

(1990) 08 CAL CK 0048
In the Calcutta High Court
Case No : F.M.A. No. 1106 of 1990

Naresh Chandra Das

APPELLANT

Vs

Gopal Chandra Das

RESPONDENT

Date of Decision : 23-08-1990

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Order 14 Rule 2
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 14 Rule 2

Citation : AIR 1991 Cal 237 : 95 CWN 564

Hon'ble Judges : S.S. Ganguly, J;S.P. Rajkhowa, J

Bench : Division Bench

Advocate : Ashoke Banerjee and Ms. Sanghamitra Nandi, for the Appellant;
Bidyut Banerjee and Miss Shila Sarkar, for the Respondent

Judgement

S.S. Ganguly, J.—The facts leading to the present appeal may be summarised as follows:--

Admittedly the parties have been running a partnership business in the name and style of Kalpataru Electric and Electronics at Bijpur within the district of North 24 Parganas. The plaintiff-appellant filed Title Suit No. 534 of 1988 in the Court of 1st Assistant District Judge, Barasat, North 24-Paraganas alleging that another business of the name of "Audio Vision" being run at Kalyani within the Civil Procedure Code, , district of Nadia was started as the branch of the partnership business at Bijpur with capital supplied from its funds and assets supplied from its stock. The appellant prayed for a declaration in the suit that the business at Kalyani was also partnership business and/ or joint property and business of the parties and consequential reliefs. The contention of the defendant-respondent as per his written statement was that the business at Kalyani was started by him alone with his own money and that it exclusively was his own business separate from the partnership business at Bijpur. He also challenged the maintainability of the suit at Barasat Court since the property in dispute was situated at Kalyani within the district of Nadia.

2. The respondent also filed an application under O. 14, R. 2 of the Civil P.C. urging the learned trial Judge to frame and try the question of jurisdiction as a preliminary issue. The prayer was opposed. However, the learned trial Judge framed an issue on the point of jurisdiction and after hearing the parties decided that he had no jurisdiction to try the suit and he directed the appellant to take back the plaint. Hence, this appeal.

3. It is urged from the side of the appellant that Order 14, Rule 2 of the Code permits the Court to try an issue of law only and not a mixed issue of law and fact. It is argued that the learned trial Court made a mistake by deciding the issue on jurisdiction which could not be decided in this case without entering into the question as to whether the disputed business at Kalyani was a branch of the partnership business at Bijpur which was a question of fact pure and simple and which required consideration of evidence to decide it which was not permissible under O.14, R. 2 of the Code. It is also urged that by deciding that the business at Kalyani was not a branch of the partnership business at Bijpur, the learned trial Judge has practically disposed of the suit on merits which he had no jurisdiction to do while disposing of an application under O.14, R. 2 of the Code. It is urged on the other hand from the side of the respondent that it is permissible to take into consideration facts of the case for deciding the issue on jurisdiction and that, therefore, the learned trial Judge made no mistake by taking into his consideration the materials on record in deciding the issue on jurisdiction as a preliminary issue.

4. The only question which arises for decision in this appeal is as to whether the learned trial Judge was justified in entering into the disputed facts of the case in deciding the issue on jurisdiction as a preliminary issue under O. 14, R. 2 of the Code.

5. As per O. 14, R. 1 of the CPC issues are of two kinds, namely, issues of fact and issues of law. Issues of facts are propositions of fact asserted by a litigant to make out his right to sue or defence and denied by the other side. Similarly issues of law are propositions of law asserted by one party and denied by the other. Legal circles recognise a third kind of issue, namely, a mixed issue of law and fact which comprises propositions of law and fact inextricably tied up with each other in such a manner so that one of them cannot be decided without deciding the other though both of them have to be decided to find an answer to the issue. Order 14, Rule 2 of the Code lays down the provisions regarding the trial of preliminary issues. The Civil P.C. (Amendment) Act of 1976 effected some changes to Order 14, Rule 2 of the Code. Order 14, Rule 2 as it stands after the amendment runs in the following way -

"Court to pronounce judgment on all issues.

2. (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(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 an issue of law only, it may try that 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,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

6. The amended O.14, R. 2 confers a discretion on the Court to try only an issue of law relating to jurisdiction or bar of suit as a preliminary issue. The leading case on O.14, R. 2 is Major S.S. Khanna Vs. Brig. F.J. Dillon, which laid down the law as under (at pp. 502-03) :--

"Under Order 14, Rule 2 where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for the 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. 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 lop-sided trial of the suit."

