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

**APPEAL NO.497 OF 2014
IN
CHAMBER SUMMONS NO.778 OF 2013
IN
SUIT NO.2894 OF 2011**

M/s. Shraddha Shelters Pvt. Ltd.

... Appellant

Versus

1 New Purshottam Nagar Co-op.

2 Mr. Bhagwanji Kanji Mistry

3 Mrs. Bharti Ram Aglave

4 The Mumbai Municipal Corporation

5 Purshottam Nagar 'A' Co-op. Hsg. Society Ltd.

6 Mr. Jayesh Bhagwanji Mistry

7 Mr. Dilip Bhagwanji Mistry

8 Mr. Kamlesh Jayantilal Gadiya

9 State Bank of India

... Respondents

Dr. Birendra Saraf a/w Ms. Pooja Kshirsagar a/w Anand Chovatia i/by
Yogesh Adhia for the Appellant.

Mr. V.A. Thorat, Senior Counsel a/w Mr. Pravin Samdani, Senior
Counsel a/w Mr. Niranjana Vaghela i/by M/s. Pandya & Co for the
Respondent No.1.

Mr. Ravi Kadam, Senior Counsel a/w Mr. Rohan Kadam and Mr. Rupesh
Geete for the Respondent Nos.2 and 3. i/by I.C. Legal.

Mr. Gaurav Joshi, Senior Counsel i/by Mr. Aditya Chitale for the
Respondent No.5.

**CORAM : A.S. OKA &
P. D. NAIK, JJ.**

DATE : 11th APRIL, 2016

P.C.

1 The submissions of the learned counsel appearing for the parties were heard on the earlier date. The challenge in this Appeal is to the order dated 6th March, 2014 passed by the learned Single Judge on the Chamber Summons taken out for amendment of the plaint by the first respondent -the original plaintiff.

2 With a view to appreciate the submissions canvassed across the Bar, a brief reference to the facts of the case will be necessary. For the sake of convenience, we are referring to the parties with reference to their status in the suit. The first substantive prayer in the Suit filed by the plaintiff is for declaration that Consent Terms dated 18th August, 2006 filed before the District Consumer Redressal Forum under the provisions of the Consumer Protection Act, 1987 are null and void and it confer no right on the first to third defendants. The present Appeal is by the third defendant. The second prayer is for a declaration that the Consent Terms stand terminated which are having no legal effect. The third substantive prayer is for issuing a decree directing the defendants to deliver up for cancelling the Consent Terms dated 18th August, 2006. The fourth substantive prayer is for a declaration that the order dated

24th August, 2006 passed by the Consumer Disputes Redressal Forum, South Mumbai on the basis of the said Consent Terms, is null and void and is of no legal effect and it confers no rights in favour of the first and third defendants. The fifth substantive prayer is for a declaration that the plaintiff is entitled for conveyance of the property described in Exhibit – B to the Petition. Another declaration is claimed that the first to third defendants are not entitled to develop the suit property. There is also a challenge to the IOD granted by the Mumbai Municipal Corporation on 2nd June, 2004. There is a relief sought against the fourth defendant – Mumbai Municipal Corporation restraining the said Corporation from granting or sanctioning any proposal for development of the suit property described in Schedule-B.

3 In the Chamber Summons No.778 of 2013, very extensive prayers were made for amendment of the plaint. The first prayer is for adding the parties. The second part of the proposed amendment is for incorporating various averments in the plaint starting from paragraphs 57A to 57B. In the plaint as originally filed, the challenge is to the Intimations of Disapproval (I.O.D.) dated 2nd June, 2004. By proposed amendment a challenge is sought to be incorporated to the IOD dated 3rd August, 2012. The second challenge which is sought to be incorporated is to the Deed of Conveyance dated 25th June, 2009

executed in favour of the third defendant. A challenge is also sought to be incorporated to the Deed of Mortgage dated 11th February, 2010 executed by the third defendant in favour of the proposed 8th defendant (Mr. Kamlesh Jayantilal Gadiya). There is a prayer for declaration that the aforesaid Deed of Conveyance, Deed of Mortgage and the Power of Attorney dated 9th October, 2009 executed by the first defendant and others in favour of the third defendant were not binding on the plaintiff. There is a further prayer sought to be incorporated for cancellation of the Deed of Conveyance and the Deed of Mortgage. The other prayers which are sought to be incorporated are for interim reliefs pending the suit.

