

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

**CHAMBER SUMMONS NO.405 OF 2016
IN
SUIT NO.2762 OF 2009**

Francis James Almeida s/o Charles I.AlmeidaApplicant

IN THE MATTER BETWEEN :

Francis James Almeida s/o Charles I.AlmeidaPlaintiff

V/s.

Rosy C.Almeida wd/o Charles I.Almeida & Ors.Defendants

Mr.Yogeshwar S.Bhate for the plaintiff.

Mr.Sanjay Jain a/w Ms.Aditi Pathak, Mr.Chetan Mhatre i/by
M/s.Utangale & Co. for defendant nos.1, 3 & 4.

Mr.M.R.Mandawgade-OSD, Court Receiver present in court.

**CORAM : K.R.SHRIRAM,J
DATE : 5.1.2017**

P.C.:-

1 This is one more instance of a vicious family fight. The plaintiff is the son of one Charls Ignatius Almeida (deceased) and defendant no.1 is the plaintiff's mother, defendant nos.2 & 3 are plaintiff's sisters and defendant no.4 is the plaintiff's brother. The plaintiff has filed this suit to declare that the properties mentioned in paragraph-13 of the plaint as joint properties of the plaintiff and the defendants and the plaintiff has 1/4th share in the 2/3rd share of the entire estate after giving defendant no.1, 1/3rd share.

2 After the suit was filed, the plaintiff had taken out a Notice of Motion No.3794 of 2009 to direct defendant nos.1 to 4 to disclose properties of the deceased, to render account and for appointment of Court Receiver for the entire estate of the deceased. On 24.6.2010, order in the Notice of Motion was passed whereby the court receiver was appointed to take formal possession of the immovable properties where the business of firm M/s.Almeida Brothers was being carried on and appoint a suitable person as an agent. Against the said order dated 24.6.2010, defendant no.4 preferred an appeal being appeal no.1040 of 2010. The appeal was admitted by an order dated 14.12.2010 and the court receiver was directed to take formal possession and appoint defendant no.4 as agent of the court receiver. Defendant no.4 has been appointed as agent of the Court Receiver. Royalty has been fixed, but these are not the subject matter of the present chamber summons.

3 On 30.4.2012 the defendant no.4 took out a Notice of Motion No.1897 of 2012 for deleting the properties mentioned in para-13 (v) to (xvii) of the plaint. On 30.7.2015, the said Notice of Motion along with the Notice of Motion No.3794 of 2009 taken out by the plaintiff came to be heard by this court. Paragraph nos.15, 16, & 17 of the order dated 30.7.2015 read as under :-

“15. Mr.Bhate proposes to file a Notice of Motion in order to impeach or challenge the various documents by which

properties are said by the Defendants to have been transferred to third parties. Till that is done, no further orders can be passed in the present Notice of Motion. Mr.Mehta points out that the documents now sought to be challenged are disclosed and yet no steps have been taken by the plaintiff to impeach or challenge that documents. There is as yet no amendment to the Plaint.

16. In my view, it is not possible to prevent the plaintiff from seeking an amendment if he so wishes. However, the plaintiff must also be put to terms keeping in mind the fact that an adequate disclosure has been made and further tht the documents disclosed by the Defendants, prima facie, indicate that they are all dispositions or sales or transfers by registered documents, many of which were executed in the lifetime of the deceased or very shortly after his demise. Consequently, the plaintiff must, on or before 17th August 2015, not only move whatever application for amendment he seeks, but also obtain necessary orders of injunction. If he does not do so, the present order will operate as the final order in the Notice of Motion No.3794 of 2009.

17. Further, in the event that the plaintiff does not obtain appropriate orders by that date, the Defendants' Notice of Motion No.1897 of 2012 will also stand made absolute in terms of prayer clauses (a), (b) and (c) except in regard to the documents at Sr.Nos.VI to VII of the chart appended to this order. In respect of those items, the order indicated above will continue."

4 The present chamber summons was lodged on 7.8.2015 for leave to amend the plaint as per the schedule annexed to the chamber summons. It is the case of the plaintiff that the plaintiff came to know about the details of the documents relating to the properties mentioned at paragraph nos.13(v) (viii) to (xvii) only when they received a copy of the affidavit in reply to Notice of Motion No.3794 of 2009 on 9.8.2012. The plaintiff is seeking to introduce the amendments and reliefs to declare those documents as documents prepared to camouflage the facts that properties belong to the estate of the deceased and this amendment to the plaint was

required.

Order 6 Rule 17 of the Code of the Civil Procedure reads as under :-

“Amendment of pleadings- *The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial”.

5 This provision has been dealt with by the Apex Court in the matter of ¹***Revajeetu Builders & Developers Vs. Narayananswamy & Sons & Ors.*** Paras-63 & 64 read as under :-

FACTORS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH APPLICATIONS FOR AMENDMENTS:

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.*

(1) Whether the amendment sought is im-perative 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;

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

1 (2009) 10 SCC 84

(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.

64. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

6 Admittedly, in this case, issues are also yet to be settled though the defendants have filed written statement. It is also settled law that while considering the application for amendment, courts do not go into the merits of the proposed amendments.

7 The courts do not allow the amendments when the amendment application changes the nature and character of the suit or when proposed amendments are not necessary for proper and effective adjudication of the case or the amendment is malafide or the amendment is ex facie barred by limitation. On this last point (limitation), court will have to consider if plaintiff files a fresh suit as per the proposed amendments, whether such a suit will be barred by limitation ?

