

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.309 OF 2017

IN

SUIT NO.3394 OF 2008

Mrs. Lajwanti G. Godhwani & Anr.Applicants/Plaintiffs

Vs.

Shyam Godhwani & Ors.Defendants

Mr. Ajay Panicker, i/b. Ajay Law Associates, for the Plaintiffs/Applicant.

Mr. Madhusudan Nair, for Defendant No.1.

Mr. Gauraj Shah, i/b. M/s. Kanga and Co., for Defendant Nos.2 and 3.

Mr. Karl Shroff, a/w. Ms Khyati Pandi, i/b.Dhru and Co., for Defendant No.4.

CORAM : K.K. TATED, J.

DATE : 15th November, 2017

P.C. :

1. Heard the learned Counsel for the parties.
2. By this Chamber Summons applicants/plaintiffs are seeking to carry out amendment of the suit/plaint in view of subsequent developments.
3. Leave granted to the applicants to carry out amendment in Schedule of Amendment during the course of day. Re-verification

dispensed with.

4. In the present proceedings, initially applicants/plaintiffs filed Suit No.3394 of 2008 for damages against Defendant No.1 and for possession of suit i.e. Flat No.194-D, 19th Floor, in Tanhee Heights, Napeansea Road, Mumbai, admeasuring about 3300 sq.ft. from Defendant No.4 after paying their charges. Following are the prayers in Suit No.3394 of 2008:-

“(a) That the Defendant No.1 be ordered and decreed to pay to the plaintiff a sum of Rs.2,56,69,689/- (Rupees Two Crores Fifty Six Lakhs Sixty Nine Thousand Six Hundred Eighty Nine Only) as more particularly stated in the particulars of claim being Exhibit-K hereto plus further interest on the said sum at the rate of 20% per annum or such other rate as this Hon'ble Court may deem fit and proper from date of suit till payment of realization thereof;

(b) That the Defendant No.1 be ordered and decreed to pay mense profit of Rs.5,00,000/- per month with yearly increase of the same by 20% with interest thereon at the rate of 20% p.a., or such market rate of compensation then prevailing at the time of decreeing the suit, from the date of suit till date of getting the suit flat no.194-D, 19th Floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. built up area vacated and released from the occupation of any third party, free from any liability, encumbrances, charges etc.

(c) In the above alternative to prayer (b) above, in the event it is found that further inquiry is required for ascertaining the mense profits, this hon'ble court may be pleased to order a separate inquiry under Order 20 Rule 12 of C.P.C. 1908 for determination of the mense profits in respect of the suit premises being flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. built up area, receivable and recoverable from the defendants.

(d) That the defendant no.1 be ordered and directed to return the amount of security deposit received from the defendant no. 4

against the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. with all interest, charges and penalty, if any, and get the suit flat, vacated from the defendant no. 4 or its agents and successors, free from any liability, encumbrances and charges;

(e) That the defendant no. 4 be ordered and directed to hand over the vacant and peaceful occupation of the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. to the plaintiffs, without prejudice to the right of the defendant no.4 to recover the security deposit and other interest, charges & compensation legally entitled to, from the defendant no. 1.

(f) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the defendant no. 1 his agents and servants from dealing with, letting out, disposing or transferring of flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. Built up area.

(g) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver High Court, as Receiver in respect of the said flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. built up area with all powers except the power to sell;

(h) That pending the hearing and final disposal of the suit, the defendant no.1 be ordered and directed to return the amount of security deposit received from the defendant no. 3 against the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft., with all interest, charges and penalty, if any, and get the suit flat vacated from the defendant no. 3 or its agents and successors, free from any liability, encumbrances and charges;

(i) That pending the hearing and final disposal of the suit, the defendant no. 4 be ordered and directed to hand over the vacant and peaceful occupation of the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. to the Plaintiff, without prejudice to the right of the

defendant no. 4 to recover the security deposit and other interest, charges & compensation legally entitled to, from the defendant nos. 1 and 2 jointly or severally.

