

(1972) 08 PAT CK 0018

In the Patna High Court

Case No : Civil Revision No. 775 of 1971

K.C. Bishwas and Sons and Others

APPELLANT

Vs

Central Alkusa Colliery Co.

RESPONDENT

Date of Decision : 03-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2
Partnership Act, 1932 — Section 69(2)

Citation : AIR 1973 Patna 184

Hon'ble Judges : G.N. Prasad, J

Bench : Single Bench

Advocate : Bishwanath Agrawal, for the Appellant; Hari Lal Agrawal, for the Respondent

Final Decision : Allowed

Judgement

G.N. Prasad, J.—The petitioners are the defendants in Money Suit No. 67 of 1965 which has been filed by the Central Alkusa Colliery Company a partnership firm carrying on business at Gandudih Colliery, in the Court of" the First Subordinate Judge at Dhanbad for recovery of Rs. 17,000/- and odd being the balance price of coal sold and supplied on credit to the petitioners between 8-7-1968 and 31-7-1968. They have filed this application in revision against the order of the learned Subordinate Judge declining their prayer to decide the issue of maintainability of the suit as a preliminary issue. The preliminary issue sought to be raised by the petitioners is whether the suit is barred u/s 69(2) of the Indian Partnership Act, 1932, which is in the following terms:

"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

2. In paragraph 1 of the plaint, it has been asserted that the plaintiff is a registered partnership firm registered under the Indian partnership Act and the

affidavit and the verification appended to the plaint has been made by Jagdish Chandra Harisingh, describing himself as one of the partners of the plaintiff firm. In the written statement which was filed on behalf of the defendants on the 21st July, 1969, it has been averred in paragraph 1 that the suit is not legally maintainable, and in paragraph 5 as follows:

"The defendants deny the allegations made in paragraph 1 of the plaint and put the plaintiff to the strict proof thereof. These defendants are not aware if the plaintiff is a registered partnership firm registered under the Indian Partnership Act. These defendants are however, aware of the fact that the Central Alkusa Colliery Co., Gandudih Colliery is within the jurisdiction of this Court as its Central office is at Central Alkusa Colliery Co.'s Gandudih Colliery, P. O. Kusunda."

On merits, the case of the defendants is that no dues of the plaintiff are outstanding against them and, on the contrary, the defendants are entitled to receive from the plaintiff a sum of Rs. 23,864.45 as per accounts contained in Schedule B of the written statement. Two of the issues framed for determination in the suit are:

"Is the suit legally maintainable in its present form?

Is the plaintiff entitled to a decree as prayed for?"

(Vide Issues Nos. 2 and 4 respectively).

3. On the 23rd June 1971, the defendants filed a petition requiring the plaintiff, as contemplated by order XXX, Rules 1 and 2 of the Code of Civil Procedure,

"to furnish the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in the plaintiff firm and the names and places of residence of all the persons constituting the plaintiff firm on whose behalf the above suit has been instituted..."

Accordingly, on the 12th July, 1971, the plaintiff filed in Court the names and addresses of six persons who "were and are the partners of the plaintiff firm on whose behalf the present suit has been filed." The names thus furnished by the plaintiff are:

"1. Kalyanji Mavji s/o late Mavji residing at present at 17, Raja Santosh Road, Alipore, Calcutta.

2. Morarji Kanji s/o late Kanji Keshavji residing at 5, Mandavile Gardens, Ballygunge, Calcutta.

3. Jagdish Chandra Harisingh s/o late Harisingh Keshavji residing at 3-B, Roy Street Bhowanipur, Calcutta.

4. Parvati Bai w/o late Harisingh Keshavji residing at 3-B, Roy Street, Bhowanipur, Calcutta.

5. Bhupendra Chatrabhuj s/o late Cha-trabhuj Kanji residing at 5, Mandavile Gardens, Ballygunge, Calcutta.

6. Ganga Bai w/o late Karshandas Rashamwalla residing at Dhanbad town in the Dist. of Dhanbad, Bihar."

On the 12th July, 1971, itself, the petitioners filed a petition under Order XIV, Rule 2 read with Section 151 of the Code of Civil Procedure, wherein they asserted that the plaintiff's firm was not a registered firm on or prior to the 19th March, 1969 (it should be 18-3-1969), on which date the present suit was instituted. In support of this assertion of theirs, the defendants relied upon "the original acknowledgment of the registration of the firm filed by the plaintiff on 9-6-1971 is this Court."

