act.

3. Before going into the contentions raised, we may extract Section 70 of the Information Technology Act, 2000 as follows:

70. Protected system:

(1) The appropriate Government may, by notification in the Official Gazette, declare that any computer, computer system or computer network to be a protected system.

(2) The appropriate Government may, by order in writing, authorise the persons who are authorised to access protected systems notified under Sub-section (1).

(3) Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

It is the main contention of the petitioner that the computer programme "FRIENDS" is a literary work as defined under Section 2(o) of the Copyright Act and he, being its creator, is the author as defined under Section 2(d)(vi) and, therefore, he is entitled to registration of copyright. According to him, his application for registration is presently rejected on account of the pendency of the suit in the civil court and ultimately he is entitled to registration of copyright under the Act. According to the petitioner, Section 70 of the Act which confers the unfettered powers on the State Government to declare any computer system as a protected system is arbitrary and unconstitutional and inconsistent with Copyright Act and Section 70 of the Act has to be declared as illegal. The alternative contention of the petitioner is that Government should have declared it as a protected system only after obtaining declaratory decree from the civil court. In the writ petition as well as in the writ appeal even though petitioner challenged Section 70 of the Information Technology Act as unconstitutional, serious contention was regarding Ext.P10 and not regarding the validity of Section 70 of the Act. According to the petitioner, there is direct conflict between the provisions of Section 17 of the Copyright Act and Section 70 of the Information Technology Act. When there is conflict between the two Acts, it is well settled law that a harmonious construction has to be adopted. Further, Information Technology Act is a comprehensive legislation with regard to Information Technology Act and its provisions. The provisions of the same will be binding especially considering Section 81 of the Act which provides as follows:

81. Act to have overriding effect. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

But, as far as the Copyright Act is concerned, it is a comprehensive special Act and it is a comprehensive legislation regarding the law relating to Copyrights in India. Therefore, as far as copyright in respect of information technology is concerned, it has to be considered with reference to the provisions of the Copyright Act and as rightly held by the learned single Judge Section 70 of the Information Technology Act is directly related to Sections 2(k) and 17(d) of the Copyright Act and Government's authority to notify the system as a protected system applies only to such of the system of "Government work". Description of Government work is defined under Section 2(k) of the Copyright Act on which Government is confirmed copyright under Section 17 (d). The learned single Judge held as follows:

...Therefore while the IT Act deals with all matters pertaining to information technology, copyright in respect of information technology has to be considered with reference to the provisions of the Copyright Act and in this regard the contention of the petitioner, in principle has to be upheld. I feel the petitioner's contention is relevant only when Section 70 is taken in insolation, and if the Government proceeds to declare any computer system or network other than "Government work" as protected. I am of the view that Section 70 of the IT Act is directly related to Sections 2(k) and 17(d) of the Copyright Act and Government's authority to notify any system as protected applies only to such of the system which answers the description of "Government work" as defined in Section 2(k) of the Copyright Act, on which Govt. is conferred copyright under Section 17(d). In other words, a notification under Section 70 of the IT Act is a declaration of copyright under Section 17(d) of the Copyright Act which applies only to "Government

work" within the meaning of Section 2(k) of the said Act. Since the apparent conflict between the provisions of both the statutes can be resolved by adopting the interpretation that a "Government work" as defined under Section 2(k) of the Copyright Act on which Government has copyright under Section 17(d) of the said Act only can be declared by Government as a "protected system" under Section 70 of the IT Act, the challenge against Section 70 as against the provisions of the Copyright Act does not survive and is only to be rejected. In other words, Section 70 of the IT Act is not against but subject to the provisions of the Copyright Act and Government cannot unilaterally declare any system as "protected" other than "Government work" falling under Section 2(k) of the Copyright Act on which Govt.'s copyright is recognised under Section 17(d) of the said Act. However, if the Government proceeds to declare any other computer system or network under Section 70 of the IT Act as a protected system, it will be open to the aggrieved party to challenge such action as arbitrary and unauthorised. So long as the authority of the Government under Section 70 of the IT Act is to declare only "Government work" as defined under Section 2(k) of the Copyright Act as "protected system" the challenge against the validity of the section will not stand and the mere possibility of the Government exceeding it's powers is no ground to declare statutory provision unconstitutional. Hence this contention is rejected.

