

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

**CHAMBER SUMMONS NO. 219 OF 2013
WITH
CHAMBER SUMMONS NO. 96 OF 2016
IN
SUIT NO. 1948 OF 1983**

Sociedade De Fomento Indus. Pvt. Ltd. .. Applicant

In the matter between :

Sociedade De Fomento Indus. Pvt. Ltd. .. Plaintiff

Vs.

Tulsidas V. Patel Pvt. Ltd. & Ors. .. Defendants

Mr.Darius Khambata, senior advcoate, Mr. Erach Kotwal, senior advocate a/w. Mr.Jayendra Kapadia and Ms. Gaurangi Pujara i/b Little & Co. for plaintiff.

Mr.Gaurav Joshi, senior advocate a/w. Ms.Priyanka Kothari, Mr.S.V.Doijode and Ms. G.J. Thakkar i/b Doijode Associates for defendant nos.1 and 7.

**CORAM : K.R.SHRIRAM, J.
DATE : 28TH SEPTEMBER, 2016**

P.C.

CHAMBER SUMMONS NO. 96 OF 2016

1 This chamber summons is taken out by the plaintiff for leave to amend the plaint as per the schedule annexed thereto.

2 At the outset, it should be noted that defendant no.7 was appointed as Administrator of defendant no.1 pursuant to the orders passed by this Court. Nobody is appearing for the defendant nos. 2 to 5 though served and no

affidavit in reply to oppose the chamber summons also is filed. Defendant no.6 is the Court Receiver of this Court.

3 Shri Joshi, counsel appearing for defendant no.1 and defendant no.7 who is the Administrator, strongly opposes the chamber summons on the ground that (a) It is affected by delay and laches and grossly time barred and (b) the suit is at a stage where the plaintiff's first witness is under cross-examination. Shri Joshi submits that the chamber summons, therefore, should not be allowed because that would also result in trial getting delayed.

4 The plaintiff is a private limited company, which entered into an Agreement, dated 31st July, 1973 with defendant no.1 whereby it agreed to purchase a six bedroom flat on the 23rd floor in a building known as 'Kanchanjunga' in Mumbai. Defendant no.1 was a company owned and controlled by one (Late) Mr.Parmanand Patel, his wife Indu Patel and their daughters Jaya Patel (Salgia) and Sudha Chowgule. Since defendant no.1 did not hand over possession of the said Flat, the plaintiff filed this suit.

The suit as filed is for specific performance of the Memorandum of Understanding (MOU), dated 31st July 1973 in respect of the property described in Exh.'A' to the plaint. This MOU was entered into between the plaintiff and defendant no.1. There are alternative prayers as well.

5 Subsequent to the filing of the suit, various aggrieved purchasers of flats in 'Kanchanjunga' came to form themselves into a Society known as 'Kanchanjunga' Co-operative Housing Society Ltd.' This Society proceeded to institute a suit being suit No.2714 of 1984 in which suit, a notice of motion was taken out for appointment of the Court Receiver in respect of 'Kanghanjunga' Co-operative Housing Society Ltd. By an order dated 28th November 1985, this Court appointed the Court Receiver, High Court, Bombay as Receiver of the entire building. Defendant no.1 filed two lists before the Court Receiver (defendant no.6) of various aggrieved purchasers.

In the lists filed by defendant no.1 with the Court Receiver, there was no flat shown on the 23rd floor, instead, a duplex flat on the 24th floor being Flat Nos.27 and 28 was shown as having been sold to defendant no.2.

It is also the case of the plaintiff that defendant nos.3 and 4 were Directors of defendant no.2 and they were family members of the Directors of defendant no.1.

6 Consequently, the plaintiff amended its plaint pursuant to an order, dated 7th February 1987, whereby defendant nos.2, 3, 4 and 5 were added as parties, relevant submission were incorporated including the submission that defendant nos.1, 2, 3, 4 and 5 have colluded and conspired to defeat the plaintiff's right to the suit premises. Defendant nos.3 and 4 have, on behalf

of defendant no.2, executed the alleged Agreement dated 22nd March 1982 for the alleged purchase of Flat Nos.27 and 28. Defendant no.5 is a company stated to be in complete charge of Kanchanjunga Building. Further reliefs were also incorporated that Agreement, dated 22nd March, 1982, allegedly entered into between defendant nos.1 and 2 was illegal, null, void, invalid and not binding on the plaintiff. Defendant nos.2 to 5 though served, have never appeared. The present amendment application, it is stated, was necessitated because certain facts came to light recently which required to be brought on record.

7 The written statement was filed on behalf of defendant nos.1 and 7. Defendant no.7 is only an Administrator of defendant no.1 and has no personal interest in the suit or in the suit property. Issues were settled on 31st July 2008 and the plaintiff filed the affidavit in lieu of examination in chief of their first witness on 14th July 2009. On 29th August 2009, the affidavit of documents and affidavit in lieu of examination in chief of the plaintiff is taken on record. The additional written statement was filed by defendant nos.1 and 7 on 30th June 2010 and additional issues were framed on 1st April 2011.

8 In view thereof, the plaintiff filed two more affidavits, dated 22nd July 2011 and 8th August 2011 in lieu of examination in chief of their first witness. The Commissioner was appointed to record evidence and the cross-examination of the plaintiff's first witness began on 4th October 2011. The cross-examination continued on 30th November 2011, 2nd May 2012, 3rd May 2012, 10th July 2012 and 6th August 2012.

