

(1997) 11 GAU CK 0032
In the Gauhati High Court
Case No : First Appeal No. 8 of 1989

Auto Engineering Works

APPELLANT

Vs

Bansal Trading Co. and Others

RESPONDENT

Date of Decision : 28-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50, Order 30 Rule 1, Order 30 Rule 10, Order 7 Rule 11, 21
Sales of Goods Act, 1930 — Section 39

Citation : (1998) 1 GLT 181

Hon'ble Judges : N.G. Das, J; B.N. Singh Neelam, J

Bench : Division Bench

Advocate : S. Deb and R. Dasgupta, for the Appellant; S.M. Chakraborty and A. Roy, for the Respondent

Judgement

B.N. Singh Neelam, J.—This First Appeal is so preferred by the Appellant-Plaintiff against the judgment and decree dated 27.2.1989 passed by the learned Additional District Judge, West Tripura, Agartala dismissing the Money Suit No. 23/1985 on contest for want of territorial jurisdiction.

2. Shri S. Deb, the learned senior counsel appearing for the Appellant and Shri S.M. Chakraborty, learned Counsel representing the Respondent Nos. 1 and 2 are heard.

3. On behalf of the Appellant, in nutshell it is submitted that the impugned judgment and decree are fit to be set aside specifically on the ground that the learned Court-below erred to decide the issue relating to his jurisdiction properly and that the said Court had the territorial jurisdiction in connection with this matter. Giving a short history of this case it is also pointed out that the said Money Suit was so filed by the Appellant-Plaintiff for the recovery of loss as to compensate the Appellant-Plaintiff either supplying the finished goods for 44.015 M.T. raw materials or paying the price of the same because of his claim there was short supply of the finished product so made by the sister concern of Respondent

No. 1 figuring as Respondent Nos. 2 to 5 which was a breach of oral contract because of the contract so being made by the Appellant first of all with Respondent No. 1 for supply of raw materials which was so supplied to the extent of 283.550 M.T. (Steel), the work for the finishing of the same as per the direction of the Plaintiff-Appellant was done by the rest of the Respondents and when such finished goods were so sent to Agartala that weight only 239.535 M.T. and since there was shortage, the claim was for compensation relating to the balance coming to 44.015 M.T. finished goods. It is also the case of the Plaintiff-Appellant coming from the mouth of his counsel Mr. S. Deb that the transaction with regard to the supply of raw materials with that of the finished product continued from 22.1.1979 to 30.9.83 and when the short supply of the finished product was so detected, after receiving the same at the other hand i.e. Agartala, cause of action arose for filing such suit. In this connection reference is made particularly to Ext-3 series which are the bills and vouchers said to have been given by the Respondents to the Appellants and the amount as submitted also paid. According to Shri Deb, learned Counsel contractual relationship (oral) was for supplying the steel raw material with Respondent No. 1 and sister concerned of Respondent No. 1 figuring as Respondent Nos. 2 to 5 were to supply finished goods to the Appellant at Agartala. The said suit bearing No. 23/85 so filed was valued for the purpose of valuation at Rs. 3 lakhs for which Court fee was paid and the compensation from the Respondents also got claimed for the short supply of finished products detailed above.

4. On behalf of the Appellant, it is also pointed out that provision of Section 21 of the CPC was not satisfied particularly with regard to the matter to be seen as to whether there had been any consequential failure of justice because of matter being taken up by the learned Court-below having no jurisdiction and this part is not touched in the impugned judgment by the learned Court-below though it has been conceded by the learned Counsel for the Appellant that objection challenging territorial jurisdiction was so filed by the Respondents before the Court of the first instance. In support of his contention that it has also to be seen as to what extent there was consequential failure of justice when the matter was so taken up by the learned Court-below on the basis of the claim so made by the Plaintiff, on which the impugned judgment is totally silent. Mr. Deb, the learned senior counsel has referred to three reported cases on this point and they are Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, Respondents and has particularly referred to its para 3 on the same point two other reported cases are also cited and they are R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd., Respondent and its para 7 and (1988) 2 GLR 27 Shri Sashi Kanta Sarma and Ors. Petitioners v. Shri Hem Kanta Sarma and Ors. Opposite parties and its paras 11.

