

REVISIONAL CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice
G. H. Thomas

1935
March, 4

MUSADDI LAL (PLAINTIFF-APPLICANT) *v.* DAL CHAND AND
ANOTHER (DEFENDANTS-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), sections 11, 151, 152, 153 and order I, rule 8—Representative suit, object of—Res judicata—Persons represented, whether can be saddled with cost of suit—Persons represented wrongly entered in plaint and saddled with costs—Amendment of plaint and decree—Court's discretion to allow amendment.

The object of instituting a representative suit under order I, rule 8 of the Code of Civil Procedure, is to create the bar of *res judicata* by reason of Explanation (6) to section 11 of the Code of Civil Procedure. But the persons whom the plaintiff represents cannot be saddled with the costs of the suit if the plaintiff should fail to win his case. *Kumaravelu Chettiar v. Ramaswami Aiyar* (1), and *Bika Bai v. Hariba Raghuj* (2), referred to.

The language of sections 152 and 153 of the Code of Civil Procedure is wide enough to cover the correction of mistakes and errors in any proceeding in a suit. Extensive powers may be exercised under the provisions of sections 151, 152 and 153 of the Code, and the question whether these extensive powers ought to be exercised in any given case is a matter purely within the discretion of the Court with reference to the facts of each particular case. Where in a representative suit the names of persons alleged to be interested in the suit are, by a mistake of the clerk of the Court, entered in the plaint as plaintiffs and, on the suit being dismissed, they are saddled with costs, but the Court neither intended nor had jurisdiction to do so, it is a fit case for amendment of the plaint and the decree under sections 151, 152 and 153, C. P. C. *Saidogir v. Deo Dat Misir* (3), distinguished.

Messrs. *Radha Krishna* and *P. D. Rastogi*, for the applicant.

*Section 115 Application No. 121 of 1931, against the order of Molvi Mohammad Abdul Haq, Additional District Judge of Lucknow, dated the 6th of September, 1931.

(1) (1933) I.L.R., 60 I.A., 278.

(2) (1918) I.L.R., 42 Bom., 556.

(3) (1915) I.L.R., 37 All., 323.

Messrs. R. K. Bose, Mohammad Naziruddin and Govind Behari Lal, for the Opposite party.

NANAVUTTY and THOMAS, JJ.:—This is an application for revision under section 115 of the Code of Civil Procedure against an order, dated the 6th of September, 1934, passed by Mr. Mohammad Abdul Haq, Additional District Judge of Lucknow, dismissing the application of the applicant Musaddi Lal for amendment of the judgment and decree, dated the 16th of March, 1933.

The facts out of which this application for revision arises are briefly as follows :

One Dal Chand was adjudged an insolvent on the 30th of October, 1928. Among his scheduled creditors were the Kathiawar Ahmedabad Banking Corporation Ltd., (in liquidation), and some other creditors. The creditor Bank mentioned above filed a suit in the Court of the Subordinate Judge of Malihabad against Dal Chand and Radhe Shiam for a declaration that the transfer of certain property made by the insolvent Dal Chand in favour of Radhe Shiam was void in law. On the 14th of March, 1932, the creditor Bank (in liquidation), through its official liquidator Mr. Sarabai Dalal, applied to the Court of the Subordinate Judge under order I, rule 8 of the Code of Civil Procedure for permission to sue on behalf of and for the benefit of the other scheduled creditors, who were mentioned in the petition as Ram Narain, Musaddi Lal, R. S. Phool Chand Rai, and Narain Das. Notices were served on these four persons but only Ram Narain appeared in court and declined the offer of the plaintiff Bank to sue for his benefit. On the 9th of August, 1932, the Subordinate Judge passed the following order :

“The plaintiff applies for permission to sue on behalf of all creditors of the defendant No. 2 (Dal Chand). Out of the four creditors besides the plaintiff, one Narain Das refuses his consent to the

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suit. The other three creditors are served and they do not turn up. I presume their consent."