9 It is the case of the applicant that during the cross-examination of PW-1 on 6th August 2012, based on the questions asked, the applicant decided to investigate the background of defendant no.2 further. The plaintiff took search of defendant no.2 on the website '*Companies House U.K.*' because defendant no.2 was a company registered in United Kingdom. It is stated that it came to light that defendant no.2 was nothing but a company controlled and managed by the Directors of defendant no.1 and the documents show that majority shareholders and the Directors of defendant no.2-Company are the immediate family members of Late Parmanand Patel, who was the Director of defendant no.1. It is also alleged that the signatories of defendant no.2, i.e., defendant no.3 and defendant no.4 are also family members of said Parmanand Patel. Therefore, according to the plaintiff, the documents obtained from Companies House, U.K. show that defendant no.2 was a Company owned, managed and controlled by the late Parmanand

Patel and his immediate family. It is alleged that, therefore, the alleged Agreement, dated 22nd March 1982 purportedly entered into between defendant no.1 and defendant nos.2 to 4 is nothing but sham, bogus and a got up document to defeat the legal rights of the plaintiff to the suit premises. This chamber summons is taken out to amend the plaint and bring these additional facts on record.

10 It is the plaintiff's case that these facts were discovered only recently and it is necessary that the plaint be further amended to bring out the nature of collusion, conspiracy and fraud played by defendant nos.1, 2, 3 and 4 to defeat the plaintiff's right to the suit premises. It is stated that these facts are required to be added to the plaint so that the plaintiff can lead further evidence on these points.

11 In reply to the chamber summons, it is alleged that since the trial has commenced, an amendment ought not to be allowed by virtue of the proviso to Order VI, Rule 17 of the Code of Civil Procedure, 1908 inserted by 2002 amendment to the CPC which requires the applicant for amendment to show due diligence.

12 Shri Khambata, counsel appearing for the applicant submitted and rightly so that in view of Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 22 of 2002, repeal and savings section, the provisions of the proviso to Order VI, Rule 17 of the CPC do not apply to the proposed amendment of the plaint which was filed in 1983, well before the 2002 or 1999 amendments to the CPC. Consequently, the requirement of due diligence by the applicant for the amendment is not applicable.

I find support for this view from the judgements of the Apex Court in ***State of Hyderabad Vs. Town Municipal Council***¹ and ***Suresh Singh Vs. Phoolan Devi & Ors.***².

13 The general rule prior to the amendment to Order VI, Rule 17 of CPC was that Courts would decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. At the same time, that is only a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the Court to order it, if that is required in the interests of justice. [***L. J. Leach And Company Ltd vs Jardine Skinner And Co.***]³

1 2007 1SCC 765

2 2009 12 SCC 689

3 AIR 1957 SC 357

14 The proposed amendment does not include amendment of any prayer clause or adding a prayer clause. From the proposed amendment, it is quite clear that the plaintiff wish to introduce additional facts to expand the facts already stated that there has been a fraud played by defendant nos.2 to 4 upon the plaintiff. In the proposed amendment, the plaintiff also wish to introduce the fact that Jaya Patel, the daughter of late Parmanand Patel, it is believed, a Director of defendant no.1 was present in Court when certain orders were being passed etc. In my view, by proposing to add these facts, the plaintiff is not setting up a new case or a new cause of action.

15 At the same time, the counsel for defendant nos.1 and 7 submitted that the applicant has also made false statements in the affidavit in support inasmuch as from the document which is at Exh.'M' to the amended plaint, the applicant always knew that defendant no.2 was a company registered in United Kingdom and they could have made enquiries earlier. The counsel also submitted that what comes out in the affidavit in support is that the applicant came to know that Parmanand Patel's family controlled both defendant nos.1 and defendant no.2 only after the cross-examination and that was incorrect.

16 I have considered the affidavit in support and in my view, that is not what comes out from the affidavit. The affidavit should be read in toto and we cannot pick and choose certain paragraphs. It is true that the plaintiff could have taken search of the registry in United Kingdom to find out the details as to who were the shareholders and who were the beneficiaries of defendant no.2. Even if the plaintiff may have been able to ascertain the ownership of defendant no.2 prior to 2013, defendant nos.2 to 5 and the shareholders and the Directors of defendant no.1 appear to have suppressed these facts.

17 At the same time, if this chamber summons is allowed, no prejudice will be caused to defendant no.1 or defendant nos.2 to 5. The question of prejudice to defendant no.7 does not arise since he is only the Administrator and defendant no.6 is the Court Receiver. The plaintiff's first witness is still being cross-examined and the amendment to the plaint and his additional affidavits seeks to introduce additional facts into the evidence. The witness can still be cross-examined by the defendants on these additional facts. Even otherwise interest of justice in this case requires that these facts be brought on record so that the defendants could also deal with and answer the allegations against them.

18 It is true that the clock has to be put back and the defendants will have to file additional written statement. Further issues may have to be framed etc. But I also feel that these additional facts are necessary to be introduced in the interest of justice.

19 In ***Jai Jai Ram Manohar Lal Vs. National building Material Supply, Gurgaon***⁴ at para 5, the Supreme Court held that :

“Rules of procedure are, intended to, be a handmaid to the administration of justice. A party cannot be refused relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court -always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide , or that by his blunder he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the -first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.”

20 It is further pertinent to note that defendant Nos.2, 3 and 4 continue to remain absent and that they have at no stage objected to the amendment to the pleadings, which amendments can only affect them.

21 In the circumstances, the chamber summons is allowed in terms of prayer clause (a). Amendment to be carried out and the amended plaint to be served within two weeks from today.

4 AIR 1969 SC 1267

22 Should the defendants wish to file an additional written statement/written statement, the same to be filed and copy served within two weeks of receiving copy of the amended plaint.

23 The suit to be listed for directions on 26th October 2016.

(K.R. SHRIRAM, J.)