

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1408 OF 2015
IN
SUIT NO. 1665 OF 1998

Aditya Medisales Limited

... Applicant
(Orig. Defendant No.1)

In the matter between:

Mr. Shailesh H. Bajaj & Anr.

..Plaintiffs

Versus

Aditya Medisales Limited & Anr.

..Defendants

Mr. Rohan Cama along with Mr. Sanjay Udeshi, Mr. Darshan Ashar and Mr. Akshay Udeshi, instructed by M/s. Sanjay Udeshi & Co., for the Applicant.

Ms. Sonal, instructed by Mr. Prasad Das, for the Plaintiff.

Mr. C. Nageshwaran, instructed by M/s. Khaitan & Co., for Defendant No.2.

CORAM : S. J. KATHAWALLA, J.

DATE : 16TH NOVEMBER 2015

P.C. :

1. By the present Chamber Summons the Applicant (Defendant No. 1) seeks leave to file an Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera along with

certain documents in support thereof. It is further prayed that if the same is permitted, then the documents marked by the Court Commissioner as 'Z1' for identification, and particularly pages 1 to 57 thereof, be taken on record, read with the Additional Affidavit of evidence and marked as an Exhibit in the present proceedings.

2. The suit pertains to 50,000 shares of Defendant No.2 held by the Plaintiffs, which were pledged in favour of Defendant No.1 by the Plaintiffs in respect of a loan of Rs.1,00,00,000/- disbursed by Defendant No.1 to Plaintiffs No.1 on certain agreed terms and conditions. By the present suit, the Plaintiffs inter alia seeks a declaration that the sale of the 50,000 shares be declared illegal, null and void and not binding upon Plaintiffs No.1 and for a decree for return of the share certificates in respect of the 50,000 shares to Plaintiffs No.1.
3. It is the case of Defendant No.1 in its Written Statement that the pledged shares were sold to recover a part of the loan amount. In paragraph 4 (v) of its Written Statement Defendant No.1 has

stated that Defendant No.1 “...had sold the said 50,000 shares which were pledged and more particularly had informed the Plaintiffs vide various contract notes. The defendant craves leave to refer to and rely upon the copies of the said contract notes as and when produced.” The said contract notes are the subject matter of the present Chamber Summons and are now sought to be proved through the proposed Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera.

4. It is submitted by Mr. Cama, learned counsel appearing for Defendant No.1 in support of the Chamber Summons, that the contract notes/bills which are sought to be brought on record are material documents, necessary for an effective adjudication of the present dispute. It is submitted that the Court ought to ensure that all the documents which assist it to resolve the controversy before it in an efficient manner are available for its perusal. He further submits that Defendant No.1 had expressly reserved its right to rely upon the said contract notes in paragraph 4(v) of its Written Statement, (extracted above). He has invited my attention to the Affidavit in Support of the

Chamber Summons setting out the circumstances in which the contract notes and bills in respect of 49,850 shares were found. He submits that the said contract notes and bills show the rate at which the subject shares were sold, which is a crucial factor in the present dispute. He further submits that the said documents were produced in response to Questions 34 to 37 of the cross examination of DW1.

5. Mr. Cama has placed reliance upon the judgments of this Court in (i) *Bastion Constructions Vs. Nusli N. Wadia & Ors.* (Order dated 6th September 2013 passed by R.D. Dhanuka J, in Suit No. 53 of 2009), and (ii) *Ramnath Nandlal Dhoot & Co. & Anr Vs. B. R. Shroti & Ors.* – AIR 1990 Bombay 387, to contend that there is no bar in law, including under Rule 172 of the Bombay High Court Rules, and/or Order XI, Rule 13 or Order VII, Rule 14 of the Code of Civil Procedure, 1908, to production of documents which are not referred to in the Affidavit of Documents filed by a party. Mr. Cama further submits that the subject documents having been produced in the course of the

cross examination, and being material for the purpose of the present suit, ought to be permitted to be led in evidence.

6. Mr. Cama further submits that there would be no prejudice whatsoever caused to the Plaintiffs were the documents allowed to be produced as the Plaintiffs are at liberty to cross-examine DW1 in respect of these documents. Mr. Cama drew my attention to the fact that the cross examination of DW1 was ongoing on the date of filing of the Chamber Summons, and even as on date has not been closed. He further submits that the documents being brought on record will not alter or impede the reliefs sought for by the Plaintiffs, in any manner whatsoever. He therefore submits that there would be no prejudice caused to the Plaintiffs by allowing the Chamber Summons, and it is in the interest of justice and would avoid delay in the suit by Defendant No. 1 having to lead the evidence of a further witness to prove the said contract notes and bills, if the Chamber Summons is made absolute.

7. *Per contra* Ms. Sonal learned Counsel for the Plaintiffs reiterates what is stated in the Plaintiffs' Affidavit in Reply to the Chamber Summons (a copy whereof was served upon the Advocates for Defendant No.1 on 14th November 2015, and Defendant No.1 has, with the leave of the Court, proceeded on the basis of denials). Ms. Sonal submitted that the Chamber Summons ought not to be allowed as Defendant No.1 was attempting to fill up a lacuna in its case viz. that Defendant No.1 had restricted its case in the Written Statement to shares stated to have been sold on the dates set out in paragraph 3B of the Written Statement, and now could not contend that any shares in addition to those referred in the said letters had been sold. Ms. Sonal submitted that some of the contract notes / bills relied upon by Defendant No.1 were fabricated. Ms. Sonal further submitted that the Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera, proposed to be filed, sets up a new case as to appropriation of 50 shares by Defendant No.1.
8. Ms. Sonal placed reliance on the following judgments of the Hon'ble Supreme Court to contend that Defendant No.1 ought

not to be permitted to lead evidence at this stage, as evidence could not be permitted to be led to fill up any lacunae or omissions in evidence, and further that the power under the provisions of Order XVIII, Rule 17 of the Code of Civil Procedure, 1908 was to be sparingly exercised:

