

(1993) 09 KL CK 0011
In the High Court Of Kerala
Case No : C.R.P. No. 2564 of 1992

S. Kalimuthu

APPELLANT

Vs

M. Kanji

RESPONDENT

Date of Decision : 13-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 14 Rule 3, Order 14 Rule 4

Citation : (1993) 2 KLJ 909

Hon'ble Judges : K. P. Balanarayana Marar, J

Bench : Single Bench

Advocate : V. Giri, for the Appellant; K. Jayakumar, for the Respondent

Final Decision : Allowed

Judgement

K. P. Balanarayana Marar, J.—Revision is directed against an order refusing to frame an additional issue in an original suit. Plaintiff is the revision petitioner. The suit O. S. 213/90 before the Munsiff, Devikulam was filed by him against the respondent for realisation of arrears of licence fee in respect of a building which is alleged to have been entrusted to respondent on agreeing to pay a licence fee of Rs. 10/- per day. Defendant claimed to be a lessee on a monthly rent of Rs. 275/-. One of the issues framed reads:

Whether plaintiff is entitled to any amount by way of arrears of licence fee as claimed in the suit?

Before filing of the present suit defendant had filed a suit as O. S. 175/87 before the same court seeking a prohibitory injunction restraining the plaintiff herein and another from entering the room. In that suit defendant claimed to be in possession of the building as a lessee. Plaintiff resisted that suit and contended inter alia that defendant was only a licensee and not a lessee. The trial court decreed the suit. An appeal was preferred against that decision as A. S. 34/79. The appeal was decided since the filing of the present suit. The appeal was allowed and in reversal of the decision of the trial court O. S. 175/87 was

dismissed. It was thereafter that revision petitioner moved the court below for getting an additional issue framed as to whether the claim of the defendant is barred by res judicata on account of the decree in O. S. 175/87 and the decree in A. S. 34/89. The request for framing additional issue was rejected by the court below finding that the matter in issue is not directly and substantially in issue in the earlier case and that there is no necessity to frame such an issue in the present suit. Aggrieved by that order plaintiff has come up in revision.

2. Heard counsel.

3. In the earlier suit defendant claimed to be a lessee and sought a permanent injunction to restrain plaintiff herein from entering the building and interfering with his possession. Though the trial court found in favour of the defendant the appellate court reversed that decision and dismissed the suit. The decision of the appellate court was rendered after the filing of the present suit for realisation of licence fee. The claim is made on the basis that defendant is holding the building as a licensee. The arrears of licence fee are sought to be realised by the present suit. The plea of the defendant is that he is a lessee and not a licensee. It was on that plea that he sought an injunction in the earlier suit O. S. 175/87 which on appeal was decided against him. Plaintiff therefore wasted an additional issue to be framed as to whether the plea of the defendant that he is a licensee is barred by the decision in the earlier suit and the appeal there from. The court below declined to frame this issue for the reason that the issue did not directly and substantially arise in the earlier suit. This finding of the court below is assailed by the learned counsel for the petitioner who points out that the issue whether defendant is a lessee or a licensee arose in the previous suit and arises for consideration in the present suit also.

4. Plaintiff - petitioner had not sought amendment of the plaint since the determination of the dispute in A. S. 34/89. The plea of res judicata is therefore absent in the pleading. It is therefore contended by learned counsel for the respondent that framing of an issue is not possible. Issues are to be framed only in respect of those material facts which have been alleged by one party and either affirmed or denied by the other. A material proposition as per rule 1 of Order XIV C. P. C. is a proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each such material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. The materials from which issues may be framed are incorporated in rule 3 of Order XIV. They are : (i) Allegations made on oath by the parties or by any persons present on their behalf or made by the pleaders of such parties; (ii) allegations made in the pleadings or in answers to interrogatories delivered in the suit, and (iii) the contents of documents produced by either party.

