

(2006) 11 GAU CK 0045

Gauhati High Court

Case No: None

Assam Tent and Tarpaulin
Industries

APPELLANT

Vs

Assam Small Industries
Development Corporation Ltd.
and Others

RESPONDENT

Date of Decision: Nov. 10, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 30 Rule 10

Citation: (2007) 2 GLR 351 : (2007) 1 GLT 118

Hon'ble Judges: B.D. Agarwal, J; A.H. Saikia, J

Bench: Division Bench

Final Decision: Allowed

Judgement

A.H. Saikia, J.

This Regular First Appeal is directed against the judgment and decree dated 25.8.2003 passed by the learned Civil Judge (Sr. Division) No. 3, Kamrup, Guwahati in Money Suit ("M.S.") No. 215/01.

2. The facts of the case briefly stated are that the appellant as plaintiff filed a money suit above mentioned against the defendants/respondents for realization of sum of Rs. 7,50,854 being the value of supply items inclusive of Assam General Sales Tax at the rate of 8% together with compound interest of 18% per annum on the said amount wherein the name, description and place of residence of the plaintiff was mentioned as under:

M/s Assam Tent & Tarpaulin Industries, a Proprietorial concern of Smti. Sarita Borar, W/o Shri Mool chand Borar, having it's administrative office situated at First Floor, Dugar Building Jail Road. Guwahati-781001 (Assam) Represented by Shri Moolchand Borar.... plaintiff

3. The defendants contested the suit by filing their written statement wherein, inter alia, in paragraph No. 1, they averred that the suit was not maintainable in its present form without narrating any details to support the said statement in succeeding paragraph.

4. After going through the pleadings of the parties so exchanged by and between them and also after hearing the learned Counsel for the parties, the learned Judge framed as many as four issues which were as under:

1. Whether the suit is bad for non-joinder of necessary parties ?

2. Whether the suit is barred by limitation ?

3. Whether the plaintiff is entitled to get a decree for realization of Rs. 11,96,701 from the defendant No. 1 ?

4. What other relief/reliefs the parties are entitled to ?

5. Eventually, having carefully considered the arguments put forward by the learned Counsel for the parties and also on proper appreciation of the materials available on record including the evidence of witnesses and relevant documents exhibited, the learned Judge decided all the issues except Issue No. 4, as mentioned above, in favour of the plaintiff/ appellant. Basically Issue No. 3 was decided holding that the defendant/ respondent No. 1, Assam Small Industries Development Corporation Limited, Bamunimaidan Guwahati was liable to pay an amount of Rs. 7,50,854 to the plaintiff/appellant. However, the Court refused to grant relief against Issue No. 4 to the appellant relying upon Order 30, Rule 10 CPC opining that the plaintiff was not entitled to get a decree for the realization of the amount mentioned above under the above referred provision of law as Smti. Sarita Borar who instituted the suit in the name of her firm above mentioned could not sue in the name of the firm as the plaintiff was itself a Proprietorial firm and the said Smti. Sarita Borar was the Proprietor of the said firm.

6. The fundamental question raised in this appeal is that whether the plaintiff/appellant can be deprived of from realizing the sum of Rs. 7,50,854 liable to be paid by the respondent No. 1, as held by the trial court, on the count that the plaintiff firm cannot sue the respondents as defendants as being the Proprietorial firm of which one Smti. Sarita Borar was the Proprietor as per Order 30, Rule 10 C.P.C.

7. We have heard the extensive arguments advanced by Mr. N. Choudhury, learned Counsel appearing for the appellant as well as Mr. H. Deka, learned senior counsel assisted by Mr. M. Islam, learned Counsel representing the respondents.

8. For the sake of convenience, the provision of Order 30, Rule 10 may be quoted as under:

10. Suit against person carrying on business in name other than his own. - Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly.

9. An ordinary reading of the above provision of procedural law would go to show that any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name.

10. Relying the above provision of law, Mr. Choudhury has vehemently submitted that the procedural law, being hand-mads of justice. Order 30, Rule 10 CPC nowhere bars filing of a suit by a Proprietor in the name of his other trade name or in the name of his or her Proprietorial firm name. It is contended that the learned Judge dismissed the suit on a non existence issue because no such issue as to whether the plaintiff being a Proprietorial firm can sue was ever framed and accordingly the suit was dismissed without giving any opportunity of being heard on the basis of such non-existence issue,

11. His stand is that since the name in which the suit was instituted was merely on misdescription of the original plaintiff, the learned Judge ought to have permitted the plaintiff to amend the suit to be instituted in the name of real plaintiff when deciding the main issues in favour of the appellant. In support of his submission, the learned Counsel for the appellant has relied on a decision of the Apex-Court reported in [Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon](#), it was held as under:

8. Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted.

