

(1973) 09 PAT CK 0016
In the Patna High Court
Case No : A.F.A.D. No. 472 of 1969

Firm Vijay Nipani Tobacco House

APPELLANT

Vs

Sarwan Kumar and Others

RESPONDENT

Date of Decision : 18-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9, Order 30 Rule 1, Order 30 Rule 10, Order 30 Rule 3

Citation : AIR 1974 Patna 117

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Advocate : Gauri Shankar Pd, for the Appellant; Kedar Nath Verma, Ashok Kumar Sinha and Braj Kishore Singh, for the Respondent

Final Decision : Dismissed

Judgement

1. This second appeal by the defendant arises out of a suit for eviction and a claim for arrears of rent.

2. Briefly stated, the case of the plaintiffs was that the house belonged to joint family consisting of the plaintiffs and the defendants second party and ultimately by a partition was allotted to the plaintiffs' share. A portion of the house had been let out to the defendant-appellant earlier by the Karta of the joint family on a monthly rental of Rs. 45/-. The defendant-appellant failed to pay the rent from Kartik, 1367 to Sravsna, 1369 Fasli. Hence the suit The plea of the defendant-appellant, however, was (1) that the suit was bad for nonjoinder of one J.K. Patel, the owner of the firm, (2) that the suit was not maintainable by some of the members of the joint family alone, (3) that the tenancy was according to the English calendar month, (4) that no valid notice had been given, and (5) that the appellant had paid municipal tax. platform tax and money over the repairs of the house as also made several advances to Brijnandan Prasad, the Karta of the joint family on the understanding that the amount would be adjusted towards rent It was said that the rent in November, 1962 was remitted by money order after

making certain deductions but the same was refused.

3. The Munsif found that there was no valid notice served on the appellant and the prayer for eviction could not be allowed. He, however, decreed the claim for rent and allowed a set off in respect of the payment made to the municipality to the extent of Rs. 150/-. The Additional Subordinate Judge who heard the appeal against the aforesaid decision concurred with the Munsif on all points and dismissed the appeal except that he allowed a set off of a further amount of Rupees 82/- paid to the Municipality as platform tax. Both the Courts rejected the other pleas raised by the appellant except that they held that the tenancy was according to the English calendar month.

4. Learned counsel for the appellant has contended that the suit was not maintainable first for the non-joinder of the proprietor of the defendant-firm J.K. Patel and secondly for the nonjoinder of the other members of the joint family as plaintiffs. Next he has urged that the appellant was entitled to an adjustment of the money spent by it over the repairs of the house,

5. With regard to the first point it has been urged that one J.K. Patel was the proprietor of the defendant-firm and the suit having been filed against the firm through B.K. Patel who is merely a manager, it was badly framed. This argument is untenable. It must be mentioned that the suit was instituted against "Firm Vijay Nipani Tobacco House through B.K. Patel, Managing Director." From the discussions aforesaid there cannot be the least doubt that the suit was instituted against the firm itself although through somebody. It is well known that a firm has as such no existence in the eye of law. When two or more persons carry on business in an assumed name they constitute a firm. The definition of firm in Section 4 of the Indian Partnership Act is as follows :--

"Persons who have entered Into partnership with one another are called individually "partners" and collectively "a firm" and the name under which their business is carried on is called the "firm name". "

The CPC has provided in Order XXX the procedure for suits by and against firms. Rule 1 provides that such persons may sue or be sued in the name of the firm. It is significant that the Code does not recognise the legal existence of a firm as such. It enables persons constituting a firm to sue in an assumed name, i. e., the name of the firm. The right is not given to the firm itself but to the individual partners who constitute the firm. The next relevant rule is Rule 3 in that Order which provides that where persons are sued as partners in the name of their firm, summons shall be served either on any one or more of the partners or upon any person having the control and management of the business. This is a special provision in respect of service of summons in such suits. The only other provision of law contained in Order XXX which is relevant in this connection is Rule 10 which provides that (sic--"any person carrying on business in a name or style other") than his own may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit all rules contained in

Order XXX will apply. It will thus appear that Order XXX provides for suits by or against two or more persons carrying on business as a firm as also in respect of a suit against a person carrying on business in an assumed name. It will thus appear that where one person is carrying on business in an assumed name, he cannot bring a suit in such an assumed name but he can be sued in such a name as if it were a firm name. In the case of a firm, however, the persons carrying on business in the firm name can sue or be sued in such name. The effect of these provisions in law is that the suit against a firm is really a suit against the partners in an assumed name and even in the case of a suit against a person instituted under Order XXX. Rule 10 of the Code, the suit is really against that person although he has been sued in the assumed name as if it were a firm name. The suit is thus against partners themselves under Rule 1 and against the particular person himself under Rule 10.

