Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 424 OF 2016

IN

SUIT NO. 2546 OF 2012

Ashutosh Y Maneklal ...Plaintiff
Versus
Lina Y Maneklal & Ors ...Defendants

Mr Rohit Kapadia, Senior Advocate, *with Mr Gaurav Joshi, Senior Advocate, Mr Farhan Dubash, Mr Anosh Sequeira, Mr Kalpesh Mehta, i/b M/s. Pravin Mehta & Mithi & Co, for the Plaintiff/ Applicant in CHS/424/16.*
Mr Janak Dwarkadas, Senior Advocate, *with Mr Prateek Seksaria & Mr Gaurav Shah, i/b Ms Veena Advani, for Defendant No. 1.*
Mr A Poojari, *i/b M/s Vimadalal & Co, for the Defendant No. 2.*
Mr Vishal Thaker, *a/w Mr Kaushalya Prajapati, for the Defendant No. 3.*

CORAM: G.S. PATEL, J
DATED: 21st April 2017

PC:-

1. The dispute is in regard to the estate of one Yogesh Maneklal, who died on 6th March 2010. The Suit is for administration. The 1st Defendant is Yogesh Maneklal's widow. The Plaintiff is their son. The Chamber Summons is filed by the Plaintiff for amendment of the Plaint and it relates principally to the shares of the 4th

Defendant, Maneklal Enterprises Private Limited ("**MEPL**"), an entity that holds at least one assets of high value, a building near Churchgate, Mumbai.

2. The case of the 1st Defendant is that her late husband held 833 shares in MEPL. She held 167 shares. The entire shareholding of 1000 shares was thus divided between them. The 1st Defendant has filed Notice of Motion No. 1551 of 2016 seeking a decree on admission. According to her, in the Plaint, the Plaintiff has admitted this shareholding, and, specifically, that Yogesh Maneklal held 833 shares in MEPL. This would have several consequences including in various litigations both here and in other Courts and Tribunals, and might materially impact the final outcome of the suit.

3. Yogesh Maneklal is said to have left three Wills. The first is of 16th January 2006. At that time MEPL's had an issued capital of 300 shares. The Will of 16th January 2006 referred to only 250 shares; the remaining 50 were held by the 1st Defendant. There is a second will of 3rd February 2006 and this refers to Yogesh Maneklal's holding in MEPL of 833 shares. This is on the basis, according to the 1st Defendant, that in February 2006, 700 further shares were issued in the ratio of 1:5. The 1st Defendant thus got 167 shares. Yogesh Maneklal got 833 shares. The Plaintiff's one preference share was cancelled. Even in January 2006, before the first Will, Yogesh Maneklal acquired the 250 shares of MEPL from a partnership called Suyash Traders for consideration of Rs.25,000/-.

4. From 1993 to 2013 Ashutosh controlled the 4th Defendant. Dividend was paid to Yogesh Maneklal. The shares were shown in his financial returns. His third Will of 28th November 2006 also shows his holding of 833 shares. When probate was sought of Yogesh Maneklal's Will, the Plaintiff accepted this position as to Yogesh Maneklal's shareholding.

5. In her Notice of Motion, therefore, the 1st Defendant now seeks reliefs based on an admission by the Plaintiff in these terms regarding these shareholdings. The Motion of course extends to other potions of the estate as well. The Chamber Summons for amendment by the Plaintiff directly affects this portion of the 1st Defendant's Notice of Motion. This is why the 1st Defendant opposes the Chamber Summons.

6. The amendment proposed is in two parts. The schedule is from pages 4 to 13 to the Chamber Summons. Clauses I to VI at pages 4 and 5 broadly seek to delete the reference to 833 shares wherever they occur in the Plaint, as being the shares held by Maneklal and replace these with the number 533; to show Suyash Traders as the holder of 250 shares; and to alter the percentages equivalent to these share holdings.

7. In the next section (also wrongly numbered VI but which have corrected in hand in the original court record to Read VII) paragraphs 12A and 12 are sought to be added to the plaint. These contain a lengthy narrative of how, according to the Plaintiff, , 250 shares of MEPL continue to remain with Suyash Traders and never belonged to Yogesh Maneklal or formed part of his estate. Proposed paragraph 12B has several sub paragraphs.

