

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

**CHAMBER SUMMONS NO.446 OF 2013
IN
SUIT NO.2385 OF 2007**

M/s.Krishna Developers & Ors.	Plaintiffs
V/s.	
N.D.Constructions	Defendants
And	
Administrator of E.F.Dinshaw Estate	Respondent

Mr.Rajeev Narula i/by M/s.Jhangiani, Narula & Associates for plaintiffs.

Mr.R.A.Shah i/by M/s.Mansukhlal Hiralal & Co. for defendant nos.1 & 2.

Mr.A.S.Daver a/w Ms.Rujuta Patil and Ms. Niyathi Kalra i/by Negandhi Shah & Himayatullah for defendant nos.4 to 7 and proposed defendant no.8.

**CORAM : K.R.SHRIRAM,J
DATE : 19.10.2016**

P.C.:-

1 This Chamber summons is filed to implead the respondent as defendant to the suit.

2 The plaintiffs have filed the Suit inter alia for specific performance of an agreement dated 30.9.1989 read with Supplemental Agreement dated 27.12.1992 entered into between the plaintiffs and defendant nos.1 to 3 and to challenge the notice of termination issued by defendants 1 to 3 to the plaintiffs.

3 The plaintiffs, it is alleged in the plaint, had agreed to purchase from defendant nos. 1, 2 & 3 the suit property belonging to defendant no.4-Trust with joint ownership with the proposed defendant no.8. The trust had agreed to sell the property as mentioned in Exhibit-A to the plaint to defendant nos.1, 2 & 3. Defendant nos.1, 2 & 3 in turn, agreed to sell the suit property to the plaintiffs. Permission from the Charity Commissioner had also obtained and the plaintiffs and defendant nos.1, 2 & 3 entered into an agreement for sale dated 30.9.1989. The very first recital reads as under :-

“WHEREAS (1) F.E.Dinshal Trust and (2) Estate of late Mr.E.F.Dinshaw are absolute owners of all those pieces or parcels of lands or ground situate lying and being at Village Malad, Taluka Borivli in the Registration District and Sub-District of Bombay City and Bombay Suburban bearing City Survey No.226 (Part) admeasuring 94,511 sq. mtrs. Or thereabouts and more particularly described in the Schedule hereunder written (hereinafter referred to as “the said property”)”

4 As the defendant nos.1, 2 & 3 did not take further steps as required under the agreement, the plaintiffs filed the present suit against defendants 1, 2 & 3 and defendant no.4-trust. For reasons

best known to the plaintiffs, though respondent was shown as part owner of the suit property, the plaintiffs chose not to add the respondent as a defendant when they filed the present suit. The counsel for the plaintiffs orally informed the Court that the plaintiffs thought that the reference to respondent no.8 in the agreement was a mistake and they came to know about the cross ownership only much later, after which the present Chamber summons was taken out.

5 The Charity Commissioner passed an order revoking the permission granted to defendant no.4 against which defendant nos. 1, 2 & 3 filed a Writ petition in this Court. The Writ petition came to be dismissed. The defendant nos. 1, 2 & 3 preferred a Special Leave Petition in the Apex Court which also came to be dismissed. Therefore, defendant no.4 cannot sell the property and because of impossibility there cannot be a decree for specific performance in favour of the plaintiffs, even assuming that defendant nos. 1, 2 & 3 wish to perform the contract, Mr.Narula in fairness stated that what remains in the Suit is only a claim for damages.

6 At this stage, the plaintiffs have decided to apply to this Court to join defendant no.8 as a defendant to the Suit. The respondent has strongly opposed this Chamber summons.

7 There is no explanation in the affidavit in support as to why, when the recitals in the agreement between the plaintiffs and defendants 1, 2 & 3 mentioned that the Respondent also was a joint owner, the respondent was not added as a defendant. It is the case of the plaintiffs that the defendant no.4 had received the payments from the plaintiffs and therefore, there was an implied agreement between the plaintiffs and defendant no.4 though the receipts were issued by defendant no.4 in favour of defendant nos.1, 2 & 3. The plaintiffs in the affidavit in support of the Chamber summons expressly state that there was no agreement between the plaintiffs and defendant nos.4 to 7 and the respondent. It is also not stated anywhere that the plaintiff wants to add the respondent because they have a claim in tort against the respondent. This clearly shows that there is no privity whatsoever between the plaintiffs and the respondent. Moreover, the implied agreements based on which the plaintiffs are trying to suggest they have a claim against respondent are dated 25.5.1989 and 3.6.1989. Even if we assume that there was an implied agreement between the plaintiffs and the respondent, still the claim against the respondent ex-facie will be grossly time barred. In paragraph no.43 of the plaint it is stated that the cause of action arose on 7.9.2004 r/w 5.12.2004. Therefore, in my view, this application is not maintainable.

8 Chamber summons dismissed with cost in the sum of Rs.50,000/-. The cost to be paid by way of cheque in favour of advocate for the respondent within a period of four weeks from today.

(K.R.SHRIRAM,J)