

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

CHAMBER SUMMONS NO. 1251 OF 2016

IN

SUIT NO. 3141 OF 2007

Noel D'souza .. Applicant

In the matter between :

Noel D'souza .. Plaintiff

Vs.

Frank Anthony D'souza .. Defendant

Mr.Sharan Jagtiani a/w. Mr.Ahuramazda Postvala i/b Wadia Ghandy & Co.for plaintiff.

Mr.Jaideep Mitra a/w. Ms.Irin D'lima i/b M/s. D'lima and Associates for defendant nos.1 to 4, 6 and 7.

CORAM : K.R.SHRIRAM, J.

DATE : 1ST MARCH, 2017

P.C.

1 This chamber summons is taken out for leave to amend the plaint as per the schedule annexed thereto. The proposed amendments are only to introduce the two prayers as (b-I) and (b-II).

2 The suit is filed for (i) a declaration that the document of relinquishment executed by the plaintiff on or about 17th January 1995 is voidable and the plaintiff has avoided the same; (ii) for a declaration that the plaintiff is entitled to 1/6th undivided share in the suit property and; and

(iii) for partition of the suit property. It should be noted that in the proposed amendment, the plaintiff is not seeking to introduce any averment in the body of the plaint. This is because the averments relating to the prayers proposed to be introduced can be found in paragraphs 15, 16, 20, 23 and 24 of the plaint.

3 Shri Mitra for the defendants strongly opposes the application and submits that (a) the amendment sought is grossly barred under Article 58 of the Schedule to the Limitation Act; (b) the plaintiff is only trying to improve its case after the issues were settled and after the defendants revealed certain documents during inspection; and (c) there is no explanation for the delay in taking out the chamber summons.

4 I am afraid, I cannot agree with Shri Mitra. The plaintiff is not seeking amendment to introduce any fresh cause of action or claim. The pleadings are already there in the plaint but the plaintiff has missed out in adding two prayers for declaring the Will dated 24th January 1995 purportedly executed by Francesca is not valid or genuine or in the alternative executed under undue influence and/or on the basis of misrepresentation and/or fraud. Therefore, Article 58 of the Schedule to the Limitation Act is not applicable to the amendment sought. Moreover, the

evidence is yet to be filed though issues have been settled. It is also to be noted that an issue which would cover the proposed amendment has already been settled as Issue no.7, i.e., questioning the validity of the Will.

5 Undisputedly, directions have been passed directing the plaintiff to file his evidence. Shri Mitra states that this chambers summons is only to avoid complying with the Court's directions.

6 It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. In the judgment of ***Revajetu Builders and Developers Vs. Narayanswamy & Sons & Ors.***¹ in paragraph 63, the factors to be taken into consideration are given, which read as under :

63 *On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.*

Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala-fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

1 (2009) 10 SCC 84

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

7 In my view, there is no change in cause of action and I do not find any malafide intention of the plaintiff in taking out this chamber summons. Change in the nature and character of the case also does not arise.

8 In the circumstances, the chamber summons is allowed is allowed in terms of prayer clause (a). The amendment to be carried out and the relevant amended pages to be served upon the defendants within four weeks. Should the defendants wish to file any additional written statement, they may do so within two weeks of receiving the amended plaint.

9 The suit be listed for directions on 17th April 2017.

10 Shri Mitra, I would say is justified in pressing for costs. The plaintiff to pay a sum of Rs.10,000/- as costs to the defendants and this amount to be

paid by way of cheque drawn in favour of the defendants' Advocates on record within two weeks from today.

(K.R. SHRIRAM, J.)