

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****CHAMBER SUMMONS NO.290 OF 2017****IN****SUIT NO.1057 OF 1997**

Usha D. Shah & Anr.

...Applicants/Plaintiffs

vs

Utility Premises Pvt. Ltd. And 3 Others

...Defendants

CHAMBER SUMMONS NO.295 OF 2017**IN****SUIT NO.1032 OF 1997**

Usha D. Shah & Anr.

...Applicants/Plaintiffs

vs

Utility Premises Pvt. Ltd. And Anr.

...Defendants

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Ms. Alpana Ghone, a/w. Mr. Ravi Gandhi, Ms. Tanaaz Padania and Mr. Rishabh Ranka, i/b. Kanga & Co., for the Plaintiffs/Applicants.

Mr. Chetan C. Agrawal, for Defendant No.2.

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CORAM : S.C. GUPTE, J.**DATED : JULY 24, 2017****ORAL JUDGMENT :**

. Heard learned Counsel for the parties.

2. Chamber Summons Nos.290 of 2017 and 295 of 2017 are taken out by the Plaintiffs under Order 18 Rule 3 of the Code of Civil Procedure, seeking permission to lead evidence in rebuttal pursuant to the liberty reserved in that behalf by them.

3. These two suits have been filed for specific performance of agreements for sale of flats recorded in letters of allotment dated 28 February 1994. It has been the Plaintiffs' case that, in pursuance of negotiations between the parties, by these letters of allotment, on 28 February 1994, Defendant No.1 agreed to sell to the Plaintiffs the two suit flats at or for the price of Rs.56 lakhs each. The case of the Plaintiffs has been that as agreement purchasers of the suit flats, they were at all material times, and even today are, ready and willing to perform their part of the contract but that Defendant No.1 refused to perform its part. It has also been the case of the Plaintiffs that, in breach of the contract with the Plaintiffs, Defendant No.1 was in the process of entering into an agreement with Defendant No.2 for sale of the entire construction to be put on the suit property (which includes the suit flats). The Plaintiffs, however, originally did not seek any relief against Defendant No.2, and restricted their claim of specific performance only against Defendant No.1. In the written statement of Defendant No.2, filed on 21 September 2005, Defendant No.2 claimed that, by virtue of an agreement dated 28 June 1996 between Defendant No.1 and one Bhupendra Capital & Finance Ltd. on the one hand, and Defendant No.2 on the other hand, development of a portion of the land was to be entrusted to Defendant No.2. It was its case that, pursuant to this agreement, Defendant No.2 had taken up/continued the development of the said portion of the land. It was also submitted by Defendant No.2 that it had no knowledge of the suit agreement purportedly entered into between the Plaintiffs and Defendant No.1 and that it had every right to deal with the suit flats in any manner it pleased, without being liable to the Plaintiffs for the same. After this written statement was filed by Defendant No.2, the Plaintiffs took out a Chamber Summons. In that Chamber Summons, the

Plaintiffs claimed to have come to know of the supplementary agreement executed between Defendant Nos. 1 and 2 and one Cogent Ventures (India) Ltd. (formerly known as Bhupendra Capital & Finance Ltd.) in the third week of February 2014, when they came across a copy of the supplementary agreement. It was the Plaintiffs' case in that Chamber Summons that, having regard to the supplementary agreement and the obligations of Defendant No.2 contained therein, it was necessary for the Plaintiffs to amend their plaint and incorporate averments in respect of the supplementary agreement as well as the claim for performance of the suit agreement against Defendant No.2. The amendment was opposed by the Defendants on various grounds, including on the ground of bar of limitation. It was submitted that the Plaintiffs had sought specific performance of the agreement dated 28 February 1994; that after this date, Defendant Nos. 1 and 2 entered into the agreement of 20 June 1996, which was modified by the supplementary agreement of 12 October 2004 and that having regard to these dates, if a suit against Defendant No.2 were to be filed on the date of the application for amendment, it would have been clearly barred by the law of limitation. This Court, by its order dated 14 July 2014, allowed the Chamber Summons *inter alia* subject to the issue of limitation being kept open. By the time the Chamber Summons came to be allowed, the Plaintiffs had already led evidence of their first witness in Suit No.1057/1997. In its additional written statement, Defendant No.2 raised the defence of limitation in respect of reliefs claimed against it in the amended suit. The amended written statement *inter alia* denied that the Plaintiffs came in power or possession of the supplementary agreement dated 12 October 2004 in the third week of February 2014, as alleged by them. Defendant No.2 submitted in the written statement that the Plaintiffs were having knowledge of the execution of the said document prior to 2007. Defendant