8 Mr.Jain appearing for the defendant no.4 submitted as under :-

(a) The order dated 30.7.2015 expressly provides that the plaintiff must, on or before 17.8.2015, not only move whatever application for amendments he seeks but also obtain necessary orders of injunction and if he does not do so, the present order will operate as a final order in the Notice of Motion No.3794 of 2009 ; Mr.Jain submitted that this chamber summons, though filed before 17.8.2015, since no application for injunction was moved before 17.8.2015, is not maintainable. Mr.Jain also submitted that by virtue of the said order dated 30.7.2015, the paragraph nos.13 (v) & (viii) to (xvii) of the plaint have been struck off and by seeking the proposed amendment the plaintiff is trying to re-introduce those portions which have been struck off.

9 During the course of Mr.Jain's submissions, Mr.Bhate on instructions from the plaintiff who is present in court stated that he shall not move for any order of injunction relating to the properties covered under original paragraph nos.13(v) & (viii) to (xvii) of the plaint, or as reflected in the chart appended to the order dated 30.7.2015.

10 The 2nd point submitted by Mr.Jain is that the proposed amendments are ex facie barred by limitation. He submitted that the documents which the plaintiff is seeking to be declared as void, are documents which were executed in 1992, 1995 or 1996 etc., way beyond the 3 years period of limitation and as it appears ex facie they are barred by limitation, this amendment application should not be allowed.

11 The 3rd point of Mr.Jain was that three of the properties i.e., properties covered under the original paragraph-13 (v), (x) & (xii) have already been sold to 3rd parties and the proposed amendment does not include adding those 3rd parties as defendants and therefore, amendment application should not be allowed.

12 The 4th point of Mr.Jain was that under Section 34 of the Specific Relief Act, unless consequential orders to the declaration as sought is prayed for, the Court cannot grant the declarations and as the proposed amendments does not include consequential orders and such declaration cannot be granted by virtue of section 34, amendment itself should not be allowed.

13 The 5th point of Mr.Jain was under Order- II Rule- 4 of the Code of Civil Procedure since the documents on which plaintiff is

seeking declaration to the proposed amendment relates immovable properties, causes of action cannot be joined. Relying on Order-II Rule-5 of the Code of Civil Procedure, he also submitted that since the proposed amendments are seeking declaration personally against defendant no.1 and defendant no.4, the causes of action cannot be joined in the present suit.

14 I have heard counsel for both the parties and also considered their arguments.

15 As regards the objection of Shri Jain that by virtue of order dated 30.7.2015, the chamber summons is not maintainable, I do not agree with Mr.Jain. Reading Justice Patel's order holistically, what it only means is if the plaintiff did not file the amendment application and also obtain necessary orders of injunction, the order dated 30.7.2015 will operate as final order in Notice of Motion No.3794 of 2009 and the defendants' Notice of Motion No.1897 of 2012 will stand made absolute in terms of prayer clauses-(a), (b) and (c) except in regard to the documents at serial nos.(vi) & (vii) of the chart appended to the order. It will not come in the way of plaintiff applying for leave to amend the plaint. Paragraph-16 of the said order itself states "It is not possible to prevent the plaintiff from seeking the amendment if he so wishes".

Therefore, the order dated 30.7.2015 does not come in the way of plaintiff applying for leave to amend the plaint.

At the same time, the statement of Mr.Bhate on instructions from the plaintiff who is present in court that plaintiff will not move, after the amendment application is allowed for any order of injunction relating to the properties at original paragraph-13 (v) & (viii) to (xvii) to the plaint is also accepted.

16 Coming to the defence of limitation, in the affidavit in support, it is expressly stated that the plaintiff became aware of the transactions which the plaintiff is seeking by way of this amendment application to be declared as void only on 9.8.2012. This chamber summons has been taken out on 7.8.2012. The statement of the plaintiff cannot be negated without a trial and therefore, I am not able to come to a conclusion that prayers sought in the proposed amendments are ex-facie barred by limitation. It will be open for the defendants to raise in their additional written statement all defences including limitation.

17 As regards 3rd defence of 3rd party not being joined regarding properties at serial nos. (v), (x) & (xii) of original paragraph-13 of the plaint, the prayer clause sought to be introduced is only for a declaration that those agreements with 3rd parties were a

camouflage agreement for sale or the subsequent deed of confirmation has been entered into to camouflage the fact that the property belongs to the estate. Mr.Bhate made a statement that he is not seeking cancellation of those documents thereby affecting rights of 3rd parties already created. Mr.Bhate submitted that if the court allows his prayer for declaration as sought, then sale proceeds that have been received by the defendants will have to be brought in as part of the estate. In view of the above, in my view, there is no need to make any 3rd party as party defendant to the suit. Moreover, the suit is for partition. Therefore, the defence raised by Shri Jain under Order II Rules-4 & 5 of the Code of Civil Procedure as mentioned above, also is not applicable.

18 Having observed as above and having considered the proposed amendments, I also find that the amendment sought is imperative for proper and effective adjudication of the case. The application for amendment is not malafide and allowing the application would not cause/lead to any injustice to the defendants. The proposed amendments also do not change the nature and character of the case.

19 In the circumstances, the chamber summons is disposed with the following order :-

- (a) Leave to amend the plaint as per the schedule annexed to the chamber summons granted ;
- (b) Statement of Shri Bhate to amend the plaint to delete portions as directed in the order dated 30.7.2015 as also the statement that the plaintiff will not challenge the order dated 30.7.2015 is accepted ;
- (c) Plaint to be amended and the amended plaint to be served within three weeks ;
- (d) The defendants to file additional written statement within 3 weeks of receiving the amended plaint in which the defendants can raise all defences including limitation.

Suit be listed for directions on 24.2.2017.

(K.R.SHRIRAM,J)