(j) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an attachment order before Judgment under order 38 rule 5 of the Code of Civil Procedure, 1908 by attaching the other personal assets of defendant no.1;

(k) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to order and direct the defendant to furnish the securities for securing the liabilities till date, to the satisfaction of this Hon'ble Court.

(l) For ad-interim and interim reliefs in terms of prayer (f) to (k) above;

(m) For costs of this suit;

(n) For such and other reliefs as the nature and circumstances of the case may require.”

5. During the course of pendency of the present suit, applicants have filed present Chamber Summons adding following prayers in suit, which reads thus:-

(e1) That it be declared that the plaintiffs together are entitled to 1/4th ownership right in the Suit property i.e. Flat No. 194-D 19th floor, in Tanhee Heights, Napeansea Road, Mumbai totally admeasuring about 3300 sq.ft. built up area, along with 2 (two) fixed car parking spaces bearing No.F1 and F2 situated on the stilt of the said Building known as “Tanhee Heights”.

(e2) That the said Suit property be partitioned between the Plaintiffs and the Defendant no.2 and 3 in accordance with their respective ownership rights as declared in the Award dated 30-3-2001 (Exhibit-B to Plaintiff);

(e3) That in order to effect partition of the said Suit property, same be ordered to be sold by and under the directions of this Hon'ble court either by public auction or by private treaty

through Court Receiver High Court Bombay and the net sale proceeds thereof be divided among the Plaintiffs and the Defendants no. 2 and 3 in accordance with their ownership percentage in the suit property.

6. This Chamber Summons is vehemently opposed by Defendant No.1 only. Defendant No.1 has filed his affidavit-in-reply dated 08.03.2017. It is the case of Defendant No.1 that by way of amendment, plaintiffs want to convert the present suit, which was filed by him for damages into suit for partition. Same is not permitted in law.

7. The learned Counsel appearing on behalf of the plaintiffs submits that in respect of suit flat, they entered into leave and license agreement with Defendant No.4 dated 05.07.1999. He submits that as per the terms and conditions of leave and licence agreement, Defendant No.4 deposited a sum of Rs.2.5 Crores with the owner i.e. K.D. Lakhani, V.D. Lakhani and Godhwani Brothers India Private Limited. He submits that at that time a sum of Rs.62.50 Lakhs was paid to K.D. Lakhani (Plaintiff), Rs.62.50 Lakhs to V.D. Lakhani (Defendant No.3) and a sum of Rs.1.25 Crore paid to Defendant No.1. He submits that on expiry of period of leave and licence agreement, owners decided to re-pay the Defendant No.4's deposits and take back the possession of the flat. At that time, Defendant No.1 failed and neglected to refund the sum of Rs.1.25 Crore to Defendant No.4. Hence, as per the terms and conditions of leave and license agreement, till today Defendant No.4 is in possession of the suit flat. He submits that K.D. Lakhani and V.D. Lakhani already returned the sum of

Rs.62.50 Lakhs respectively to Defendant No.4 of their share. He submits that though Defendant No.1 called upon on several occasions, he failed and neglected to refund the sum of Rs.1.25 Crore to Defendant No.4 and hence, Defendant No.4 is in possession of the suit property without paying any licence fees as per the terms and conditions of agreement since 2002.

8. The learned Counsel for the applicants submits that in respect of Godhwani's family property, the Arbitrator was appointed. He submits that the Arbitrator by his Award dated 30.03.2001 specifically held that Shyam Godhwani (Defendant No.1) have no right, title, or interest in respect of the suit flat. It is specifically stated in the said Award that Godhwani Brothers India Private Limited, Defendant No.2 have 50% share in the suit flat. He relies on paragraph 38(c) of the said Award, which reads thus....

“It is declared that the interest to the extent of half share in the Flat No.194 on the 19th Floor of the building Tanhee Heights Napean Sea Road and Parking Spaces belong to Godhwani Brothers (India) Private Limited and not to Shyam Rochiram Godhwani in his personal capacity.”