4 By the impugned order, the learned Single Judge allowed the chamber summons in terms of prayer clauses (a) and (b). However, on the statements made by the learned counsel for the plaintiff, the proposed paragraph 57G was ordered to be deleted from the schedule of the amendment. The contentions of the parties were kept open.

5 At the outset, the learned Senior Counsel representing the plaintiff raised an objection to the maintainability of the Letters Patent Appeal against an order permitting amendment of the plaint. He relied upon the decision of the Apex Court in the case of Shah Babulal Khimji.

Vs. Jayaben D. Kania and another¹. The learned counsel appearing for the Appellant stated before the Court that according to the Appellant, the case is governed by clause (1) of paragraph 120 of the said decision in the case of *Shah Babulal Khimji* and he is confining his submissions on the grounds which are covered by clause (1) of paragraph 120 of the said decision.

6 The learned counsel appearing for the Appellant has taken us through the text of the proposed amendment. He invited our attention to paragraphs starting from 57C. He submitted that in paragraph 57C, it is sought to be contended that the action of submitting the building plans with the Municipal Corporation was in direct breach of the Consent Terms dated 18th August, 2006 (for short “the said Consent Terms”) which are subject matter of challenge in the suit. He pointed out various sub-clauses of paragraph 57C in which a contention has been raised that the IOD is granted in breach of various clauses of the said Consent Terms. He also pointed out that in paragraph 57G which was deleted by the plaintiff on its own, reliance was placed on the terms and conditions in the said Consent Terms. He pointed out paragraph 57L wherein it is again contended that the conveyance of the suit property is in breach of the said Consent Terms. He pointed out that the prayers which are sought to be incorporated are

1 1991 (4) SCC 8

on the footing that the concerned defendants have committed breach of the said Consent Terms. He relied upon the decisions of the Apex Court in the case of B.K. Narayana Pillai Vs. Parameshwaran Pillai and another². He relied upon another decision of the Apex Court in the case of Prem Raj Vs. The D.L.F. Housing and Construction (Private) Ltd. and another³. Relying upon the said decisions, he submitted that in the plaint, the contention of the plaintiff is that the Consent Terms are vitiated by fraud and now additional reliefs are sought to be claimed by relying upon the breaches of the said Consent Terms. His submission is that mutually destructive allegations are sought to be incorporated by the proposed amendment. He pointed out that the stand taken in the unamended plaint is that the Consent Terms are null and void. He submitted that the impugned amendment ought not to have been permitted.

7 The learned Senior Counsel appearing for the plaintiff, apart from relying upon the decision in the case of *Shah Babulal Khimji* relied upon a decision of the Division Bench of this Court in the case of Sheshgiridas Shanbhag Vs. Sunderrao⁴. He invited our attention to the text of the proposed amendment. He submitted that the reliefs are

2 (2001) SCC 712

3 AIR 1968 SC 1355

4 AIR (33) 1946 Bom.361

claimed on the basis of the rights available to the plaintiff under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short “the MOFA Act”). His submission is that the allegations of breach of the Consent Terms are incorporated merely as a narrative and that is precisely the finding recorded by learned Single Judge in paragraph 10 of the impugned order. He submitted that paragraph 57G was given up as alternative relief was sought by the said paragraph in the event the Consent Terms are declared to be null and void. He submitted that in the course of narration, it is contended that some of the terms of the Consent Terms have not been complied with by the concerned defendants. He would, therefore, urge that there is no reason as to why the amendment should be disallowed. He, therefore, submitted that no interference is called for with the impugned order.

8 We have carefully considered the submissions. We have already referred to the prayers made in the plaint. For the purposes of deciding this Appeal, prayers (a) and (b) are material which read thus :-

“(a) that this Hon'ble Court do declare that the Consent Terms dated 18.08.2006, being Exhibit 'N' hereto, null and void ab initio, of no legal effect and conferring no rights in favour of Defendant Nos.1 to 3;

(b) That this Hon'ble Court do declare that the Consent Terms dated 18.08.2006, being Exhibit 'N' hereto, terminated, of no legal effect and confer no rights in favour of Defendant Nos.1 to 3.”

