Hajee Sattar Hajee Peer Mahomad Vs Khusiram Benarsilal

Application in Original Suit No. 4019 of 1949

Court: Calcutta High Court

Date of Decision: Dec. 13, 1950

Acts Referred:
Limitation Act, 1908 â€" Section 22

Citation: (1952) 1 ILR (Cal) 153

Hon'ble Judges: Sarkar, J

Bench: Single Bench

Advocate: M. Hazra, for the Appellant;R.C. Deb, for the Respondent

Final Decision: Allowed

Judgement

Sarkar, J.
This is an application for amendment of the plaint. The suit is for damages for breach of contract. In the cause title, the Plaintiff is

described as ""Hajee Sattar Hajee"" ""Peer Mahomad, a firm"". It is alleged that Hajee Sattar Hajee Peer Mahomad is the name of an individual

carrying on business in his own name and with him the contract was made and the words ""a firm"" were inserted by mistake. By this application the

Plaintiff seeks only to delete the words ""a firm"" in the cause-title, leaving the rest of the plaint as it is.

2. The sole question is whether this is a case of correcting misdescription or that of adding a new Plaintiff in the place on the old one. If it is the

former, there can be no objection to the order being made, while if it is the latter, it must be refused, as in that case, u/s 22 of the Limitation Act,

this suit would then be deemed to have been instituted on the day the order is made and on that basis it would be barred by limitation. I seems, the

question under that section properly arises at the hearing of the suit, but, as the matter has been argued at some length, I had better express my

view of it.

3. Mr. Deb, opposing the application, argued that Neogi Ghose and Company v. Sardar Nehal Singh (1931) 35 C.W.N. 432, concludes the

matter. I am clear in my mind that, both on authority and on principle, that case requires reconsideration. I would first point out that, on the facts,

that case is no authority of any help in this case. That was a case where a Plaintiff carrying on business in a name other than his own had instituted a

suit in that name and then applied for amendment of the plaint by bringing in his own name in the place of his assumed trade name, the suit, as

framed, being clearly not maintainable. Buckland J. held that such an amendment was a case of substitution, i.e., really of addition of a new.

Plaintiff and not of the correction of a mere misdescription. The case before me is not of that kind at all. It is not a case of an individual trading and

suing in a name other than his own but of one trading in his own name and who has sued in that name but has unfortunately and mistakenly added

the description ""a firm"" in the plaint after his name. How can this be a case of substitution? The Plaintiff, before the amendment, was Hajee Sattar

Hajee Peer Mahomad, and after the amendment, the Plaintiff would remain the same. The Plaintiff says, ""I had said I was a firm ""but that is wrong,

for I am only an individual. Allow me to ""correct my mistake."" Mr. Deb said a man"s own name may become his firm name. I do not follow that at

all. A firm name is only another name of the proprietor, or the proprietors collectively, carrying on the business using that firm name. How can a

person carrying on business in his own name be said be trading in a firm name, for it is his own name and not mother name? To describe such a

name as the name of a firm (sic) business is clearly wrong. The present case is, therefore,--(sic) different from Neogi Ghose and Co"s case

(supra).

4. Now, what was the reason behind the decision in Neogi Ghose and Company v. Sardar Nehal Singh (supra)? Buckland J. did not give any

reasons of his own but simply adopted what Blackwell J. said in Vyankatesh Oil Mitt Company v. N.V. (sic) (1927) 30 Bom. L.R. 117, 120. In

that case, a co-partnership firm carrying on business outside what was then British India filed a suit in the firm name in a British Indian Court. Such

a suit was obviously untenable, for the CPC did not provide for such a firm to sue in the firm name. An application was later made, at a time when

a fresh suit on the same cause of (sic) would have become time-barred, for an amendment substituting the names of the individual partners as

Plaintiffs in the place of the firm name. Blackwell J., having first stated that, in law, a firm, as such, had no legal existence and that the Code only

allowed an action to be brought; by or against, a firm in the firm name in the cases where the persons constituting the firm carried on business in

British India, which statements are undisputedly correct, expressed himself as follows:

I am, therefore, of opinion that the suit is brought by an entity which has no existence in the eyes of Indian Law and there being no mode of

procedure whereby such an entity is permitted to sue in India, the suit as framed is, in my opinion, not maintainable at all, because it is brought by

an entity which has no (sic) existence at all.

5. On this opinion, he came to the conclusion that--

The amendment asked for cannot be treated as an amendment following upon a, mere description, but must be treated as an application for

substitution, as Plaintiffs, of the individual persons who compose the entity which the law does not recognise.

6. I find the greatest difficulty in following this reasoning. If the Plaintiff is a non-existent entity, it is clear that the amendment must be a case of

substitution, for, thereby, somebody else is put in the void existing by reason of the Plaintiff being nonexistent and it cannot be a case of

misdescription, for a thing which does not exist cannot be described at all. Indeed a suit filed in the name of a non-existent person is an untenable

suit and really no suit at all, for there is none who can be said to have filed it. And if a suit does not exist, there is of course no question of any

amendment".

