

Supreme Enterprise Vs ACE 3 Marketing and Others

Court: Gauhati High Court

Date of Decision: Aug. 4, 2010

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 10 Rule 2, Order 14 Rule 1, Order 14 Rule 2, Order 14 Rule 2(2), 115

Constitution of India, 1950 – Article 227

Partnership Act, 1932 – Section 69(2)

Citation: AIR 2010 Guw 152 : (2010) 6 GLR 326 : (2011) 1 GLT 133

Hon'ble Judges: Utpalendu Bikas Saha, J

Bench: Single Bench

Advocate: S. Kataki, for the Appellant; A.K. Goswami and K.K. Dey, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

U.B. Saha, J.

The instant revision petition is filed by M/s. Supreme Enterprise, a proprietorship firm u/s 115 read with Section 151 of the

CPC and Article 227 of the Constitution of India for setting aside the order dated 10-6-2010 in Misc. (J) Case No. 305/2009 arising out of

Money Suit No. 97/2009 passed by the learned Civil Judge No. 1, Kamrup at Guwahati whereby and whereunder the learned Munsiff rejected

the prayer of the Petitioner, Defendant in the suit, for framing preliminary issue before framing other issues and also for disposal of the suit after

hearing the parties on the preliminary issue.

Heard Mr. S. Kataki, learned Counsel for the Petitioner, Defendant No. 2 in the aforesaid suit as well as Mr. A. K. Goswami, learned senior

counsel assisted by Mr. K. K. Dey, learned Counsel for the Opposite Party No. 1, who is the Plaintiff in the suit, at this motion stage.

2. The case of the Petitioner is as follows: The Respondent No. 1, M/s. ACE 3 Marketing a non-registered partnership firm instituted a Money

Suit being Money Suit No. 97/2009 through one of its partners, Sri Debasish Borkotoki in the Court of learned Civil Judge, No. 1, Kamrup

impleading the Petitioner as Defendant No. 2 as well as one Sri Prashanta Bora and the Director of the Directorate of Cultural Affairs,

Government of Assam were added as Defendants with a prayer for declaring that the Plaintiff-Respondent No. 1 is entitled to receive and the

Defendant Nos. 1 and 2 are jointly and severally liable to pay an amount of Rupees 18,81,784/- as outstanding dues against the completion of the

work of supplying and installation of sound reinforcement system in Rabindra Bhawan at Guwahati and also for recovery of the said outstanding

dues from the Plaintiff along with other prayers.

3. Upon receipt of the summons, all the Defendants in the suit appeared and the Petitioner-Defendant No. 2 in the suit filed a written statement and

thereafter by a separate application under Order XIV, Rule 2 read with Section 151 of the CPC (hereinafter referred to as "Code") made a

prayer for framing preliminary issue being the suit is barred due to provisions of Section 69(2) of the Indian Partnership Act, 1932 (for short,

hereinafter referred to as "Act"). The said application was taken up for hearing and upon hearing the parties, particularly the Plaintiff and the

Petitioner, the Court below vide its order dated 10-6-2010, which is impugned herein, rejected the said prayer stating, inter alia, that the suit

cannot be disposed of on framing preliminary issue as sought for.

4. Mr. Kataki while urging for admission of the instant revision petition and setting aside the impugned order after giving proper hearing, would

contend that learned Court below failed to consider the provisions of Sections 69(2) of the Act as well as Order XIV Sub-rule (2) of Rule 2 of the

Code.

5. This Court has gone through the plaint as well as the written statement filed by the present Petitioner. This Court has also perused the application

filed under Order XIV, Rule 2 read with Section 151 of the Code filed by the present Petitioner and the impugned order.

6. Upon perusal of the plaint, written statement, application for framing preliminary issues and the impugned order, this Court is of the considered

opinion that question arises for decision in the instant revision petition is as to whether preliminary issue can be framed by a Court in a suit upon

taking note of the pleadings of the parties without framing other issue even when question is raised about the jurisdiction of the Court and/or

provisions of law like Section 69(2) of the Act created bar to the suit.

