

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO. 1476 OF 2014****IN****SUMMARY SUIT NO. 787 OF 2013**

M/s.M.H. Construction

...Plaintiff

vs.

The State of Maharashtra &amp; Ors.

...Defendants

Mr.G.B. Pawar for Plaintiff.

Ms.Uma Palsuledesai, AGP for Respondent Nos.1 to 3.

**CORAM : S.C. GUPTE, J.****03 FEBRUARY 2015****P.C. :**

This Notice of Motion seeks, firstly, production of certain documents listed out in prayer clause (a) of the Notice of Motion. Learned Counsel for the Plaintiff submits that these documents have since been produced by the Defendants. Prayer clause (a) of the Notice of Motion has, thus, worked itself out. Prayer clause (c), which is merely a consequential prayer on failure to produce the documents listed out in prayer clause (a), also need not be considered. Prayer clause (b) is seeking directions against Defendant Nos.1 to 3 to admit the documents produced with the plaint. Learned Counsel for the Plaintiff submits that in the course of their evidence, Defendant Nos.1 to 3 have relied on the very same documents, which are produced with the plaint. The documents, thus, being all admitted by the Defendants, prayer clause (b) has also worked itself out.

2           Prayer clause (d) seeks to strike out the issue concerning pecuniary jurisdiction of this Court, or in the alternative, to try this issue as a preliminary issue by excluding all other issues. It is submitted by the learned Counsel for the Plaintiff that having regard to the documents now produced by the Defendants, the issue does not arise for the consideration of this Court and, at any rate, must be tried immediately as a preliminary issue. Having regard to the pleadings of the parties in the present suit, this Court has framed issues on 31 October 2014.

Issue No.3 concerning the pecuniary jurisdiction of this court arises on the basis of the allegations contained in para 1 and 1(iii) of the written statement of the Defendants. The issue cannot be struck off pending final determination thereof, because some evidence is now available in the course of the trial suggesting that the issue should be decided one way and not the other. So also, there is no point in trying this issue as a preliminary issue. Hence prayer clause (d) is rejected.

3               As far as prayer clause (e) is concerned, by which two additional issues are proposed by the Plaintiff, learned Counsel for the Defendants does not object to the framing of the following additional issue, which is accordingly framed as an additional issue :

“Whether the Plaintiff proves that the work done certificate issued by Defendant No.2 is based on the measurement recorded and checked by the Executive Engineer of the Defendants?”

4               As for additional Issue No.2 proposed in prayer clause (e), namely, whether the Defendants are liable for criminal action, the same does not arise on the pleadings of the parties or come within the purview of this court in the suit as framed. An issue arises when a material proposition is affirmed by one party and denied by the other. A material proposition is that proposition of law or fact which a Plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. The defendant's liability for a criminal action as a result of the acts complained of by the Plaintiff herein is not necessary to be alleged to show the Plaintiff's right to sue, and thus not a material proposition.

5               Prayer clause (f) of the Notice of Motion is merely a fall-out of prayer clause (d), which is already dealt with and answered against the Plaintiff above. Prayer clause (f) thus does not merit acceptance.

6               The Notice of Motion is accordingly disposed of.

7            Learned Counsel for the Plaintiff submits that the Plaintiff's affidavit of evidence in lieu of examination-in-chief has already been filed. The documents have also been already marked. Mr.Rohan Kelkar, Advocate, is appointed as a Court Commissioner for recording of evidence. The Commissioner shall record the evidence and submit his report within a period of six weeks from today. The Commissioner's fees fixed shall be borne by the parties equally. The parties may now write to the Commissioner for fixing a date for recording of evidence.

**(S.C. Gupte, J.)**