

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

**CHAMBER SUMMONS NO. 166 OF 2002
IN
SUIT NO. 1065 OF 1981**

Jagdish R. Singh	.. Plaintiff
Vs.	
1. Keki Rattansha Kalapesi & Anr.	.. Defendants
And	
M/s. Seven Star Estates (Pvt.) Ltd.	.. Respondent

Mr.Prerak Sharma a/w. Mr.Niranjan B. Amin i/b B. Amin & Co. for plaintiff/applicant.

Ms.Priyanka Kothari a/w. Ms. Neha Bhatt i/b Bilawala & Co. for defendant no.2 and for respondent in chamber summons.

**CORAM : K.R.SHRIRAM, J.
DATE : 14TH SEPTEMBER, 2016**

P.C.

1 This chamber summons is for leave to amend the plaint. The suit, as filed in the year 1981, is for specific performance of an Agreement dated 28th July 1977 read with Agreement dated 29th May 1980 entered into between the plaintiff and defendant no.1. No relief is sought against defendant no.2. Defendant no.1 expired on 3rd December 1981 and there was a consent order passed by the Prothonotary and Senior Master permitting the legal heirs of defendant no.1 to be brought on record.

As the plaintiff did not take steps to amend the plaint, the plaintiff took out the chamber summons no.1533 of 2001 to condone the delay of

almost 19 years for carrying out the amendment. That chamber summons came to be dismissed and the Court observed that the plaintiff not having carried out the amendment within the time prescribed, the suit stood abated against defendant no.1.

2 The present chamber summons has been taken out for leave to amend the plaint as per the Schedule annexed to the chamber summons. It is the case of the plaintiff-applicant that on 30th January 2002, when the plaintiff was served with the writ of summons and plaint in another suit bearing No.4060 of 2001 filed in this Court by the respondent and defendant no.2 for a declaration that the respondent and defendant no.2 are the absolute owners of the suit property, in the said plaint, it was averred that by a registered Deed of Assignment dated 31st December 1981, the suit property was transferred and assigned by defendant no.1 and confirmed by defendant no.2 in favour of defendant no.3. The counsel for the applicant states that in view thereof, the plaint in this suit is required to be amended to have the said Deed of Assignment declared as sham, illegal etc. This chamber summons has been taken out on 8th February 2002, i.e., within two weeks of the plaintiff being served a copy of the plaint in suit no.4060 of 2001. The counsel states that the whole amendment also pertains to the same property of which he was seeking specific performance against defendant no.1 and to

avoid multiplicity of proceedings, the present amendment should be permitted.

3 Ms.Kothari appearing for defendant no.2 and the respondent strongly opposes the application. The counsel submitted that when the original defendant no.1 filed the reply in notice of motion bearing No.787 of 1981 that the plaintiff had taken out in this suit way-back in 1981, defendant no.1 had mentioned that he had sold the property to defendant no.2 for a consideration of Rs.6,50,0000 and defendant no.2 took possession of the suit property on 20th May 1981 to the knowledge of the plaintiff. Ms.Kothari also submitted that the plaintiff was aware of, at that stage also, about the irrevocable Power of Attorney in favour of defendant no.2 and hence the plaintiff cannot say he came to know only in January 2002 and as there has been considerable unexplained delay, the chamber summons should be dismissed.

4 It should be noted that the affidavit in reply filed in notice of motion No.787 of 1981 by defendant no.1 only mentions about the Sale Deed of the suit property of defendant no.2 for a consideration of Rs.6,50,000/- and issuance of irrevocable Power of Attorney. It does not talk about any Deed of Assignment being registered because that Deed of Assignment came to

executed on 31st December 1981 and came to be registered on 29th March 1995. It should also be noted that the defendant no.1 died on 3rd December 1981 whereas defendant no.2 had entered into a Deed of Assignment on 31st December 1981. That also gives raise to another issue whether the Power of Attorney, after the death of original defendant no.1, was itself valid and could defendant no.2 have used it to execute the Deed of Assignment.

5 I am not going into the merits of the amendment sought. It is settled law that the Courts should not consider the merits of the amendment at the time of hearing the amendment application.

In my view, the affidavit relied upon by Ms.Kothari does not mention about the Deed of Assignment or the registration of the Deed of Assignment. Therefore, I would, for the moment, go along with the applicant that they came to know about these subsequent facts only on 30th January 2002, when they were served with the copy of the writ of summons and plaint in suit no.4060 of 2001. Further, in this suit, even issues are yet to be settled. It is settled law when issues are yet to be settled, under Order VI, Rule 17 of the Code of Civil Procedure, 1908, the Courts are rather liberal in considering an amendment application unless it changes the cause of action or the amendment is barred by limitation or is otherwise malafide. In my view, there is no malafide and the cause of action also is not changed. *Prima-*

facie, it does not appear to be barred by law of limitation. But at the same time, when issues are framed, the issue of limitation can also be included.

6 Keeping open all defence of the defendants including on limitation open, the chamber summons is allowed in terms of prayer clause (a) and accordingly disposed.

7 The amendment to be carried out and the amended plaint to be served upon the defendants within two weeks. Ms.Kothari, on instructions, waives service of writ of summons against the newly added defendants.

8 The additional written statement/ written statement to be filed within two weeks of receiving the amended plaint.

9 From the prayer clause, it appears that the claim in the suit is valued at less than Rs.1 crore. Therefore, the suit be transferred to the City Civil Court, Bombay.

(K.R. SHRIRAM, J.)