

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

Writ Petition No.5927/2014 (O)

Ramesh Joshi

Vs.

The Government of M.P., and another

Shri R.B.Singh, Advocate for the petitioner.

Ms. Sadhana Pathak, Government Advocate for the respondent No.1/State
None for respondent No.2 despite service.

WHETHER APPROVED FOR REPORTING: YES

It is settled law that partnership firm is not the legal entity. The firm name is only a compendious name given to the partnership and the partners are real owners of assets and the partnership property belongs to all the partners constituting the firm.

Section 153 CPC

The term "suit" used therein in the opinion of this Court is comprehensive and encompasses proceedings in the Court of justice by a party for an action under law and proceedings for execution of the order of the Court involving different modes of procedure under Order 21 CPC. Further, the words "**any proceeding in the suit**" and "**all necessary amendments**" used in section 153 CPC for the purpose of determining the real question or **issues raised by or depending on such proceeding** are of wide amplitude. The proceedings in general parlance means the form in which the actions are brought and defended, adjudication by enquiry or trial, rendering of the judgment and execution thereof.

If imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition or substitution of a party but, merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. It is in fact an intention of the party and the Court is required to discover the person or persons intended to sue or to be sued, therefore, a mere misdescription of a party can always be corrected provided the mistake was *bona fide*.

Hence, the plaint in the name of a firm or a defendant arrayed in the name of firm by itself is not a nullity. In either eventuality, it

represents all partners of the firm with a defective description of such a party for the purposes of CPC. Therefore, under section 153 CPC, Court can exercise the power to correct the misdescription of a party [**Mura Mohideen Vs. O.A.Mohomed, AIR 1955 Mad 294 & Purushottam Umedbhai and Co, Vs. M/s Manilal and Sons, AIR 1961 SC 325**].

The general power of amendment under section 153 CPC in the aforesaid context though extends to the execution proceedings but, cannot be invoked to modify or alter or add to the terms of the original judgment or order or decree. The maxim *actus curiae neminem gravabit*, ie., an act of court shall prejudice no man is squarely applies to such jurisdiction.

Writ petition dismissed.

Relevant Paragraphs: 2, 5, 8, 9 to 22

Reserved on: 14/10/2019

ORDER
(05/11/2019)

Rohit Arya, J

This writ petition under Article 227 of the Constitution of India by an objector Ramesh Joshi s/o Girdharilal Joshi is directed against the order dated 23/07/2014 in execution case No.3/99, No.31B/95X3/99 passed by the executing Court/Additional District Judge, Barwaha District Khargone (formerly known as West Nimar) whereunder an application for addition of the name of the petitioner as judgment-debtor by virtue of being partner of defendant No.3/firm in the cause title has been allowed.

2. Facts relevant and necessary for disposal of this writ petition in nutshell are to the following effect:

The Commissioner, Municipal Corporation, Khandwa [the respondent No.2 (for short, the plaintiff) had filed recovery suit being civil suit No.31B/1995 against the following parties as defendants:

(a) M/s Kirloskar Brothers Limited, Registered Office Udyog Bhawan, Tilak Road, Pune (Maharashtra);

(b) Kirloskar Brothers Limited Regional Sales Office 15 Maharani Road, Indore; and

(c) M/s Joshi and Company Authorized dealer of Kirloskar Brothers Indore Road, Barwaha, Tehsil Barwaha District West

