IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL SIDE JURISDICTION

CHAMBER SUMMONS NO.1129 OF 2014
IN
SUIT NO.2411 OF 2009

Shilpa Shares & Securities & Ors. … Petitioners
Vs.
The National Co-Op. Bank Ltd. & Ors. … Respondents

Mr. Hemant R Sapale, plaintiff No.2 present in Court.
Ms. Aruna Mehta, Adv. i/b. M/s. S Pathak & Co. for defendant Nos.1 and 2.
Ms. Nutan Patankar, Adv. a/w. Mr. V P Sawant, Adv. and Prabhakar Jadhav, Adv. and Nikhil Patil, Adv. for respondent No.8.
Mr. Joel Carlos, Adv. for respondent No.10.
Mr. Sandeep Patil, Adv. for respondent Nos.6 & 7 – MMC.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 14th August, 2015.

P.C. :

1. This Chamber Summons is taken out for extensive amendments to the plaint. The issues in the suit have been framed. Directions for filing affidavit of evidence and documents by the plaintiffs have been passed. The plaintiffs have filed their affidavit of evidence and documents on 28th November, 2014. The cross examination of the plaintiffs in the suit would begin. This Chamber Summons has been taken out on 21st November, 2014.

2. As per the judgment in the case of ***Vidyabai & Ors., Vs. Padmalatha & Anr. (2009) 2 Supreme Court Cases 409***, the trial has begun since it has been held in paragraph No.15 of the judgment that the trial is deemed to commence when the issues are settled and

the case is set down for recording of evidence. Evidence itself has begun by the plaintiffs having filed their examination in chief by way of affidavit.

3. At such a stage this Chamber Summons is taken out. Under the proviso to Order 6 Rule 17 of the CPC no application for amendment is to be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

4. It is upon such a position in law this application would be required to be considered. The suit is filed against two defendants, the defendant No.1 bank and its present director. The plaintiffs had taken a loan from the bank. The loan is not paid. The plaintiffs as the borrowers and / or guarantors would be defaulters. Recovery proceedings were started. The recovery certificate is obtained. The execution proceedings were commenced and is completed by the auction of the suit property. The plaintiffs have challenged the auction. The plaintiffs have sued for damages against the bank.

5. In this Chamber Summons the plaintiff has sought to bring on record 22 other defendants. These are all the parties connected or unconnected with the loan and the execution thereof.

6. Defendant No.3 is the recovery officer. An order against him would be executable against defendant No.1 bank itself.

7. Respondent No.4 is the General Manager in RBI. The plaintiff has sought to contend about certain circulars / rules of the

RBI for One Time Settlement (OTS). Certain OTS came to be demanded. The plaintiff has filed various Writ Petitions upon and in respect of the OTS. Orders have already come to be passed. Certain WPs are pending either in this Court or in Supreme Court. Whatever be the orders in the WP, if the plaintiffs relied upon them in the suit and showed that they suffered damages due to such orders, the damages would have to be claimed essentially against defendant No.1 bank. They cannot be claimed against the GM of RBI for having passed circulars by which all banks are covered.

8. Respondent No.5 is Reliance Infrastructure Ltd. It is sought to be brought on record on the ground that it has changed electric connections of 6 tenants in the suit property. The plaintiffs would be entitled to show the damage incurred by the change of the electric connections. Such damages would also be claimable against defendant No.1 bank. Even if that action is incorrect, malafide or collusive, damages cannot be claimed against an electricity company.

9. Respondent No.6 is the Assistant Municipal Commissioner of the Mumbai Municipal Corporation (MMC). The MMC is stated to have issued two notices to respondent No.10 which is the auction purchaser under Section 354 of the MMC Act for pulling down the suit building. The plaintiffs claim that it is without notice to the plaintiffs. It would have been issued upon the auction purchaser as the auction purchaser is the present owner and the plaintiffs would cease to be owners upon the auction purchase. Consequently if any damage is caused to the plaintiffs by virtue of the notice or even the execution of the notices, the damages can be claimed from defendant No.1 bank as a aftermath of the cause of action that accrued against

them. The municipality which is bound to issue notices under totally different parameters of the suit building being dilapidated which would cause danger to life and property of the occupants or others cannot be held liable in damages for the wrongful action, whatever it be.

10. Defendant No.7 is the executive engineer of the MMC and would go the same way as defendant No.6.

11. Defendant No.8 is the Principal and Professor of the Civil Engineering Department, Bharatiya Vidya Bhavan's Sardar Patel College of Engg. It is stated to have issued a false structural certificate of the building. If the plaintiffs have incurred any damages due to such false structural certificate, the plaintiffs may be entitled to claim damages but only from defendant No.1 bank upon the wrongful action of defendant No.1 which may have resulted in to the certificate having to be issued. No relief is claimed against respondent No.8.