9. The learned Counsel for the applicants submits that the said Award was challenged by Defendant No.1 alongwith his father by preferring Arbitration Petition No.413 of 2001 before this Court. He submits that the said petition was dismissed by this Court by order dated 19.12.2001. He submits that thereafter Defendant No.1 alongwith his father preferred Appeal No.614 of 2002. Same was dismissed by the Appellate Court on 14.08.2002. Thereafter,

matter carried to the Apex Court being Civil Appeal No.641 of 2005. That appeal also stands rejected by order dated 07.09.2006. The learned Counsel for the applicants submits that it is crystal clear from the Award dated 30.03.2001 that Defendant No.1 have no right, title or interest in respect of the suit property. He submits that as Defendant No.1 failed and neglected to refund the sum of Rs.1.25 Crore to Defendant No.4, the suit flat is in possession of Defendant No.4 only as per the terms and conditions of leave and license agreement. Because of this, attitude on the part of Defendant No.1, plaintiffs and other Defendants are suffering. He submits that as on today, neither they are getting any income out of the said flat, nor they are entitled to enjoy the same. On the other hand, they have to pay maintenance charges to the society also. Considering these facts, the applicants/plaintiffs preferred the present Chamber Summons for partition and for disposal of the same, so that they can clear Defendant No.4's liability i.e. payment of Rs.1.25 Crore with interest, if any. He further submits that if the Chamber Summons is allowed, a main structure of the suit is not going to be changed. He further submits that even the Apex Court in the matter of **Raghu Tilak D. John Vs. S. Rayappan & Ors., reported in 2001-II-SCC-472** held that amendment sought to be changed the nature of the suit originally filed, is not a reason for refusing application for amendment under Order 6 Rule 17 of the Civil Procedure Code. He relies on paragraph Nos.3, 4 and 5 of this authority, which reads thus:-

“3. The appellant filed a suit against the respondents praying for a decree of permanent injunction restraining them, their

agents and subordinates from demolishing the compound wall in the suit scheduled property. During the pendency of the suit, the respondents-defendants were alleged to have entered the appellant's house unauthorisedly and demolished the compound wall on north, east and west side. They were also alleged to have damaged the gate in the entrance.”

“4. In view of the subsequent developments, the appellant filed an application under Order 6 Rule 17 for the amendment of the plaint for adding paras 8(a) to 8(f) in his plaint. The trial court rejected his prayer and the revision petition filed against that order was dismissed by the High Court vide order impugned in this appeal, mainly on the ground that the amendment, if allowed, would result in introducing a new case and cause of action. It was further held that as the appellant was seeking recovery of damages, the amendment could not be allowed as it would allegedly change the nature of the suit. It was also observed that the amendment sought was barred by limitation.”

“5. After referring to the judgments in *Charan Das v. Amir Khan*, *L.J. Leach & Co. Ltd. & Anr. v. Jardine Skinner & Company*, *Ganga Bai v. Vijay Kumar*, *M/s.Ganesh Trading Co. v. Moji Ram* and various other authorities, this Court in *B.K.Narayana Pillai v. Parameswaran Pillai* held:

"3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.”

10. On the basis of these submissions, learned Counsel for the applicants submits that in the interest of justice, this Hon'ble Court be pleased to allow the present Chamber Summons. He submits that if Chamber Summons is not allowed, an irreparable loss will cause to the applicants.

11. The learned Counsel appearing on behalf of Defendant Nos.2 and 3 submits that they are supporting the plaintiffs in allowing this Chamber Summons. He submits that they have no objection if the Chamber Summons is allowed for carrying out amendment. He submits that even if amendment is allowed, a basic nature is not going to be changed of the suit. He submits that the plaintiffs specifically made averments in the plaint to the effect that plaintiffs and Defendant Nos.2 and 3 are owners in respect of the suit property to the extent of 25%, 50% and 25% share respectively. He further submits that the plaintiffs made averments in the plaint that Defendant No.1 have no right, title, interest in respect of the suit property. Therefore, if the Chamber Summons is allowed, the nature of suit is not going to be changed. In support of this contention, he relies on the Apex Court's judgment in the matter of A.K.Gupta and Sons V/s. Damodar Valley Corporation, reported in MANU/SC/0014/1965 (AIR-1967-SC-96). He submits that in this authority, the Apex Court held that under Section 153 and Order 6 Rule 17 of Code of Civil Procedure, 1908, court can allow amendment of claim which is not suing to change the cause of action. He relies on paragraph Nos.7, 8 and 9, which reads thus.....

