

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

**CHAMBER SUMMONS NO.1063 OF 2015
IN
SUIT NO.1573 OF 1992**

Konark Builders & Developers Pvt.Ltd. .. Plaintiff

In the matter of :

Konark Builders & Developers Pvt.Ltd. .. Plaintiff

vs.

Sunderji Mulji Shah & Ors. .. Defendants

And

Mrs.Godavari Sumermal Bafna and Ors. .. Respondents

Mr.Karl Tamboly, a/w Mr.Rakesh Mandavkar and Ms.Amrita Dubey i/b
Mr.Bhavesh V. Panjuani i/b M/s.Mulla and Mulla and Craigie Blunt and
Caroe for the applicant

Mr.Vivek Kantawala a/w Mr.Amey Patil i/b M/s.Vivek Kantawala and
Company for the defendant no.3 in Suit No.1573 of 1992 and proposed
respondent nos.1 to 5 in Chamber Summons No.1063 of 2015

Mr.Sanjeel Kadam i/b M/s.Kadam and Company for the defendant no.7

**CORAM : K. K. TATED, J.
DATE : OCTOBER 31, 2017**

P.C.:

1. Heard the learned counsel for the parties.

2. Advocate for the applicant plaintiff submits that they have already served all the defendants as well as respondents. To that effect, he has filed two affidavits of service dated 31.10.2017. Both the affidavits of service are taken on record.

3. By this Chamber Summons, applicant plaintiff is seeking permission to bring on record legal heirs of deceased defendant no.5, Sumermal Mishrimal Bafna who died on 1.1.2015.

4. The learned counsel for the plaintiff submits that they filed Suit No.1573 of 1992 for specific performance of Memorandum of Understanding being Exhibit-B to the plaint in respect of the suit property i.e. land bearing Survey No.151/A, C.T.S.No.460, 461, 461(1), 462 and 531 admeasuring 38,374 72 sq.mtrs. situated at Village Nahur, Mulund, Greater Bombay more particularly described in Exhibit "A" to the plaint.

5. The learned Counsel for the plaintiff submits that they learnt about the death of defendant no.5 from newspaper. Hence, plaintiff through their advocate's letter dated 14.2.2015 called upon the defendant no.3 and 5's advocate to provide the names and addresses of legal heirs of defendant no.5 and also present trustees of defendant no.3, Bafna Charitable Trust. He submits that Vivek Kantawala and Co., Advocates & Solicitors by their letter dated 20.2.2015 replied to letter dated 14.2.2015. He submits that instead of disclosing the names and addresses of the legal heirs of deceased defendant no.5, the said advocate in his letter dated 20.2.2015 stated that the defendant no.5 joined as party defendant in the present Suit as trustee of defendant no.3. Therefore, there is no question of bringing his legal heirs on

record. He submits that during the pendency of the present Chamber Summons and as per the order passed by this court, advocate for defendant disclosed the names and addresses of the legal heirs of deceased defendant no.5. Hence, they carried out the amendment in the Chamber Summons.

6. The learned Counsel for the applicant plaintiff submits that defendant no.5 joined in the present litigation in his personal capacity as well as a trustee of defendant no.3 Trust. In support of this submission, the learned Counsel for the applicant relies on paragraph 10 and 25 of the plaint which reads thus:

“10. The Plaintiffs say that relying upon the aforesaid representations of the Defendants and believing them to be true, the Plaintiffs conveyed their desire and willingness to develop the Suit Property and on or about 27th November 1987 a Writing in the form of a “Memorandum of Understanding” recording the broad terms of their agreement was entered into and executed by the Defendant No.1 for an on behalf of the Defendants No.2 on the one hand and the said Mr.Umesh Karia for an on behalf of the Plaintiffs on the other hand whereby the Plaintiffs acquired the unrestricted rights to develop the suit property for the consideration and on the main terms and conditions therein mentioned. Upon execution and in pursuance of the said “Memorandum of Understanding”, the Plaintiffs paid an amount of Rs.1,00,00,000/- (Rupees One Crore) to the Defendant No.1 and the Defendant No.5 towards part-payment of consideration for acquiring the development rights in respect of the suit property, wherefrom Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand) were paid by two Cheques drawn in favour of the Defendants No.2 firm viz. M/s.Hill View Developers, one being for Rs.10,00,000/- (Rupees Ten Lakhs) bearing No.612929 dated 7.12.1987, both drawn on the Indian Overseas Bank, Marine Lines, Bombay 400 020, and the amount of Rs.87,50,000/- (Rupees Eighty -seven Lakhs Fifty Thousand) was paid to the said Defendant Nos.1 and 5 in