7. True, this is a decision on the pre-amendment O.14, R. 2. That, however, hardly makes any differences since the pre-amendment O.14, R. 2 applied to all issues of law compulsorily whereas the post-amendment O. 14, R. 2 also applies to issues of law only but exclusively relating to jurisdiction and bar of suit though at the discretion of the Court. The decision in Major S.S. Khanna Vs. Brig. F.J. Dillon, therefore, applies not only to the pre-amendment but to the post-amendment Order 14, R. 2 as well with full force. That is why this decision has been cited and followed by the High Courts throughout the country including this High Court both before and even after the post-amendment O.14, R. 2 came into force. Thus in Estrela Batteries Ltd. Vs. Modi Industries Ltd., , Bairagi Ch. Das Vs. Kartik Chandra Das and Others, ; Madhabananda Ray and Another Vs. Spencer and Company Ltd., ; Cheni Ram and Another Vs. Shanti Devi and Another, ; Daljit Singh Vs. Joginder Singh Sekhon, Mahima Ranjan v. Madan Mohan, (1980) 84 Cal WN 426 and Mahabir Prosad Lilha Vs. Biswanath Kothari and Others, following the principles laid down in Major S.S. Khanna Vs. Brig. F.J. Dillon, it has been held that only issues of law -- and after the amendment those relating to jurisdiction and bar of suit only -- may be tried as preliminary issues under O. 14, R. 2 of the Code, it was also held that issues of fact and mixed issues of law and fact cannot be decided as preliminary issues.

8. What is an issue of law? It has been very ably stated in *Daljit Singh Vs. Joginder Singh Sekhon*, that normally if answer to an issue is determinable on the basis of some principle of law, that issue is an issue of law. An issue of law does not, however, float in thin air. Such an issue may arise only in the background of facts which may be disputed or not disputed. Where the facts are disputed and law can be applied only after the disputes of fact is resolved on consideration of evidence, the issue becomes a mixed issue of law and fact.

9. Order 14, Rule 2, as we have seen just now, permits the Court to try an issue of law only and not also a mixed issue of law and fact. It is because of this that it has been observed in *Ram Babu Singhal Enterprises (P.) Ltd. Vs. Digamber Parshad Kirti Parshad*, that an issue under O.14, R. 2 should be such as instead of requiring a detailed evidence to be looked into may be decided on admitted pleadings even before the evidence is led. Similar is also the observation in *Daljit Singh Vs. Joginder Singh Sekhon*, where it is said that if the parties want to lead evidence on an issue that issue ceases to be an issue of law. In *Mitsubishi France Vs. Neyveli Lignite Corporation Ltd. and Another*, the learned trial Judge declined to decide the issue of jurisdiction as a preliminary issue on the ground that the question of jurisdiction was a mixed question of fact and law. The appellate Court observed:

"Turning to the order under appeal, we are not in a position to accept the reasons of the learned Judge. After all if the point of jurisdiction is held in favour of the appellant, he need not undergo the ordeal of trial. No doubt, it may be a mixed question of facts and law. Nevertheless, where in the event of the appellant succeeding on this issue, it could avoid the ordeal of trial, certainly it is not only desirable but also just that this issue be tried as a preliminary issue."

10. With all respect to the Hon"ble Judges who delivered this judgment, we find it very difficult to agree with the view that they have taken in this passage. In view of the provisions of O.14, R. 2 and the clear dictum to the contrary in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, we do not see how can we hold that a mixed issue of fact and law can be tried as a preliminary issue, although that may be convenient to the parties to the proceeding. In this case, namely, *Mitsubishi France Vs. Neyveli Lignite Corporation Ltd. and Another*, the point relating to jurisdiction was contained in Cl. 18 of the suit-contract which neither party could disregard. The fact in this case was not really disputed as such and the issue of jurisdiction here perhaps could not be called a mixed issue of law and fact at all. In *Ghatmal Champala Vs. Amaravathi Dyeing Private Ltd.*, following *Sowkabai Pandharinath Rajapurkar Vs. Sir Tukojirao Holkar*, and *Narayan Glass Works v. Beni Prasad* AIR 1951 Ajm 57 1 it was held that where the question of returning the plaint for want of territorial jurisdiction is involved and the evidence on, that question can be conveniently separated from the rest of the evidence and the finding on that question may not render the trial of the other issues unnecessary, it is always safe to decide the said question or issue since that would save unnecessary expenditure and waste of time on the side of the parties in case the

finding on the issue is against the plaintiff. Technically this certainly will be a permissible procedure since O. 14, R. 2 does not prohibit consideration of evidence even on the question of jurisdiction and bar of suit also.