7. But I do not understand how the suit before Blackwell J", was by a non-existent Plaintiff. Was it because it was a suit by a firm and a firm, as

such, has no legal existence? If this is so, then no firm can ever sue at all. But that would be absurd. Partners can of course sue as a firm. Even a

suit in the firm name is permitted by the Code in certain cases. Was it then suit by a non-existent person, because the suit was in the first name in a

case where such a suit is not allowed by the Code Again I do not see. It comes to this that a suit in a firm name is a suit by a non-existent Plaintiff

but if such a suit is permitted by the Code it becomes a suit by an existing person. This would be right only if the effect of Order XXX of the Code

is the incorporate certain firms. But it clearly does nothing of the kind. See Ex parte Blain. In re. Sawers (1879) 12 Ch. D. 522, 533 per James L.J

So Farwell L.J. said in Sadler v. Whiteman (1910) 1 K.B. 868, 889:

In English law a firm as such has no legal existence partners carry on business both as principals and as agents for each other within the scope of

the partnership business the firm name is a mere expression, not a legal entity, although for (sic) venience under Order XLVIII-A it may be used

for the sake of suing and being sued.

8. Order XLVIII-A of the Rules of the Supreme Court in England is the same as Order XXX of our Code. With regard to the reasoning of

Blackwell J. based on Order XXX. Beaumont C.J. in the later Bombay case of Amulakchand Mewaram v. Babulal Kanalal Taliwala (1933) AIR

(Bom.) 304, 305, said the same thing in these words:

Order XXX authorises the bringing of a suit in a firm name in a certain class o case and it may be that inferentially it forbids the bringing of a suit in

a firm name in any other class of case. But I do not see how Order XXX can affect the question of fact, whether a suit brought in the name of a

firm in a case not within Order XXX is in fact a case of misdescription of existing persons or a case of a suit brought by a nonexistent entity.

9. Order XXX of the Code, therefore, does not affect the question as to who are the Plaintiffs and whether they exist or not in a case where a suit

is filed in a firm name. The decision of that question depends on the general law of partnership and on the facts of the case. The real position in law

when a suit is brought in a firm name is, I believe, well known. It is a common saying that the firm name is only a compendious way of describing

the partners, so that the suit in the firm name is really a suit by all the partners. If an authority for this is required, I may read what Lindley L.J. said

in Western National Bank of City of New York v. Perez Triana and Company (1891) 1 Q.B. 304, 314:

When a firm''s name is used, it is only a convenient method of denoting those persons who compose the firm at the time when that name is used

and a Plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

10. And this would be so whether the Code allowed the suit to be brought in the firm name or not, for the Code has nothing to do with the

question. Indeed in the Western National Bank''s case (supra) a suit had been brought against a firm in the firm name in a case where the

corresponding provisions of the English Rules did not permit such a suit to be brought. All the same, however, an amendment was directed bringing

the partners of the Defendant firm on the record in the place of the firm name. This case is, hence, clearly an authority against the decision of

Blackwell J. It may be noted that this English case turned on question of service of the Writ in a case where the suit was brought in a firm name and

the actual decision has lost its importance because the English Rules have since been changed. The principle of that decision, which I have referred

to, however, still remains good. So much for the principle of the Vyankatesh Oil Mill Company''s case (supra). I shall now refer to a (sic)

authorities.

11. There is one class of cases which has been of more or less (sic) occurrence. They are where a suit is brought in the name of a Hindu joint

family business as Plaintiff. Such a suit is clearly not maintainable. See Lalchand Amonmal v. M.C. Boid and Company (1934) ILR 61 Cal. 975.

Notwithstanding that an amendment has always been allowed bringing the members of the family on the record as Plaintiffs in the place of the

trading name of the family, on the basis that it is merely correcting a misdescription. These cases are clearly against the principle of the decision in

the Vyankatesh Oil Mill Company''s case (supra), for in these cases, too, a suit had been brought in the firm name where the Code did not permit

such suits. Such a case was that of Ramprosad Shivlal v. Shrinivas Balmukund (1925) AIR (Bom.) 527, which had been decided by McLeod C.J.

and Coyajee J. before the Vyankatesh Oil Mill Company''s case. Indeed this case was cited before Blackwell J. but that learned Judge

distinguished it on the ground that it was the case of a joint Hindu family business and that no argument based on Order XXX had been advanced

in it. Clearly, as I have just now shown, the fact that it was the case of a joint family business makes no difference. I have also previously shown

that the argument based on Order XXX was fallacious. In our Court, Das J. cited with approval Ramprosad Shivlal v. Shrinivas Balmukund

(supra) and Amulakchand Mewaram v. Bahulal Kanalal Taliwala (supra), where a similar decision was arrived at. See Munshilal and Sons v. Modi

Bros. ILR (1948) 1 Cal. 81. It has been conceded by counsel on either side, that this Court, in an appeal from the Original Side, has taken the

same view as in Ramprosad Shivlal v. Shrinivas Balmukund (supra). This appeal is, however, unreported and the particulars of it have not been

given to me. Such a judgment, would, of course, be binding on me and prevent me from following the Vyankatesh Oil Mill Company''s case (

supra). In Amulakchand Mewaram v. Bahulal Kanalal Taliwala (supra), Beaumont C.J. said with reference to the Vyankatesh Oil Mill Company''s

case,--

I must confess that I have some difficulty in following both the reasons and the conclusions of the learned Judge in that case.

and he disapproved the comments and the distinction made by Blackwell J. with regard to Ramprasad Shivlal v. Shrinivas Balmukund (supra). In

this Court again, Panckridge J. in Bisseswarlal Budhmull v. Sukhdeodas Baijulal (1940) 44 C.W.N. 806 recorded (sic) disapproval of Neogi

Ghosh and Company''s case (supra) and hence also of Vyankatesh Oil Mill Company''s case (supra). In this state of the authorities the judgments

in the latter two cases must be taken to have lost their force.

