

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

CHAMBER SUMMONS NO.493/2017

IN

SUIT NO. 1543/1992

Ghanashyam Shankar Sandu & Ors. ... Applicants

Maryland Construction Co. Pvt. ltd. ... Plaintiffs

V/s.

Mathura S. Sandu & Ors. ... Defendants

Dr. Biren Saraf with Mr. Mikhail Behl i/b. Mr. Satendra Kumar for the
Applicant / defendant Nos.37 to 41, 43, 67, 69 to 80 and 82.

Mr. Vachan Bodke a/w. Ms. Madhu Hiraskar i/b. M/s. Chitnis Vaithy &
Co. for the plaintiff

Mr. Mayur Khandeparkar with Mr. Murari Madekar and Mr. Sachin
Kudalkar i/b. M/s. Madekar & Co. for defendant No.83.

CORAM: K.K. TATED, J.

DATED : SEPTEMBER 4, 2017

P.C. :

1. Heard the learned counsel for the parties. The Chamber Summons is filed by defendant Nos.37 to 41, 43, 67, 69 to 80 and 82 for carrying out amendment in the written statement as per schedule annexed to the Chamber Summons.

2. The learned counsel for the applicant submits that they filed the Chamber Summons for carrying out amendment in written statement on the basis of the documents, from another suit being Suit

No.1277/1992. He submits that though they raised all the contentions and objections in the written statement, they want to place on record better particulars of those contentions/defence on record in the written statement. He submits that immediately after filing of the written statement dated 27.08.1997 they learnt about the proceedings of Suit No.1277/1992 in respect of the suit property. Hence, they filed the Chamber Summons. He submits that it is well settled law that the amendment in the written statement cannot be rejected on the ground of delay. In support of his contention, he relies on the judgment in the matter of **B. K. Narayana Pillai Vs. Parmeshwaran Pillai & Anr. 2000 (1) SCC 712**. Paragraph 4 thereof reads thus:

“4. This Court in *A. K. Gupta & Sons Vs. Damodar Valley Corporation* 1966 (1) SCR 796 held:

"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 or new case or cause of action is barred: Weldon v Neale (1887) 19 QBD 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 Vs. Amir Khan AIR 1921 PC 50 and L.J. Leach and Company limited and another v. Jardine Skinner and Company 1957 SCR433.

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 (1884) 26 Ch.D. 700) 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 in Kishandas Rupchand Vs. Rachappa Vithoba (1909) ILR 33 Born. 644

approved in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil* 1957 SCR 595.

The expression 'cause of action' in the present context does not mean 'every fact which it is material to oe proved to entitle the plaintiff to succeed' ss was said in Cooke v. Gift (1873) 8 CH 107. 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 Proper Corporation limited 1962-2 All ER 24, 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': Doman v. J.W. Ellis and company Limited 1962-1 All ER 303. 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."

Again in *Smt Ganga Bai Vs. Vijay Kumar & Ors.* 1974 (2) SCC 393 this Court held:

"The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far reaching discretionary powers ie governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

In *M/s. Ganesh Trading Co. Moji Ram* 1978 (2) SCC 91 it was held;

4. *"it is clear from the foregoing summary of the main rules of pleadings and provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its Counsel is inefficient in setting out its*

case initially the short coming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original l's was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be avowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which can not be compensated by costs. No amendment should be allowed which amounts to or relates in defeating s legal right accruing to the opposite part on account of lapse of time. The delay in Filing the petation for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement."

He also relied on the judgment in the matter of **Andhra Bank Vs. ABN Amro Bank N. V. & Ors. AIR 2007 SC 2511**. Paragraph 5 thereof reads thus:

"5. We have heard Mr. Rohit Kapadia, learned senior counsel appearing for the appellant and Mr. S. Ganesh, learned senior counsel for the respondent. We have perused the original written

statement as well as the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement, we are of the view that the amendment sought to be introduced by the appellant must be allowed. From a perusal of the impugned order of the Special Court we find basically that two grounds have been taken by the Special Court for rejecting the prayer for amendment of the written statement. The first ground is that considerable delay has been caused by the appellant in filing the application for amendment of the written statement. It is well settled that delay is no ground for refusal of prayer for amendment. Mr. Ganesh, appearing for ABN Amro Bank submits before us that by filing of such an application for amendment of the written statement which has been filed with long delay, the appellant sought to stall the hearing of the suit which has been fixed on 13th July, 2007. In response to this Mr. Kapadia, learned counsel for the appellant, submits that in the event the prayer for amendment is allowed by us his client undertakes to file the amended written statement by day after tomorrow, i.e., 12th July, 2007 before the Special Court. Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr. Kapadia, we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a perusal of the amendment application we find that the appellant in their prayer for amendment has only taken an additional defence that in view of Section 230 of the Indian Contract Act, the suit itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Indian Contract Act was or is not maintainable.”