"Order".

"I permit the plaintiff to continue the suit for the rest of the three creditors, that is, Ram Narain, Musaddi Lal and Rai Sahib Phool Chand Rai."

No order was passed by the learned Subordinate Judge in his own hand-writing making Ram Narain, Musaddi Lal and R. S. Phool Chand Rai plaintiffs in the suit, but the Peshkar of the Court somehow misinterpreted the Court's order of the 9th of August, 1932, and thought that the names of the three secured creditors of the defendant Dal Chand were to be brought on the record as plaintiffs, and he accordingly amended the plaint and got the Subordinate Judge to initial the amendment. No such amendment was necessary under order I, rule 3 of the Code of Civil Procedure, and these persons, Ram Narain, Musaddi Lal and R. S. Phool Chand Rai could not be made plaintiffs against their will and without their consent. No notice was sent to these persons informing them that they were to be made plaintiffs in the suit brought by the Kathiawar and Ahmedabad Banking Corporation Ltd., against Dal Chand, and Radhe Shiam.

The suit of the plaintiff Bank was ultimately dismissed with costs by the Subordinate Judge by his order, dated the 16th of March, 1933. The heading of the suit as given in the judgment is "*The Kathiawar and Ahmedabad Banking Corporation Ltd., through its official liquidator, plaintiff v. Dal Chand and Radhe Shiam defendants*", and throughout the judgment the learned Subordinate Judge considered that in the suit in which he was writing judgment there was only one plaintiff, that is, the official liquidator of the creditor Bank. Everywhere in the judgment he uses the singular word "plaintiff" and not the plural plaintiffs". In the decree, however, the decree-writer of the Court, finding that

the plaint showed four plaintiffs, prepared the decree in conformity with the plaint.

Subsequently when the defendants applied in execution for recovery of their costs not only from the creditor Bank but also from B. Ram Narain, Musaddi Lal and R. S. Phool Chand Rai, who had been wrongly impleaded as plaintiffs, then the applicant Musaddi Lal realised that he was saddled with costs in a suit which he had never filed, and to the prosecution of which he had never given his consent. He, therefore, applied under the provisions of sections 151, 152 and 153 of the Code of Civil Procedure for amendment of the decree, dated the 16th of March, 1933. The learned Additional District Judge of Lucknow declined to amend the judgment and decree holding that there was no clerical or arithmetical mistake in the judgment and decree. and that the Subordinate Judge had deliberately passed an order impleading the applicant Musaddi Lal as a plaintiff, and although that order may have been wrong, the applicant could only get it corrected by filing a regular appeal against, or for a review of that order. He, therefore, rejected the application of Musaddi Lal on the 6th of September, 1934. Dissatisfied with the order of the learned Additional District Judge the applicant has filed the present application for revision under section 115 of the Code of Civil Procedure.

In our opinion this application must be granted. Section 153 of the Code of Civil Procedure lays down that a Court may, at any time, and on such terms as to costs or otherwise, as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. It is clear from the facts of the case cited above that there was in the present case no order passed by the learned Subordinate Judge in his own hand-writing impleading the applicant Musaddi Lal as a plaintiff. In fact no such order could have been

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legally passed by the Court. All that was required of the Court under order I, rule 8, of the Code of Civil Procedure was to have a notice of the institution of the suit sent at the expense of the plaintiff to all such persons whom the plaintiff wanted to implead, either by personal service or where from the number of persons or any other cause, such service was not reasonably possible, by public advertisement as the Court in each case might direct.