12. Respondent No.9 is the second auction purchaser whose auction purchase has been cancelled. The property has been sold to respondent No.10 instead. Respondent No.9 would, therefore, have no interest in the property and cannot be a proper party to the suit.

13. Respondent No.10 is the auction purchaser. Had the plaintiff any grievance they could have joined respondent No.10 in the suit. However, the plaintiffs have already sued respondent No.10 along with respondent No.1 bank in the Bombay City Civil Court (BCCC). The suit is pending. Another suit on the same cause of action would not lie and cannot be allowed. Reliefs against

respondent No.10 cannot be granted in two courts. The first suit having been filed in the BCCC would have to be prosecuted there and consequently no reliefs could be given against respondent No.10 in this suit.

14. Respondent Nos.11 to 14 are the shareholders of respondent No.10. They would go the same way as respondent No.10. The decree and the order, if any, would have to be procured against respondent No.1 which is private limited company. Respondent Nos.11 to 14 would only be liable to the extent of the unpaid share capital on the shares held by them.

15. Respondent Nos.15 to 20 are the tenants or occupants of the property. They have not obtained loan, the defaulted or concerned with the consequent legal action upon the auction purchase. They would only have to attorn tenancies to the new landlord. They are consequently not a proper parties in suit for damages against the bank or even in a suit for damages against the auction purchaser (which is already filed in BCCC).

16. The plaintiffs have set out extensive averments to be made in the plaint. Plaintiff No.2 who has appeared in person on behalf of the plaintiff has shown the court the case of the plaintiffs against the respondents. They claim damages against all the respondents except respondent No.8 upon the distinct cases as shown above as events subsequent to the filing of the suit.

17. Counsel on behalf of the respondent No.10 drew the court's attention to several pages of the schedule to the Chamber Summons

showing the proposed amendments to the plaint which deal with events prior to the filing of the suit. The extensive amendments need not be discussed herein.

18. It is seen that what are stated to be the averments of the plaint is essentially the evidence of the plaintiffs to prove their case of damages. The plaintiffs would require to show various acts done, correspondence exchanged, notices given and actions taken as also orders passed in such actions to show and substantiate their claim for damages. The plaintiffs would be entitled to file such evidence. It is seen to be essentially documentary evidence that is relied upon by the plaintiff. Hence the plaintiff may be entitled to file the various letters etc. (subject to proof) as also the various orders passed in various proceedings taken (for which there is a presumption of correctness and need not be proved) as and by way of evidence of the plaintiffs. If such evidence is not yet brought on record in the affidavit of evidence which has been filed by the plaintiffs on 28th November, 2014, the plaintiffs may be allowed to file further affidavit of evidence as also further documents. However, each of the facts that have transpired would not tantamount to pleadings and cannot be allowed to be pleaded.

19. In any event due diligence has not been shown to bring such pleadings on record after to the trial having commenced. No case of filing such pleadings or making such averments at this stage is made out.

20. The plaintiffs have sought to raise the extent of the damages claimed by them and have sought to replace the damages of

Rs.11,46,11,343/- by Rs.33,81,77,811/- in paragraph 10 of the plaint. The amendment to that extent may be allowed and such damages may even be granted subject to the plaintiffs proving the damages to that extent.

21. The plaintiffs have sought further prayers against defendant Nos.1 to 3, 5 & 6 and 9 to 14. Since these defendants are neither necessary nor proper parties to the suit those prayers cannot be allowed. However, it may again be clarified that subject to the plaintiffs proving the damages suffered by them such damages could be claimed and would be granted against defendant Nos.1 & 2.

22. The further reliefs of mandatory nature in favour of the plaintiffs to carry out the repairs of the building as also prohibitory injunctions pending the suit in respect of the notice under Section 354 issued in respect of the suit property by the MMC would also be considered only as per legal action already taken by the plaintiff in that behalf. This plaint in a suit for damages against defendant Nos.1 and 2 cannot be allowed to have such prayers.

23. Hence the Chamber Summons is dismissed except for the amendment with regard to the additional extent of damages claimed by the plaintiff in a sum of Rs.33,81,77,811/- which of course, the plaintiffs would require to prove in the suit.

24. Chamber Summons is disposed of accordingly.

25. The plaintiff No.2 is present in person and has argued the Chamber Summons. The plaintiff shall carry out amendments to

show the higher extent of damages claimed by them within two weeks. The copy of the plaint served upon defendant Nos.1 and 2 shall be taken to be amended to the above extent of damages.

26. Suit to be on board on 7th October, 2015.

(ROSHAN DALVI, J.)