

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13214 OF 2017
ALONG WITH
WRIT PETITION NO.13484 OF 2017

M/s. Skyline Construction,	]	
A Partnership Firm,	]	
Through its Partners :-	]	
Sukhdev Bhimrao Shinde & Ors.	]	 Petitioners
V/s.		
Joma Chaahu Mhatre (Since Deceased),	]	
Through LRs.:-	]	
Pandurang Joma Mhatre & Ors.	]	 Respondents

Mr. S.M. Oak, i/by Mr. Sagar A. Joshi, for the Petitioners.

Mr. P.S. Dani, Senior Counsel, with Mr. Prashant D. Patil, for Respondent No.2.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 4TH APRIL, 2018.

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Oak, learned counsel for the Petitioners, and Mr. Dani, learned Senior Counsel for Respondent No.2.

2. By these Writ Petitions, filed under Article 227 of the Constitution of India, the Petitioner-Firm is challenging the order dated 13th November 2017 passed by the Civil Judge, Senior Division, Panvel, below

the applications filed by Respondent No. 2 in Special Civil Suit No.30 of 2011 and Special Civil Suit No. 32 of 2011 for dismissal of the Suit for inaction on the part of the present Petitioner-Firm since framing of the issues.

3. The Trial Court has, after considering the submissions advanced before it, by learned counsel for Respondent No.2 that the Suit itself is not maintainable and evidence need not be recorded, in pursuance of the issues, as the Petitioner-Plaintiff is not entitled to the relief of specific performance of the contract, in view of the bar created under Section 16 of the Specific Relief Act, 1963, framed the following issue and ordered it to be decided as preliminary issue. The relevant portion of the order of the Trial Court reads as follows :-

“(3)Hence, the following preliminary legal objection is taken up for hearing prior to recording of evidence, in order to ascertain feasibility of disposal of Suit only on legal objection.

“Whether suit for specific performance of contract is maintainable in the light of Section 16 of the Specific Relief Act, 1963, on the face of the plaint and plaint documents ?”

4. The submission of learned counsel for the Petitioner is that, the Trial court has committed a grave error in framing such issue as to the preliminary objection to the maintainability of the Suit and trying it as

preliminary issue. It is submitted that, the application filed by Respondent No.2 was totally on a different aspect i.e. he has sought for dismissal of the Suit on account of inaction on the part of the Petitioner to proceed with hearing of the Suit, after the issues were framed, but the Trial Court has proceeded on totally different footing and raised this objection to the maintainability of the Suit and is also trying the same as preliminary issue.

5. By pointing out to the provisions of Section 16 of the Specific Relief Act, 1963, the submission of learned counsel for the Petitioner is that, the specific performance of the contract cannot be enforced in favour of a person, if he fails to aver and prove that he has performed or is always ready and willing to perform the essential terms of the contract, which are put-forth by him, other than the terms, the performance of which has been prevented by Defendant. Learned Counsel for the Petitioner has urged that, it is a personal bar to the relief of specific performance of the contract, but the Suit for compensation can definitely be maintainable. Therefore, this is not the issue, which can be tried as a preliminary issue or preliminary objection.

6. Further the learned counsel for the Petitioner has also, by pointing out to the provisions of Order 14 Rule 2 of the Code of Civil Procedure, 1908, submitted that the preliminary issue can be framed only in

relation to jurisdiction of the Court or the bar to the Suit created by any law for the time being in force. Here in the case, according to him, the absence of the averments relating to readiness and willingness to perform his part of the contract in the plaint cannot act as a bar to the Suit, created by any law for the time being in force. It is also not relating to the jurisdiction of the Court. In such situation, the Trial Court was totally wrong in framing the objection and deciding it as preliminary one. Hence, in the opinion of learned counsel for the Petitioner, this is a fit case, where this Court should intervene, interfere and restrain the Trial Court from deciding such objection as preliminary issue.