- (i) *Badiraj Naggappa Vernekar Vs. Sharadchand Prabhakar Gogate – AIR 2009 SC 1604;*
- (ii) *M/s. Bagai Construction Vs. M/s. Gupta Building Material Store – AIR 2013 SC 1849; and*
- (iii) *K. K. Velusamy Vs. N. Palanisamy – (2011) 11 SCC 275.*

9. I have heard the learned Counsel for the parties, and with their assistance I have perused the relevant portions of the Plaint, Written Statement and evidence of Defendant No.1. It is clear from the record that Defendant No.1 has stated even in its Written Statement that all the shares, and not merely the shares referred to in the letters set out at paragraph 3B of the Written Statement, have been sold. Pertinently, some of the reliefs prayed for in the Plaint, proceed on the basis that all 50,000 shares have been sold. Hence, at this stage, prima facie, I am

unable to agree with the submission of the learned counsel for the Plaintiffs that Defendant No. 1 has not come with a case that all the shares (save and except 50 shares as clarified in the proposed Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera, and in the cross examination of DW1), have been sold. Hence, there does not appear to be any lacunae which are sought to be filled by Defendant No.1. Undoubtedly, in the present case, the contract notes and bills will have a bearing on the adjudication of the suit, as the same will assist the Court in determining the quantum of shares sold, the price at which the said shares were sold and the dates of sale thereof. To my mind therefore, the said documents will assist to resolve the controversy before this Court in an efficient manner, and thus the test laid down by this Court for determining whether to allow such documents to be produced on record at this stage, notwithstanding the fact that the said documents were neither filed with the Written Statement, nor referred to in the Affidavit of Documents filed by Defendant No.1, stands satisfied.

10. It bears mention that at this stage that there is no basis or cogent reasoning placed on record to support the Plaintiffs' contention that the said contract notes/bills are fabricated. Indeed copies of some of these very contract notes have been placed on record by the Plaintiffs and marked as the Plaintiffs' documents. Needless to state it is open to the Plaintiffs to buttress their contention of fabrication in the course of cross-examination, but at this stage, without more, I am unable to uphold the submission made on behalf of the Plaintiffs in this regard.
11. For more reasons than one, I am of the view that there will be no prejudice caused to the Plaintiffs by Defendant No.1 being permitted to file the said documents on record through the Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera. Firstly, the cross-examination of DW1 is not concluded and DW1 is in the box and can be effectively cross-examined on all issues arising out of or in relation to the contract notes / bills which form the subject matter of the present Chamber Summons. Secondly, allowing the documents to be

proved by the present witness will save considerable time of the Court as well as of the parties, as Defendant No.1 would not require to lead the evidence of a further witness for this purpose. It is fairly conceded by Ms. Sonal that the additional documents, will not alter the reliefs prayed for by the Plaintiffs; this is another factor which shows that merely permitting the said documents to be led in evidence, would not in any manner prejudice the Plaintiffs or alter their position to their detriment.

12. Furthermore, I am satisfied that there is no bar in law against additional documents being produced at this stage. The principles laid down in the judgments of the Supreme Court relied upon by the learned Counsel for the Plaintiff were in the facts of the respective cases, and in fact dealt with situations pertaining to recall of witnesses, at the stage of final arguments. The fact situation and stage of proceedings prevailing in the present case is very different. Admittedly, in the present case, DW1 is still under cross examination and hence the question of recall does not arise. Furthermore, as held above, I am of the view that the present Chamber Summons is not an attempt by

Defendant No.1 to fill up any lacunae or omissions, and sufficient cause has been shown by Defendant No.1 for production of the documents at this stage. Pertinently, in the judgments relied upon by the learned Counsel for the Plaintiffs, the Supreme Court has clearly held that if the evidence in question has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to go so far as to permit recall of a witness or allow further evidence even at the stage of final arguments. The Hon'ble Supreme Court has further held that the Court would have the discretion to permit further evidence to be lead by the parties, as may be necessary to bring about a just and effective adjudication of the disputes in question. As already held above, I am of the view that the documents in question in the present case, are material to the suit and would be necessary to be considered for an effective determination of the present suit. Hence, I am of the view that the interests of justice require that the present Chamber Summons be allowed.

13. As regards the submission made by learned Counsel for the Plaintiff regarding Defendant No.1's stand on appropriation of 50 shares, being a new or inconsistent case to that set out in is Written Statement, the Plaintiffs are always at liberty to cross examine Defendant No.1's witness as to any claimed contradictions, and that cannot be a reason to refuse to permit material documents to be brought on record. The record shows that the Plaintiffs have already cross examined DW1, in some respects, on the issue of the 50 shares. Needless to state, it is open to the Plaintiffs / their Advocates to cross-examine DW1 on this aspect, should they feel that the same is necessary.
14. In the circumstances, the Chamber Summons is made absolute in terms of prayer clause (a). The Additional Affidavit in lieu of Examination in Chief of D.W – 1 Mr. Sunil Ajmera along with the above documents is taken on record. The Chamber Summons is disposed of accordingly with a clarification that the parties will be heard on 27th November, 2015 on marking of the documents at pages 1 to 57 of 'Z1' on the basis of the evidence led by way of Additional Affidavit in lieu of Examination in Chief

of D.W.1 – Mr. Sunil Ajmera which has been tendered today.
However, there shall be no order as to costs.

(S.J. KATHAWALLA, J.)