8. I do not propose to allow the amendments in paragraphs I to VI. I will allow portions of the proposed paragraphs 12A and 12B but without permitting the corresponding changes to Exhibits "F" and "G", sought in the previous sections of the schedule. My reasons follow.

9. Mr. Dwarkadas urges that these amendments take away an important admission. Perhaps if I allowed all the deletions in Sections I to VI this might be true. I must decline Mr Dwarkadas's invitation to examine the merits of the proposed amendment at this stage, to see whether what is proposed is true or not, assess whether the amendments fully accord with the original Plaint, and judge whether the Plaintiff's cause is or is not credible. That is not, I think, an exercise in which I can legitimately engage at this stage. That examination on merits must be kept for a time after the amendment is allowed (in part, as indicated), and the Plaintiff given an opportunity to defend what he is saying and the Defendants an equal opportunity to fully controvert it. That right will of course have to be kept open.

10. Does the amendment "take away" an admission, at least in relation to the shares? I do not think so, and, in any case, sufficient safeguards can be provided to ensure that the interests of both sides are protected. On the other hand, not allowing the Chamber Summons seems to me is a course that would result in at least one of the parties being prevented from presenting the fullness of his case. This is important because whatever may be situation regarding dividends, financial returns etc., MEPL's register of members still shows 250 shares in the name of Suyash Traders. Mr. Dwarkadas says this is inevitable because the Plaintiff "controls" that register; but that, surely, is not a factual statement that can be accepted straight away. MEPL has one other shareholder, after all, the 1st Defendant. Did she accept the position reflected in that register? How might she explain it? All these are matters that must be tested and cannot be brushed aside in a summary fashion at this stage. Perhaps this is not so much a question of "taking away" an admission as creating one by eliding altogether the effect and consequence of the register of members. The versions of both sides will need to be examined.

11. The question of "taking away an admission" also does not strictly speaking arise. Ashutosh may have to explain now why it is he first proceeded on the basis that his father held 833 shares and how it comes to pass that he only now "discovered" something that was arguably specially within his knowledge all along, viz., that 250 shares remained outside his father's holding and estate. He must also explain how, if these 250 shares were always with Suyash Traders, on an increase in capital Yogesh Maneklal came to hold any shares at all, and what is it that Yogesh Maneklal paid Suyash Traders Rs. 25,000 for in 2006. Conceivably, Mr. Dwarkadas may yet be able to show that these amendments to the Plaint, far from assisting the Plaintiff, actually harm his cause. He may also be able to show that even after the Plaintiff was given the fullest opportunity to explain his original "admission", what he said provides no real explanation at all. But to give a party an opportunity to explain a statement is one thing; to prevent him for offering that explanation at all is a very different matter. I believe it is not just the best course, but one that the law demands, to give both sides an opportunity to deal with the matter squarely rather than permitting a scenario where the Plaintiff says he was denied an opportunity of explaining his so-called admissions in the Plaint.

12. Mr. Dwarkadas's reliance on the decision of Supreme Court in case of *Gautam Sarup v Leela Jetly & Ors*[1] does not, I think, carry him the required distance in a matter like this. In paragraph 16 the Supreme Court said:

> "16. A thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the Plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order XII Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. The decisions of this Court unfortunately in this regard had not been uniform. We would notice a few of them."

1 (2008) 7 SCC 85.

13. Mr Dwarkadas's case does not, I think, fall within the frame of Section 58 of the Evidence Act so much as under Sections 17 and 21. Section 58 speaks of a fact the parties *agree to admit*:

> **Section 58 — Facts admitted need not be proved**
>
> No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

Section 58 "admitted facts" are of a class, like those of which judicial notice is taken. But Sections 17 and 21 tell us what is an admission and when it is relevant:

> **Section 17 — Admission defined**
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> An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Section 21 with its illustrations says:

> **Section 21 — Proof of admissions against persons making them, and by or on their behalf**

Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may by proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between ***A*** and ***B*** is, whether a certain deed is or is not forged, ***A*** affirms that it is genuine, ***B*** that it is forged.