No.2 also took up a stand that the Plaintiffs were in possession of the supplementary agreement (Exhibit P-7) prior to April 2007 and, accordingly, reiterated its defence that the suit against Defendant No.2 was barred by the law of limitation. Based on the pleadings of the parties, including the amended plaint and the additional written statement, this Court framed the following issue as an additional issue :-

“Whether any part of the relief claimed against Defendant No.2 is barred by law of limitation pursuant to the order of amendment dated 14 July 2014?”

In view of this additional issue, the Plaintiffs were allowed to file additional affidavit in lieu of examination-in-chief insofar as the issue of limitation was concerned. The Plaintiffs, accordingly, filed additional affidavit of PW1 (who was earlier examined in Suit No.1057/97) in lieu of further examination-in-chief. The witness was duly cross-examined on this additional affidavit. After the cross-examination of PW1, the Plaintiffs closed their evidence in Suit No.1057 of 1997. After the closure of evidence in Suit No.1057 of 1997, the Plaintiffs also led evidence in Suit No.1032 of 1997 through the same witness, i.e. PW1. The witness was once again cross-examined by the Defendants' Advocates. The Plaintiffs, thereafter, closed their evidence in Suit No.1032 of 1997. The Defendants, thereafter, led separate evidence in the two suits through three witnesses, who were duly cross-examined by the Plaintiffs' Counsel. In the course of the cross-examination of these witnesses, i.e. after the closure of the cross-examination of DW1 and later at the close of cross-examination of DW2, the Plaintiffs purported to reserve liberty to lead evidence in rebuttal under Order 18 Rule 3 of the Code of Civil Procedure. The present Chamber

Summons is taken out for permission to lead such evidence in rebuttal pursuant to this liberty.

4. In the first place, Order 18 Rule 3 of the Code of Civil Procedure provides for a case where there are several issues in a suit, the burden of proving some of which lies on the other party, that is to say, the party other than the party beginning. In such a case, the party beginning may, at its option, either produce his evidence on all issues, including the issues, the burden of proving which lies on the other party, or reserve his evidence by way of answer to the evidence produced by the other party on those issues. As it is at once clear, the *sine qua non* for applying Order 18 Rule 3 is existence of issues arising in a suit, the onus of proving at least one of which is on the defendant. In the case of issues, where the onus to prove lies squarely on the plaintiff, there is no provision or occasion for reserving the plaintiffs' evidence in rebuttal. As is clear from the issues framed in the present suit, which is a suit seeking specific performance of a purported agreement for sale, the onus to prove all issues is on the Plaintiffs, including the issue of limitation, which squarely arises on the pleadings of the parties. In the premises, there is no question of the Plaintiffs reserving any part of their evidence in rebuttal on any issue, including the issue of limitation.

5. Learned Counsel for the Plaintiffs relies on the judgment of this Court in the case of **Nipendrachandra Bid vs. Rajaram Pulp And Paper Mills Ltd.**¹ That was a case where the defendant had raised a counter claim against the plaintiff. Issue Nos. 4, 5 and 6, out of eight issues framed in the suit, concerned this counter claim. The burden of proving these issues was placed on the defendant. After examination of one witness, the plaintiff