“7. It is not in dispute that at the date of the application for

amendment, a suit for a money claim under the contract was barred.

The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new case or cause of action is barred: *Weldon v. Neale*. 19 Q.B.D. 394 But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: see *Charan Das v. Amir Khan* L.R. 47 IndAp 255 and *L. J. Leach and Company Ltd. v. Jardine Skinner and Co.* MANU/SC/0009/1957 : [1957]1SCR438”

“8. The Principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes [*Cropper v. Smith*] and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended *Kisandas Rupchand v. Rachappa Vithoba* approved in *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*.”

“9. The expression cause of action in the present context does not mean very fact which it is material to be proved to entitle the plaintiff to succeed as was said in *Cooke v. Gill* in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property corporation Ltd.* and it seems to us to be the only possible view to take. Any other view would make the rule futile.

The words new case have been understood to mean new set of ideas : *Dornan v. J. W. Ellis and Co. Ltd.* This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right

acquired by any party by lapse of time.”

12. On the basis of these submissions, the learned Counsel for Defendant Nos.2 and 3 submits that in the interest of justice, this Court be pleased to allow the present Chamber Summons.

13. The learned Counsel appearing on behalf of Defendant No.4 submits that they are in possession of the suit flat pursuant to the leave and licence agreement. He submits that unless and until they get their fixed deposits with interest, there is no question of handing over possession either to plaintiffs or other defendants. Therefore, they are submitted to give Court orders in the present Chamber Summons.

14. The learned Counsel appearing on behalf of Defendant No.1 vehemently opposed the present Chamber Summons. They have filed their affidavit-in-reply dated 08.03.2017. The learned Counsel for Defendant No.1 submitted that by this amendment, plaintiffs want to convert the suit for damages into suit for partition and that is not permitted in law. He submits that Defendant No.1 in his reply in paragraph 4 specifically admitted the share of plaintiffs and Defendant No.3 to the extent of 25%. He submits that Defendant No.1 also have a share in the suit property.

15. The learned Counsel for Defendant No.1 submits that during the course of the argument, the learned Counsel for plaintiffs, with permission of this Court carry out amendment in schedule of amendment to the Chamber Summons. He submits

that by this amendment, the plaintiffs are seeking to introduce altogether new facts and prayers in the present suit. He submits that by this amendment, the plaintiffs are seeking to carry out partition in the suit property between plaintiffs and Defendant Nos.2 and 3 only. He submits that Defendant No.1 have also right in the said property. He submits that if amendment is allowed, an irreparable loss will cause to Defendant No.1. He submits that by way of amendment, the plaintiffs want to introduce altogether new facts in the present case and also new prayers, which are contrary to the original prayers. Therefore, there is no question of allowing the present Chamber Summons and same is required to be dismissed with costs.

16. I heard both the sides at length. There is no dispute that earlier the plaintiffs have filed the suit for damages against Defendant No.1 only and also for other reliefs i.e. possession of the suit from Defendant No.4. By way of amendment, the plaintiffs want to introduce altogether new facts and prayers. By way of amendment, the plaintiffs are seeking to convert the suit of damages into suit of parties between plaintiffs and Defendant Nos.2 and 3 only. This itself shows that the plaintiffs want to change the entire structure of the suit itself and that is not permissible in law. The authorities cited by plaintiffs and Defendant Nos.2 and 3 in the matter of *Raghu Tilak D. John and A.K. Gupta (supra)* are not applicable in the facts and circumstances of the present case. The Apex Court in both these matters held that by way of amendment, applicant wants to bring altogether new facts, same should not be permitted.

17. Considering the above mentioned facts and the averments made by both the learned Counsel, I am of the opinion that the present Chamber Summons cannot be allowed because the plaintiffs want to change the suit for damages into suit for partition and that is also between plaintiff and Defendant Nos.2 and 3 only.

18. Hence, Chamber Summons stands rejected.

19. No order as to costs.

(K.K. TATED, J.)