

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

906 WRIT PETITION NO. 12703 OF 2017

MAHENDRA KRUSHI SEVA KENDRA,
THROUGH ITS PROPRIETOR
VISHNU RAMSAHYA UPADHYAYA AND ANOTHER
VERSUS
OMEX AGRO FERTILIZERS PRIVATE LIMITED,
THROUGH ITS DIRECTOR / PROPRIETOR
DINESHKUMAR CHIRANJILAL PAPRUNIYA

...
Advocate for Petitioners : Mr. C. R. Deshpande.

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CORAM : **V. K. JADHAV, J.**
DATE : 29th November, 2017.

ORDER:

. Heard.

2 Leave to correct prayer clause (C).

3 Being aggrieved by the order passed by 7th Civil Judge Junior Division, Latur dated 31st August, 2017 below Exhibit 58 in Regular Civil Suit No.134 of 2006, the original Defendants approached to this Court by filing the present writ petition.

4 Brief facts giving rise to the present writ petition are as follows:

- a) The Respondent / Plaintiff has instituted Regular Civil Suit No.134 of 2006 against the Petitioners / firms for recovery an amount of Rs.94,180/- alongwith interest. Though the Petitioners / original Defendants duly served in the said suit, they have not appeared in the suit and as such, the Trial Court has passed the order to proceed with the suit *ex-parte*. The Trial Court by judgment and decree dated 22nd February, 2011, decreed the suit in terms of its prayer clause with interest at the rate of 12% per annum from the date of institution of the suit till realization of the entire amount.
- b) Being aggrieved by the same, the Petitioners / original Defendants preferred an appeal bearing Regular Civil Appeal No.8 of 2014 before the District Court, Latur. The learned District Judge-4, Latur vide judgment and order dated 24th January, 2017 allowed the appeal subject to costs of Rs.10,000/- and further directed to restore Regular Civil Suit No.134 of 2006 to its

original number. The learned District Judge has quashed and set aside the judgment and decree passed by the Trial Court dated 22nd February, 2011 subject to the condition that the Petitioner shall deposit 50% amount due as on the date of the order before the Trial Court within one month, which would be payable to the Plaintiff-firm subject to the fresh judgment and decree. The learned District Judge has also given certain other directions, which are not relevant for the purpose of deciding the present writ petition.

- c) After remand of the matter and after restoration of the suit as directed by the learned District Judge, the Respondent / Plaintiff has filed an application Exhibit 58 under Order VI Rule 17 of the Code of Civil Procedure for carrying out the amendment in the plaint. According to the Respondent / Plaintiff, the suit has been instituted to recover the amount against two different firms by name Mahendra Krushi Seva Kendra at Parathwada, Taluka Achalpura,

District Amravati and also Krushna Agro Service Centre, Chikaldara Road, Damangaon (Gadi), Taluka Parathwada, Taluka Achalpura, District Amravati. Both the firms are run by the family of Upadhya. Actually, the four brothers of Upadhya family deal with the business and the elder brother by name Vishnu Ramsaya Upadhya was looking after the business. It has been further stated in the said application that, however, the actual proprietorship of two different firms, though it is within the family, was not perfectly within the knowledge of the Plaintiff and unfortunately the suit came to be filed under the proprietorship of Vishnu Ramsaya Upadhya. Thus, due to inadvertent mistake, the name of proprietor of the firm came to be wrongly written as Vishnu Ramsaya Upadhya for both the firms. In view of the discloser and obtaining the correct knowledge, one Mr. Manoj Ramsaya Upadhya, who also shown as a proprietor of the aforesaid firm and one Ashok Ramsaya Upadhya is the

proprietor of Krushna Agro Service Center, the said application came to be filed for seeking amendment in the plaint. The learned Judge of the Trial Court vide impugned order allowed the said application. Hence, this writ petition.

5 The learned counsel for Petitioners submits that way back in the year 2006, the Respondent / Plaintiff has instituted the suit showing incorrect name of the persons as proprietors of the said firms. The learned counsel submits that after remand of the matter in the year 2017, application Exhibit 58 came to be submitted by the Respondent / Plaintiff seeking amendment in the plaint to that extent. The learned counsel submits that the proposed amendment would change the nature of suit and also that would lead to insist the Court to settle a time barred claim against the persons, who were not impleaded as proprietors in the original suit.

6 On perusal of appeal memo and the judgment and order passed by the District Judge-4, Latur in Regular Civil Appeal No.8 of 2014, it appears that these two proprietors, for the first time, brought to the notice of the Court in appeal that they are the proprietors of said

two firms. It is to be mentioned here again that even though the Petitioner's firms came to be served duly by paper publication at the initial stage when the suit was instituted in the year 2006, said firms have not appeared before the Court and as such, the Trial Court has passed an order to proceed *ex-parte* against them. In view of the same, there was no opportunity for the Respondent / Plaintiff to comply the provisions as contemplated under Order 30 Rules 1 and 2 of the Code of Civil Procedure.

7 It further appears from the perusal of the judgment and order passed by the District Judge that the learned District Judge has remanded the matter for two reasons firstly that if the appeal is dismissed and the judgment and decree is kept as it is, the same is difficult to execute for the reason that the names of the proprietors have been wrongly shown in the suit. Secondly, for the obvious reason that the judgment and decree under challenge in appeal before the District Judge, was an *ex-parte* decree. In paragraph 11 of the judgment, the learned District Judge has made the following observations:

“11. The proprietary firm and proprietor are not two separate entities, but these are one and the same. Even if decree is passed against the

proprietary firm it is to be executed against the proprietor. If the name of the proprietor is wrong, then the judgment and decree is meaningless, because it cannot be executed only against the proprietary firm. So, if this appeal is dismissed and the judgment and decree as it is kept in existence, it is difficult to execute. So, there is need to have meaningful judgment and decree. In other words, the judgment and decree must be against the correct person. This is one of the two grounds to think for to remand the suit to the learned lower Court.”

8 In the light of those observations, the Respondent / Plaintiff has rightly filed application Exhibit 58. I do not think any point of limitation arise in this case because the suit was instituted well within the limitation against both the firms for recovery of money. The learned Trial Judge has therefore, rightly allowed the application Exhibit 58. I am agree with the observations made by the learned District Judge that the proprietary firm and proprietor are not two separate entities and even if the decree is passed against the proprietary firm, the same cannot be executed if the names of the proprietors have been mentioned incorrectly. In that event the judgment and decree would be meaningless. Though the proposed amendment sought belatedly, the same was inevitable since the

Petitioners themselves disclosed all these facts for the first time before the District Court in appeal preferred against the *ex-parte* judgment and decree in the original suit. The writ petition is accordingly dismissed. No costs.

[V. K. JADHAV, J.]

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