12. Supporting the findings of the trial court, Mr. Deka, the learned senior counsel, has contended that the trial court justifiably and rightly dismissed the suit as the plaintiff, being a proprietorial firm, cannot sue the defendants when the proprietor was one Smti. Sarita Borar in terms of Order 30, Rule 10 CPC which specifically fetters filing of such suit when it is permitted that such Proprietorial firm may be sued. According to him, the instant suit wa -, filed in the name of the trade and not by the sole Proprietor representing the said trade running in the name and style of M/s. Assam Tent and Tarpaulin Industries is itself fatal and as such no wrong was committed by the trial court in refusing to grant any relief to the plaintiff following the provision of Order 30, Rule 10 CPC. To bolster up his submission, he has relied on a decision of the Division Bench of this High Court reported in (1998) 1 GLR 406 Auto Engineering Works v. Bansal Trading Co. wherein this court while dealing with the provision of Order 30, Rule 10 CPC, held in paragraph 11 that since the suit filed

in the trade name and not by the representative or sole Proprietor of the business i.e. in the name and style of M/s Auto Engineering Works, was fatal.

13. Having given our thoughtful consideration to those arguments placed before us on behalf of the rival parties and also after carefully going through the provision of Rule 30, Order 10 CPC, we find that no embargo has been imposed by the said provision as regards filing of a suit by the plaintiff/proprietor in the name of the Proprietorial firm. It is an enabling provision permitting such firm to be sued as defendant. It is crystal clear from the language used in the provision itself that by the phrase "may be sued", it means and permits a firm to be sued.

14. Assuming this provision itself puts a restriction in filing a suit in the name of the firm and not in the name of the Proprietor himself or herself as held by the trial court, the same, being a procedural one, is curable and it can be regularised by allowing the plaintiff by correcting the name of the plaintiff in its proper form. However, the question of such amendment would come only when it is accepted that Order 30, Rule 10 CPC exclusively prohibits instituting a suit by the Proprietor in the trade name. This court does not see such bar prescribed in the said provision.

15. What happened in this case is that no issue of such nature as regards the maintainability of the suit on being filed in the name of the firm and not being in the name of the person concerned who is the Proprietor of the firm, was framed by the trial court and hence no adequate and reasonable opportunity of being heard was ever afforded to the appellant when all the vital issues including Issue No. 3 were answered affirmative in favour of the plaintiff. Even the defendant/respondent No. 1 was made liable for payment of the amount so claimed by the plaintiff. More important point that was lost sight of the trial court, was that in describing the name of the plaintiff, the name of the Proprietor was being duly reflected in the body of the plaint and the husband of the Proprietor was authorized to represent in the suit itself which clearly indicates that there cannot be any doubt as regards genuineness of the firm.

16. Accordingly, since the name of the Proprietor has also been disclosed and vividly reflected in the description of the name of the plaintiff in the plaint itself, we are of the firm opinion that the Proprietorial firm, i.e., M/s Assam Tent and Tarpaulin Industries has been properly identified by mentioning the name of Proprietor, Smt. Sarita Borar, wife of Sri Mool Chand Borar who has been authorized to represent the firm by exht. 1(1), Letter of Authority dated 14.12.2001 prior to filing of the suit on 18.12.2001. Hence we do not find the same to be fatal and with all respect, we are unable to persuade ourselves to agree with the views expressed in Auto Engineering Works's case (supra). The reason of our disagreement with the Engineering Works's case (supra) is that in the cited case the Proprietor's name was not mentioned and disclosed but in the case at hand the name of the Proprietor as well as the person who was authorized to represent in the suit was manifestly and apparently disclosed and demonstrated in the plaint itself. As such the facts herein differs with the factual

situation of the above cited case.

17. We, therefore, agree to hold that the plaintiff/appellant cannot be deprived of his legitimate claim/entitlement to realize the payment which was held to be due and payable by the defendant/respondent No. 1.

18. Consequently, we unhesitatingly hold that Order 30, Rule 10 CPC cannot operate as a bar for realization of the amount mentioned above, liable to be paid by the defendant/respondent No. 1 to the plaintiff/ appellant and the finding to the effect that " As the plaintiff is a Proprietorial firm and Sarita Borar is the Proprietor of the said firm, as such said Sarita Borar cannot sue in the name of her firm in view of the provision of Order 30, Rule 10 of CPC, as such the plaintiff is not entitled to get a decree in this suit for realization of the amount due and payable by the defendants" is accordingly set aside. The suit is, therefore, decreed by affirming and upholding all the findings save and except the one in regard to Issue No. 4, arrived at by the court below.

19. In the result, this appeal succeeds and stands allowed to the extent as indicated above.