3. The learned counsel for the applicant submits that if the Chamber Summons is not allowed, irreparable loss will be caused to the applicant. He submits that in the interest of justice, this court be pleased to allow the applicant to carry out amendment in the written statement. He further relies on the order dated 14.07.2017 passed by this court by which this court allowed the plaintiff to file an affidavit in lieu of evidence after more than 20 months from the date when this court had directed him to comply. He submits that at the time of passing the said order dated 14.07.2017, they specifically pointed out before this court that the Chamber Summons is pending for carrying out amendment in the written statement. Paragraph 4 of the said order reads thus:

“4. Mr. Behl for defendant Nos.37 to 43 and 65 to 82 states that a Chamber Summons has been taken out on behalf of the defendants for leave to amend the written statement being Chamber Summons (L) No.493/2017 and a copy thereof has been served upon the plaintiffs. Counsel for plaintiffs requests one week time to file a reply. Time granted.

Chamber summons be listed for hearing on 09.08.2017.”

4. On the basis of this submission, the learned counsel for the applicant submits that this court be pleased to allow the applicant to carry out amendment in the Chamber Summons.

5. On the other hand, the learned counsel for the plaintiff vehemently opposed the Chamber Summons. They filed the Affidavit-in-Reply dated 21.07.2017. The main contention raised by the plaintiff in the reply that the applicant has failed to explain the delay in making the Chamber Summons. His contention is that the

defendants have filed their written statement on 27.08.1997 and the Chamber Summons is filed in the year 2017. Hence, there is no question of allowing defendants to carry out amendment in the written statement and the Chamber Summons be dismissed with costs.

6. Heard both sides at length. The main objection raised by the learned counsel for the plaintiff is that there is delay on the part of the applicant defendant to make the present Chamber Summons for carrying out amendment in the written statement. He submits that the delay is not properly explained by the applicant in the present proceedings. Hence, there is no question of allowing the Chamber Summons, allowing the defendant to carry out amendment in the written statement. It is to be noted that, the objections raised by the advocate for the plaintiff in allowing the Chamber Summons on the ground of delay, cannot be accepted in view of the judgments of the apex court in the matter of *B. K. Narayana Pillai (supra)* and *Andhra Bank Vs. ABN Amro Bank N.V. & Ors (supra)*. As referred hereinabove, in both these authorities, the apex court has categorically held that delay on its own, untouched by fraud, should not ground for rejecting the application for amendment and opposite party should be properly compensated with costs for the delay.

7. Other objections raised by the advocate for the plaintiff that the proposed amendment in the written statement is not relevant in the facts and circumstances of the present case. It is to be noted that, by way of Chamber Summons the defendants sought to bring on record the material and relevant facts which will be required to be considered

by this court for doing a complete justice between the parties effectively and finally. The amendments are required for determining the question in controversy between the parties. The defendants have filed the Chamber Summons on the basis of the facts in Suit No.1277/1992 between the plaintiff and third party. In any case, the defendants have specifically made a statement before this court that the plaintiff has already created third party right, title and interest in respect of the suit property. In support of this contention, the learned counsel for the defendant relies on the pleadings of the suit No.1277/1992.

8. Considering these facts and the law declared by the apex court as stated above, I am of the opinion that the applicants - defendants have made out a case for allowing the Chamber Summons.

9. Considering these facts and the law declared by the Apex Court as stated hereinabove, I am satisfied that the applicant has made out a case for allowing the Chamber Summons. At the same time, the applicant has to pay cost of Rs.25,000/-. Cost shall be paid to Kirtikar Law Library, High Court, Mumbai, within two weeks from today.

10. Hence, the Chamber Summons is allowed as under:

- a. The applicant to carry out amendment in the written statement dated 27.08.1997 as per schedule annexed to the Chamber Summons within two weeks from today.
- b. If amendment is carried out within stipulated time as stated hereinabove, the defendant to serve an amended copy of the written statement on the plaintiff as well as other parties.

- c. Liberty granted to the plaintiff if they so desire to file an additional affidavit in lieu of evidence, within four weeks thereafter, with copy to other side.
- d. The applicants to pay cost of Rs.25,000/-.
- e. The cost shall be paid to the Kirtikar Law Library, High Court, Mumbai within two weeks from today, failing which the Chamber Summons shall stand rejected, without further reference to the court.
- f. The Chamber Summons stands disposed of accordingly.

(K.K. TATED, J.)