A may prove a statement by ***B*** that the deed is genuine, and ***B*** may prove a statement by ***A*** that the deed is forged; but ***A*** cannot prove a statement by himself that the deed is genuine, nor can ***B*** prove a statement by himself that the deed is forged.

(b) ***A***, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. ***A*** may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) ***A*** is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post mark of that day.

The statement in the date of the letter is admissible, because, if ***A*** were dead, it would be admissible under section 32, clause (2).

(d) ***A*** is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) ***A*** is accused of fraudulently having in his possession a counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was

> counterfeit or not, and that the person did examine it and told him it was genuine.
>
> ***A*** may prove these facts for the reasons stated in the last preceding illustration.

14. Even if there is an admission, it is always open to the party against whom that admission is proposed to be used to explain that admission. It is also possible for him to say that there is in fact no such admission. These are not opportunities that can be denied. The law on this is firmly settled: clear admissions, though substantive evidence against the person making them, are not conclusive. In *Bharat Singh v. Bhagirathi*,[2] the Supreme Court said:

> 19. **Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17, and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted.** We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. **Admission is substantive evidence of the fact admitted** while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the

2 (1966) 1 SCR 606 : AIR 1966 SC 405.

> witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

(*Emphasis added*)

Thus, admissions, *unless explained*, furnish the best evidence.[3]

15. When the Supreme Court says that the party should not be permitted to wholly resile from an admission, I believe I am addressing precisely that by disallowing the proposed amendments in Sections I to VI and only allowing a restricted amendment.

16. The second decision cited by Mr Dwarkadas of the Supreme Court in *Revajeetu Builders & Developers v Narayanswamy & Sons & Ors*[4] also does not significantly assist Mr. Dwarkadas or persuade me that a Chamber Summons such as this must be disallowed. In paragraphs 21, 58 and 63 the Supreme Court said thus:

> "21. The Respondents relied on the decision of this court in *Usha Balashaheb Swami & Others v. Kiran Appaso Swami & Others* wherein the court has held that by way of amendment, admission made in pleadings and particularly in the plaint cannot be sought to be omitted or got rid of. The Court further observed that a prayer for amendment of the plaint stand on different footing. The relevant observations of the Court are set out as under:
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> > "19. … a prayer for amendment of the plaint and a prayer for amendment of the written

3 Ramji Dayawala & Sons (I) Ltd v Invest Import, (1981) 1 SCC 80.

4 (2009) 10 SCC 84.

> statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.
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> 20. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as a question of prejudice would be far less in the former than in the latter case."

58. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

63. On critically analysing 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 imperative for proper and effective adjudication of the case?
>
> (2) Whether the application for amendment is bona fide or mala fide?
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> (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;
>
> (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.
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> 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.

17. I cannot accept Mr Dwarkadas's submission that the amendment lies outside the frame of what is required for a decision in the suit. One of the key aspects of this litigation is bound to be a determination of shareholding and interest in MEPL. The question therefore is whether in a situation like this the Plaintiff should be told that despite the fact that there is a register of members that shows 250 shares today in the name of Suyash Traders he should not be allowed to present any explanation for that factual state of affairs. I do not think that is at all correct.

18. I will allow the Chamber Summons in these limited terms: Para 12A and 12B are permitted to be added by amendment. The rest of the amendments are disallowed, including the changes to Exhibits "F" and "G".

19. Amendments to be carried out on or before 4th May 2017. Copy of the amended Plaint will be served on the Advocates for the Defendant by 9th June 2017. Additional Written Statement to be filed on or before 18th August 2017.

20. The Plaintiff and the 1st Defendant will be both entitled to file further Affidavits in Notice of Motion No. 1551 of 2016 in view of these amendments.

21. The Motion will be listed for directions on 9th June 2017 and for fixing a date.

22. The rival rights and contentions on merits are expressly kept open.

(G. S. PATEL, J.)