(1921) 05 AHC CK 0027

Allahabad High Court

Case No: None

Firm Kirpa Ram Sita Ram		APPELLANT
	Vs	
Firm Mangal Sen Bishan Mal		RESPONDENT

Date of Decision: May 16, 1921

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 20

Citation: AIR 1922 All 367 : 65 Ind. Cas. 93

Hon'ble Judges: Walsh, J; Wallach, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

1. This suit was brought in Cawnpore against three persons who were alleged to be carrying on business in Cawnpore. They were sued as defendants upon the record by the following description: Lala Mangal Sen, Bishan Mal alias Bishambhar Nath and Banarsi Das, proprietors of the firm of Banarsi Das and Co., Delhi, and of Mangal Sen Bishambhar Nath of Cawnpore at present residing at Delhi. The question was raised at once, and the learned Judge decided in favour of the defendants, that the Cawnpore Court had no jurisdiction. The plaintiff contended that the contract was both made and to be performed in Cawnpore. The learned Judge decided that question against him We think there is nothing in this point. We have seen the contract. It was clearly made in Delhi with the firm Banarsi Das of Delhi. That, however, does not dispose of the question of jurisdiction. Section 20, Civil Procedure Code, provides that a Suit may be instituted in a Court within the local limits of whose jurisdiction each of the defendants, where there are more than one at the time of the commencement of the suit, actually carries on business, secondly, and in the alternative, within the limits of whose jurisdiction any of the

defendants at the time of the commencement of the suit carries on business, provided that in such case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. The learned Judge, therefore, had to decide whether these three people, sued not in a firm''s name but as individuals and proprietors of the contracting firm in Delhi and also proprietors of the other firm in Cawnpore, carried on business in Cawnpore, or whether if one of them did, there was any reason why he should not give leave for the suit to be brought in Cawnpore. We recognise that in the case of firms carrying on business in different parts of the country or of the Province, sometimes constituted of the same people, sometimes constituted with the omission of one person who has no interest in a branch business in one of the towns, or with the addition of a new person who has an interest confined only to that branch business, it is often extremely difficult to make up one''s mind whether the firms or persons so carrying on business are really the same legal entity or person in each plate, but, however difficult it may be, it is a duty imposed upon a Court to analyse the facts as thoroughly as it can and to arrive at a determination, and it is a duty important in the public interest, because, without expressing any opinion as to the individual merits in this case, it cannot be denied that creditors are constantly kept at arm''s length, just rights are defeated and the machinery of the Courts is abused by persons who disguise themselves under the mask of a pseudonym for the purpose of concealing their identity and imposing upon the credibility of those who believe in them. It is not possible to lay down any clear rules for guidance on what is really a question of fact in each case. The best guidance that a Judge can follow is his own common sense and experience of business matters. Take for example the case of the Dunlop Co., who sell tyres all over the world. Probably in the great majority of, if not in all cases, they sell to their sub-agents who dispose of the Dunlop goods to the public, for example in India, and it would be very difficult to show that the Dunlop people carried on business within the meaning of the section in any town in which their sub agents for that purpose were selling Dunlop tyres. On the other hand, to take a very familiar illustration given during the argument, the well-known refreshment contractors, Messrs. Kellner and Co, would have considerable difficulty, we should say, in persuading a Court that they did not carry on business in Allahabad where they have a refreshment room and sell goods, even although it might happen that their manager in Allahabad was made a partner in respect of the Allahabad business and took a share in the profits.

2. We have made these general observations with a view, if possible, of assisting the Court which has to determine the issues which we are going to send down, which we hope will dispose of this knotty point.

3. According to the view of the learned Judge, up to the date of the first order the defendants, although members of both the Delhi firm and the Cawnpore firm, were members of a separate and distinct business in Cawnpore by reason of the fact that an additional partner was a member of the firm in Cawnpore, namely, one Jugal Kishore, and at one time, he distinctly held that the firm of Mangal Sen Bishambhar Nath was not a

