

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9134 OF 2024

Sahakar Maharshi Shankarrao Mohite Patil
Sahakari Sakharkharkhana Ltd. .. Petitioner

Versus

Jaymankumar H. Ashar, Deceased through Legal
heirs Mrunalini Jai Munim and Ors. .. Respondents

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- Ms. Harsha Shah a/w. Mr. Keyur Adhvaryu, Advocates for Petitioner.
 - Mr. Gaurav Mehta a/w. Ms. Dhvani Mehta and Ms. Sunain Masand, Advocates for Defendant Nos.1(b) and 1(c).
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CORAM : MILIND N. JADHAV, J.

DATE : JULY 24, 2024.

P.C.:

- 1.** Heard Ms. Shah, learned Advocate for Petitioner and Mr. Mehta, learned Advocate for Defendant Nos.1(b) and 1(c).
- 2.** The present Writ Petition impugns the order passed by the learned Trial Court pursuant to the order passed on 29.02.2024, *inter alia*, allowing the Defendants to approach the Trial Court for framing of additional issues.
- 3.** In view of the liberty which was granted by this Court in its order dated 29.02.2024, Defendants sought addition of the following two issues in the list of issues framed by the learned Trial Court:-s

11. Whether right to sue qua the legal heirs of deceased defendant no. 1 survives?

12. Whether agreement dated 30.12.1991 i.e. Exh.A to the plaint binds the legal heirs of deceased defendant no.1?

4. Learned Trial Court has allowed the said Application and framed two issues 11 & 12. Thereafter, Plaintiff approached this Court with a grievance that if the said issues are seen, then those would be contrary to the stand adopted by the original Defendant No.1 in the Suit proceedings.

5. Ms. Shah, learned Advocate for the Plaintiff would submit that an Application for seeking to frame the two additional issues, rather introducing two fresh issues was made by Defendants in view of inconsistency in the written statements of the substituted Defendants which is contrary to the averments made in the written statement filed by their predecessor i.e. original Defendant No.1. She would submit that considering the fact that this is a Suit for specific performance of Agreement dated 30.12.1991 qua and as against the original Defendant No.1, additional issues sought for by the substituted Defendant Nos.1(b) and 1(c) to introduce new issues with respect to survival of the right to sue the legal heirs of Defendant No.1 should not be allowed since according to her these proceedings are civil proceedings seeking specific performance of an Agreement between

the parties.

6. She would argue that subject to the outcome of the decision in the Suit for specific performance, in the event if the Plaintiff succeed, undoubtedly the Plaintiff will have to execute the decree against the estate of the original Defendant No.1 in the hands of the substituted Defendants and in that view of the matter, in so far as Issue No.12 is concerned, Ms. Shah raises a strong objection stating that the burden of proving the validity, subsistence and binding nature of the Agreement dated 30.12.1991 has to be cast upon the Defendants and in that view of the matter, the Defendants' proposed Issue No.11 should not be allowed to be framed. I fully agree with the submissions of Ms. Shah. Once the legal heirs of original Defendant stand substituted in the Suit proceedings, the proposed Issue No.11 cannot be allowed to be framed because if the Plaintiff succeeds, then he will have to proceed against the estate of original Defendant in the hands of his legal heirs. Hence, Issue No.11 as proposed is deleted.

7. I have heard Ms. Shah, learned Advocate for Petitioner and Mr. Mehta, learned Advocate for Respondents and with their able assistance perused the pleadings of the present case regarding proposed Issue No.12.

8. At the outset, learned Advocates have placed before me the issues which have already been framed by the learned Trial Court at an

earlier point of time. Perusal of those issues clearly show that as against Issue No.4, the burden is cast on Defendant No.1 to prove whether the Defendant No.1 had performed and completed all his obligations under the Agreement dated 30.12.1991. During the interregnum and the pendency of the Suit proceedings, Defendant No.1 has expired. The present Defendants have stepped into the shoes of Defendant No.1 who have proposed Issue No.12. Issue No.12 as it is framed does not cast the burden either on the Plaintiff or Defendants and in that view of the matter, such an open ended issue can never be allowed to be framed and in that view of the matter, I have proposed to the parties that the said issues required to be recasted to cast the burden on the substituted Defendant No.1(b) and 1(c) who have stepped into the shoes of Defendant No.1 to prove whether the Agreement dated 30.12.1991 would not bind the legal heirs of Defendant No.1.

9. In that view of the matter, I am in agreement and in consonance with the submissions made by Ms. Shah in so far as the objection to Issue No.12 is concerned.

10. Considering that this is a Suit is for specific performance of an Agreement, it is improbable to prove the said Issue No.12 by the Plaintiff. The Defendants rather substituted Defendants should prove the said issue as to whether the Agreement is binding upon them or

otherwise.

11. Hence, in so far as Issue No.12 is concerned, I propose to frame the following issue for consideration of the learned Trial Court which shall be added as Issue No.11 as 10 issues have already been framed by the learned Trial Court earlier:-

“Issue No.12: Whether the Defendants prove that the Agreement dated 30.12.1991 to the plaint does not bind the legal heirs of Defendant No.1?”

12. In view of the above, the impugned order dated 28.03.2024 stands modified to the above extent. Learned Trial Court shall take into cognizance and add the above quoted Issue No.12 which shall be numbered as Issue No.11 in the list of Issues framed in the Suit proceedings and thereafter proceed strictly in accordance with law.

13. All contentions of the parties are expressly kept open as available them in law.

14. With the above directions, Writ Petition is partly allowed and disposed.

[MILIND N. JADHAV, J.]

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