5. It is also pointed out by Mr. Deb, the learned Counsel that Agartala District Judge Court had the jurisdiction as to interfere such title suit so filed because the delivery of the finished goods was made at Agartala when such short supply was detected which was the cause of action and in support of his contention a

reported case is also cited A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, Respondent and in this connection particularly attention is drawn to its paras 20 and 21. Mr. Deb, the learned Counsel however, has also in all fairness, pointed out that true it is that the raw materials was so supplied by the Respondent No. 1 at Calcutta, the payment was so made at Calcutta for which the Sales Tax Authority, West Bengal realised sales tax. The supply of raw materials from Respondent No. 1 to the other Respondents for finishing goods was also made at Calcutta but since the detection of short supply was found at Agartala when the finished goods got received by the consignee, the Appellant, that being the position it can very well be said that Agartala Civil Court had also the territorial jurisdiction as to accept the suit. Casually it is also referred that though after the receipt of the raw material the Appellant became the master of the same but in the plaint it has also been specifically detailed with regard to Respondent No. 1 all the time being the trustee of the raw material and the finished goods and there might also the possibility of Respondent No. 1 not supplying that much of raw material to its sister concern for which the Plaintiff had paid price and therefore the relief sought for by filing the suit was from all the Respondents. It is also submitted by making an alternative argument that taking the worst view that even in this First Appeal it is held that the District Court, Agartala had no territorial jurisdiction, but even in that case a seal of finality be given to the finding arrived at by the learned Court-below in Money Suit No. 23/1985 while deciding other-issues. It is also urged that taking the worst view that the lower Court below did not find territorial jurisdiction, in that case, in all fairness, it was expected of him as to return the plaint with a direction to file the same before the competent Court having territorial jurisdiction but that has also in the instant case, not been done. On these grounds as also incorporated in the Memo of Appeal with that of the other grounds so incorporated thereunder the prayer is that the appeal be allowed, the impugned judgment and decree under challenge be set aside as claimed by M/s. Auto Engineering Works of Agartala being a proprietorship concern registered under Small Scale Industries who undertakes various works for fabrication, manufacture etc. having a case to stand in the eye of law as also detailed above.

6. Mr. S.M. Chakraborty, the learned Counsel has appeared on behalf of the Respondent Nos. 1 and 2 and has submitted that though no one has appeared on behalf of the rest of the Respondents i.e. Respondent Nos. 3 to 5 but the rest of the Respondents not appearing have got a similar case particularly with that of Respondent No. 2.

7. On behalf of the Respondents the first objection so raised is that the suit was being filed by the M/s. Auto Engineering Works, 6 Shakuntala Road, Agartala as Plaintiff, but under the provision of Order 30 Rule 10 of the Code of Civil Procedure, the suit cannot be filed by the concern ; the concern may even being proprietorship concern ; because the same has to be filed by a person representing the concern running in the name of M/s. Auto Engineering Works i.e. Shri Braja Lal Banik claiming himself to be the whole and sole Proprietor of

the said concerned. Since that has not been done this infirmity in the filing of the suit is in itself fatal to in any way, entertain the plaint. In support of this contention Bhagvan Manaji Marwadi Vs. Hiraji Premaji Marwadi, Bhagwan Manaji Marwadi and Ors. Appellants v. Hiraji Premaji Marwadi, Respondent, in this connection it is pointed out that the Division Bench of Bombay High Court in this reported case has held that in the background of the provision of the Order 30 Rule 1 of CPC if a suit is to be filed ; that must be filed by the person representing the Firm or the concern by which the said business is run and not otherwise. The said Division Bench had also held that a suit may be brought against the trade/firm in its name but not viceversa. If the trade in the instant case was in the name and style of M/s. Auto Engineering Works and as claimed by the Plaintiff he is the sole proprietor, the proprietor has to come forward as a Plaintiff representing the said concern i.e. M/s. Auto Engineering Works which has at all not been done. Therefore, any story put in the individual capacity by Shri Braja Lal Banik before the learned Court-below as also detailed in the plaint has got no meaning in the eye of law. The present trade in the name and style of M/s. Auto Engineering Works is itself would not have been able to pay the decretal amount and by looking into the relief so sought for, no specific amount is shown being claimed from the Respondents and that being the position even if there would have been money decree because of these laches in the plaint it would not have been executable at all. Under the provisions of Order 7 Rule 11 of the CPC hence it is pointed out that because of the false and vexatious claim so put, the plaint was liable to be rejected outright and in support of this contention the learned Counsel for the Respondents has referred to a case reported in T. Arivandandam Vs. T.V. Satyapal and Another,