*the form of bearer bonds. The Defendant acknowledged receipt of the said amount of Rs.1,00,00,000/- (Rupees One Crore) in the said “Memorandum of Understanding” itself. The further payment in respect of the said transaction was to be made on receipt of the 1st Commencement Certificate and at the agreed intervals as set out in the said “Memorandum of Understanding”. A copy of the said Writing viz. “Memorandum of Understanding” is hereto annexed and marked **EXHIBIT “B”** and is hereinafter referred to as “the Suit Writing”.*

“25. Without prejudice to the foregoing submissions and in the alternative and only in the event of this Hon'ble Court coming to the conclusion for any reason that the specific performance of the said Agreement i.e. Memorandum of Understanding being the Suit Writing (Exhibit “B” hereto) cannot be granted, the Plaintiffs would submit that the Defendants are liable to pay the Plaintiffs a sum of Rs.8,00,00,000/- (Rupees Eight Crores) as damages suffered by the Plaintiffs due to the breach of contract committed by the Defendants as set out in the particulars of claim hereto annexed and marked EXHIBIT “R”. The Plaintiffs submit that the Defendants are bound and liable to pay to the Plaintiffs the said amount of Rs.8,00,00,000/- (Rupees Eight Crores) together with interest thereon at the rate of 18% per annum from the date of filing of the Suit till payment or realisation.”

7. The learned Counsel for the applicant plaintiff submits that it is specifically stated in the plaint that as per Memorandum of Understanding plaintiff paid an amount of Rs.1 Crore to the defendant no.1 and 5 towards part payment of consideration acquiring the development rights in respect of the suit property. This itself shows that the plaintiff filed the suit against defendant no.5 in his personal capacity as well as a trustee of defendant no.3. He further submits that even by way of prayer clause (b) they claimed the damages to the extent of Rs.8 crores from the defendants and also claimed refund of the amount paid by them to the defendant no.5 in his personal capacity. He submits that considering the pleadings in plaint and

averments made in affidavit in support of Chamber Summons, applicant plaintiff may be permitted to bring the legal heirs of defendant no.5 and also the present trustees of defendant no.3 trustees on record. He submits that some of the legal heirs of defendant no.5 are present trustees of defendant no.3 trust. Therefore, in the interest of Justice, this Hon'ble Court be pleased to allow the present Chamber Summons.

8. On the other hand, the learned Counsel for the defendant no.3 and respondents i.e. legal heirs of deceased defendant no.5 vehemently opposed the present Chamber Summons. He submits that present Chamber Summons is not maintainable in law. He submits that upon bare reading of pleadings of the plaintiff in the plaint and particularly paragraph 5 it is crystal clear that plaintiff filed the present Suit against defendant no.5 as trustee of defendant no.3 trust. He relies on paragraph 5 of the plaint which reads thus:

“5. The Defendant No.5 is a Trustee of the Defendant No.3 Trust and is also closely connected with the Defendants No.4 Trust.”

9. The learned Counsel for the defendant no.3 further submits that even in paragraph 8(a) of the plaint, the plaintiff has specifically stated that defendant no.5 was the Main /Chief Trustee of Defendant no.3 Trust. He submits that this fact itself shows that defendant no.5 was joined in the present litigation as trustee of defendant no.3 trust. Hence, there is no question of allowing the plaintiff to bring the legal heirs of deceased defendant no.5 on record.