9 Thus, the specific prayer made in the Complaint is that the said Consent Terms are null and void ab initio, and consequential order dated 24th August, 2006 passed by the Consumer Disputes Redressal Forum is nullity. There are detailed averments made in the complaint which according to the plaintiff show that the Consent Terms are null and void. It is not necessary for us to narrate the material contentions which are incorporated in the complaint as regards the said Consent Terms. Suffice it to say that the foundation of the suit is that the said Consent Terms are null and void.

10 Before we advert to the proposed amendment, it will be necessary to make a reference to the decision of the Apex Court in the case of *B.K. Narayana Pillai*. The Apex Court was dealing with the power of the Court to allow amendment by exercising the jurisdiction under Order VI Rule 17 of the Civil Procedure Code, 1908 (for short “the said Code”). In paragraph 4 of the said decision, the Apex Court held thus :-

“4. The principles applicable to the amendments of the complaint are equally applicable to the amendments of the

written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations is negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.”

(underline supplied)

11 In the case of *Prem Raj*, the plaintiff had filed a suit for declaration that the contract is void and inoperative as the same was obtained by undue influence. The question before the Apex Court was whether in a same suit, in the alternative, a relief of specific performance of the same contract could be sought. While holding that such a relief cannot be sought, the Apex Court also considered the objections based on doctrine of election. In paragraph 6 of the said decision, the Apex Court observed thus :-

“6. We do not think there is any substance in this argument. The question of election between the two reliefs would have arisen only if the appellant could have shown that in respect of specific performance he had a cause of action. As we have already pointed out, the appellant has not made out a cause of action so far as the relief of specific performance is concerned and hence the appellant is not entitled to be put to election with regard to the two alternative reliefs. We accordingly reject the argument of the appellant on this aspect of the case.”

12 It is in the context of the law laid down by the Apex Court that the proposed amendment will have to be considered. What is sought to be added in paragraph 2 of the plaint is the description of the added defendants. Paragraph 57C which is sought to be added also contains the description of the added defendants. In paragraph 57C, it

is contended that latest plans submitted by the first to third defendants to the Municipal Corporation and sanctioned on 3rd August, 2012 are in direct breach of the Consent Terms. It is sought to be contended in the said paragraph that limited rights granted to the original developers are clearly recorded in the Consent Terms. In clauses (a) to (d) of paragraph 57C, the allegations are of the breach of the said Consent Terms. Even clause 3 of the paragraph 57C relies upon violation of clause 7 of the Consent Terms. Even paragraph 57D refers to limited authority granted by the plaintiff to the erstwhile developer under the consent terms. In paragraph 57 I, again reliance is placed on clause 25 of the Consent Terms. In paragraph 57L, it is contended that the first and second defendants and the predecessors of sixth to eighth defendants have conveyed the suit property to the Respondents in direct contravention of their obligations under MOFA and in contravention of the Consent Terms dated 18th August, 2006. It is contended that the first and second defendants and predecessors of the sixth to eighth defendants were entitled to convey the land to the third defendant and the third defendant was not entitled to mortgage the property.

13 Thus, in substantial number of paragraphs which are sought to be added by way of additional averments, the plaintiff is relying upon the said Consent Terms which are alleged to be null and

void in the plaint. In fact, the foundation of the suit is that the consent terms are null and void. Thus, an attempt made by the plaintiff is to raise several mutually destructive pleas.

14 After having challenged the Consent Terms in the suit by contending that not only the Consent Terms but the order on the basis of the Consent Terms is null and void, now for challenging subsequent IOD and subsequent conveyance, a case sought to be made out that the concerned defendants have committed breaches of the terms and conditions of the Consent Terms which according to the case of the plaintiff are null and void.

