

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3128 OF 2011

M/s. Rashmi Gruh Nirman Pvt. Ltd
through Ashwin T. Shah and
Mr. Chandravadan G. Thakkar .. Petitioner

vs.

Unique Shanti Developers and anr. .. Respondents

WITH

CIVIL APPLICATION NO. 183 OF 2015

Shri. Harshad Punamchand Doshi
the Proprietor of M/s. Unique Shati
Developers (since deceased) thorough
his legal heir .. Applicant

In the matter between

M/s. Rashmi Gruh Nirman Pvt. Ltd
through Ashwin T. Shah and
Mr. Chandravadan G. Thakkar .. Petitioner

vs.

Unique Shanti Developers and anr. .. Respondents

Ms Neeta Karnik for the Petitioner in WP No.3128 of 2011 and for
the Original Petitioner in CA No.183 of 2015.

Mr. R.D. Suryawanshi for Respondent No.1 in WP 3128 of 2011 and
for Applicant/Original Respondent No.1 in CA No.183 of 2015.

Mr. Prashant Kamble for Respondent No.2 in WP No.3128 of 2011 &
for Original Respondent No.2 in CA No.183 of 2015.

CORAM : M. S. SONAK, J.
DATE : 19 MARCH, 2015

P.C. :-

1] This petition impugns the order dated 21 December 2010
made by the 7th Civil Judge, Senior Division, Thane permitting the

respondent No.1, i.e., original plaintiff in Special Civil Suit No.362 of 2000 to delete the name of “*M/s. Unique Shanti Developers*” from the cause title to the plaint and to insert the name of '*Madhuben Harshad Doshi*' being the legal representative of late Mr. Harshad P. Doshi. By the impugned order, learned Civil Judge also rejected the petitioner's application below Exhibit-382 urging the dismissal of the suit, on the ground that the suit in the name of '*M/s. Unique Shanti Developers*' was not at all competent.

2] Mr. R.D. Suryawanshi, learned counsel for respondent No.1 raised a preliminary objection to the maintainability of this writ petition, on the ground that alternate remedy by way of instituting a civil revision application, was available to the petitioner. There is no reason to entertain this preliminary objection, particularly since this petition was admitted on 25 July 2011 and the objection is raised at the stage of final hearing. Further, the order impugned in the present petition, is a common order made upon Exhibit-385 filed by respondent No.1 seeking amendment of the plaint and Exhibit-382 filed by the petitioner seeking dismissal of the suit. As against, the order made below Exhibit-385 seeking amendment, a civil revision application would not be maintainable. Accordingly, the petitioner

has rightly invoked the extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

3] There is no dispute that the plaintiff in the present case, was described in the plaint in the following manner:

*“Unique Shanti Developers,]
Through Shri. Harshad Punamchand Doshi]
The Proprietor of Unique Shanti]
Developers, age 48 years, occ: business]
having office at Shanti Vihar Building]
A/A 001, Opp. Sector No.2, Mira Road (E)]
District Thane 401 107.] Plaintiff”*

4] After the suit had proceeded upto a fairly advanced stage, Mr.Harshad P. Doshi, the Proprietor of Unique Shanti Developers expired on 14 August 2009. On 5 October 2009, an application was taken out under Order 22 Rule 9 of Code of Civil Procedure, 1908 (CPC) to bring on record his legal heirs. The application was allowed on 25 February 2010 and in pursuance thereof, the legal heirs of late Mr. Harshad P. Doshi, have been brought on record in the suit. Admittedly, the order dated 25 February 2010, was never challenged by the petitioner.

5] On 23 March 2010, however, at the stage when evidence on behalf of respondent No.1-plaintiff was proceeding, the petitioner

filed application dated 23 October 2010 (Exhibit-382) urging dismissal of the suit, on the ground that a suit was not at all maintainable under the trade name '*M/s.Unique Shanti Developers*'. The petitioner, in the said application, further urged that the counterclaim could proceed, since under the provisions of Order 30 Rule 10 of CPC, there was no bar to sue a defendant under a trade name.

6] On 21 August 2010 (Exhibit-385), respondent No.1 filed an application under Order 6 Rule 17 of CPC seeking amendment to the cause title.

7] As noted earlier, by common order, dated 21 December 2010 (impugned order), learned Civil Judge has allowed application at Exhibit-385, but rejected the application at Exhibit-382. Hence, the present petition.

8] Ms Karnik, learned counsel for the petitioner submitted that the provisions of Order 30 Rule 10 of the CPC only permit any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name.

However, there is no provision either under the CPC or for that matter any other law, which permits a person to sue under any name other than his own, including his firm name. In the present case, admittedly, M/s. Unique Shanti Developers, is a Proprietary concern. Such Proprietary concern is not a legal entity like a company etc. Therefore, a suit in the name of such firm name or trade name, was not at all maintainable and the same ought to have been dismissed. Ms Karnik by way of a demurer, submitted that correction, if any, to the cause title could have been carried out until the Proprietor Mr. Harshad P. Doshi was alive. However, consequent upon his demise on 14 August 2009, the suit had to be dismissed and there was no question of permitting legal heirs of late Mr. Harshad P. Doshi to prosecute the suit any further. Ms Karnik placed reliance upon the decision of the Calcutta High Court in case of *Neogi Ghose & Co. vs. Sardar Nehal Singh*¹, and the Patna High Court in case of *R.J. Mohammed Yakub Saheb vs. M/s. Dipa Sahu Deoki Prasad*², in support of her contentions.