7. It would be proper for the Court before issuance of notice upon the Respondents to examine whether any case is made out by the Petitioner

even for issuance of notice, in view of the impugned order passed by the learned Court below.

8. For such examination, it would be proper to reproduce the relevant portion of the provisions of Order XIV, Rule 1 and 2 of the Code.

Accordingly, the same is reproduced herein under:

1. Framing of issues : (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions 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.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statement, if any, and "(after examination under Rule 2 of

Order X and after hearing the parties or their pleaders), ascertain upon what material propositions of fact or of law the parties are at variance, and

shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the Defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issue.- (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.

9. From a bare reading of the aforesaid provision it appears that Rule 1 of Order XIV is relating to framing of issues and Rule 2 empowers the trial

Court to try and pronounce the judgment on all issues subject to preliminary issue, if any, framed on the question of either on jurisdiction of the

court or a bar to the suit created by any for the law time being in force, fall to determine the fate of the suit finally. If a suit can be finally decided on

hearing the preliminary issue then hearing on all other issues and pronouncement of judgment on those issues is not called for. Therefore, it can be

easily said that first all issues have to be framed and thereafter the preliminary issue is to be taken up for trying/hearing and if the suit can be finally

determined on decision in the preliminary issue then the Court can postpone the settlement of other issues. It further appears that power to decide

preliminary issue before deciding other issues is also a discretionary power of the Court, Court may or may not go for decision of the preliminary

issue first being the same is obligatory whereas the framing of all issues including the preliminary issue is mandatory in nature, more so, the Court

has no power to accept the prayer for framing preliminary issues either on jurisdiction of the Court or bar to suit created by any law for the time

being in force excluding the framing of all other issues, as the same is not the intention of the legislature.

10. In view of the aforesaid position, this Court is of the considered opinion that unless all issues including preliminary issue is framed in terms of

Order XIV, Rule 1 after filing and reception of the pleadings of the respective parties, being the same is mandatory, a preliminary issue cannot be

framed separately but once a preliminary issue has been framed along with other issues then the Court is under the obligation to decide the

preliminary issue first and if upon decision on the preliminary issue the suit can be decided finally then settlement of other issues can be postponed.

If the Court considers that mere decision on preliminary issue would not finally determine the suit then the Court can go for pronouncement of

judgment on all issues.

11. In Sub-section (2) of Section 69 of the Act it is stated, inter alia, that no suits 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, meaning thereby, that a bar is created for filing a suit by a unregistered firm. However, whether a suit is maintainable or

not is a question that has to be decided by the trial Court after hearing the parties on preliminary issue. Therefore, it would not be proper for this

Court to express any opinion in this order regarding the merit of the suit, though it appears from record that the Plaintiff firm is not a registered firm.

12. This Court is of further opinion that as the law does not prescribe for framing of preliminary issues divorce from all issues, the learned trial

Court did not commit any error or irregularity in rejecting the prayer for preliminary issue before framing all other issues involved in the suit and also

did not commit any material irregularity and/or illegality while rejecting the prayer for framing of preliminary issue before framing all other issues.

Rather the trial Court acted within its jurisdiction. Therefore, it would not be proper for this Court to exercise its jurisdiction either u/s 115 of the

Code or Article 227 of the Constitution of India.

13. In view of the above, the impugned order passed by the learned Court below is not required to be interfered with by this Court. For the

reasons stated above, the Petitioner even fails to make out a case for issuing notice upon the other Respondents.

14. Hence, the instant revision petition is rejected.

15. However, it is made clear that the rejection of the revision petition would not be a bar for the trial Court for framing all issues including the

preliminary issue, if any, and take the preliminary issue first for trying and then other issues for proper adjudication of the suit in question.