

(2010) 06 BOM CK 0084
In the Bombay High Court
Case No : Writ Petition No. 251 of 2009

Engineers Combine

APPELLANT

Vs

Goa State Infrastructure Development Corporation Ltd. and
State of Goa

RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 3, Order 1 Rule 9,
Order 14 Rule 2, Order 14 Rule 2(2)
Goa, Daman and Diu Civil Courts Act, 1965 — Section 26

Citation : (2010) 5 BomCR 205

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : C. Mascarenhas, for the Appellant; S. Bandodkar, A.G.A. for
Respondent No. 2 and D. Pangam, for the Respondent

Judgement

N.A. Britto, J.—Rule. By consent heard forthwith.

2. The Petitioner herein is the plaintiff in Special Civil Suit No. 3/2008.

3. This petition is directed against Order dated 8-10-2008 of the learned District Judge-4, Margao by which a preliminary issue framed in the suit has been decided against the plaintiff.

4. Some bare facts are required to be stated to dispose off the present Writ Petition. It is an admitted position that the Petitioner had entered into an agreement with defendant No. 1 dated 23-2-2004 for the construction of a bridge at Pushavati River in Sanguem Taluka. Contending that both the defendants were responsible for breach of the contract with the plaintiff, the plaintiff filed the suit for compensation i.e. for the recovery of a sum of Rs. 5,85,022/- with interest at the rate of 18% from 15-1-2005. There is no dispute that defendant No. 1 is a Government Company and defendant No. 2 is the Government of Goa. That a Government Company is a separate legal entity is also the law laid down by the Apex Court in the case of Steel Authority of India

Ltd. v. Shri Ambica Mills Ltd. and Ors. AIR 1998 SC 418. That defendant No. 1 is fully owned and controlled by defendant No. 2 is an admitted position, by defendant No. 1.

5. The defendant No. 2, the State of Goa did not contest the suit. The Defendant No. 1-Corporation contested the suit by filing a written statement and in that written statement took a preliminary objection stating that the suit suffered from mis-joinder of parties insofar as the defendant No. 2 was concerned as there was no privity of contract between the plaintiff and defendant No. 2. That defendant No. 2 was not a necessary party was not a plea taken by defendant No. 1 in the written statement and inspite of that a preliminary issue came to be framed, along with other issues and which came to be decided by the impugned Order. The relevant issue reads as follows:

Whether the suit has to be dismissed as against defendant No. 2, State of Goa, not being a necessary party to the suit.

6. The learned trial Court by the impugned Order has come to the conclusion that defendant No. 2 was not a necessary party to the suit, and hence ordered the deletion of defendant No. 2, the State of Goa. After ordering the deletion of the defendant No. 2, the learned trial Court has directed that the suit be presented to the Court of the Civil Judge, Senior Division within whose jurisdiction the cause of action arose, in terms of Section 26 of the Civil Court's Act, 1965.

7. The plaintiff, inter alia, has sought for the following relief:

b). That the defendants be directed to pay to the plaintiff the principal sum of Rs. 15,85,022/- with interest thereon at the rate of 18% per annum from 15-1-2005 till full realization towards work done and compensation.

8. Shri C. Mascarenhas, the learned Counsel appearing on behalf of the Petitioner/Plaintiff submits that the issue of mis-joinder raised by the defendant No. 1 is an issue which could not be decided as a preliminary issue in terms of Order XIV, Rule 2, C.P.C. since the only issues which could be decided as preliminary issues are the issues pertaining to jurisdiction of the Court or a bar to the suit created by law for the time being in force. In support of this submission, learned Counsel has placed reliance on various Judgments including Ramesh B. Desai and Ors. v. Bipin Vadilal Mehta and Ors. 2006 AIR SCW 3768 wherein the Apex Court has held that Sub-rule (2) of Order XIV, Rule 2, C.P.C., lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try the same issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The said statement of law had been made by the Apex Court relying on its earlier decision in the case of Major S.S. Khanna Vs. Brig. F.J. Dillon, wherein it was held that "under Order XIV, Rule 2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or

any part thereof may be disposed of on issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lopsided trial of the suit. The Apex Court has further observed that though there has been a slight amendment in the language of Order XIV, Rule 2, C.P.C. by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

9. Reliance has also been placed by Shri Mascarenhas on the Full Bench decision of the Allahabad High Court in *Sunni central Waqf Board and Ors. v. Gopal Singh Vishrad and Ors.* AIR 1991 Allahabad 89 wherein it has been held that misjoinder of a party is not covered by the expression "bar to the suit", referred to in Clause (b) of Rule 2(2) of Order XIV CPC. Learned Counsel has also referred to various other averments made by the plaintiff in the plaint to show that some departments of the Government of Goa were responsible for the delay in completion of the project undertaken by the plaintiff by virtue of the said agreement dated 23-2-2004.

10. On the other hand, Shri D. Pangam, the learned Counsel appearing on behalf of defendant No. 1 has submitted that the Court has exercised its powers in terms of Order 1, Rule 10, C.P.C. in deleting the name of defendant No. 2 from the cause title. Learned Counsel further submits that the averments referred to on behalf of the plaintiff particularly those of para 6 may show that the persons mentioned therein may at the best be the witnesses of the plaintiff but not parties to the suit. Reference is also made to the provisions of Order 1, Rule 3, to suggest that the plaintiff had no cause of action against defendant No. 2 as the cause of action of the plaintiff was against defendant No. 1 alone on account of the breach of the said agreement.

11. Shri S. Bandodkar, the learned Additional Government Advocate appearing on behalf of Respondent No. 2, while adopting the submission made on behalf of Respondent No. 1 has placed reliance on the *The State of Kerala Vs. The General Manager, Southern Railway, Madras*, wherein the Apex Court has held that the claim in a suit for recovery of money under the Railways Act, 1890 against different railway administration owned by the Central Government in accordance with the general principle of law contained in Order 1, Rule 3 of the CPC has got to be made against the person against whom the right to relief is alleged to exist.

12. The plaintiff has filed the suit claiming a right of relief against both the defendants. Whether the plaintiff would ultimately succeed or not is entirely a different matter. Admittedly, as already stated, neither the defendant No. 1 nor defendant No. 2 had taken a specific plea that defendant No. 2 was not a necessary party to the suit. All that the defendant No. 1 had stated is that the suit suffered from mis-joinder of defendant No. 2 as there was no privity of contract between the plaintiff and defendant No. 2. Therefore, a plea of misjoinder simpliciter could not have been decided as a preliminary issue. Misjoinder of parties does not create a bar to the suit. On the contrary Order 1, Rule 9 specifically states that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may deal with the matter in controversy so far as regards the rights of the parties actually before it. Whilst deciding the said preliminary issue, the Court does not appear to have had in mind at all the provisions of Order 1, Rule 10, inasmuch as no plea that defendant No. 2 was not a necessary party, was taken by defendant No. 1. Therefore, the submission that the Court had exercised its powers under Order 1, Rule 10 cannot be accepted. The Court was only deciding a preliminary issue which could not have been decided as a preliminary issue. In fact, it appears that even the preliminary issue which has been framed, has been wrongly framed without there being any statement of defendant No. 1, that defendant No. 2 was not a necessary party to the suit. Defendant No. 2 had not sought for its deletion and in such a situation the learned trial Court ought not to have deleted the name of defendant No. 2, when defendant No. 2 itself had not objected or sought for its deletion.

13. Therefore, the Writ Petition deserves to succeed. The impugned Order is hereby set aside. Parties to appear before the learned trial Court on 8th July, 21010, at 10.00 a.m.