

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO. 176 OF 2017
IN
NOTICE OF MOTION (LODGING) NO. 2566 OF 2016
IN
SUIT NO. 1759 OF 2009**

Prashant Shashikant Kittur ...Appellant
(Org.Defendant No.3(a))

Versus

Kairoos Minoo Bhaya & Ors. ...Respondents

**WITH
NOTICE OF MOTION (LODGING) NO. 1537 OF 2017
IN
COMMERCIAL APPEAL NO. 176 OF 2017
IN
NOTICE OF MOTION (LODGING) NO. 2566 OF 2016
IN
SUIT NO. 1759 OF 2009**

Prashant Shashikant Kittur ...Applicant (Org. Appellant)

IN THE MATTER BETWEEN :

Prashant Shashikant Kittur ...Appellant
Versus
Kairoos Minoo Bhaya & Ors. ...Respondents

Ms. Shakuntala I. Joshi a/w Ms. Jalpa Pithadia i/b S. I. Joshi & Co. for the Appellant/Applicant

Mr. A. M. Varnekar for the Respondent Nos. 1 and 2

**CORAM : S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.
TUESDAY, 19th DECEMBER, 2017**

P.C. :

1 We have heard both sides extensively on this appeal, which is directed against the order of the learned single Judge dated 24th October, 2016 in Notice of Motion (Lodging) No. 2566 of 2016 in Suit No. 1759 of 2009.

2 The Notice of Motion was moved by the appellant/original defendant No.3(a).

3 In the affidavit in support of this notice of motion, which sought a dismissal of the suit, by invoking Order VII Rule 11(a) of the Code of Civil Procedure, the applicant pointed out that defendant No. 3 (original) was a Director of the defendant No.1-Company. It is settled law that the Directors are not, therefore, liable for any acts of the Company. The defendant No.3(a) is a legal heir of the deceased defendant No.3 and was neither a Director nor aware of any of the facts alleged in the plaint. Hence, the plaint does not disclose any cause of action against the original defendant as also the substituted defendant. That is how the relief claimed in the motion was sought by the appellant/original defendant No.3(a).

4 The learned single Judge was of the opinion that the present applicant is the son of original defendant No.3. He was brought on record pursuant to an order dated 21st January, 2011. He has also filed a written statement. The issues were settled, the trial has begun, the plaintiff's witness is already in the box and the defendant No.2 has completed cross-examination of the plaintiff's witness No.1. The suit was at a stage where the present appellant, so also the defendant following him, were to cross-examine this witness, if they so desire.

5 At this stage, this notice of motion was moved and therefore, the learned single Judge was of the opinion that the reliefs sought, in the peculiar facts and circumstances, cannot be granted in this notice of motion, which is moved on 30th August, 2016 in Suit No. 1759 of 2009.

6 Ms. Joshi appearing in support of this appeal raised several contentions and she would submit that given the position of a Director in the Company, he is not personally liable for any of the acts, much less, to compensate the loss caused allegedly to a shareholder like the plaintiff.

Therefore, by merely alleging collusion between the company and the Directors, no decree could have been sought against original defendant No.3, by the plaintiff. In any event, the cause of action, if at all available in law, perished with the death of the defendant No.3.

7 After hearing Ms. Joshi at some length and perusing with her assistance, some of the provisions of the Companies Act, 2013, the Indian Succession Act, 1925, we do not think we should enter into this larger controversy, for, it would be purely academic.

8 We do not think that by mere rejection of the notice of motion by the order under challenge, the controversy raised before us is concluded particularly against the appellant. It would be open for the appellant, despite filing the written statement and participating in the trial, to urge that the plaint discloses no cause of action either against the predecessor in-title or the present defendant No.3(a). That a Director has an existence independent of the Company in law unlike a sole proprietorship and partnership firm. That, a decree in the sum claimed for the alleged loss caused by the acts of a company in not issuing duplicate shares to the

plaintiff, cannot be passed as against the Directors, particularly, given the role as a member of the Board of Directors of a Limited Company and secondly, none of the Directors are personally responsible for any of the acts which are attributed to them while allotting shares to parties like the plaintiff who may claim to be ex-Director of the company. The application to issue duplicate shares, the manner in which it is dealt with and disposed of and the outcome thereof, are all acts attributable to the Board and not to individual directors. Meaning thereby, it is a collective decision. All these arguments are still open and can be canvassed at an appropriate stage before the learned single Judge. Merely because the appellant/original defendant No.3(a) has to participate in the trial and await the stage of arguments does not mean that any of the defences are foreclosed. There is no prejudice caused and all contentions as noted above are still open and are specifically kept open.

9 We do not think we should entertain this appeal. The same is, therefore, disposed of with the above clarification.

10 Equally, all contentions of the plaintiff to the contrary are kept open. We do not think that the learned single Judge will be so harsh as not to allow the original defendant No.3(a)/appellant to cross-examine the plaintiff's witness. If all defendants have concluded it, it would be open for the appellant to request the learned Judge to allow such cross-examination and seek the necessary leave in that behalf. We are sure that the pendency of this appeal could be highlighted as a factor preventing the applicant from making such a request earlier.

11 In view of the above order, nothing survives for consideration in Notice of Motion No. 1537 of 2017. It is, accordingly, disposed of.

SMT. BHARATI H. DANGRE, J.

S.C. DHARMADHIKARI, J.