The applicant Musaddi Lal no doubt received notice that the Kathiawar and Ahmedabad Banking Corporation Ltd., which was itself in liquidation, had filed a suit against the insolvent Dal Chand. Musaddi Lal did not think it necessary to appear in Court nor was he bound to do so. The costs of a suit brought by a plaintiff in his representative capacity cannot be ordered to be paid by any other person alleged to be interested in the suit, on whose behalf the suit might have been brought and indeed the learned Subordinate Judge in dismissing the plaintiff's suit with costs made it clear that he was only referring to the plaintiff Bank, namely the Kathiawar and Ahmedabad Banking Corporation Ltd. (in liquidation), which was the sole plaintiff in the present suit, although it was purported to have been filed in a representative capacity on behalf of all the scheduled creditors of the insolvent Dal Chand.

As pointed out by Sir Dinshaw Mulla in his standard Commentary on the Code of Civil Procedure, 10th edition, pages 465 and 466, the heading of a suit brought in a representative capacity under order I, rule 8 of the Code of Civil Procedure, is to be as follows:

“AB on behalf of himself and all other creditors
 of XY Plaintiff.

versus

CD Defendant.”

Had the learned Subordinate Judge in the present case adopted this heading in his judgment, in the prepara-

tion of the decree no mistake would have arisen, and the applicant Musaddi Lal would not have been saddled with costs in respect of a suit which he never filed and to which he was no party. The object of instituting a representative suit under order I, rule 8 of the Code of Civil Procedure, is to create the bar of *res judicata* by reason of Explanation (6) to section 11 of the Code of Civil Procedure—see *Kumaravelu Chettiar v. Ramaswami Aiyar* (1). But in any case the persons whom the plaintiff represents cannot be saddled with the costs of the suit if the plaintiff should fail to win his case. The learned counsel for the opposite party referred to a Bench decision of the Allahabad High Court reported in *Saidogir v. Deo Dat Misir* (2), as also to another Bench decision of the same High Court reported in *Aziz Ullah Khan v. The Collector of Shahjehanpur* (3).

In our opinion the facts of these cases are entirely different from those of the present case. The language of sections 152 and 153 of the Code of Civil Procedure is wide enough to cover the correction of mistakes and errors in any proceeding in a suit. It has been held that extensive powers may be exercised under the provisions of sections 151, 152 and 153 of the Code, and the question whether these extensive powers ought to be exercised in any given case is a matter purely within the discretion of the Court with reference to the facts of each particular case.

As was pointed out by a learned Judge of the Bombay High Court, in *Bika Bai v. Hariba Raghuji* (4) in giving leave to the plaintiff under order I, rule 8 of the Code of Civil Procedure, for suing in a representative capacity, the Court should exercise caution before it makes persons liable for large sums who are not actually parties to a suit nor have personally authorised it, and that in drawing up an order for costs in a representative action

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it should be stated whether the representing party alone, of all other members of the representative party, were to bear the costs of the suit assuming there was jurisdiction in the particular case to make such an order.

In our opinion upon the facts of this particular case the learned Subordinate Judge neither intended nor had jurisdiction to saddle the applicant Musaddi Lal with the costs of the suit filed by the creditor Bank against the defendants. We consider that this is eminently a fit case in which we should exercise the powers vested in us under the provisions of sections 151, 152 and 153 of the Code of Civil Procedure.

We, therefore, allow this application for revision with costs, set aside the order of the learned Additional District Judge, dated the 6th of September, 1934, and grant the application for amendment of the decree, dated the 16th of March, 1933. The plaint filed by the Kathiawar and Ahmedabad Banking Corporation Ltd., should also be amended and the names of Ram Narain, Musaddi Lal and Rai Sahib Phool Chand Rai wrongly entered therein should be removed from the array of plaintiffs. Their names should also be removed from the decree, dated the 16th of March, 1933. The judgment of the 16th of March, however, in our opinion, needs no amendment since the learned Subordinate Judge has throughout his judgment made reference only to the plaintiff Bank.

No orders are necessary on Civil Miscellaneous Applications Nos. 70 and 72 of 1935 as we have in disposing of this application for revision virtually granted the relief sought by it. The stay order, dated the 22nd of January, 1935, is hereby vacated.

Application allowed.