

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.108 OF 2016

**IN
SUIT NO.2419 OF 2007**

Jai Veera Darshan Co-op. Hsg. Soc. Ltd. & Anr.Applicants

IN THE MATTER BETWEEN :

Mrs. Kusumgauri Himatlal Jani & Ors.Plaintiffs

V/s.

Harminder Kaur A. Vijan & Ors.Defendants

**WITH
NOTICE OF MOTION NO.3211 OF 2007
IN
SUIT NO.2419 OF 2007**

Mrs. Kusumgauri Himatlal Jani & Ors.Plaintiffs

V/s.

Amriksingh Ishwarsingh Vijan & Ors.Defendants

Mr. Niranjan Vaghale i/b. M/s. Pandya & Co. for the plaintiffs.

Mr. Chirag Mody a/w. Mr. Nilesh Tated i/b. DSK Legal for the defendant nos.2 & 3 and for the applicant in CHS/108/2016.

**CORAM : K.R.SHRIRAM,J
DATE : 28th APRIL, 2016**

P.C.:-

1 This chamber summons is taken out on behalf of defendant nos.2 and 3 for leave to amend the written statement. It is settled principle that a prayer for amendment of the plaint or a prayer for amendment of the written statement stand on two different footings. The general principle that amendment of pleadings cannot be allowed

so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. (*Usha Balasaheb Swami & Ors. vs. Kiran Appaso Swami & Ors.*¹⁾)

2 At the same time, though inconsistent pleas can be taken, once admission is made in the written statement to change the same is not permissible by way of an amendment. (*Modi Spinning & Weaving Mills Co. Ltd. & Anr. vs. Ladha Ram & Co.*²⁾). At the same time even assuming that there was admission made by the defendant in his written statement, such admission can be explained by amendment of his written statement. (*Sushil Kumar Jain vs. Manoj Kumar & Anr.*³⁾).

3 The counsel for the plaintiffs strongly opposes the application for amendment. The reason for opposing the amendment application is that :

1. 2007 SC 1663
2. AIR 1977 SC 680
3. AIR 2009 SC 2544

(a) the suit was filed in 2007, the defendant nos.2 and 3 made their written statement on 5th October, 2009 and amendment is sought in 2016 after the plaintiffs have given their evidence till 19th March, 2015 in the issue under Section 9(A) on the ground of limitation, that was framed by this court.

It has to be clarified that the other issues in the suit have not been settled as yet because when the plaintiffs moved for interim relief, the defendants took out a notice of motion for deciding the issue of limitation as a preliminary issue under Section 9(A) of the CPC;

(b) the defendant nos.2 and 3 are seeking withdrawal of admissions made by them in the written statement;

(c) they are taking contrary stand and setting up a new case in defence of the suit; and

(d) it is nothing but a rehash of the contentions and statements already made along with long arguments.

4 The last two objections raised, i.e., (c) and (d), in view of the settled position in law as mentioned earlier, the amendment cannot be rejected.

5 As regards the objection at (b) above that the defendants are withdrawing their admissions, the counsel for the plaintiffs identified from the first item in the schedule of proposed amendments and correlated it with paragraph 3 (d) and 3(h) of the plaint and also referred to paragraph nos.13 and 16 of the written statement. In the first sentence of the paragraph that the defendants wish to introduce as paragraph 13(a) the defendants are denying that original defendant no.1 took no steps to incorporate the proposed society, “Veera Co-operative Housing Society”. In paragraph 3(d) of the plaint, the plaintiffs have alleged that the original defendant no.1 took no steps to incorporate the proposed society, “Veera Co-operative Housing Society”. Paragraph 13 of the written statement, as originally filed by the defendant nos.2 and 3, reads as under :-

“13. The statements contained in paragraphs 3(a) to (e) appear to be substantially correct, but do not appear to be the complete facts. These defendants crave leave for the true and the correct interpretation of the contents in the aforesaid paragraphs.”

6 Therefore, in my view, by this first sentence in proposed paragraph 13(a), the defendants are withdrawing the admission (as they had not specifically denied) that the original defendant no.1 took no steps to incorporate the proposed society, “Veera Co-operative Housing Society”. Therefore, this sentence in proposed paragraph

13(a) cannot be permitted to be inserted in the written statement.

7 Similarly in the last but one sentence of the proposed paragraph 13(a), it is stated as under :-

“It is denied that original defendant no.1 never paid any rent to the late Himatlal Vithalji Jani.”

In paragraph 3(h) of the plaint, it is averred as under :-

“3(h). The plaintiffs say and submit that the original defendant no.1 did never pay any rent to the said Himatlal Vithalji Jani or to the plaintiffs during the period of the said Lease or thereafter.”

This paragraph is dealt with in paragraph 16 of the written statement, which reads as under :-

“16. With reference to paragraph 3(h) of the plaint, these defendants submit that if in fact the Lease Deed was to be acted upon as such the plaintiffs would have demanded rent or would have terminated the Lease Deed and sought to recover possession from the defendant nos.1 and 2.”

8 Therefore, what in effect the defendant nos.2 and 3 have stated is that they did not make the payment because there was no need to make the payment. But in the proposed amendment they are denying that the original defendant no.1 never paid any rent to the late Himatlal Vithalji Jani, which in effect means that the original defendant no.1 paid rent to late Himatlal Vithalji Jani.

Therefore, in my view, here also there is a withdrawal of admissions that the defendant nos.2 and 3 had made.

9 As regards the defence that the evidence of the plaintiffs under Section 9(A) has concluded and therefore, the defendants are trying to amend their defence based on the plaintiffs' case and plaintiffs' evidence, in my view, should not come in the way of allowing the amendment application. Under Order 6 Rule 17, the court may at any stage allow either party to alter or amend their pleadings but no application for amendment should be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

10 In this case since only preliminary issue on limitation is being agitated, the trial has not commenced. Moreover from the rest of the amendment being sought, I find the same to be only explanations to what has already been stated in the written statement.

11 In the circumstances, the chamber summons is allowed and disposed of in terms of the Schedule annexed to the chamber

summons except the portion bracketed in red ink in the proposed paragraph 13(a).

12 The defendant nos.2 and 3 to pay a sum of Rs.25,000/- as cost to the advocate for the plaintiffs. This amount has to be paid by way of cheque drawn in favour of the advocate for the plaintiffs within four weeks from today.

13 The amendment to be carried out within two weeks from today and the amended written statement to be served within one week thereafter.

14 The notice of motion to come up on board in due course.

(K.R.SHRIRAM,J)