4. The defendants' prayer for deciding the issue of maintainability of the suit as a preliminary issue was opposed on behalf of the plaintiff and it was alleged that the plaintiff firm was registered with the Registrar of Firms at Patna on 21-10-1955 with four partners but thereafter three of the partners had died. The partnership, however, was continuing and was ultimately reconstituted by the surviving partner (Shri Kalyanji Mavji) and the heirs of the deceased partners and a formal deed of partnership was, accordingly, executed on the 5th July, 1968. It was further stated on behalf of the plaintiff that an information regarding the change in the constitution of the firm was lodged with the Registrar of Firms, which the latter had acknowledged on the 22nd December, 1969. Thus, according to the plaintiff, it was a registered partnership firm at the time of the institution of the suit.

5. The Court below has, however, rejected the defendants' petition merely on the ground that it is not desirable "to dispose of the case on preliminary issue of law because it is linked with question of fact as to who were original partners and as to how their heirs again reconstituted the partnership without any dissolution for the moment." Being thus aggrieved, the petitioners have moved this Court in revision.

6. The short point which I have to decide is whether this is a case in which the issue of maintainability should have been decided as a preliminary issue as prayed for by the petitioners. The relevant provision is contained in Rule 2 of Order XIV of the CPC which lays down in substance that if a suit or any part thereof may be disposed of on the issues of Law only, then the Court must try those issues first and postpone the settlement of the issues of fact after the issues of law have been determined. There are at least two reported decisions of this Court which lay down that Rule 2 of Order XIV is mandatory. They are the decisions of Courtney--Terrell, C. J., in Janki Das and Another Vs. Kalu Ram and Another, and of Narayan, J., in P.C. Gangulee Vs. Sm. Kadhuri Devi, . It follows that where, however, the issue in question is not a pure issue of law, but an issue involving a mixed question of fact and law, the Court may decline to decide it as a preliminary issue. In other words, some harmony has to be maintained

between the provision contained in Order XIV, Rule 2 and the general principle that it is undesirable to try a case piecemeal. In *P.C. Gangulee Vs. Sm. Kadhuri Devi*, it was observed by Narayan, J., that the Court has first to be convinced that there is an issue on which the whole case can be dismissed, and that once the Court comes to the conclusion that there is a pure question of law to be decided as a preliminary issue in the case, it cannot decline to decide that issue as a preliminary issue on the mere ground that the Court does not favour disposal of suits on preliminary points. In *Janki Das and Another Vs. Kalu Ram and Another*, Courtney-Terrell, C. J., took the view that interlocutory orders are certainly matters of discretion of the lower court, but the discretion must be exercised in accordance with the proper principles of justice and with regard to the proper interpretation of the rules in question (and if it) has not been exercised according to judicial principles, then it is the duty of this Court to interfere.

7. Turning to the facts and circumstances of the present case, the position is shortly this. The plaintiff claims to be a registered partnership firm with six partners whose names have been disclosed as aforesaid. Section 69(2) of the Partnership Act would be a bar to the institution of the suit unless it is proved that this partnership firm was registered in accordance with the Partnership Act on or before the 18th March, 1969, which was the date on which the suit had been instituted. If this simple question of fact is decided against the plaintiff, then it will not be necessary for the Court to go into any other question which is in dispute between the parties. Chapter VII of the Indian Partnership Act provides for registration of firms. Section 58 lays down the procedure for the registration of a firm and a statement containing the prescribed particulars to be submitted to the Registrar of Firms for the purpose. It also requires that the statement in the prescribed form must be accompanied by the prescribed fee, which is provided in Schedule I as not exceeding Rs. 3/-. Section 59 is in these terms.

"When the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement."

Chapter VII of the Act also contains separate provisions in Section 62 for noting of changes in the names and addresses of partners, and in Section 63 for recording of changes in and dissolution of a firm. Evidently, the latter section deals with a reconstitution of a firm which has already been registered u/s 59. Under Sec. 63 a notice has to be given to the Registrar of such change in the constitution of a registered firm specifying the date thereof, and in Schedule I of the Act, the maximum fee payable for a notice u/s 63 is one rupee. I have referred to these provisions of the Act in order to show that the question is as to whether the action taken by the plaintiff in 1969 was in pursuance of coming into existence of a new partnership firm or of a mere reconstitution of the old firm which had been registered in 1955. This could be determined with reference

