

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

**CHAMBER SUMMONS NO.87 OF 2014
WITH
NOTICE OF MOTION NO.1154 OF 2014
IN
SUIT NO.3540 OF 2005**

M/s. Sheth Builders Private LimitedPlaintiff

Vs.

Mr. Michael Gabriel & Ors.Defendants

Ms. A.V. Khanolkar for plaintiff/applicant in CHS/87/2014.

Ms. Anuja Karia a/w. Mr. Prashant Mairale I/b. M.S.D'mello for defendant no.1 and for applicant in NMS/1154/2014.

Ms. C.J. Bhatt, Legal Custodian appointed for defendant no.2 present.

Mr. O.A. Das for defendant nos.3 and 4.

Mr. Vishal Talsania I/b. Hafeezur Rahman for proposed defendant/respondent in CHS/87/2014.

CORAM : K.R.SHRIRAM, J.

DATE : 25th SEPTEMBER 2018

P.C.:

CHAMBER SUMMONS NO.87 OF 2014

1 This chamber summons is for leave to amend the plaint as per the Schedule annexed to the chamber summons.

2 When I considered the averments made in the affidavit in support and the proposed amendment, what plaintiff proposes to introduce are facts which have transpired before the suit was filed. Nothing is there in the affidavit in support to explain why those averments were not made in the plaint earlier. Moreover, no case also is made out in the affidavit in support as to why in a suit for specific performance filed by plaintiff against defendant nos.1 to 7, proposed defendant no.8 is also necessary to be

added.

3 There is not even an averment as to why respondent is a proper and necessary party to the suit. Paragraph 11 of the judgment of the Apex Court in **Kasturi V/s. Iyyamperumal and Ors.**¹ reads as under :

11. As noted hereinafter, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker Vs. Small 1834 (40) English Report 848 made the following observations:

"It is not disputed that, generally, to a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non- performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

4 The suit is also a suit for specific performance. As stated earlier, no case is made out as to why presence of respondent is necessary to

1. (2005) 6 SCC 733

adjudicate the controversies involved in the suit for specific performance of the contract for sale. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If one consider the proposed amendment, if those amendments are allowed, the scope of the suit for specific performance, in my view, would be enlarged and it would be practically converted into a suit for title.

5 In the circumstances, chamber summons dismissed with cost in the sum of Rs.50,000/- to be paid to defendants by way of cheque drawn in favour of the advocate on record for defendants within two weeks from today.

NOTICE OF MOTION NO.1154 OF 2014

1 This notice of motion is to transfer short cause suit no.3820 of 2008 pending in the Bombay City Civil Court at Bombay to this Court and to be tagged with suit no.3540 of 2005.

2 Ms. Khanolkar, counsel for plaintiff states that the application is filed under Section 22 of the Code of Civil Procedure, 1908 which according to Ms. Khanolkar is not maintainable and therefore, plaintiff has filed an affidavit in reply opposing the application. Ms. Karia, counsel for applicant states that prayer clause in the notice of motion does not mention any

Section and in the affidavit in support, it is mentioned Section 22 of the Code of Civil Procedure, 1908 instead of Section 24 of the Code of Civil Procedure, 1908. Ms. Karia states that it is a typographical error and it should be considered as Section 24. I am inclined to agree with Ms. Karia and considering this application as an application under Section 24 of the Code of Civil Procedure, 1908.

3 This notice of motion has been taken out by defendant no.1. The suit no.1362 of 2008, which is sought to be transferred to this Court was originally filed in this Court and because of increase in pecuniary jurisdiction of Bombay City Civil Court, got transferred to Bombay City Civil Court. The prayer sought in that suit, counsel submit, is to declare an agreement dated 15th March 2005 entered into between plaintiff and defendant nos.1 to 4 as null and void. In suit no.3540 of 2005 pending in this Court, plaintiff is seeking specific performance of the same agreement which applicant in his suit is praying for declaring as null and void. Therefore, in my view, the issues will be common and evidence to be recorded also will be common. It will save substantial judicial time if both the suits are clubbed together.

4 In the circumstances, notice of motion is allowed and accordingly disposed.

5 Suit no.3820 of 2008 pending in Bombay City Civil Court be transferred to this Court and be tagged alongwith suit no.3540 of 2005. Registry of Bombay City Civil Court shall ensure that the papers are sent to the registry of Bombay High Court within two weeks of receiving a copy of this order.

6 Both suits to be listed for issues on 15th October 2018 on which date parties to come with agreed draft issues and a separate list of issues on which they are unable to agree. In the meanwhile, parties shall file their respective affidavit of documents, complete discovery and inspection and also exchange statement of admission and denial with reasons for denial.

7 It is made clear that since one suit is of the year 2005 and the other is of the year 2008, no further time will be granted to comply with any of the above directions and if the affidavits of documents are not filed and inspection is not completed and statement of admission and denial is not exchanged, parties will not be permitted to rely on any document apart from those documents copies whereof are annexed to the plaint and/or written statement and/or mentioned in the list of documents annexed to the plaint and/or written statement.

8 At this stage, Mr. Das, counsel for defendant nos.3 and 4 states that written statement is ready and what is required to be done is it has to be declared and lodged in the registry. The written statement to be declared

and copy served on plaintiff and other defendants on or before
29th September 2018.

(K.R. SHRIRAM, J.)

Gauri
Amit
Gaekwad

Digitally
signed by
Gauri Amit
Gaekwad
Date:
2018.09.27
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