6. This being the legal position the present suit was instituted against the firm. Obviously, therefore, it was a suit against the partners constituting the defendant firm. If J.K. Patel was the proprietor and partner of the firm, he also must be deemed to be a party although he is being sued in the assumed name of a firm. There is no substance thus in the contention of non-joinder of the proprietor of the firm. Even if it be assumed that he was the sole proprietor of the firm carrying on business in such a name, the suit had been instituted against him in the assumed name. In either view of the matter there is no substance in the contention of learned counsel for the appellant

7. Learned counsel placed reliance on a decision of this Court in the case of *Sinehi Ram Bihari Lall Vs. The Agent East Indian Railway Co.*, . In that case a suit had been instituted against the Agent of the East Indian Railway Co. claiming damages done to certain goods conveyed by the Railway. *Ross, J.*, held that the Railway as such had not been impleaded in the suit and that it was "not a case of mere misnomer". The learned Judge held that the Railway had acquired a right by virtue of the law of limitation and even an amendment could not be allowed and the suit was held to be non-maintainable. It does not appear from the report as to what was the relief sought for in that case, whether it was for a personal decree against the Agent or a decree against the Railway. In my view, that was the basic question to be considered in order to determine whether the suit was essentially and in fact against the Railway company or against the Agent of the Railway. It appears, however, from the statement by the learned Judge that in that suit it was not a case of a mere misdescription or misnomer that the suit was in essence against the Agent. The facts of that case are entirely different from those of the instant case where the suit has been instituted not against anybody else but against the persons carrying on business in the firm name. It will be relevant to mention that the decision of the learned Judge was followed in the case of *East Indian Railway Co. Vs. Ram Lakhani Ram*, . In that case also the suit was instituted against the Agent of the East Indian Railway Co. and a personal decree had been sought for against the Agent of the Railway. The learned Judges followed the decision in *Sinehi Ram Bihari Lall (supra)*. *Das, J.*,

however, said:--

"I quite admit that where there is a description of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time, for, in a case of misdescription the Court will not have any difficulty in coming to the conclusion that the defendant had been substantially sued though under a wrong name."

The facts of this case also, as pointed out earlier, are entirely different. These decisions are, therefore, of no avail.

8. As I have said earlier, the main point for consideration is to find out from the frame of the suit as to whether the description of the defendant is one which vitally affects the nature of the suit. It is well settled that where there is a misdescription of a party and does not cause prejudice and the suit is essentially by or against the party intended to sue or be sued, the Court would not attach much importance to the misdescription and would not hold the suit to be non-maintainable on that account. In this connection it has also to be borne in mind that the suit does not fail merely because of a non-joinder or misjoinder of parties unless prejudice is caused thereby. The provisions of Order 1, Rules 9 and 10 of the CPC have to be kept in mind in this connection. In the case of *The Saraspur Manufacture Co. Vs. B.B. and C.I. Railway Co.*, the question was whether a plaint could be allowed to be amended where the suit had been instituted against the Agent of the B. B. and C. I. Railway Company Ltd, and the prayer was to substitute the company as defendant in place of the Agent. Their Lordships held that in view of the prayer that the defendant company should pay the amount sued, for, the description of the defendant merely amounted to misdescription and in fact it was a suit against the Railway Company itself and, therefore, the Courts below should have allowed the plaintiffs prayer for the amendment. Incidentally it may be mentioned that the decision of this Court in the case of *Sinehi Ram Bihari Lall Vs. The Agent East Indian Railway Co.*, was noticed and dissented from. In the case of *Municipal Commissioners Vs. Gangamani Chaudhurani*, the suit had been filed against the Chairman of the Municipal Commissioners instead of the Commissioners themselves, for a declaration that the assessment made by the Municipal Commissioners was ultra vires and illegal. Their Lordships held that the name is not always the true criterion for determining the party really sued and the nature of the allegations in the plaint and the nature of the relief sought should be considered. They held that the case must be deemed to be one of misdescription within the meaning of Order 1, Rule 10 of the Code, As I have said, in the present case there is neither mistake in describing the person sued against inasmuch as the suit has been instituted against the persons in the firm name. This case before me therefore, stands on a much higher footing than those of misdescriptions.