7. Per contra, learned counsel for Respondent No.2 has, on the last date of the hearing, pointed out that, on this preliminary objection, learned counsel for both the parties have advanced their submissions and yesterday, i.e. on 3rd April 2018, the matter was kept by the Trial Court for passing orders thereon. Today, it is submitted by him that the learned Trial Court has started dictating the order on 3rd April 2018 and the matter is kept today, i.e. 4th April 2018, for proceeding further with the dictation.

8. In my considered opinion, at this stage, definitely, it would not be proper on the part of this Court to interfere and restrain the Trial Court from passing any further order; especially when the impugned order is

passed last year in November 2017 and thereafter, on the basis of the impugned order, learned counsel for the Petitioner has also advanced submissions before the Trial Court. As a result, the matter is argued before the trial Court on this preliminary objection and now it is partly dictated. Hence, the wisdom and the experience of this Court requires that this Court should hold its hands and not intervene and interfere at this stage.

9. Learned counsel for the Petitioner has relied upon the Judgment of the Apex Court in the case of *Surya Dev Rai Vs. Ram Chander Rai and Ors.*, (2003) 6 SCC 675, wherein the Hon'ble Apex Court has laid down certain guidelines as to the exercise of the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. According to learned counsel for the Petitioner, if there is a patent error apparent on the face of record, which is self-evident, this Court needs to invoke its writ jurisdiction. Here, in the case, it is submitted that considering the way the Trial Court has proceeded to frame this objection as preliminary issue, this is a fit case, where, the writ jurisdiction has to be invoked.

10. However, in my considered opinion, the observations and guidelines laid down by the Hon'ble Apex Court in its Judgment in paragraph No.38, Clause (7), mandate that,

*“Care, caution and circumspection need to be exercised,
when any of the two jurisdictions are sought to be invoked*

during the pendency of any Suit or proceedings in a subordinate court and the error, though calling for correction, is yet capable of being corrected at the conclusion of the proceedings in an Appeal or Revision preferred against it and entertaining a Petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the Suit or proceedings. The High Court may feel inclined to intervene where the error is such, as if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.”

11. In paragraph No.39 of its Judgment, the Hon’ble Apex Court has also held that,

“The facts and circumstances of the given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene, because the error of jurisdiction, though committed, is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in Appeal or Revision preferred at the conclusion of the proceedings.” (emphasis supplied)

12. Learned counsel for the Petitioner draws attention of this Court to the further observations made by the Hon'ble Apex Court in paragraph No.39 of its Judgment to the effect that,

“But there may be cases, where “a stitch in time would save nine”.

13. According to learned counsel for the Petitioner, if the Trial Court proceeds to decide this preliminary objection, it may result into dismissal of the Suit itself, thereby prolonging the lis and the Petitioner will have no option but to file an Appeal and hence, this is a fit case, where intervention by this Court would operate as *“a stitch in time would save nine”*.

14. However, in my considered opinion, the facts of the present case do not warrant interference; particularly the stage at which the matter is now before the Trial Court. If the Trial Court is at this stage in the process of dictating the Judgment or order and as there is definitely a remedy of Appeal or Revision is available, if the order goes against the Petitioner, then the following observations of the Hon’ble Apex Court, in above said judgment are the guiding light.

“While summing up that, the power is there, but the exercise is discretionary, which will be governed solely by the dictates of judicial conscience, enriched by judicial experience and practical wisdom of the Judge.”

15. In the light of the above observations, it will be against the judicial conscience of this Court, enriched by judicial experience and practical wisdom, to interfere in the impugned order at this stage. Hence, both the Writ Petitions do not call for any interference and hence, stand

dismissed.

16. At this stage, learned counsel for the Petitioner submits that, as the question whether the Petitioner is ready and willing to perform his part of the contract is a question of fact, the Petitioner may be permitted to raise this issue in an Appeal under Section 105 of the CPC. It is needless to state that, the Petitioner is always having such liberty to raise this issue in Appeal.

17. Rule is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.]