

BASMA v. NEW INDIA ASSURANCE COMPANY

SUPREME COURT (Marke, J.): November 26th, 1964
(Civil Case No. 318/64)

- 5 [1] **Civil Procedure—writ of summons—name of party—incorrect name no ground for setting aside writ:** The omission of the word “Limited” in the name of a limited company, which is a party to legal proceedings, is a mere misnomer which can be cured by amendment and is not a ground for setting aside a writ of summons (page 200, lines 1–6).
- 10 [2] **Civil Procedure—writ of summons—name of party—when misnomer crucial:** When a company is misnamed in legal proceedings, the test as to whether the misnomer is so crucial as to cause a writ to be set aside for irregularity is the attitude of a reasonable recipient of such a writ, if, in all the circumstances and looking at the document as a whole, the recipient company would know that it was intended for itself but that there was a mistake as to name, then this is a case of mere misnomer which can be cured by amendment (page 199, lines 18–26; page 200, lines 2–4).
- 15 [3] **Companies—name—name in litigation—incorrect name no ground for setting aside writ:** See [1] above.
- 20 [4] **Companies—name—name in litigation—when misnomer crucial:** See [2] above.

25 The plaintiff (now the respondent) brought an action against the defendant (now the applicant) during which the defendant moved to set aside the writ of summons.

30 In the title to the action, the defendant, a limited company, was not described as “limited.” The defendant applied to the court to have the writ of summons set aside as it was not sued in its proper corporate name. The plaintiff resisted the application on the ground that no confusion had resulted from the misnomer.

Case referred to:

- 35 (1) *Davies v. Elsby Bros., Ltd.*, [1961] 1 W.L.R. 170; [1960] 3 All E.R. 672, *dictum* of Devlin, L.J. applied.

Basma for the defendant;
King for the plaintiff.

MARKE, J.:

40 This is an application by the defendant to set aside the writ of summons in this action on the ground—“that the defendant is re-

ferred to as 'The New India Assurance Company' instead of 'The New India Assurance Company Ltd.' An affidavit in support of this application was filed and in para. 3 thereof it states: "The said writ names the defendant as 'The New India Assurance Company.'"

Mr. Basma for the plaintiff, the respondent on this application, conceded that the proper name style and title of the defendant was "The New India Assurance Company Limited" and referred to para. 2 of the writ (which was indorsed with the statement of claim) in which he had described the defendant as a limited liability company incorporated in India and carrying on business in Freetown. He urged, however, that, as the omission of the word "Limited" in the name of the company in the title to the action had not resulted in any confusion as to whom was meant to be sued, the application should fail.

Mr. King for the applicant argued that all corporations must be sued in their corporate names and, as the defendant was not sued in its corporate name, the writ must be set aside.

In my view this is a matter to which the test of Devlin, L.J. in *Davies v. Elsby Bros., Ltd.* (1) becomes relevant. Devlin, L.J., in prescribing the test, said ([1961] 1 W.L.R. at 176; [1960] 3 All E.R. at 676):

"How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself 'Of course it must mean me, but they have got my name wrong,' then there is a case of mere misnomer."

I stop here. It is clear that Mr. King knew from the start that the writ was intended for the company on whose behalf he appears, even though the word "Limited" was omitted in the name of the defendant in the title of the action.

In the first place, Mr. King, on entering a conditional appearance, instead of using the name of the company as it appears in the title to this action in the writ, added the word "Limited." Then, in the body of the memorandum of appearance he states: ". . . [E]nter a conditional appearance for The New India Assurance Company Limited, defendants in this action." In the judge's summons to set aside the writ, and in the affidavit in support thereof, again he does not continue the misnomer in the defendant's name in the title of this action, but describes the defendant by its proper name, style and title thereby bringing himself within the ambit of the first test Devlin, L.J. has prescribed for such cases.

After carefully considering all that has been argued by both solicitors, I have come to the conclusion that the omission of the word "Limited" in the name of the defendant in the title of this action is a mere misnomer, which can be cured by an amendment, and is, therefore, not a ground for setting aside the writ of summons in this action.

The summons is therefore dismissed, with costs to be taxed and paid by the defendant to the plaintiff.

Application dismissed.

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WILSON (A. O. S.) v. WILSON (E. T.) and COUSINS

SUPREME COURT (Beoku-Betts, J.): December 16th, 1964
(Divorce Case No. 26/63)

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[1] **Evidence—burden of proof—divorce—adultery—burden lies throughout on person alleging adultery:** In a divorce case, the burden of proving adultery is throughout on the person alleging it, there being a presumption of innocence (page 201, line 41—page 202, line 3).

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[2] **Evidence—burden of proof—standard of proof—divorce—adultery—proof against persons charged beyond reasonable doubt:** In a divorce case, adultery must be proved strictly and beyond all reasonable doubt (page 201, line 41—page 202, line 6).

[3] **Evidence—presumptions—presumption of law—presumption of innocence—adultery:** See [1] above.

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[4] **Family Law—divorce—adultery—burden of proof lies throughout on person alleging adultery:** See [1] above.

[5] **Family Law—divorce—adultery—evidence—evidence of both opportunity and inclination required:** To support a finding of adultery as a ground for divorce there must be evidence both of opportunity and of inclination or passion (page 202, lines 27–29).

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[6] **Family Law—divorce—adultery—evidence—proof of particular acts of adultery unnecessary where general cohabitation:** Where adultery is alleged as a ground for divorce, proof of general cohabitation excludes the necessity for proof of particular acts of adultery (page 202, lines 29–30).

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[7] **Family Law — divorce — adultery—standard of proof—proof against person charged beyond reasonable doubt:** See [2] above.