11. The law in this regard may, therefore, be summarised as follows:--

Under Order 14, R. 2 the Court may only try an issue of law relating to jurisdiction and bar of suit as a preliminary issue provided that issue may be separated from the facts constituting the cause of action of the suit or the defence taken therein and provided further that evidence on that issue can be separated from the rest of the evidence, required to be adduced to establish the cause of action or the defence and all questions relating thereto.

12. What is the situation in the case at hand? As stated above the parties clashed on their assertions as to whether the business at Kalyani was a branch of the partnership business at Bijpur or not. On the decision of this question depends the decision on the point of jurisdiction since it is not disputed that the Court at Barasat will have jurisdiction to try the suit in case the business at Kalyani is in fact a branch of the partnership business at Bijpur. Whether the business at Kalyani is a branch of the business at Bijpur or not is purely a question of fact. And since the question on the point of jurisdiction cannot be decided without deciding the question as to whether the business at Kalyani is a branch of the partnership business at Bijpur or not, the question of jurisdiction in this case must be treated as a mixed issue of law and fact. The learned Court below also appreciated this position. At the beginning of his finding he states the position thus:--

"During the hearing of this preliminary issue this Court is not going to consider the merits of the suit as to whether the disputed business is a partnership business as claimed by the plaintiff or a proprietorship business of the defendant." (vide page 5 of the certified copy).

13. He contradicts himself a few lines below by saying ".....yet for the purpose of deciding the preliminary issue regarding the question of jurisdiction the plaintiff must satisfy this Court that disputed business styled as "Audio Vision" is a Branch Partnership business under Head Office styled as "Kalpataru Electric and Electronics". Putting the onus on the appellant in this way the learned Court below proceeded to consider the materials on record and ultimately concluding that the business at Kalyani is not a Branch Partnership business of the business at Bijpur concluded that he had no jurisdiction to try the suit. Thus in the course of his judgment the learned trial Judge practically contradicted himself. He started by saying that he would not enter into the question as to whether the business at Kalyani was a branch of the business at Bijpur; but he actually entered into that question and came to his conclusion on the materials on record not proved or exhibited according to law as yet. This decision of his cannot be supported; for, as stated above the issue of jurisdiction in this case was a mixed issue of law and fact and, therefore, the learned Court ought not to have taken

up this issue for decision as a preliminary issue. The question as to whether the business at Kalyani was a branch of the partnership business at Bijpur was the main point of controversy between the parties and this controversy could not be settled without entering into the evidence adduced by the parties. In this case this main question in controversy between the parties was decided by the learned Court below without giving the parties an opportunity to establish their respective cases by producing their evidence. From what has been stated above it also becomes quite clear that the issue on jurisdiction in this case could not be separated from the material facts of the case which formed the cause of action of the suit and further that it would also not have been possible for the parties to adduce evidence on this issue which had nothing to do with the other facts constituting the merits of the case. The procedure adopted by the learned trial Judge and the conclusion arrived at by him cannot, therefore, be supported, being contrary to the letter and spirit of the provisions of O.14, R. 2 of the Code.

14. In view of what has been stated above the present appeal must succeed and we allow it accordingly. In the circumstances stated it is hereby ordered that the Order No. 24 dated 21-2-1990 passed by the learned 1st Assistant District Judge, Barasat in Title Suit No. 534 of 1988 is hereby set aside. The learned trial Judge is hereby requested to frame issues in the suit including one regarding jurisdiction and to dispose of all the issues at one and the same time. In case, the same learned trial Judge is still continuing in the post he may, if he feels embarrassed, request the learned District Judge, North 24-Paraganas to transfer the suit from his Court to some other Court of Assistant District Judge at Barasat.

S.P. Rajkhowa, J.

15. I agree.

16. Appeal allowed.