We agree with the above observations.

4. Section 2(k) of the Copyright Act deals with the Government work as follows:

(k) 'Government work' means a work which is made or published by or under the direction or control of -

(i) the Government or any department of the Government;

(ii) any Legislature in India;

(iii) any Court, Tribunal or other judicial authority in India;

Section 17(d) of the Copyright Act is as follows:

17. First owner of copyright:- Subject to the provisions of this Act, the author of a work shall be the owner of the copyright therein;

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(d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

There is a statutory presumption in favour of every enactment and apart from a vague statement that Section 70 of the Information Technology Act is unconstitutional, petitioner was not able to show it is unconstitutional. Legislative power of Parliament is not questioned by the petitioner in enacting Section 70. When virus of an enactment or section is challenged alleging conflict with the provision in another Act, the conflict should be resolved as far as possible in favour of the legislature putting the most liberal construction and looking at the substance of the legislation by using the principle of harmonious construction. (See: Diamond Sugar Mills v. State of U.P. AIR 1962 SC 652 at 655) and Peerless General Finance and Investment Co. Ltd. and Anr. v. Reserve Bank of India and Ors.). When there is conflict between the provisions of two Acts, court has to construe the provisions in such a way to avoid a 'head on clash' and a harmonious construction should be adopted to resolve the conflict (See: Jogendra Lal Saha v. Stale of Bihar and Ors.). A harmonious construction of Copyright Act and Information Technology Act is necessary and questions regarding the 'copyrights' for the computer system, electronic devices and other works under the Information Technology Act are covered by the Copyright Act. Copyright (Amendment) Act, 1999 shows that copyrights with regard to the data work, data basis, computer work etc. are specifically covered under the Copyright Act. All matters connected with copyright can be resolved by the provisions in the Copyright Act as it is a special Act for that purpose and matters regarding information technology have to be resolved by applying the provisions of the Information Technology Act as t is a special Act for that purpose. There is no conflict between the provisions of Copyright Act and Section 70 of Information Technology Act. Hence, we are of the opinion that there is no merit in the challenge made in Section 70 of the Information Technology Act.

5. The next question to be considered is whether Ext.P10 notification issued by the Government is liable to be set aside and can Government declare "FRIENDS" application software as a protected system? To decide that question whether petitioner has got a copyright of "FRIENDS" software or whether it is a Government work within the meaning of Section 2(k) of the Copyright Act, this Court declared to decide the matter on merits in O.P. 33536 of 2002 by the District Court, Thiruvananthapuram. We are of the opinion that Ext.P10 could be issued by the Government without registration of the copyright and even without a declaration of copyright by the civil court under Section 60 of the Copyright Act. If any party claims that he has got a copyright and the Government cannot declare it as a protected system, it is for him to go to the civil court and get an injunction and also get a declaration that he has got a copyright of the property. It is settled position that no registration is required to claim copyright under the Copyright Act and non-registration under the Copyright Act does not bar action for infringement. The learned single Judge rightly held as follows:

...A Division Bench of this Court in Kumari Kanaka v. Sundararajan 1972 KLR 536 held that registration of the work under the Copyright is not compulsory, nor is it a condition precedent for maintaining a suit for damages or for injunction against infringement of copyright. Similar is the view taken by the Madras High Court in Manojah Cine Productions v. Sundaresan AIR 1976 Mad. 22 and by the Allahabad High Court in Nav Sahitya Prakash v. Anand Kumar . Therefore, if the "FRIENDS" software is a "Government work" as defined under Section 2(k) of the Copyright Act, then by virtue of Section 17(d) of the said Act, the Government is entitled to notify it under Section 70 of the IT Act as a protected system without any prior registration under the Copyright Act. There is nothing to indicate in Section 70 of the IT Act that the Government. should get any declaratory decree of copyright from District Court under Section 60 of the Copyright Act before issuing notification declaring a computer system as protected. Sections 60 and 61 of the Copyright Act are only remedial measures available to an aggrieved party. While Government is free to issue notification under Section 70 of the IT Act without any registration of copyright or without obtaining any declaratory decree of copyright from District Court under Section 60 of the Act, it was open to the petitioner to challenge Ext.P10 by filing a suit under sections 60 and 61 of the Copyright Act, Though the petitioner is defending the suit, it will not be permissible for the petitioner as defendant to challenge Ext.P10 in the pending suit filed by the State.