Nimar on the premise that the plaintiff had **(i)** for supply of water to the public at large is in requirement of 200 hrs power electric motor and pump for its erection at Water Supply Center Jaswadi; **(ii)** contacted defendants No.1 and 2 as they are engaged in the business of manufacturing motor pumps, electric motor pumps etc., **(iii)** however, the defendant No.2 vide letter dated 10/11/1992 informed that since they undertake commercial business through authorized dealers only but, not directly, therefore, defendant No.3 its authorized dealer may be contacted; **(iv)** thereafter quotations were invited; **(v)** the quotation of defendant No.3 was found to be lowest and the same was approved vide resolution No.212 dated 02/12/1992 for supply of 200 hrs power electric motor and pump for an amount of Rs.10,11,625/-; **(vi)** accordingly, agreement was entered between the plaintiff and the defendant No.3 on 04/12/1992 for supply of the electric motor & pump and as per terms and conditions of the agreement, an advance of 25% of the amount was to be paid and the motor & pump were to be delivered within three months; **(vii)** an advance money of Rs.1,81,500/- was paid vide cheque No.0523728 dt.04/12/1992 drawn on Bank of India, Branch Khandwa and the same was received by defendant No.3; **(viii)** however, the supply was not effected resulting into termination of the agreement vide notice/order dated 20/08/1993 calling upon the defendants to return the advance amount with interest at the rate of 12% per annum.

Earlier, the plaintiff had filed a complaint before the District Consumer Forum,. Khandawa against the defendants No.1 and 2. The Consumer Forum sustained the objection raised by defendants No.1 and 2 that there was no privity of contract between the plaintiff and the defendants No.1 & 2. Instead, the agreement was entered into between the plaintiff and the defendant No.3 for supply of 200 horsepower electric motor and pump as well as advance amount of Rs.1,81,500/- was paid to defendant No.3 to its partner. The complaint was accordingly rejected on 01/08/1995.

Thereafter, the plaintiff filed the instant suit with the aforesaid facts.

3. Defendants No.1 and 2 filed written statement and denied plaintiff averments reiterating the stand as was taken before the District Consumer Forum inter alia contending that plaintiff had entered an agreement with defendant No.3 for supply of the electric

motor and pump who had also received the advance money from the plaintiff. Therefore, recovery, if any; can be made only from defendant No.3 but not by the defendants No.1 and 2.

4. Defendant No.3 remained *ex parte*.

5. Trial Court upon pleadings of the parties, framed issues and allowed parties to lead evidence. Thereafter drawn following conclusions:

(a) defendant No.3; an authorized dealer of defendants No.1 and 2 had submitted quotation & rates for supply of 200 horsepower electric motor & pump to the plaintiff (exhibit P/2 and P/3);

(b) the quoted rates of defendant being lowest were approved through resolution No.212 dated 02/12/1992 for entering into agreement and also further sanction / release of payment of 25% towards advance payment to the defendant No.3 (exhibit P/4);

(c) agreement was entered into on 04/12/1992 between the plaintiff and the defendant No.3 through its representative Girdharilal; proprietor of the firm (exhibit P/5);

(d) in terms of the agreement, an advance money of 25%; Rs.1,81,500/- was paid vide cheque No.0523728 dt.04/12/1992 drawn on Bank of India, Branch Khandwa for supply of the motor and pump within three months and the same was received by defendant No.3. The remaining amount was required to be paid after supply was made (exhibit P/6);

(e) following non-supply of motor & pump, a notice dated 20/08/1993 was served upon the defendants through registered post cancelling the agreement dated 04/12/1992 calling upon the defendants to return the advance amount with interest at the rate of

- 12% per annum (exhibits P/7, P/8 & P/9);
- (f) reply to notice was submitted by defendant No.3 (exhibit P/10);
- (g) copy of order passed by the District Consumer Forum that it has no jurisdiction to deal with the dispute (exhibit P/11);
- (h) copy of letter dated 03/05/1993 addressed by office of defendant No.2 to defendant No.3 that defendants No.1 and 2 had transported the electric motor and pump for supply to the plaintiff but, defendant No.3 chose not to seek delivery of the same for supply to the plaintiff (exhibit P/12);
- (i) oral evidence was led by the plaintiff and the defendants No.1 & 2 to reinforce the contentions raised by the plaintiff in the plaint and in the written statement by the defendants.