10. The learned Counsel for the defendant submits that in the

present proceeding, plaintiff carried out amendment of the plaint on 30.6.2014. By way of amendment, they placed on record Exhibit-"Z" i.e. agreement dated 10.3.2008 between defendant no.3 trust and defendant no.7 Atul Projects (India) Ltd. He submits that the plaintiff specifically brought on record the said document by way of amendment dated 30.6.2014. He submits that first paragraph of the said agreement itself shows that deceased defendant no.5 was trustee of defendant no.3 trust. First paragraph of the said document reads thus:

"THIS AGREEMENT is made and entered into at Mumbai on this 10th day of March 2008 between [1] SHRI SUMERMAL M. BAFNA, [2] MR.SURESH S. BAFNA, [3] MR.RAJKUMAR S. BAFNA AND [4] MRS.VIMLA SUDHIR NAVLAKHA, all residing at Dariya Mahal, Nepeanses Road, Mumbai 400006 all Indian Inhabitants, the present trustees of Bafna Charitable Trust, a Public Charitable Trust registered under the Bombay Public Trust Act, 1950 under PTR No.E-3881(B), hereinafter referred to as the "VENDORS" (which expression shall unless, it be repugnant to the context or meaning thereof be deemed to mean and include the Trustee or Trustees for the time being of the said Trust, survivors or survivor of them and the heirs, executors and administrators of such last survivor, their/his or her assigns) of the ONE PART AND ATUL BUILDERS AND ESTATES LIMITED having their address at 501, Trade Avenue, Suren Road, Off. Western Express Highway, Andheri (East), Mumbai 400 093; hereinafter referred to as the "PURCHASER" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successors, and assigns) of the OTHER PART:"

11. The learned counsel for the defendant further submits that even on bare reading of the MOU between Shri Sunderji M. Shah and M/s.Konark Builders and Developers Pvt.Ltd. it shows that suit property was belonging to the trust defendant no.3 only. Therefore, there is no

question of allowing the plaintiff to bring the legal heirs of the trustee on record. In support of this contention, he relies on Order XXXI Rule 1 of the Code of Civil Procedure, 1908 which reads thus:

“1. Representation of beneficiaries In suits concerning property vested in trustees, etc..- In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the court may, if it thinks fit, order them or any of them to be made parties.”

12. The learned Counsel for the defendant submits that at the most plaintiff can be allowed to bring the present trustees of the trust on record subject to limitation point. Therefore, there is no substance in the present Chamber Summons and same is required to be dismissed with costs.

13. I have heard both the sides at length.

14. It is to be noted that paragraph 5 and paragraph 8(a) of plaint shows that plaintiff sued defendant no.5 in his capacity as a trustee of defendant no.3 trust. The defendant no.5 trustee has expired. Therefore, there is no question of bringing his legal heirs on record. The trust does not die. At best, the plaintiff is entitled to implead the successor trustees. At the most, plaintiff can bring present trustees of trust on record subject to limitation. Not only that the plaintiff has on their own, carried out amendment in plaint on 30.6.2016. By way of amendment, they have placed on record agreement dated 30.3.2008. This agreement shows that defendant no.5 was trustee of defendant

no.3 trust. In spite of these facts, the plaintiff filed present Chamber Summons for allowing them to bring legal heirs of deceased defendant no.5 on record which is not maintainable in law.

15. At this stage, the learned counsel for the applicant plaintiff submits that at least they may be permitted to bring on record respondent no.4, Mr.Rajkumar Sumermal Bafna and respondent no.5, Mrs.Vimala Sudhir Navalakha, as current trustees in the present proceedings. For this, advocate for legal heirs of deceased defendant no.5 have no objection subject to limitation. Considering these facts, following order is passed:

- a) Applicant plaintiff is permitted to bring on record respondent no.4, Mr.Rajkumar Sumermal Bafna and respondent no.5, Mrs.Vimala Sudhir Navalakha, as current trustees of defendant no.3, subject to limitation.
- b) Amendment be carried out within four weeks from today.
- c) If amendment is carried out within stipulated time as stated hereinabove, plaintiff to serve the defendants with copy of amended plaint.
- d) Liberty granted to the defendants, if they so desire, to file their additional written statement on the basis of amended copy of plaint within 12 weeks.
- e) Other prayers of the applicant plaintiff in the present Chamber Summons stand rejected.
- f) Chamber Summons stands disposed of accordingly. No order as to costs.

(K.K.TATED, J.)