Admittedly, petitioner did not file any suit. Petitioner was free to file a suit under Sections 60 and 61 of the Limitation Act wherein he could challenge Ext.P10 notification if it infringes his copyright. Sections 60 and 61 of the Copyright Act read as follows:

60. Remedy in the case of groundless threat of legal proceedings:- Where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may, notwithstanding anything contained in Section 34 of the Specific Relief Act, 1963 (47 of 1963), institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit --

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any as he has sustained by reason of such threats:

Provided that this section does not apply if the person making such threats, with due diligence, commences and prosecutes an action for infringement of the copyright claimed by him.

61. Owners of copyright to be party to the proceeding:

(1) In every Civil Suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the Court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.

(2) Where any Civil Suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceeding in respect of the same cause of action shall lie at the instance of the owner of the copyright.

6. We agree with the learned single Judge that Ext.P10 is not an adjudicatory order under Chapter IX of the Information Technology Act to file an appeal to the Cyber Appellate Tribunal constituted under Chapter X of the Information Technology Act. It is true that under Ext.P6 agreement disputes between the parties could be settled by arbitration by second respondent in terms of clause 7 (2) of the said agreement. Petitioner has not chosen to avail such a remedy. Admittedly, petitioner did not file any suit and did not go for arbitration. The remedy of the petitioner was to file a suit or to refer the matter to arbitration instead of filing a writ petition. That was not done. Counsel for the petitioner insisted that since they have not filed any suit and writ petition was pending from about two years, the question whether "FRIENDS" software developed is a Government work and whether Government can issue Ext.P10 notification under Section 17(d) of the Copyright Act should be decided by this Court. Arguments were advanced by both sides to the point. The learned single Judge went through the contentions in detail and found after examining Exts.P1, 3, 6 and 9 that the software was developed for the Government and for the purpose of rendering services by the Government to the public. Even though Exts.P6 and 9 are executed with fourth respondent and Government is not directly a party, fourth respondent was only a Government agency and Government created the above agency as a total solution provider for developing softwares for the Government. Clause (10) of Ext.R4(b) reads as follows:

10. Departmental Task Force will monitor the actual implementation of the project vis-a-vis the milestones set by the TSP.

Intellectual Property Rights of the system developed by all the TSPs and Departments shall vest in the Government of Kerala. Government of Kerala will be free to deploy the same system or with modification in any of the Government/Semi-Government/Quasi Government Departments/ Organisation.

Fourth respondent was bound by the above clause. Petitioner who understood technical support by executing agreement with fourth respondent is also bound by the above clause in Ext.R4(b). Government has decided itself to the IPR copyright in respect of "FRIENDS" software and there is no document or clause in the agreement to show that fourth respondent has assigned IPR right to the petitioner. The agreement was valid for a definite period and the petitioner was bound to give technical support during the currency of agreement. The software developed is for the sole purpose of collection of tax and amount payable to the various Government agencies through a single window. The learned single Judge held that it answers the definition of 'Government work' under Section 2(k). We agree with the learned single Judge.

7. It is contended by the learned Government Pleader that findings 7 and 8 were not warranted as when suit is maintainable, the court should not have directed to withdraw the suit, but, the question whether Government is entitled to publish Ext.PIO notification under Section 70 was decided by the learned single Judge himself and, therefore, a declaratory suit was not necessary. The learned single Judge also held that the petitioner is prohibited from claiming any right from "FRIENDS" software in view of Ext.PIO notification. Therefore, a further suit is unnecessary and, in any event, no appeal has been filed by the Government. We agree with the finding of the learned single Judge that Section 70 of the Information Technology Act is not unconstitutional, but, while interpreting Section 70 of the Information Technology Act, a harmonious construction with Copyright Act is needed and copyright of IT Government work is also protected under the Copyright Act and remedy provided under the Copyright Act can be availed by the parties, if their copyright is infringed even in respect of IT work. No grounds are made out by the petitioner to set aside Ext.P10 notification issued under Section 70 of the Information Technology Act in a petition under Article 226 of the Constitution of India. Therefore, the Writ Appeal is dismissed.