Eventually in paragraphs 12, 13, 14, 19 and 23 of the judgment, the trial concluded that there was privity of contract between the plaintiff and defendant No.3. The civil suit No.31B/1995 has been decreed on 20/07/1998 with following decree:

“ 28 – (अ) प्रतिवादी क्रमांक 3 वादी को अनुबंध के अंतर्गत प्राप्त अग्रिम राशि तथा सूचना पत्र व्यय के 1,81,500/- + 500/- रूपए, अर्थात् 1,82,000 (एक लाख बैयासी हजार रूपए) देवेगा।

(ब) प्रतिवादी क्रमांक 3 उक्त राशि पर चेक प्राप्ति के दिनांक 4-12-92 से वाद प्रस्तुति दिनांक 4-12-95 तक तथा वाद प्रस्तुति दिनांक से उक्त राशि का पूर्ण भुगतान होने तक की अवधि का 12 प्रतिशत प्रतिवर्ष की दर से ब्याज भी देवेगा। दिनांक 4-12-92 से 4-12-95 तक की अवधि के ब्याज की राशि आज्ञापति हस्ताक्षरित होने के पूर्व वादी द्वारा उक्त राशि पर न्याय शुल्क देने पर देय होगी। वादी निर्णय दिनांक से 2 दिन के अंदर उक्त ब्याज की राशि के लिए न्यायशुल्क जमा करे।

... .. “

Thereafter, execution case was filed for recovery of Rs.1,82,000/- with interest. The same was transferred on an application filed by plaintiff under Order 21 rule 6 CPC to the Court of Additional District Judge, Barwaha District Khargone on 22/06/1999.

6. The executing Court had attached immovable property of defendant No.3 and given on *supardgy* to Girdharilal Joshi s/o

Kaluram Joshi; proprietor of the firm. It further appears that Girdharilal Joshi had raised objection under Order 21 rule 58 CPC alleging that the attached property was not of Joshi and Company but, the same was rejected. Thereafter, a case was registered against Girdharilal Joshi under section 406 IPC. During pendency of the proceedings, Girdharilal Joshi passed away.

Thereafter, an application was filed to array the present petitioner in the execution proceedings as legal representative and partner of defendant No.3 firm with further prayer that the amount under the decree be recovered from the present petitioner and in default, he be sent to the civil prison. The same was allowed vide order dated 26/04/2013.

The petitioner had challenged the aforesaid order before this Court in W.P.No.9719/2013 with a grievance that the decree was passed by Court at Khandwa and the execution proceedings have been filed at Barwah, therefore, the same is not maintainable against the petitioner. A coordinate Bench vide order dated 11/09/2013 disposed of the aforesaid writ petition with liberty to raise an objection against recovery from the petitioner before the executing Court.

By the order impugned, the trial Court has overruled the objection of petitioner and decided to proceed further for recovery of decretal amount from the present petitioner under Order 21 CPC.

7. A coordinate Bench of this Court while issuing notices in this case has stayed execution proceedings in case No.31-B/95X3/99 vide order dated 13/08/2014.

8. Learned counsel for the petitioner has raised two-fold submission that **(i)** the defendant No.3 M/s Joshi and Company Authorized dealer of Kirloskar Brothers Indore Road, Barwaha, Tehsil Barwaha District West Nimar was neither sued through partner nor the proprietor/partner arrayed by name as party-defendant. The firm itself is not a legal entity, therefore, the decree passed against defendant No.3 is against non-existent entity and a nullity. No application for amendment in the cause title was ever made during pendency of the suit; **(ii)** section 152 read with section 153 CPC do not empower the executing Court to amend the cause title in execution proceedings.

Even otherwise, the application for amendment of cause title is barred by time and referred to section 22 (i) of the Limitation Act.

9. Heard.

10. Before adverting to submissions advanced, it is expedient to quote section 4 of the Indian Partnership Act, 1932:

“4. Definition of “partnership”, “partner”, “firm” and “firm name”.- “Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

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”.

11. It is settled law that partnership firm is not the legal entity. The firm name is only a compendious name given to the partnership and the partners are real owners of assets and the partnership property belongs to all the partners constituting the firm [(N.Khadervali Saheb vs. N. Gudu Saheb (2003) 3 SCC 229, relied upon)].

Order 30 rule (1) CPC enables the partners carrying on business may sue or be sued in the name of firm of which such persons are partners at the time of accrual of cause of action.