12. Coming now to the question whether the amendment should be allowed, the principle involved may he read from what Beaumont C.J. said in

Amulakchand Mewaram v. Babula Kanalal Taliwala (supra). In that case the learned Chief Justice allowed an amendment bringing on record the

members of a joint family after the suit had become time-barred in a case where the suit had originally been brought in the firm name He put the

matter in this way:

It seems to me that the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the

name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no

amendment can cure it. If the latter is the case, prima facie there ought to be an amendment because the general rule, subject, no doubt, to certain

exceptions, is that the Court should always allowed an amendment where any loss to the opposing party can be compensated for by costs. Now it

seems to me where you have a suit brought in the name of A.B. and Company, if it be proved that A.B. and Company, is the name of an existing

firm or family consisting of certain individuals, C, D and E, then the description A.B. and Company, merely cloaks the identity of C, D and E who

are before the Court under that name. It under the Rules C, D and E are not allowed to sue in the name A.B. and Company, then for the purposes

of the suit the description is incorrect and must be altered. But it seems to me that in such a case the proposed alteration does not involve

introducing new Plaintiffs, but merely involves describing correctly, rather than incorrectly the Plaintiffs already before the Court. I think that was

the basis of the decision of Crump J. and the Court of Appeal in Ramprosad v. Srinivas (supra).

13. With this statement of the principle I respectfully agree and it seems to me it has the support of the decision of the Judicial Committee in Peary

Mohun Mukerjee v. Narendra Nath Mukerjee (1909) ILR 37 Cal. 229.

14. Now, applying this principle to the present case, I find no difficulty in allowing the amendment. The suit, being in the firm name, is really by the

partners and is, therefore, by existing persons and hence the ordinary rule would be to allow the amendment. Indeed this is a simple case, for here

the case made is that it is what is popularly called a one-man firm, so that even the name has not to be changed but only the words ""a firm"" after the

name have to be deleted.

15. Now, I find that no cause has been shown as to why the ordinary rule as to amendment should not apply. Mr. Deb argued that, in fact, it is not

a one-man firm, but he does not dispute that there is a person of the name of Hajee Sattar Hajee Peer Mahomad. What Mrs. Deb in substance

said is that his contract was not with this individual. If this is right the suit (sic) fail on the merits at the hearing, but with that question I have nothing

to do in this application for amendment.

16. Now, I will refer to two cases which seem to me to be very such in point. The first is the case of Seodoyal Khemka v. (sic) Manmull (1923)

ILR 50 Cal. 549, 559. That was a suit for a declaration that certain partnership carried on by the parties had stood dissolved and for accounts

thereof. Among the Defendants one was described as ""Joharmull Manmull"". Clearly, this name deferred to a firm and it was contended that a firm,

as such, cannot be a partner in another firm and hence the suit was not properly constituted, for Joharmull and Manmull who were the (sic)

partners were not parties to the suit, they being made arties only as a firm and in a partnership action all the partners lust be made parties. Page J.

in his judgment overruled this (sic) and said:

Now, in my opinion, in the pleadings as they stand, the Defendants Joharmul (sic) and Manmull Khemka are sufficiently described, and in my

opinion, (sic) two gentlemen are before the Court and are parties to the suit. If an application were made to amend the plaint so as to substitute for

Joharmull Manmul, he words ""Joharmull Khemka and Manmull Khemka"", such an amendment could not be an amendment by which a new party

was added, but it would be an amendment merely for the purpose of more clearly describing parties who are already before the Court. Such an

application would not in my opinion, be within (sic) 22 of the Limitation Act.

17. The second case is that of Bhagirath Singh v. Munga Lal (1939) AIR (Pat.) 40. In this case, a Hindu father and a son, who alone carried on a

joint family business in their joint names, filed a suit and in the plaint described themselves in their two names with the addition of the word ""firm"".

An objection was taken by the Defendants that the Plaintiff firm was not registered under the Partnership Act. Then the Plaintiffs applied to amend

the plaint by deleting the word ""firm"" and this amendment was allowed, though, at the date of the order, a fresh suit would have been barred. It

was held to be a case of correcting a mere misdescription and not of addition of parties. I am unable to distinguish these cases from the case

before me.

18. In the result, I will allow the application. There will be an order in terms of prayers A and B of the petition. The Defendant will get the costs of

this application, certified for counsel. The costs of any additional written statement that it may be necessary for the Defendant to file are reserved.