Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1506 OF 2015
IN
SUIT NO. 1908 OF 2009

Shekhar Bhojraj – Trustee & Ors ... Plaintiffs
Versus
Bank of India & Ors ... Defendants

Mr OA Das*, for the Applicant in CHS 1506/2015 and Respondent No.1/Bank.*
Mr SM Gorwadkar, *Senior Advocate, for the Plaintiffs, with Mr Himanshu Kane, Rahul Kada, & Nikhil Sharma, i/b Puranik & Co., for the Plaintiffs.*

CORAM: G.S. PATEL, J
DATED: 13th December 2017

PC:-

1. The matter is wrongly shown under the caption of dismissal. It should have listed for final disposal today. By consent, it is taken up for hearing and final disposal.

2. Heard.

3. This is a Chamber Summons by the original 1st Defendant in a suit of 2009 to amend its written statement. The trial has already begun: issues have been framed, and the evidence Affidavit of the Plaintiffs' first witness has already been filed.

4. The Plaintiffs claim that the 1st Defendant, the Bank of India, negligently cleared a large number of cheques – about 120 – drawn on the Plaintiffs' account with that bank despite the fact that these cheques were allegedly forged by the 2nd Defendant. These were not the only transactions between the parties. There were several thousand cheques issued, but the forged cheques are these 120 or so.

5. It seems that now in this Chamber Summons the 1st Defendant wishes to add a considerable amount of material to the written statement. This is set out in the schedule to the Chamber Summons.

6. There are two immediate difficulties in the way of allowing the Chamber Summons. First, the trial has already begun and, therefore, the provisions of Order VI Rule 17, and, in particular, the proviso to that Rule will apply. The Bank must show, in support of its application, that, despite due diligence, it could not have raised the matter sought to be introduced by the amendment before the commencement of the trial. The Affidavit in support of the Chamber Summons says nothing at all in this regard. The only explanation we find is in paragraph 5 of a much later Affidavit dated 31st March 2016. That portion is at page 248 of the record in the Chamber Summons and this is how paragraph 5 reads:

> 5. I further say that after a long time, the matter was placed for hearing and the, our previous advocate handling the Bank case had returned the brief, due to his personal difficulties. Thereafter, we have assigned the matter to our

> present advocate. While preparing the evidence, our advocate informed us that some documents, i.e. cheques and some other documents pertaining to Charity Commissioners report etc. are eventual and is to be produced before the Hon'ble Court for proper adjudication of the matter and have demanded the same. As the said cheques were not readily available in the branch, the same could not be submitted earlier. I further say that as advised by our counsel, we have once again tried to trace out the same from our branch office. Inspite of our due diligence, we could not trace out the same in the branch office. Lastly, we have searched the same from the Banks godown where old records were kept. After through and continuous search by several staffs on several days, we could trace-out the some of cheques. Accordingly, we have instructed our advocate to file necessary application after taking the other information from Plaintiffs to amend the written statement a there were relevant and important facts and records which would assist the Hon'ble Court in reaching to proper conclusion and adjudication."

7. I do not see how this is in any sense in compliance with the requirements of the proviso to Order 6 Rule 17. As I have noted, the case is that these forged cheques were negligently cleared. The original cheques were, therefore, always with the bank and not with the Plaintiffs. The bank undoubtedly has standard operating protocols for the storage and preservation of all cleared cheques. I have absolutely no idea why the 1st Defendant was looking in its branch office rather than in the designated godown for these cheques. It is impossible without doing violence to the language to call this "due diligence".

8. The second reason for not accepting the application is that the amendment appears to be entirely unnecessary. The controversy is plain. What the 1st Defendant seeks to do by way of this amendment is to actually plead evidence. It is well settled that what is required to be pleaded are the material facts constituting the cause of action or the defence, and never the evidence. Bearing in mind the equally settled principle that a party must have a sufficient pleading as a foundation for its evidence, it will no doubt be open to the Defendants to lead every piece of evidence in accordance with law and as permissible in law. That is surely sufficient for the purposes of determination of the trial of the issues raised in the trial.

9. In my view this Chamber Summons cannot be permitted at this late stage.

10. For the forgoing reasons the Chamber Summons is dismissed. In the facts and circumstances of the case there will be no order as to costs.

(G. S. PATEL, J.)