Section 152 CPC empowering the Court to amend the judgments, decrees or orders and the same reads as under:

“152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties”.

Section 153 CPC provides for general power to amend which reads as under:

“153. General power to amend.- The 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 proceeding 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.”

12. The basis of the provision under section 152 CPC is founded on the maxim *actus curiae neminem gravabit*, ie., an act of court shall prejudice no man. The maxim 'is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law' said Cresswell J in *Freeman Vs. Tranah* 12 CB 406. An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified.

Section 152 CPC is based on two principles; *(i)* the act of the court should not prejudice any party and *(ii)* the courts have a duty to see that their records are true and represent the correct state of affairs.

The Hon'ble Supreme Court while discussing the ambit and scope of section 152 CPC in the case of **State of Punjab Vs. Darshan Singh, (2004) 1 SCC 328** has held that after passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal on mere change of view, is not entitled to vary the terms of the judgments, decrees and others earlier passed except by means of review.....

The power under section 152 CPC is not the power of review. Therefore, the omission sought to be corrected which goes to merits of the case is beyond the scope of section 152. It cannot modify, alter or add to the terms of its original judgment, decree or order [**Dwaraka Das Vs. State of M.P., (1993) 3 SCC 500 & Jayalakshmi Coelho Vs. Oswald Joseph Coelho, (2001) 4 SCC 181** referred to].

13. The words "**any proceeding in the suit**" and "**all necessary amendments**" used in section 153 CPC for the purpose of determining the real question or **issues raised by** or **depending on such proceeding** are of wide amplitude. The proceedings in general parlance means the form in which the actions are brought and defended, adjudication by enquiry or trial, rendering of the judgment and execution thereof. The term "suit" used therein in the opinion of this Court is comprehensive and encompasses proceedings in the Court of justice by a party for an action under law and proceedings for execution of the order of the Court involving different modes of procedure under Order 21 CPC. [**Bhoganandham Sessaiah Vs. Budhi Veerabhadrayya (died) and others, AIR 1972 Andhra Pradesh 134 (FB)** referred to].

The principles on which the power to amend should be exercised are now well settled. A party is not allowed by amendment to set up a new case or a new cause of action particularly, when a suit on the new cause of action is barred. However, if the proposed amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts the amendment may be allowed even after expiry of the statutory period of limitation [**Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and others, AIR 1957 SC 363 & A.K.Gupta and Sons Ltd., Vs. Damodar Valley Corporation, AIR 1967 SC 96**, referred to].

The Hon'ble Supreme Court in the case of **Master Construction Co. Pvt., Ltd., Vs. State of Orissa, AIR 1966 SC 1047**, it has been observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court liable to be corrected. As such, the principles underlying the scope of power to amend either under Order 6 rule 17 CPC or under section 153 CPC are substantially the same.

In the case of **Purushottam Umedbhai and Co, Vs. M/s Manilal and Sons, AIR 1961 SC 325** it has been held that the plaint in the name of a firm is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purposes of the Code. Therefore, a civil Court can permit an amendment of the plaint to enable a ***proper description of the plaintiffs*** to appear in it in order to assist the Court in determining the real question or issue between the parties invoking jurisdiction under section 153 CPC. As such, correction of the error is not an addition or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake provided the mistake was *bona fide*. Therefore, such an amendment shall not attract the provisions of section 21(1) of the Limitation Act.

14. The Civil Procedure Code through codified procedure is intended to help facilitate administrative of justice regard being had to the concept of justice, equity and good conscience. Therefore, the provisions thereunder must receive liberal construction ensuring

substantive justice.

The general powers conferred upon the Court under CPC are required to be liberally construed to attain the object of substantial justice between the parties. As the general power of transfer and withdrawal of cases conferred upon the District Judge under section 24 CPC extends to the suits and execution proceedings, I find no reason why such wide liberal principle of liberal construction be not applied to section 153 CPC to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*, i.e., a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties [**Commissioner of Income-tax Vs. Hindustan Bulk Carriers, AIR 2003 SC 3942**].