9] Mr. Suryawanshi, learned counsel for respondent No.1 defended the impugned order, by submitting that the suit in the

1 AIR 1931 Calcutta 770

2 AIR 1959 PATNA 200

present case had not been filed in the trade name of the proprietary concern, and the Proprietor Mr. Harshad Doshi, was very much the real plaintiff. In such circumstances, learned counsel submitted that this was a case of mis-description, which could be corrected at any stage of the proceedings. Further, the learned counsel emphasized that in absence of any challenge to the order dated 25 February 2010, by which the legal heirs of the Proprietor were permitted to be brought on record, there remains no force in the hyper technical contentions urged by and on behalf of the petitioner. Mr. Suryawanshi placed reliance upon the decision of this Court in case of *Municipal Council, Tiroda vs. K. Ravindra & Company and others*³, and the decision of Hon'ble Apex Court in case of *Rasiklal Manikchand Dhariwal & anr. vs. M.S.S. Food Products*⁴ in support of his contentions.

10] The rival contentions now fall for determination.

11] As noted earlier, the suit in the present case was filed with the description 'M/s. Unique Shanti Developers through Shri. Harshad P. Doshi'. Thus, it is clear that the suit was not instituted merely

3 2003(6)Bom.C.R.287

4 (2012) 2 SCC 196

in the trade name or the firm name, as was the case in the case of *Neogi Ghose (supra)* or for that matter *R.J. Mohammed Yakub Saheb (supra)*'s case. The two decisions accordingly, are distinguishable upon the said ground alone. That apart, even in the case of *Neogi Ghose (supra)*, learned Single Judge of the Calcutta High Court had held that but for the issue of limitation, learned Single Judge would have been prepared to allow the amendment to correct the cause title upon the terms that the plaintiff should pay all the costs incurred up to the date of amendment.

12] In case of *Municipal Council, Tiroda (supra)*, the plaintiff was described as “*K. Ravindra & Co. through its proprietor Shri. Narayan Sakharam Kantonde*” . In such a fact situation, this Court held that this was a case of only mis-description and amendment can always be allowed to rectify the same.

13] Similarly, in case of *Rasiklal Dhariwala (supra)*, the plaintiff had described the title of the plaintiff as follows:

“*Messers M.S.S. Food Products,
Plot No.D, Sector E,
Sanver Road Industrial Area, Indore,
Through – Proprietor – Nilesh Vadhwani
Son of Shri Ashok Vadhwani, aged 27 years,
Occupation – Business*”.

14] The Hon'ble Apex Court in the aforesaid context held that the above description of the plaintiff in the plaint at best may be called to be not in proper order, inasmuch as the name of Nilesh Vadhvani must have preceded the business name in the cause title. The Hon'ble Apex Court very specifically observed that this was not an illegality which goes to the root of the matter

15] No doubt, the Hon'ble Apex Court, in case of *Rasiklal Dhariwala (supra)*, in the context of the provisions contained in Order 30 Rule 10 of CPC, has held that the said provisions are enabling and provide that the person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name. As a necessary corollary, the said provision does not enable a person carrying on business in a name or style other than in his own name to sue in such name or style. To the same effect are the observations in case of *R.J. Mohammed Yakub Saheb (supra)*. However, as noted earlier, this is not a real issue involved in the present case, because this is not a case where the plaint was filed with the description of the trade name or the firm name alone. This distinction has been recognised by this Court in case of *Municipal Council of Tiroda (supra)* and further by the Apex

Court in case of *Rasiklal Dhariwala (supra)*. Accordingly, it cannot be said that there was any jurisdictional error or for that matter illegality in the impugned order allowing the amendment in the facts and circumstances of the present case.

16] There is no merit in the contention of Ms Karnik that the amendment for rectification of the cause title could have been carried out only up to the stage when Shri. Harshad P. Doshi was living, because only he would be in a position to say with certainty that there was some mistake or error in the cause title. The mistake or error in the description, is an obvious one. There was no ambiguity at any stage, as to who was the real plaintiff in the suit. It is possibly for this reason that no objection appears to have been taken or atleast pressed by the petitioner for a period of at least ten years since the institution of the suit. Besides, the order dated 25 February 2010, by which the legal heirs of the real plaintiff, i.e., Mr. Harshad P. Doshi have been permitted to be brought on record, has also attained the finality for want of challenge. In these circumstances, Mr. Suryavanshi is right that the objection as raised, was of a hyper technical nature.

17] There is accordingly, no reason to interfere with the impugned order. This writ petition is dismissed. Since, based upon such a hyper technical objection belatedly raised, the proceedings in the suit have been protracted, the petitioner shall pay costs of Rs.10,000/- to respondent No.1.

18] Since the petition is dismissed, Civil Application No.183 of 2015 does not survive and the same is also disposed of, accordingly.

(M. S. SONAK, J.)

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