to the kind of statement or notice given to the Registrar as also the amount of the fee paid in that context. If it was a case of registration of a newly constituted firm, then the statement would be u/s 58 and the accompanying fee would be Rs. 3/-. On the other hand, if it was a case of mere re-constitution of an already registered firm, then the notice to the Registrar would be u/s 63 and the accompanying fee would be rupee one. In this Court the petitioners have asserted that entry in Serial No. 558 of 1969 in the Register of Firms maintained u/s 59 of the Indian Partnership Act, a copy of which has been appended as Annexure "4" to the supplementary affidavit filed on behalf of the petitioners, shows that the plaintiff firm was registered u/s 59 on the 22nd December, 1969 on the basis of the requisite statement filed on the 20th November, 1969, and the requisite acknowledgement of registration of firm granted by the Registrar of firm under the rules, a copy of which is Annexure "2" to the main revision application, shows that in that context the fee paid to the Registrar was Rs. 3/-, implying thereby that it was a case of a fresh registration as contemplated by Sections 58 and 59, and not one of a reconstitution of an existing registered firm as contemplated by Section 63 of the Act. It is, therefore, urged that the entire legal position would become clear merely from those public documents to enable this Court to decide whether the plaintiff was a registered partnership firm on the date of the institution of the present suit or not. To refute this contention it was contended by Mr. Harilal Agrawal appearing on behalf of the plaintiff opposite party that despite those public documents, upon which the petitioners rely, a question would arise as to whether or not the plaintiff firm had taken over the assets and business of the originally registered firm of 1955. In my judgment, there is no force in this contention of Mr. Agrawal. The reason is that even if a new registered firm takes over the assets and business of another firm, that cannot have the effect of transforming the new firm into the firm of which it takes over the assets and business. However, at the present moment I am not entering into a consideration of the question as to whether the present firm was registered for the first time on the 22nd December 1969 or not. That question must be left to be determined by the Court of the first instance. The point that I wish to emphasise is that no elaborate enquiry will be necessary for the purpose of determining the question as to whether the plaintiff was or was not a registered firm on the date of institution of the present suit as contemplated by Section 69(2) of the Act. Such an enquiry ought not, in my opinion, to be postponed for being taken up along with other questions of fact or law over which the parties are or may be at issue in the suit. The question which will be necessary for determining the issue of maintainability of the suit will involve an enquiry into the facts which will be entirely distinct from the question which will fall for determination of the cases of the parties on merits.

8. On merits, the Court will be required to decide whether the plaintiff has any outstanding dues against the defendants in connection with the transaction of supply and delivery of coal, or whether the defendants are entitled to receive any money from the plaintiff as asserted in the written statement. For dealing with

this question, the evidence will be entirely different from that required for dealing with the issue of maintainability of the suit. If the suit can be disposed of on the issue of maintainability alone, it would undoubtedly be futile to embark upon an elaborate inquiry into the merits of the plaintiff's claim against the defendants or into the merits of the counter claim of the defendants against the plaintiff. In connection with the counter claim of the defendants, a further consideration arises, namely, that they will have to pay court-fee on their counter claim, which will be wasted if it is ultimately held that the suit is not maintainable u/s 69(2) of the Indian Partnership Act and the defendants may have to take some other measure against the individual partners for recovery of their alleged dues as contained in Schedule B of the written statement. In my opinion, therefore, this is pre-eminently a case where in the ends of justice, the question of maintainability of the suit ought to be tried as a preliminary issue. The decision of the Court below not to take up this issue as a preliminary issue for trial on the mere ground that it is linked up with certain questions of fact does not represent a sound exercise of discretion in accordance with the principles of justice and fair play.

9. I should add that even in a case where the preliminary issue is one of pure Issue of law, as for example, whether the suit is barred by res judicata or not, some material has got to be brought on the record for the decision of the issue of law. It has never been suggested that an issue of res judicata should not be tried as a preliminary issue on the ground that it would be necessary to admit certain documents or judgments into evidence, likewise, a question as to whether a suit is or is not barred by reason of Section 69 of the Partnership Act, will require some materials to be brought on the record, in the shape of public documents and the registered deed of partnership But the determination of this issue as a preliminary issue cannot be refused merely on the ground that certain documents will have to be exhibited for the purpose.

10. Nor do I think that a prayer for determination of the issue of maintainability of the suit as a preliminary issue can legitimately be thrown out on the mere ground that that may lead to a piecemeal trial, because even in a case which falls strictly within the ambit of Order XIV, Rule 2 of the Code of Civil Procedure, the same consideration might apply, for, if an appellate court were to differ from the view taken by the trial Court on the issue of law involved for the determination of the question of maintainability of the suit, there will be a chance of remand and fresh decision of all the issues in the suit. Such case must, therefore, be decided upon its own facts and no general rule can be laid down as to whether an issue should be decided as a preliminary issue or not. In the instant case, I have already indicated that the decision on the question of maintainability of the suit depends upon materials entirely distinct from those which will be necessary for the decision of the suit on merits and that it will result in unnecessary harassment to the parties by requiring them to lead elaborate evidence on the merits of the case, if it is ultimately found that the suit itself is not maintainable u/s 69 of the Partnership Act.

11. For the reasons which I have given above, I set aside the order of the Court below as contained in paragraph 3 of the order dated the 12th July, 1971, and direct the trial Court to decide the issue of maintainability of the suit as a preliminary issue. The application is, accordingly, allowed; but in the circumstances of the case, there will be no order as to costs.