

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

CHAMBER SUMMONS NO. 754 OF 2015

IN

SUIT NO. 152 OF 2015

Dilip Parashuram Toraskar

....Plaintiff

Vs.

M/s Parorch Developers L.L.P & Ors.

....Defendants

Mr. Swapnil Bangur a/w Mr. Anil S. Varma i/b Chellammal Jeganathan V.
for plaintiff.

Mr. D.D. Madon, Senior Advocate a/w Ms. Amita Jaisani and Ms. Dharmika
Patel i/b Purnanand and Co. for Defendant Nos. 1 and 3 to 5;

Mr. Chirag Mody i/b C.C. Patel for Defendant No.2;

Ms. Deepti Panda i/b Shah and Furia Associates for Defendant No.6.

CORAM : K.R.SHRIRAM, J.

DATE : 23rd NOVEMBER, 2016

P.C.

1. This chamber summons is taken by the plaintiff for leave to amend the plaint as per the Schedule annexed to the Chamber Summons. The plaintiff not only wish to incorporate certain averments but also wish to add certain prayers.

2. At the outset, Mr. Madon, Senior Counsel appearing for defendant nos.1 and 3 to 5 submits that the defendant nos.1 and 3 to 5 have raised an objection to the suit on the basis that the suit is barred by limitation and also that this Court has no jurisdiction. Mr. Madon submits that the question of jurisdiction has to be answered as expeditiously as possible before other issues which arise in the suit are dealt with or before the entitlement of the plaintiff to any reliefs. Mr. Madon also submits that this Court, in view of the issue of jurisdiction raised, cannot proceed to even consider this Chamber summons for leave to amend the plaint unless

the issue of jurisdiction is decided first. Having regard to the mandate of Section 9(a) of the Code of Civil Procedure as applicable to the State of Maharashtra, Mr. Madon relied upon a judgment of a Single Judge of this Court (A.M.Khanwilkar, J.) in ***Arjun Dada Gadage Vs. Mallappa Gurappa Chougule and Subhashchandra Bhau Shahpure, Secretary, Shedshal Shikshan Prasarak Mandal***¹.

3. Similar submissions were made in a later matter before another Single Judge of this Court (D.Y. Chandrachud J.) in the matter of ***Immigrants Ideal Producers Co-operative Society Ltd., & Anr. Vs. Jahanara Moiz Dalal***². His Lordship Mr. Justice Chandrachud after considering the judgment in *Arjun Dada Gadage* (supra) has in paragraph 16 stated as under :-

16. The principles which have been laid down by the learned Single Judges in the aforesaid decisions are, with respect, correct. There can be no doubt about the question that once an issue of jurisdiction is raised. It has to be decided expeditiously, as a preliminary issue. The decision of that issue cannot be adjourned to the hearing of the motion for interim relief and in any event not to the trial of the suit. The question of jurisdiction has to be answered as expeditiously as possible, before other issues which arise in the suit are dealt with and before the entitlement of the plaintiff to relief on merits is considered. The question, however, in the present case is a more limited issue and that is as to whether the learned Trial Judge was ousted from his jurisdiction to allow the amendment of the plaint altogether. The answer must be in the negative. It must be emphasised that in the present case, there is a finding recorded by the learned Trial Judge that the bonafides of the plaintiffs could not be questioned. The application for amendment was not mala fide nor was it an effort to delay the disposal of the application questioning the jurisdiction of the Court.

4. As this also is an application for amendment, I am inclined to go ahead and hear this application for leave to amend the plaint by following the judgment of this Court in *Immigrants Ideal Producers Co-operative Society Ltd.* (supra). Just because an objection under Section 9(a)

1. 2004 (1) BomCR 741

2. 2004 Vol. 106(2) Bom. L.R. 417

has been taken, does not mean that the Court is divested of its jurisdiction even to consider an application for amendment of the plaint.

5. Now coming to the proposed amendments, it is settled law that, if the amendment application seeks to fundamentally change the nature and character of the suit, the Court should not permit such an amendment even though, following the amendment to Order VI Rule 17 of the Code of Civil Procedure, Courts are generally liberal in granting, unless the trial has begun in the suit. The status of the matter is that only some of the defendants have filed the written statements.