8. Mr. Chakraborty has also pointed out that as regards the objection challenging the territorial jurisdiction of the learned Court below, objection was so filed in the said suit on 11.3.1986 itself. The written statement was so filed on 18.11.87, issues were so framed on 15.12.87 and additional issues as preliminary issue for deciding the territorial jurisdiction when objected was framed on 8.1.88. Referring to the provision of Section 21 of the CPC it is also pointed out that certain restrictions are put in the said Section as to be considered by the appellate Court or the revisional Court while hearing on the point of territorial jurisdiction and therefore, as claimed by the learned Counsel for the Appellant it was not incumbent on the part of the learned Court-below to give the detailed reasonings of consequential failure of justice which was caused or would have been caused by entertaining such suit having no territorial jurisdiction. Furthermore, it is pointed out that an alternative prayer so made on behalf of the Appellant that as to give seal of finality on the findings of the learned Court-below on other issues when deciding territorial jurisdiction, issue was decided negatively and it is pointed out with all emphasis that when the learned Court-below in the instant case has held that it had no territorial jurisdiction, any finding arrived at by the said Court on other issues in the instant case is a complete nullity and in support of this contention Mr. Chakraborty learned

Counsel appearing for the Respondents has referred to two of the recorded cases Kiran Singh and Others Vs. Chaman Paswan and Others, and Ajudh Raj and others Vs. Moti, Ajudh Raj and Ors. Appellants v. Moti. It is also pointed out that by going through the plaint it will transpire that nowhere the details of any oral agreement finds place with regards to the Respondent Nos. 2 to 5 being bound to supply the finished goods at Agartala or as regards to any order so made for supply of finished goods to be made by Respondent Nos. 2 to 5. It has also been pointed out that before the learned Court-below only one witness was examined i.e. Shri Brajalal Banik, the sole proprietor of M/s. Auto Engineering Works and Ext. 3 series and the Xerox copies of the bills and vouchers so furnished by him marked as Ext. 3 series subject to objection would not have been marked as Exhibits when the original bills and vouchers were so available with the said Proprietor and nowhere either in the order-sheets or in the deposition, there is any whisper with regard to comparing the Xerox copies with that of the original prior to accepting the same as exhibits. Concluding, it is pointed out that rightly the learned Court-below had dismissed the suit holding that the said Court had no territorial jurisdiction and further more in the instant case there was no question of even returning the plaint with a direction to file the same before the competent Court having territorial jurisdiction because of the plaint itself suffering from gross irregularities which were sufficient in themselves as not to accept such plaint and that is why no such specific direction for returning the plaint was so given by the learned Court below.

9. This will not be out of place to mention that after hearing the Respondents lawyer the learned Counsel for the Appellant was also given an opportunity as to reply on law point and in that context it has been argued by Mr. Deb, the learned Counsel that the provisions of Order 30 Rule 10 CPC does not apply in the instant case because it relates to the Firm and particularly to the persons who are to be sued and as far as the present case is concerned M/s. Auto Engineering Works is not a Firm but a trade run in the name and style of M/s. Auto Engineering Works by the sole proprietor Shri Brajalal Banik. By referring to AIR 1932 Bombay 516, reported case so cited on behalf of the Respondents, it is pointed out that the same particularly referred to the decision in connection with the provisions of Order 21 Rule 50 and it was not a matter for deciding the provisions under Order 30 Rule 10 though casually touched by the Division Bench. It is also submitted that the decision arrived at by the Division Bench under Order 21 Rule 50 CPC in AIR 1932 Bombay 516 (supra) has been differently decided in Gambhir Mal Pandiya Vs. J.K. Jute Mills Co., Ltd., Kanpur and Another, In this connection Mr. Deb has particularly referred to its para 6. Casually Mr. Deb has also referred a decision reported in AIR 1959 Bombay page 529 referring that by the Division Bench of Bombay High Court in 1959 the reported case AIR 1932 Bombay page 516 is also discussed differently and that being the position hence the prayer is that no reliance be placed on the reported case AIR 1932 Bombay 516 be thus placed.

10. The other argument so advanced from the Respondents side is also

controverted in reply by Mr. Deb, learned senior counsel submitting that the reported cases so cited have got no relevancy and that the learned Court below had the territorial jurisdiction.

11. After hearing both the sides, we have carefully gone through the provisions of law with that of the documents so available before us for perusal.

12. First of all before taking the issue of territorial jurisdiction, let us see as to what extent the plaint so filed can be said to be in order. In this connection taking into consideration the first ground so taken by the Respondents that since the suit was filed in the name of the trade and not by the sole Proprietor representing the said trade running in the name and style of M/s. Auto Engineering Works is fatal and the plaint on this score alone was liable to be not entertained. For better appreciation of the same the provisions of Order 30 Rule 10 is to be looked into carefully. Order 30 Rule 10 runs as under:

ORDER XXX SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

10. Suit against person carrying on business in name other than his own - Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly.