9. In the present case much stress has been laid on the fact that the suit had been instituted against the persons in the firm name but "through B.K. Patel" who is merely an employee. The suit cannot be held to be bad on that account

From the description itself it is clear that the suit was against the persons constituting the firm. The words "through B.K. Patel" are really redundant. In this view of the matter I am supported by a large number of decisions. To cite only a few, in the case of *Motilal Jasraj Vs. Chandmal Hindumal*, the description of the defendant was "Chandmal Hindumal as manager and owner of the shop "Manmal Chandmal"." Their Lordships held that the suit having been filed against Manmal Chandmal the further description as "the manager and owner of the firm" was a mere surplusage. In the case of *Ram Kumar Ram Chandra Vs. The Dominion of India*, the plaintiff firm was described "as Messrs. Ram Kumar Ram Chandra through Ram Kumar adult son of a partner of the firm". The plaint stated that the plaintiff was a partnership firm and that Ram Kumar was its partner. Their Lordships held that in law the words "through Ram Kumar adult son of a partner of the firm" were unnecessary and as such it could be treated as redundant and ignored; the above addition did not alter the fact that the firm was in fact the plaintiff. In the case of *Mohammadali Kunju Ahammed Kunju v. Abraham George*. AIR 1953 Trav-Go 209 the learned Judges held that the firm as such need alone be described as the plaintiff or the defendant and the addition of the words "represented by A, a partner, or by B, the manager" does not alter the character of the suit as one by or against the firm and that such description can only be treated as mere surplusage. Reliance was placed, by the learned Judge on the decisions in the case of *Motilal Jasraj (supra)* and *Bhadreswar Coal Supply Co. Ltd. v. Satis Chandra Nandy and Co.* AIR 1936 Gal 353.

10. In the instant case thus the words "through B.K. Patel, Managing Director" were redundant. It may also be mentioned that it was the defendant firm which appeared in the trial Court and again it was the defendant firm which filed the appeal before the lower appellate Court and it is the defendant firm again which has come up in second appeal. It is obvious that the parties have taken the suit to be one against the firm itself. It has been found by the Courts below that B.K. Patel had control over the business of the firm. Therefore, there was no prejudice to the appellant. In fact the plaintiffs need not have added the words "through B.K. Patel, Managing Director" in the description of the firm. It was redundant.

11. In this connection I may mention that in this Court an application for amendment of the plaint under Order VI, Rule 17 of the CPC has been filed to delete the words "through B.K. Patel". In my view, the suit having been filed against the persons in the firm name and" the description being redundant, the present application is also redundant. I have found that the suit was basically against the persons carrying on business in the firm name.

12. The second reason alleged for the non-maintainability of the suit need not detain us. In the present case the other members of the erstwhile joint family were impleaded as defendants to the suit. Their written statement admitted the plaintiffs case of partition. The lower appellate Court has given a finding of fact that it was "an admitted fact that the holding has fallen to the lot of the plaintiffs". The plaintiffs were, therefore, competent to file the present suit in

their name.

13. The only other point which remains to be considered is in respect of the claim of adjustment of the money spent over repairs. This point is concluded by the concurrent findings of facts. Both the Courts have disbelieved the claim of the appellant in respect of the alleged repairs. They have also not believed the case of advances of cash alleged to have been made. No good ground has been shown which would entitle this Court to go behind these findings and decide for itself whether the findings are correct.

14. In the result, I find that there is no good ground for interference with the judgment and decree passed by the Court below. This appeal is accordingly dismissed.