6. Before, we deal with averments in the plaint and the proposed amendments, it should be noted that the plaintiff had earlier made an application for leave to amend the plaint, which came to be allowed pursuant to order dated 6th February, 2015 passed by the Additional Prothonotary and Senior Master. The two prayers pre-amendment were as under :

“(a) that the Defendants be ordered and decreed to pay the Plaintiffs sum of Rs.17 Crores with interest and further provide two flats of each admeasuring 1000 Sq. fts. Carpet areas.

(b) that this Honourable Court be pleased to restrain the Defendants their servants, persons and agents permanently by an order of injunction of this Hon'ble Court from dispossessing the Plaintiff from the Suit Premises and/or disturbing the Plaintiff's peaceful possession and enjoyment of the Suit Premises I.e structure situated at Toraskar Compound, facing Adi Shankaracharya Marg, I.I.T., Powai, Mumbai 400076.”

Post amendment, the prayers became as under :

“(a) That this Hon'ble Court be pleased to order and decree the Defendants to pay the Plaintiff a sum of Rs.17 Crores with interest at the rate of 18% from the date of filing of the suit till payment or realization.

(b) That this Hon'ble Court be pleased to declare that the Defendants are bound and liable to provide two flats admeasuring 1000 sq.ft. each in

the building to be constructed on the suit land and that Defendants be ordered and decreed to execute the required documents in favour of the Plaintiff for allotment of the said two flats and further order and decree to handover peaceful possession of the said two flats to the Plaintiff.

(c) that this Honorable Court be pleased to restrain the Defendants their servants, persons and agents permanently by an order of injunction of this Honorable Court from dispossessing the Plaintiff from the Suit Premises and/or disturbing the Plaintiff's peaceful possession and enjoyment of the Suit Premises i.e structure situated at Toraskar Compound, facing Adi Shankaracharya Marg, I.I.T., Powai, Mumbai-400 076."

7. I asked the counsel for the plaintiff as to why they did not seek amendment as they are seeking now, when they moved an application earlier. There was no reply. I also asked the counsel as to whether there are any developments that have come up after the suit was filed that needed to be added to effectively dispose the suit. Counsel answered in the negative. Therefore, the plaintiffs were in the knowledge of the facts, which they wish to introduce now, even before the suit was filed. Even in such a situation, Courts may be liberal when the matter status is pre-trial. But if the proposed amendments alter the nature and character of the suit, the Court shall not grant.

8. I have considered the proposed amendments. In my view the proposed amendments fundamentally changes the nature and character of the suit. The suit as filed is a simple money suit, whereas by the proposed amendments, the plaintiff wants to make this a suit for specific performance. It is because, paragraph 19 of the plaint reads as under :

"19. The Suit is for recovery for money of Rs.17 Crores with interest and also claiming two flats of each 1000 Sq. fts Carpet and as such accordingly the plaintiff values the Suit at Rs.17 Crores and pays the Court fees accordingly. Court fees of Rs.3,00,000/- paid."

9. Paragraph X(b)(iii) of the proposed amendment read as under:-

“(b-iii) That this Hon'ble Court be pleased to pass an order and decree granting specific performance of the oral agreement as more particularly described in Paragraph 14-A to the Plaintiff”.

Para (III) reads as under :

“(III) The Plaintiff is filing the present Suit for specific performance of the Agreement for Allotment of Flat dated 27th April, 2007 and for a monetary decree for a sum of Rs.17,00,00,000/- and in the alternative for damages in the event this Hon'ble Court does not come to a conclusion that specific performance of the Agreement for Allotment of Flat dated 27th April, 2007 cannot be granted.

10. Therefore, when we consider the proposed amendments, the plaintiff is indeed trying to convert the suit which was originally filed for money decree and for possession of two flats of 1000 square feet to a suit for specific performance in addition to the prayers sought.

11. Mr. Bangur appearing for the plaintiff was at pains to explain that the plaint originally filed was also in the nature of a suit for specific performance. If that was so certainly plaintiff would have atleast made an averment in the plaint that they were and are ready and willing to perform their obligations under any agreement on which they relied upon. There are no such averments. Even para 19 of the plaint says the suit is for recovery of money of Rs.17 Crores and two flats.

12. In the circumstances, since the proposed amendments fundamentally changes the nature and character of the suit, I am not inclined to grant the relief as sought in the Chamber Summons.

13. The Chamber Summons dismissed.

(K.R. SHRIRAM, J.)