

IN THE BOMBAY CITY CIVIL COURT AT BOMBAY.

NOTICE OF MOTION NO. 2024 OF 2019

(CNR NO. MHCC01-005606-2019)

IN

SUIT NO. 9591 OF 1990

(CNR NO. MHCC01-007273-2012)

(HIGH COURT SUIT NO. 140 OF 1990)

M/s. Palshetkar & Co. and Others

...Plaintiffs

Versus

Mangala Prakash Pradhan and Others

...Defendants

CORAM : HIS HONOUR JUDGE

SHRI G.G.BHANSALI.

(C.R.NO.31).

DATE : 19th AUGUST, 2019.

Mr. Paresh S. Madkaikar, Advocate for Plaintiffs.

Mr. S.R.Ketkar, Advocate for Defendant Nos.5 to 8.

ORAL ORDER

This is a motion taken out by plaintiff for deletion of Issue No.12. It runs as follows :

“Whether defendant nos. 5 to 8 prove that plaintiff nos. 1 to 3, 11 to 14 have committed default in payment of principal and interest required for construction in violation of agreement dated 04/07/1994 ?”

2. Perused reply in detail filed by defendants 5 to 8.

3. Ld. Advocate Madkaikar for plaintiffs submits that in view of the scope under Order 14 Rule 1 and 2, issues are required to be framed by the Court on material assertions by plaintiff and denials by the defendant. This is a suit filed in the year 1990 before the Original Side of the Hon'ble High Court for specific performance of the contract. Pleadings are completed. The impugned agreement dated 04/07/1994 is not averred in plaint nor in written statement, therefore the impugned issue will not arise before the Court. It is requested to peruse the orders of the Hon'ble High Court in different notice of motion dated 07/07/1997 and 13/01/2009. It is added that it will widen the scope of the present suit which will be beyond the issue under controversy.

4. It is continued by ld. Advocate Madkaikar for plaintiffs that in view of the agreement between the parties dated 04/07/1994, the suit no. 27/2013 is filed by the defendants 5 to 8 of present suit for recovery of amount against the plaintiff of present suit for recovery of Rs.16 Crores. It is requested to delete Issue No.12.

5. Ld. Advocate S.R.Ketkar for defendants 5 to 8 requested to note that in view of the order in the present suit some of the plaintiffs were transposed as defendants 5 to 8. It is admitted that the agreement dated 04/07/1994 is not part of the pleading. However the remaining uncompleted construction came to be completed by then plaintiffs, who are defendants 5 to 8 and some of the parties in view of the impugned agreement dated 04/07/1994. The agreement dated 04/07/1994 is part of the pleading in written statement. Accordingly, after completion of the construction the possession of respective flats are given to six members; and the defaulted six members have not received the possession of their flats.

6. Ld. Advocate Ketkar for defendants 5 to 8 submits that the material relief in the present suit has become infructuous as the main purpose has got completed, therefore no specific performance can be directed to be completed by this Court. It is added that the purpose to present suit is limited to the extent of consequential relief. It is concluded that Issue No.12 is essential to narrate all the facts before the Court. It is requested to reject the motion.

REASONS FOR THE ORDER

7. In view of Order 41 Rule 1 and 2 of the CPC, it is the duty of the Court to frame the issue in view of material assertion of one side and denial of other. The object of framing issue is to curtail evidence and to inform the parties that what is the fact in issue.

8. It is admitted by ld. Advocate Madkaikar for plaintiffs that plaintiffs are signatory in the impugned agreement dated 04/07/1994. The factual aspect is not denied that in view of the agreement of 1994, the remaining construction is completed and possession to six flat members has been given. The remaining six flats are not possessed by the members who have defaulted the payment.

