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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7617OF 2016

M/s Vikas Enterprises ... Petitioner.

V/s.

M/s Girish Construction Co. & ors ... Respondents

Mr. Kumar Tolani, for petitioner

Mr. B. R. Zaveri i/by Mr. D.B. Zaveri, for respondents

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 26th APRIL, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner and respondents.
- 2] By this petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 23.11.2015, passed by City Civil Court, Mumbai, thereby dismissing the Chamber Summons No.583 of 2015, in Suit No.8498 of 1994.
- 3] The said Chamber Summons was taken out by the petitioner, who is the plaintiff before the trial Court, under Order VI Rule 17, read with Order 1 Rule 10 of the Code of Civil Procedure, to add respondent as party defendant to the suit and for that purpose to incorporate pleading as annexed in the schedule with the Chamber Summons.

4] It is the case of the petitioner that he has filed this suit for specific performance of the contract against defendant No.1 on the basis of agreement of sale dated 29.6.1982. The defendant Nos. 2 to 7 have executed an agreement in favour of defendant No.1 on 10.11.1983, who in turn has sold the said property to respondent M/s Marble Traders. In view thereof, it was submitted before the trial Court that impleadment of M/s Marble Traders is essential for the decision of this suit.

5] This Chamber Summons was, however, resisted by the respondent and the trial Court, vide its order, was pleased to reject the said Chamber Summons on two fold grounds. First, that there was inordinate delay in filing this Chamber Summons and hence in the absence of any averment relating to exercise of due diligence, the amendment in the pleading cannot be allowed after the trial is commenced. Secondly, it was held that the predecessors in title of the plaintiff-petitioner as well as respondent are different and therefore, presence of respondent in the suit is neither necessary nor proper.

6] While challenging this order of the trial Court, the submission of learned counsel for the petitioner is that the trial Court was confused on account of implementation of T.P.S. Scheme, as a result of which, the suit property earlier bearing C.T.S. No.356, now it is C.T.S. 366. The vendor of petitioner and respondent- Marble

Traders is the same. Defendant Nos. 2 to 7 from whom defendant No.1 has purchased the suit property and from whom the petitioner has also agreed to purchase.

7] As regards this aspect of the case, I find substance in the submission of learned counsel for the petitioner that the vendors are the same and property appears to be one and the same.

8] However, as regards the second ground, I find that the trial Court has rightly rejected the Chamber Summons. As rightly submitted by learned counsel for respondent, the suit is filed in the year 1994 and this agreement is executed by defendant Nos. 2 to 7 in favour of Karsan Dana Parmar in the year 1981 and from Karsan Dana Parmar, in favour of respondent is of the year 1992. Therefore, it goes without saying that even prior to filing of suit, this agreement was very much in existence. Not only that, the petitioner was also aware that respondent-Marble Traders was in possession of the suit property. There are recitals in the Court Commissioner's report clearly stating that Marblewala is in possession of some portion of the suit property. Therefore, in the facts of this case, it was incumbent upon the petitioner to explain as to why this amendment for impleadment of Marble Traders was not sought at an earlier stage.

9] The contention of the petitioner is that he came to know about the title of Marble Traders, in inquiry before the City Survey

Officer, in the year 2012 and immediately thereafter Chamber Summons is filed and therefore, it is urged that the sufficient cause is made out to explain the delay.

10] The trial Court has, however, refused to accept this contention and in my considered opinion rightly so. In view of Proviso inserted to Order VI Rule 17 C.P.C, by way of Amendment, the petitioner has to first cross the hurdle of showing that despite exercise of due diligence he could not bring these facts to the notice of the Court at an earlier stage. The petitioner, has, however, failed to cross this embargo. As laid down by the Hon'ble Apex Court in the case of *Vidyabai and ors -vs- Padmalatha and anr [(2009) 2 SCC 409]*, this Proviso is considered to be a jurisdictional aspect. Hence unless it is crossed, it will not confer jurisdiction on the Court to consider the amendment application. As the petitioner has failed to cross it, therefore, the trial Court was right in rejecting this Chamber Summons.

11] As submitted by learned counsel for respondent, the name of the respondent was registered in the City Survey record in the year 1996, which acts as notice to the petitioner and to others. In view thereof, considering the inordinate delay and also having regard to the absence of any explanation about exercise of due diligence, when the trial Court has rejected this Chamber Summons, in Writ

jurisdiction of this Court, no perversity can be found in the impugned order of the trial Court, so as to interfere therein.

12] The Writ Petition, therefore, being without merits stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]