5. The materials mentioned in the rule are intended to enable the court to ascertain the contentions of the parties and to determine the points which are in issue. The rule enables the court to apply its mind to the contents of documents

also before framing issues To facilitate the court for the proper framing of the issues provision is made in rule 4 of Order XIV to compel the attendance of any person for examination or the production of any document. On a combined reading of rules 3 and 4 of Order XIV it is thus clear that the court can look into the contents of a document and frame an issue there from even if the point is not raised in the pleadings. Wide powers are conferred under rule 5 to amend and strike out issues. That rule stipulates that the court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. This rule consists of two parts. Under the first part it is discretionary for the court to amend issues or frame additional issues whereas it is obligatory on the court under the second part to make such amendment of issue or to frame such additional issue if that is necessary for determining the matters in controversy between the parties. Even then the power under this rule is subject to the provisions of rule 3. In other words, a court cannot frame an issue on a point which does not arise out of the three classes of materials mentioned in rule 3. Wide powers are thus conferred on the court to amend the issues or frame additional issues at any time before passing of the decree. It is also obligatory on the part of the court to make all amendments or frame additional issues which are necessary for determining the matters in controversy between the parties. While making amendments or framing additional issues the court has to refer to the materials mentioned in rule 3 of Order XIV. In case one or other of the materials mentioned therein is available it is competent for the court to make amendment or frame additional issues on that basis.

6. Rule 3 enables the court to take into account- the documents produced by the parties besides the pleadings and replies to interrogatories and allegations made on oath while framing issues. Even if there is no clear pleading the court can raise an issue from the documents produced by the parties. In other words, the court is not confined to pleadings only. The court will be competent to frame an issue from the documents produced though a pleading is not raised either in the plaint or in the written statement.

7. Learned counsel for respondent has raised a contention that the court cannot enlarge the scope of pleadings so as to enable the court to raise an issue on a point not covered by the pleadings. Counsel has cited the decision of the Privy Council reported in A. I. R. 1950 PC 68 - Kanda v. Waghu. The Privy Council held that the determination in a cause should be founded upon a case to be found in the pleadings or involved In or consistent with the case thereby made. This decision cannot be taken as an authority for the proposition that the court cannot go beyond the pleadings to determine the point in controversy between the parties. What has been held is only that the determination should be founded on the case pleaded by the parties or involved in or consistent with the case thereby made. The determination has to be made by the court on the basis of the points in controversy in respect of which issues are to be framed. While framing issues

the court has to look into some materials which are provided in rule 3 of Order XIV. When rule 3 specifically enables the court to frame issues from all or any of the materials mentioned therein it is competent for the court to frame an issue from the contents of the documents produced by either party which is one of the materials enumerated therein. Learned counsel for revision petitioner is therefore right in his submission that an issue can be framed on the contents of the documents produced by plaintiff. The additional issue sought to be raised in this case is one of res judicata. The parties are at issue on the question whether the entrustment of the building in favour of the defendant partakes the character of a lease or whether it is only a licence. The claim in the suit is for arrears of licence fee whereas defendant has set up a plea of lease and contends that what is payable is rent. This dispute has to be resolved in the suit in order to give relief to plaintiff. Identical question had come up for consideration in the earlier suit filed by the defendant. The appeal against the decree in that suit was decided since the filing of the present suit. A determination of the question is stated to have been made therein. It is for that reason that plaintiff wanted an issue of res judicata to be framed after producing a copy of the appellate judgment. It may be true that the plea of res judicata being in the domain of procedure the party who relies on that plea has to raise the same in the pleading on the basis of which an issue has to be framed. But when all the requisite facts and the necessary documents for ascertaining the point are before the court it will be competent for the court to frame an issue of res judicata on the basis of such facts and documents. All the more so in a case where the earlier suit was decided during the pendency of the subsequent suit. For determining the matters in controversy between the parties it is therefore necessary to frame an additional issue on the plea of res judicata based on the judgment of the appellate court in A. S. 34/89. The court below has therefore exercised its jurisdiction with material irregularity in refusing to frame the additional issue. The impugned order is liable to be set aside.

In the result the revision is allowed and the impugned order is set aside. The court below is directed to frame the additional issue sought to be raised by the plaintiff and proceed to dispose of the suit in accordance with law after framing that additional issue. No costs.