branch of the firm Banarsi Das & Co., Delhi, But without being a branch in the sense that they were subordinate to and under the control of the Delhi firm and compelled to render an account to the Delhi firm, they might still be in substance the same business so as to make the present defendants carry on business in Cawnpore, if they were transacting the business of the Delhi firm in Cawnpore as agents for the Delhi firm, purchasing goods and selling goods and obtaining orders, forwarding or receiving orders to and from Delhi and merely remunerating themselves by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions. One sentence alone with regard to this matter in the learned Judge"s judgment has entirely shaken our confidence in what he intended to find. He said as follows: "The business of Jugal Kishore Bhagwati Prasad is practically carried on in the same premises" ("practically" is always a dangerous word to use when you are finding facts, because it suggests a modification or doubt as to the real finding which you are intended to arrive at), "in which the business of Mangal Sen Bishambhar Nath is carried on." It is quite possible that Jugal Kishore might have been carrying on the business of the firm of Jugal Kishore Bhagwati Prasad and might also have been disposing of the goods of Mangal Sen Bishambhar Nath. No doubt that is a possibility if Jugal Kishore was really engaged in a business totally distinct from Mangal Sen Bishambhar Nath, selling a different class of goods altogether which could not in any way compete with Mangal Sen Bishambhar Nath, but there is nothing in the judgment of the learned Judge to suggest that the business was of a different kind of goods and the presumption is that a man, expert in a particular trade, does not waste his energies upon enterprises of a totally different character and if Jugal Kishore carried on business in the same kind of goods, it seems inconceivable that he should be at the same time carrying on a business of his own on behalf of himself and one Bhagwati Prasad in the same place in direct competition with Mangal Sen Bishambhar Nath, if he was also a member of that firm. The suggestion that one man could be possibly allowed, even if he was able to do it, to carry on two businesses of the same kind and on the same premises in competition with on a another, is so extravagant that it seems there must be some defeat in the language which the learned Judge has used.

4. Similarly the learned Judge his used language which makes us doubt whether he has really appreciated what "carrying on business" mans. "Carrying on business" is used in the section as distinct from personally working; of course a man personally working in a particular place is carrying on business, but a man may carry on business, and thousands of people do, in a place where he does no personal work of any kind, and these defendants may be carrying on business at Cawnpore either through an agency or through a manager or by their servants, without ever haying left the town of Delhi, The learned Judge seems to think that carrying on business in this section involves some personal presence or personal effort in Cawnpore. That is not the law and he ought to disregard the question altogether. "Carrying on business" meant, in this section, having an interest in the business transactions at the particular place; a voice in what is done; a share in the gain or loss, as the case may be; and some control, if not over the actual method of working, at any rate, upon the existence of the business.

5. Secondly, the learned Judge has, in the plainest way, intimated that, in his opinion, the mere fact that Mangal Sen Bishambhar Nath have been selling their goods in the bazar, is not "carrying on business." We" really do not quite know what the learned Judge had in his mind. Selling is the most important part of a business, if you want to make any profit at all. Carrying on business necessarily means making provision for the future. Indeed, for example, when a man reaches the stage of insolvency, he commits an offence against the insolvency laws unless he winds up his affairs, that is to say, if he goes on incurring liabilities and incurring losses when he is unable to pay his debts. But nobody can say that, if with a view to winding up his business and preventing any further losses and committing a breath of the insolvency laws, he proceeds to dispose of his stock, he would not still be carrying on business. Winding up or disposing of your goods with a view to winding op, is just as much carrying on business while it lasts, as purchasing your goods or investing your capital in carrying on business. The learned Judge has persuaded himself that there is not the slightest evidence on the record to show that the defendants or any of them had been carrying on the business of that shop, because the most they were doing was selling of goods. This is a clear misdirection.

6. With these observations which we have made with a view, if possible, of clearing the ground and assisting the learned Judge to arrive at the conclusion necessary for the disposal of this case, we refer the following issues:

(1) Was the firm in Cawnpore at the date of the contract owned by the members of the firm of Banarsi Das & Co. Delhi, together with or without the addition of Jugal Kishore?

(2) Was the firm in Cawnpore started by the members of the Delhi firm for the development of their Delhi business?

(3) If Jugal Kiashore was a partner in the Cawnpore business, did he become so by way of payment for his management of it in Cawnpore or how otherwise?

(4) Did the Cawnpore firm deal in the identical articles imported by the Delhi firm for their business? If so, how were they accounted for by Cawnpore to Delhi?

7. Either side may adduce any additional and material evidence. The usual ten days will be allowed far filing objections.

Judgment.

Walsh, J.

8. On the findings to the issues this appeal must be dismissed and the order of the Court below confirmed with costs.