9. It is necessary to peruse order of the Hon'ble High Court dated 07/07/1997 wherein in para 9 it is observed as follows :

“It is undoubtedly true that the terms and conditions of the agency will have to be fixed by this Court. We have already indicated that the plaintiffs are willing to deposit the entire balance amount. The plaintiffs are also agreeable to bear the costs of the

construction. In these circumstances, it will be totally unjust to direct them to pay interest at this interim stage. We are also not inclined to accede to the prayer of Mr. Vahanvati to permit the defendant Nos.1 to 3 to withdraw the amount. The builders have abandoned the project midway, making the flat purchasers run from pillars to post to get their flats as per the agreement. It seems that the builders have also created some third party interest. In these circumstances, it will not be proper to allow them to withdraw the amount at this interim stage.”

10. In continuation of aforesaid order the Hon'ble High Court has directed the Receiver to complete the construction at the cost of plaintiffs.

11. Ld. Advocate Madkaikar for plaintiffs requested to note that as per order of the Hon'ble High Court dated 17/01/2009, it is observed in para 10 that the impugned agreement is a inter-se agreement between the parties, which is not subject matter of the suit or any orders passed by this Court.

12. It is crystal clear that the agreement dated 04/07/1994 cannot be a part of the suit or pleading, as suit came to be filed in the year 1990 i.e. before four years of the filing of the suit. However, prior to reference to abovementioned para 10, it is necessary to peruse the opening para of the order dated 17/01/2009. It runs as follows :

“The Court Receiver has submitted his report dated 15th December 2007 bearing No.404/2007

wherein the Court Receiver has inter-alia sought directions against the plaintiff no.1 (now transposed as defendant no.5) to hand over the possession of flats bearing Nos.101, 102, 501, 502, 601 & 602 alongwith the keys thereof to the Court Receiver forthwith and in turn to hand over the said flats to the respective plaintiffs / purchasers to get the said flats completed at their own costs. The Court Receiver has also sought directions against the plaintiff no.1 (now defendant no.5) to forward the details of the certified account of the constructions to get the said building completed since 1st April 2002 upto 31st March 2007 to the Court Receiver.”

13. In view of abovementioned circumstances and by consent of the parties, the plaintiffs no.1, 2, 3 and 13 were transposed as defendants 5 to 8. In the order of the Hon'ble High Court dated 13/01/2009, in paragraph no.3, it is made clear that the said transposition of four plaintiffs as defendants shall not affect any of their rights and/or contentions in any manner.

14. This is a suit filed in the year 1990. The impugned agreement dated 04/07/1994 german between parties inter-se because of the present suit filed before the Court. The majority of the facts are not disputed by the parties that the construction work came to be completed and six flat members have accepted the possession. In this scenario, the fact in issue in present suit cannot be segregated from the agreement dated 04/07/1994, even though it was not part of the basic pleading. In view of the concept of res-gestae the scope to relevancy of

facts require to be widen. Therefore the Issue No.12 is necessary to decide the rights between the parties as the agreement dated 04/07/1994 is referred by the Hon'ble High Court in various orders, whereby the remaining construction is completed. Resultantly, there is no merit in the motion. Hence the order :

- ORDER -

1. Notice of Motion No. 2024/2019 stands rejected.
2. Suit is 29 years old, parties may insist for expedite hearing.
3. N/m No. 2024/19 stands disposed off accordingly.

(At the request of Id. Advocate Madkaikar, two months time is given as next date for hearing.)

(G.G.BHANSALI)
Judge,
City Civil & Sessions Court,
Mumbai.

Date : 19/08/2019.

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| 1. Dictated on | : 19/08/2019. |
| 2. Transcribed on | : 20/08/2019. |
| 3. Signed on | : 21/08/2019. |
| 4. Delivered to Certified | : |
| Copy Section on | |

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL

SIGNED JUDGMENT/ORDER”

UPLOAD DATE AND TIME
21/08/2019. 5.37 p.m.

NAME OF STENOGRAPHER
Miss M.A.Kulkarni

Name of the Judge (with Court Room no.)	HHJ Shri G.G.Bhansali. (Court Room No.31).
Date of Pronouncement of Judgment/Order	19/08/2019.
Judgment/Order signed by P.O. on	21/08/2019.
Judgment/Order uploaded on	21/08/2019.