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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 12561 OF 2019

M/s Palshetkar & Co. & Ors.

...Petitioners

vs

Mangala Pradhan & Ors.

...Respondents

.....

Mr Kaushal Tamhane i/b M/s Dhanuka & Partners for the Petitioners
Mr Mahesh Kukreja for Respondent Nos.1 to 3.

Ms. Tanmayi Vijayakar i/b Uzair Kazi for Respondent No.4

Mr. Saket Ketkar for Respondent Nos.5 to 8.

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CORAM : B. P. COLABAWALLA, J.
(Through Video Conferencing)
12th JUNE 2020.

P.C.:

This Writ Petition challenges the order passed by the Bombay City Civil Court at Bombay dated 19th August, 2019 (impugned order). In the trial Court the plaintiffs (petitioners herein) had filed a Notice of Motion for deleting issue No.12 which reads as under;

“12. Whether defendant Nos. 5 to 8 prove that plaintiffs No.1 to 3, 11 to 14 have committed default in payment of principal and trust required for construction in violation of agreement dated 04.07.1994?

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The premise on which the Notice of Motion was filed, was

that the agreement dated 4th July, 1994 was not germane to decide whether the plaintiffs were entitled to specific performance or otherwise and that this agreement did not form part of the pleadings. The learned Judge after hearing all parties, in paragraph 14 held as under;

“14. This is a suit filed in the year 1990. The impugned agreement dated 04.07.1994 germane 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 the present suit cannot be segregated from the agreement dated 04/07/1994, even though it was not part of the basic pleadings. 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 of 2019 stands rejected.
2. Suit is 29 years old, parties may insist for expedite hearing.
3. N/m No. 2024/2019 stands disposed of accordingly.”

3. I have heard the learned advocates appearing on behalf of the petitioners (original plaintiffs) as well as for respondent Nos.5 to 8. The learned advocates appearing for respondent Nos.5 to 8 have brought to my attention that the agreement dated 4th July 1994 expressly finds mention in the Written Statement filed by defendant Nos.5 to 8. He submits that it is in this light that the above mentioned issue came to be framed. He submitted that the aforesaid issue is an important issue as recorded in the

impugned order, and therefore, the trial Court correctly retained the issue and dismissed the Notice of Motion filed by the plaintiffs (the petitioners herein).

4 I have heard the learned advocates for parties. It is not in dispute that notwithstanding what is stated in the impugned order, the agreement dated 4th July, 1994 forms part of the pleadings, namely, the Written Statement filed on behalf of defendant Nos.5 to 8. The trial Court has come to a finding that the agreement dated 4th July, 1994 is germane in the present suit, and therefore, cannot be segregated from the other issues framed in the suit. On going through the impugned order, I find that it does not suffer from any perversity or error apparent on the face of the record that would require my interference under Article 227 of the Constitution of India. Even otherwise, under Section 105 of the Code of Civil Procedure, 1908, if the aforesaid issue is decided against the plaintiffs and an appeal is filed from a decree passed thereon, the grounds raised in this Notice of Motion can always be set out as grounds of objections in the Memorandum of Appeal to challenge the said decree. This is another reason why I do not find the need to interfere with the impugned order at this stage.

5. This being the case, I find that there is no need to interfere with the impugned order at this stage. The Writ Petition is, therefore, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. It is made clear that the aforesaid issue shall be

decided by the Trial Court on its own merits and uninfluenced by any observations made in this order.

(B. P. COLABAWALLA, J.)