¹ 1979 Mh. L.J. 221

filed a purshis, under which he declared that he did not want to examine any other witness in support of his case, except the witnesses in rebuttal if necessary. Thereafter, the defendant himself entered into the witness box and also examined one more witness in support of his case. After the defendant closed his case, the plaintiff made a request to the Court to record evidence of a witness in rebuttal of the evidence adduced by the defendant in support of his counter claim. This request was granted by the Trial Court. The defendant came to this court by way of a revision. The objection before the court primarily was that after leading his evidence, the plaintiff could not seek to reserve liberty for leading further evidence in rebuttal. The submission was that such option ought to have been exercised by the plaintiff before he began his evidence and that it was not open to the plaintiff to exercise his option at a later stage, i.e. after examination of his witnesses. This objection was not accepted by our Court in **Nipendrachandra Bid's** case. The Court held *inter alia* that Order 18 Rule 3 did not lay down any particular time, at which the option referred to in it was to be exercised by a party. The Court held that it was neither possible nor advisable to lay down any general principle in this behalf; to some extent, the time at which the option could be exercised, would depend on the facts and circumstances of each case. In this context, our Court referred to the object behind the intimation of his election by the Plaintiff in terms of Order 18 Rule 3. The Court held that the object was to let the other party know such election so that he might have a fair opportunity to plan his evidence, including “cross-examination of opposite party's witnesses”, which was but one element of that planning.

6. As I have already noted above, the law discussed by our Court in **Nipendrachandra Bid's** case concerns the time at which the option must

be exercised. It does not detract from the requirement that the option, in the first place, is to be exercised in a suit only when the onus to prove some of the issues lies squarely on the opponent, that is to say, the party other than the party beginning. In a case where the onus to prove all issues is on the party beginning, there is no question of having or reserving any option.

7. Ms. Ghone, learned Counsel appearing for the Plaintiffs, submits that in this case, though the onus is on the Plaintiffs to prove all issues, including the issue of limitation, the Defendants in their evidence, for the first time, came up with a case that there was a meeting for an out of court settlement between the parties in the month of January 2007, where, after the perusal of the documents, including Exhibit P-7, the Plaintiffs were satisfied with the rights and authority of Defendant No.1 and, thereafter, agreed to enter into terms and accordingly draft consent terms were actually prepared between the parties. Learned Counsel submits that in view of these facts brought out in the evidence by the Defendants, the Plaintiffs must be allowed to lead evidence in rebuttal. Simply on the basis of evidence brought on record by the Defendants, no rebuttal could be sought by the Plaintiffs under Order 18 Rule 3 of the Code of Civil Procedure. Rebuttal could be sought only against evidence brought on record by the defendant on an issue or issues, the onus to prove which lied on the defendant, after reserving liberty to lead such evidence in rebuttal.

8. Even otherwise, both parties were put to notice when evidence began after the amendment was allowed by this Court that whether or not the Plaintiffs knew of the document P-7 prior to April 2007 was an issue to be determined by this Court. The Plaintiffs clearly led their evidence on this issue. After leading such evidence, they closed their case and allowed the

Defendants to lead evidence. At that stage, it is not open to the Plaintiffs to seek any liberty to lead further evidence in rebuttal. Apart from everything else, such liberty puts the Defendants at a great disadvantage in the trial. Had any liberty been reserved, when the Plaintiffs opened their case, the Defendants could have planned the cross-examination of the Plaintiffs' witnesses and also examination of their own witnesses accordingly. Now after the Defendant completed cross-examination of the Plaintiffs' witnesses and also led their own evidence in chief, the Plaintiffs cannot hope to lead further evidence on the same issue.

9. In the premises, there is no merit in the Chamber Summonses. The Chamber Summonses are, accordingly, dismissed. Costs to be costs in the cause.

10. It is clarified that the contention of the Plaintiffs that the evidence led by the Defendants in this behalf is beyond the pleadings of the Defendants is not being tested by the present order. This contention is certainly open to the Plaintiffs, to be agitated in the course of the trial, when either the admissibility or the probative value of the Defendants' evidence is considered by the Court. It is also clarified that the observations made in this order are for the purposes of deciding the Chamber Summonses, and will not in any event prejudice the Plaintiffs at the trial of the suit.

(S.C. GUPTE, J.)