15. With the aforesaid principles of law, let us examine the facts in hand.

16. The firm was served with notice given under the seal of the Court dated 08/08/1996 through paper publication published on 20/08/1996 but, there was no representation of the firm in the suit (Order 5 rule 19 CPC) and it remained *ex parte*.

17. Defendant No.3 M/s Joshi and Company is a partnership firm which is still in existence and petitioner is the partner. Paragraph 9 of the judgment and decree dated 20/07/1998 passed in civil suit No.31B/1995 by the trial Court.

18. The trial Court as discussed above has categorically concluded that defendant No.3 is an authorized dealer of defendants No.1 and 2. The quotation and rates for supply of 200 horsepower electric motor and pump was submitted by defendant No.3 to the plaintiff. The same being lowest was approved and an order was placed for supply of the same by executing an agreement on 04/12/1992. As per terms and conditions of the agreement, an advance of 25% of the amount was to be paid and the goods were to be delivered within three months. An advance of Rs.1,81,500/- was paid vide cheque No.0523728 dt.04/12/1992 drawn on Bank of India, Branch Khandwa to defendant No.3. However, supply was not made giving rise to cause of action for termination of the agreement and consequently filing the instant suit for recovery of the amount.

Suit was decreed by the trial Court (supra) and the same has attained finality.

19. During the execution proceedings, the movable property of the firm were given on *supardginama* to late Girdharilal Joshi; proprietor of the firm after attachment with an undertaking to produce the same before the Court as and when ordered for realization of the outstanding dues. Girdharilal Joshi had objected to the order of attachment. The objection was rejected. The default of not making available the attached property had led to initiation of proceedings under section 406 IPC. During pendency of the execution proceedings, Girdharilal Joshi passed away. Under the circumstances, the instant application was filed to array present petitioner son of late Girdharilal Joshi in the proceedings as judgment-debtor as existing partner of the defendant No.3 firm. Application has been allowed by the impugned order.

20. It appears that in the suit, due to accidental slip the proprietor of the firm was not arrayed, however, the firm was arrayed as defendant No.3 against whom the liability was crystallized by a detailed discussion in the judgment by the trial Court referred to and reiterated above. There is no dispute that the petitioner is the partner of the firm—defendant No.3. In fact, the proprietor/partner has carried on business of the firm both as principal and as an agent of the firm. The firm name is a mere expression and not a legal entity. Therefore, the description of defendant No.3 may be imperfect in the plaint; an error which can be permitted to be corrected. It is neither addition nor substitution of a party but, merely a clarification or description of defendant No.3. As a matter of fact, the suit was intended against the persons constituting the firm for recovery. Therefore, mere mis-description of such party can always be corrected. The mistake *ex facie* was *bona fide*.

21. Therefore, in the considered opinion of this Court, such correction can always be made even in the execution proceedings as by such recourse; no change or amendment is allowed in the judgment and decree to the prejudice of the judgment-debtor and, therefore, the same is not in conflict with the principle *actus curiae neminem gravabit*, ie., an act of court shall prejudice no man underlying sections 152 and 153 CPC on the contrary with the

correction of description of defendant No.3, the intention of the judgment and decree are given effect to ensuring complete and substantive justice. Hence, the two-fold submission of learned counsel for the petitioner is hereby answered in negative. The principle laid by the High Court of Calcutta in the case of **Sachindra Chandra Chakravarti Vs. Jnanendra Narayan Singh Roy and another, AIR 1963 Calcutta 417** is not disputed but, the same is distinguishable on facts and not helpful to the petitioner.

22. Writ petition sans merit and is hereby dismissed.

23. Before parting with the case, it is considered apposite to observe that the suit is of the year 1995. Therefore, the executing Court shall endeavour to execute the decree within a period not later than two months from the date of receipt copy of the order passed today.

24. Registry is directed to transmit the original record to the concerned executing Court forthwith.

b/-

(Rohit Arya)
Judge
05-11-2019