So it relates to a suit by or against Firms and also by or against persons carrying on business in the names of other than their own. In the instant case M/s. Auto Engineering Works may not be a firm but admittedly the said trade is run in the name of M/s. Auto Engineering Works by Shri Brajalal Banik claiming himself to be the sole proprietor of the trade running in the name and style of M/s. Auto Engineering Works. That being the position, the mischief of Order 30 Rule 10 comes into operation even in the instant case and by going through Rule 10 with that of the reported case so cited AIR 1932 Bombay 516 (supra), we are constrained to hold that in such circumstances it was incumbent on the part of Shri Brajalal Banik as to file the suit in the capacity of his being the representative or Proprietor of the said trade M/s. Auto Engineering Works which in the instant case has not been done. Matter would have been different if the M/s. Auto Engineering Works would have been sued in which even if non-mention of the name of the proprietor Shri Brajalal Banik would not have been fatal but because of the suit being filed by M/s. Auto Engineering Works the same would have been filed in the background of the provision of Order 30 Rule 10 by the Firm represented by someone and thus the contention so made on behalf of the Respondents on this issue has got a bearing on the case and the reported cases so cited on behalf of the Appellant on this issue Gambhir Mal Pandiya Vs. J.K. Jute Mills Co., Ltd., Kanpur and Another, and Mandalsa Kumari Devi and Others Vs. M. Ramnarain Private Ltd. and Others, have got no bearing as they particularly relate to another matter relating to Order 21 Rule 50 Code of Civil

Procedure. Secondly, after going through the plaint it also felt that nowhere specifically it has been mentioned with regard to any oral agreement so made between the Plaintiff and the rest of the Respondents except Respondent No. 1 as to supply raw-material at Calcutta, and also there is much of variation in the stand so taken by the Plaintiff with regard to at one place all through Respondent No. 1 remaining as the trustee of the raw-material and the finished goods where at other place saying the same was given to the sister concern Respondent Nos. 2 to 5 which goes to show that the Plaintiff has tried to blow hot and cold in the same breath.

13. As regards the territorial jurisdiction admittedly the Plaintiff is silent on the point of the place where the oral agreement was so made and as regards the raw-material received, the same was received at Calcutta, payment was so made at Calcutta, sales tax imposed was received by the Government of West Bengal, finishing of the goods were so made at Calcutta. Now only point which is taken by the Appellant that the supply of finished goods since was made at Agartala which is totally denied by the Respondent No. 2. Taking the worst view it was so received at Agartala but in the background of the provision of Section 39 of the Sales of Goods Act with that of the finding of the reported case AIR 1975 Gau 34 Sasa Musa Sugar Works Pvt. Ltd. Petitioner v. Chunilal Chororia, Opposite party, it can well be said as dealt with at length in para 6 of AIR 1975 Gauhati 34 that where the seller is required to send the goods to the buyer, delivery of goods to a carrier for the transmission to the buyer is *prima facie* deemed to be delivery of goods to the buyer and in the instant case since the transmission as per the Appellants case to the local transport was so done at Calcutta, the cause of action for any breach of contract arose not at Agartala where the goods are ultimately said to have been received, but at Calcutta where the goods even as admitted by the Appellant were being handed over to the Private transport concern for transmission to Agartala. That being the position we do not feel hesitant as to hold that the learned Court below has right decided the territorial jurisdiction matter against the Plaintiff-Appellant.

14. Since other gross irregularities being found in the said plaint, after deciding that the said Court had no territorial jurisdiction, was also within its limits as not to return the plaint to be filed before the competent Court having territorial jurisdiction because the said plaint in that form was not acceptable leaving apart the Court having no territorial jurisdiction. As regards the points so raised on behalf of the Appellant making an alternative argument that taking the worst view the said Court had no territorial jurisdiction in this first appeal a final seal of certainty be given to the other findings arrived at by the learned Court below on other issues, it is hereby held that when the learned Court below had no territorial jurisdiction as also held by us, there is no question of giving seal of finality to the other findings so arrived at by the learned Court below on other issues. Learned Court below rather was expected as to decide the preliminarily issue with regard to the territorial jurisdiction which was decided negatively coming to the conclusion that the said Court had no jurisdiction and thus any

other finding arrived at on other issues by the learned Court below in our considered opinion is a complete nullity.

15. Consequently, finding no merit in this first appeal so preferred by the Appellant the same is hereby dismissed. However, the parties to bear their own costs.