BOMBAY HIGH COURT

The Vyankatesh Oil Mills Co

Vs.

N.V. Velmahomed

O.C.J. Suit No. 2599 of 1926

(Blackwell, J.)

08.07.1927

JUDGMENT

Blackwell, J.

1. [His Lordship, after stating the facts as above, continued:] In considering the question whether the proposed amendment is to be treated as a correction of a mere misdescription or as a substitution of different parties, it is necessary to bear in mind that by the law of India as well as by the law of. England a firm as such has no separate legal entity. This is very admirably pointed out by Mr. Justice Mulla in Rampratab Gavrishankar (1922) 25 Bom. L.R. 7, where that learned Judge said (p. 10):

> To begin with it may be observed that the law of England as well as of British India knows nothing of a firm as a body or artificial person distinct from the members composing it. In this respect a firm differs from a company incorporated under the Companies Acts, such a company being a corporate entity separate from its shareholders, though the latter can control its action by passing resolutions in general meeting. The word ' firm ' is a short, collective name for the individuals who constitute the partners, and though under the Rules of the Supreme Court and under the Code of Civil Procedure actions may now be brought by and against partners in the name of their firm, the general doctrine that ' there is no such thins as a firm known to the law' (see per James L. J in Ex parte Corbett (1880) 14 Ch, D. 122, remains in force

2. Before the introduction of Order 30 to the Civil Procedure Code, it appears from certain decisions that actions were allowed to be brought particularly in the mofussil against firms in the firm name without any objection being taken thereto. Thus, in *Kusturchand Bahiravdas v. Sagarmal Shriram, I.L.R. (1892) Bom. 413*, a suit was brought to recover a debt due to the firm of Kondanmal Sagarmal and the plaintiff was described as "the firm of K.S. by its manager S.S."

The defendants objected that one Malamchand was a partner in the firm and should be a party to the suit. He was accordingly joined as a co-plantiff on January 27, 1888. The defendants then contended that the suit was time-barred under Section 22 of the Indian Limitation Act (XV of 1877). It was held that the case was one of misdescription and not of nonjoinder, for the action was brought in the name of the firm by its manager. It is plain from the judgment in that case that it was assumed that the action could be brought in the name of the firm, although up to that time there was no provision in the Civil Procedure Code corresponding with Order 30. Indeed it was argued that there was nothing in the Civil Procedure Code to prevent such a suit being filed, and it appears to have been assumed that a suit in that form could be filed. That being so I do not consider that that case is an authority on the question now before me, having regard to the fact that Order 30 of the Civil Procedure Code now indicates clearly that an action can only be brought by or against a firm in the firm name in cases in which the persons claiming or being liable as partners are carrying on business as partners in British India.

3. It is plain from the terms of the plaint itself in this case that the plaintiffs carry on business in Sangli and this application for an amendment is now made to me upon the basis that they are carrying on business there, and are not carrying on business in British India. I am, therefore, of opinion that the suit is brought by an entity which has no legal 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 legal existence. It follows from my opinion that the amendment asked for cannot be treated as an amendment following upon a mere description, but must be treated as an application for the substitution as plaintiffs of the individual persons who compose the entity which the law does not recognise.

4. If the suit in its present form were regarded as a suit by the individual partner who signed and affirmed the plaint, this would not assist the plaintiffs, because, by reason of Section 45 of the Indian Contract Act, all living joint promisees must join in the suit to enforce a debt due to them; and, as has been held in numerous authorities, an action brought by any number less than the full number of joint promisees is misconceived, and the constitution of the suit is wrong from the beginning, the suit being not good unless all the co-promisees are joined (see *Ramsehuk v. Ramlall Koondoo*[1] as an illustration of this line of authorities: see also *Kalidas Kevaldas v. Nathu Bhagvan*[2].

5. Mr. Gupte referred me to *Ramprasad Shivlal v. Shrinivas Balmukund*[3], In that case Mr. Justice Crump held that where a suit was originally brought against a firm, in the name of the firm, but subsequently the title of the plaint was amended by substituting the names of the members of the defendant's family on its being ascertained that the defendant was not a firm but an undivided Hindu family, there was not an addition of parties but only a substitution in order to correct a misdescription, and the Division Bench upheld his decision. That, however, was a case dealing with a Hindu joint family, and no argument appears to have been adduced to the learned Judge as

to the effect of Order 30 of the Civil Procedure Code. Moreover, it appears from the judgment of Mr. Justice Crump that he relied in support of his view upon the decision in *Kasturchand Bahiravdas v. Sagarmal Shriram*[4] to which I have already drawn attention. For the reasons I have given, I think that the introduction of Order 30 materially alters the position, and as indicated by me, I do not think that the last mentioned case is any longer an authority which can be relied upon.

6. Attention may also be drawn to a case of *Mason and Son v. Mogridge*[5] where the Court

[1] I.L.R (1881) Cal. 815
[2] I.L.R (1883) Bom. 217
[3] AIR 1925 Bom 527
[4] I.L.R (1892) Bom. 413
[5](1892) 8 T.L.R. 805

of Appeal in England took the view that a single person cannot sue in a firm name, and that inasmuch as a single person had sued in the firm name, the suit was entirely misconceived as being brought by an entity which the law does not recognize.

7. My view, therefore, being that this suit is badly framed from the outset, and that new parties who are recognized by law will have to be substituted for the present plaintiffs who are an entity not recognized by law, the question arises upon what terms I should allow the amendment, Having regard to the view expressed by Mr. Justice Warrington in the case of *Attorney-General v. Pontypridd Waterworks Company*[6] think that I ought to allow an amendment only upon the terms that the plaintiffs should pay all the costs incurred up to the date of the amendment, I think I should make that order for this reason, that having regard to the view which I have expressed upon the form of the action as it id now framed, the defendants would be entitled to judgment unless another plaintiff or other plaintiffs are substituted for the present plaintiffs. It may be observed that the present plaintiffs had notice from paragraph 6 of the written statement that this point would be taken, They could It that stage at little expense have applied for the necessary amendment. They did not do that, and they took their chance of being able to satisfy the Court that the plaintiffs did in fact carry on business in British India, and called evidence before me in the attempt to do so. In that attempt they failed. I do not, therefore, think that there is any injustice in ordering them, as I do order them, as a condition of the amendment, to pay all the costs of this action up to the time of the amendment. I make that order accordingly.

[6][1908] 1 Ch. 388