BOMBAY HIGH COURT

Amulakchand Mewaram

Vs.

Babulal Kanalal Taliwala

O.C.J. Appeal No. 33 of 1932

(John Beaumont, Kt., C.J. and Rangnekar, J.)

07.03.1933

JUDGMENT

Beaumont, C.J.

1. This is an appeal from an order of Mr. Justice Mirza refusing leave to the plaintiffs to amend the plaint by altering the name in which they sued. The suit was commenced in 1926, and the plaintiffs are described as Amulakchand Mewaram, a firm of merchants carrying on business at Kalbadevi Road outside the Fort of Bombay. It was very early appreciated that in fact that firm is not a partnership firm, but is the name of a joint Hindu family, in which, according to the evidence, there are three members, and it was proposed in 1926 that the plaint should be amended by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs. The defendant was prepared to agree to that amendment, and the terms of a consent order were actually settled, but the defendant contended that he would be entitled to the costs of amending the written statement. That contention would seem to me to have been well-founded, but the plaintiffs objected to it, and in consequence the proposed amendment was not proceeded with. The result was that the suit came on for trial in due course in 1932, and at the hearing the plaintiffs asked to be allowed to amend the plaint by substituting the names of the members of the joint family for the name of the family firm. That amendment was clearly necessary if the suit was to proceed, because a Hindu joint family is not a firm in the name of which proceedings may be commenced under Order 30, Rule 1, of the Civil Procedure Code, that rule being confined to firms of merchants carrying on business in British India. The learned Judge refused leave to amend and dismissed the suit, and from that order this appeal is brought.

2. 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 allow an amendment where any loss to the opposing party can be compensated for by costs. Now it seems to me that where you have a suit brought in the name of A.B. & Co., if it be proved that A.B. & Co. is the name of an existing firm or family consisting of certain individuals C, D and E, then the description A.B. & Co. nearly cloaks the identity of C, D and E who are before the Court under that name. If under the rules C, D and E are not allowed to sue in the name of A.B. & Co., 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 involvee describing correctly, rather than incorrectly, the plaintiffs already before the Court. I think that was the basis of the decision of Mr. Justice Crump and the Court of Appeal in *Ramprasad v. Shrinivas*[1], though the actual decision in that case turned on the effect of the Indian Limitation Act having regard to an amendment which had been allowed. The learned Advocate General on behalf of the respondent has relied on a decision of Mr. Justice Blackwell in *Vyankatesh Oil Mill v. Velmahomed*[2] I must confess that I have some difficulty in following both the reasons and the conclusion of the learned Judge in that case. It was a case of a suit brought in the name of a firm carrying on business outside British India, and therefore not justified by the terms of Order 30 of the Civil Procedure Code, and the learned Judge expressed the view that the plaintiff firm was a non-existent entity. But the order which he subsequently made giving leave to amend seems inconsistent with that finding. The learned Judge referred to the case of *Ramprasad v. Shrinivas* and an earlier case of *Kasturchand Bahiravdas v. Sagarmal Shriram*[3] and expressed the view, if I understand him rightly, that those cases ought not to be followed having regard to the subsequent enactment of Order 30. I do not follow that. Order 30 authorises the bringing of a suit in a firm name in a certain class of 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 30 can affect the question of fact, whether a suit brought in the name of a firm in a case not within Order 30 is in fact a case of mis-discription of existing persons, or a case of a suit brought by a non-existent entity. That question, as I say, is one of fact, and in the present case it is proved on the evidence that the firm in whose name the suit was originally brought does describe certain existing persona. I think, therefore, that leave to amend ought to have been given and that we must give leave. But having regard to the very foolish conduct of the plaintiffs in not carrying the amendment through in 1926 and waiting up to the hearing, we can only give them leave on somewhat drastic terms as to costs. The plaintiffs must pay the costs up to and including the hearing and must also pay the costs of the necessary amendment of the plaint, that is their own costs, and the defendant's costs of any supplemental written statement. With regard to the costs of the appeal, I should say that prima facie if leave to amend is refused and a successful appeal is brought the appellant ought to have the costs of the appeal, and I do not read the decision in *Gunnaji Bhawji v. Makanji Khoosalchand*[4] on which the learned Advocate General relies, as laying down any general rule to the contrary. Costs are always in the discretion of the Court, and peculiarly so where the payment of costs is imposed as a term of amendment, and no doubt the particular order made by the Court in that case may have been justified on the facts of that case. In the present case also there are peculiar circumstances,

because if the plaintiffs had not been foolish in the conduct of the proceedings there never would have been any question of their amending at the hearing and no appeal would have been necessary from any adverse decision. In the circumstances we think the proper order as to the costs of the appeal will be that each party bears his own costs of the appeal. On these terms we allow the amendment asked for by the plaintiffs and set aside the order dismissing the suit.

[1] AIR 1925 Bombay 527 : (1925) 27 BOM LR 1122 : 90 Ind. Cas. 685 [3] I.L.R. (1892) Bom. 413
[2](1927) 30 Bom, L.R. 117 [4]I.L.R. (1909) Bom. 250 10 Bom. L.R. 969

Rangnekar, J. –

3. I agree.

Appeal dismissed.