15 The learned Single Judge has observed that the allegations of the breach of terms and conditions of the Consent Terms are only by way of narration. After having carefully perused the text of the proposed amendment, we do not agree that the averments of breaches of the terms and conditions of the said Consent Terms are merely by way of narration. We may make a useful reference to paragraph 57C in which the following contention is sought to be added :

“57C. However, the Plaintiff has come to know that the latest plans submitted to Defendant No.4 by the Developers and approved and sanctioned by Defendant No.4 u/no.CE/1782/WS/AH dated 03/08/2012 to the

Developers, are in direct breaches of the said Consent Terms, which are set out below.”

16 In clause (a)(i) of paragraph 57C, the contention is that the Recreation Ground/ Garden shown in the sanctioned plan is in breach of clause 7 of the Consent Terms. Even in clause (ii), the allegation is of breach of clauses 8, 10 and 12 of the said Consent Terms. Even in clause (b) of paragraph 57C, the allegation is as regards breach of clauses 8, 10 and 12 of the Consent Terms. After referring clause 8 of the Consent Terms, it is contended that the latest plans are in violation of authority granted by the plaintiff. Even in clause (d), there is an allegation of violation of clause 25 of the Consent Terms. Clause (e) contains the allegation that there is a violation of clause 7 of the said Consent Terms. In proposed paragraph 57D, the plaintiff wants to rely upon the provisions of the MOFA Act. In proposed paragraph 57I, again the allegation is of breach of paragraph 25 of the Consent Terms. It is true that an allegation is sought to be incorporated as regards the contravention of the obligations under the MOFA. It is true that the proposed relief as regards IOD dated 3rd August, 2012, Deed of Conveyance dated 25th June, 2009, Deed of Mortgage dated 11th February, 2010 and the Power of Attorney dated 9th October, 2009 are based on breaches of the terms and conditions of the Consent Terms as well as on the basis of the provisions of the MOFA Act.

17 On the basis of the alleged breaches of the provisions of the MOFA Act, the reliefs which are prayed for in the proposed prayer clauses (k)1 and (k)4 could have been sought. However, practically in each new paragraph of the plaint, it is sought to be contended that there is a breach of the terms and conditions of the said Consent Terms. Therefore, it is difficult to strike out or segregate those portions of the proposed amendments wherein mutually destructive plea is raised by placing reliance on its terms and conditions in the said Consent Terms. As stated earlier, though the reliefs which are claimed by way of prayer clause (k)1 to (k)4 and consequential interim reliefs could have been claimed on the basis of the alleged breach of the provisions of the MOFA Act, to enable the plaintiff to come out with proper amendment, it will be appropriate if the entire impugned order is set aside by granting liberty to the plaintiff to take out a fresh chamber summons for incorporating the reliefs which are sought to be incorporated by way of impugned amendment based on the alleged infringement of the provisions of the MOFA Act and alleged infringement of the ownership rights of the plaintiff. However, the plaintiff cannot seek to rely upon the terms and conditions of the said Consent Terms and seek additional prayer clauses on the basis of breaches of the terms and conditions in

the said Consent Terms. This will amount to permitting the plaintiff to introduce mutual destructive plea by way of amendment.

18 Considering the reliefs which are sought to be claimed on the basis of the breach of the provisions of the MOFA Act, we find that there will be nothing wrong in the proposed impleadment of the additional defendants.

19 Therefore, the Appeal must succeed in part and we pass the following order :-

ORDER

- (i) The impugned order dated 6th March, 2014 is hereby quashed and set aside and the Chamber Summons No.778 of 2013 stands disposed of with liberty to the original plaintiff to take out a fresh chamber summons seeking to incorporate prayers which are sought to be incorporated by Chamber Summons No.778 of 2013;
- (ii) Needless to add that all contentions of the parties on merits of the suit are expressly kept open;
- (iii) The Appeal is disposed of accordingly;
- (iv) At this stage, the learned counsel appearing for the original plaintiff submits that notwithstanding the

continuation of the order of stay of suit for a period of six weeks in Appeal No.497 of 2014, the plaintiff can be permitted to file chamber summons in terms of the liberty granted;

- (v) The plaintiff can always file a fresh chamber summons after expiry of a period of six weeks. Hence, the prayer is rejected.

(P. D. NAIK, J)

(A.S. OKA, J)