

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1844 OF 2016
IN
SUIT NO. 262 OF 2010

Dietrich Engineering Consultant Holdings & Anr	...Plaintiffs
<i>Versus</i>	
Bchist India & Ors	...Defendants
<i>And</i>	
Frederic Dietrich & Ors	...Respondents

Mr Sarosh Bharucha, *with Mr Swapnil Gupte, I/b Argus Partners,*
for the Plaintiffs/Applicants.

Mr Sandesh Shukla, *with Rajmani Varma, I/b M/s Navdeep Vora &*
Associates, for Defendants Nos. 1 to 3.

CORAM: G.S. PATEL, J
DATED: 22nd November 2018

PC:-

1. This is the Plaintiffs' Chamber Summons in a Suit for an injunction and other reliefs. The Plaintiffs claim that the Defendants wrongfully dealt with certain proprietary and confidential information to which the Plaintiffs were entitled.

2. The Suit is already at a very advanced stage. The trial has commenced. The cross-examination of the Plaintiffs' first witness is

complete. Mr Bharucha for the Plaintiffs does not dispute this. What he submits is that the proposed amendments annexed in a Schedule to the Chamber Summons propose only two things. The first is innocuous. It proposes to correct the name of Plaintiff No. 1 to reflect its current name. There can be no objection to this.

3. The second proposed change is to add two individuals and one company, all based in Switzerland, as Plaintiffs Nos. 3, 4, and 5. Then there are further amendments consequential to the proposed addition of Plaintiffs Nos. 3, 4 and 5.

4. The reason for this change is, in Mr Bharucha's submission, merely prudence or abundant caution, and nothing else. He submits that certainly no new cause of action is being introduced. The proposed new Plaintiffs adopt the whole case of the existing Plaintiffs without adding or subtracting anything to it. The justification is this: The proposed 3rd and 4th Plaintiffs are brothers and are the driving forces behind the 1st Plaintiff. The proposed 3rd Plaintiff is also a director of the 1st Plaintiff and a Managing Director of the proposed 5th Plaintiff. The proposed 4th Plaintiff is a Co-director of the 1st Plaintiff and a Managing Director of the proposed 5th Plaintiff. The two individuals own certain patents in various countries. The proposed 5th Plaintiff is a wholly-owned subsidiary of the 1st Plaintiff and owns various patents. The 1st Plaintiff is the assignee from the proposed Plaintiffs Nos. 3, 4 and 5 of one or more of the patents in respect of which confidential information is supposed to have been made available to the Defendants. That the 1st Plaintiff is entitled to these patents has

been the case of the 1st Plaintiff from the very beginning. In any case, none of this changes the cause of action as originally pleaded.

5. The only questions that arise are, first, whether the proposed amendment “takes away a valuable right” that can be said to have accrued to the Defendants. I do not see how that can fairly be said. On the contrary, it seems to me to be entirely in the Defendants’ interests to have all claimants and potential claimants to the confidential information arrayed on one side. To say that a claim by proposed Plaintiffs Nos. 3, 4 and 5 would be time-barred and that this is a valuable right seems to me to beg the question. That is not a right that can be said to have ‘accrued’ to the Defendants. Indeed, it would perhaps be unwise for the Defendants to say this because it posits that the Defendants do have proprietary confidential information to which Plaintiffs Nos. 3, 4 and 5 had some entitlement. The entire defence, however, is constructed on the basis that all the information in question is and was in the public domain and that it was never imparted or communicated to any of the Defendants. That defence remains unaltered, as does the case of the Plaintiffs.

6. The second question arises from the argument advanced about the alleged failure of the Plaintiffs to show diligence. I do not think there is substance to this either. What the present application shows is not a lack of diligence on the part of the Plaintiffs or their previous Advocates, but a great deal of prudence on the part of their present Advocates. That is indeed a reason to allow the Chamber Summons rather than to disallow it.

7. The reliance by the Defendants on the decision of the Supreme Court in *J Samuel & Ors vs Gattu Mahesh & Ors*.¹ on the question of due diligence was in the context of the omission of a specific plea that was mandatory and statutorily required; specifically a plea of readiness and willingness essential in a Suit for specific performance. Here, the law is not that such a plea can never be introduced by amendment.²

8. Indeed it can, but the question is whether the absence of a statutorily required plea, a matter that would undoubtedly give the defendants in such a suit a very valuable right, can be, so to speak, papered over at a late stage without an explanation of due diligence. That is not at all the case before me today. There is, in principle, no quarrel with the reliance placed by the Defendants on the Supreme Court decision in *Revajeetu Builders & Developers v Narayanswamy & Sons & Ors*.³ However, it must be noted that while setting out various factors to be kept in mind while considering an application for amendment, the Supreme Court did say that the ones it listed were *some* of the factors to be borne in mind while dealing with applications under Order 6 Rule 17; and then clarified in so many words that the list it provided was only illustrative and not exhaustive. This tells us that no rigid formulation can be applied to applications for amendment. Each must be considered on its own merits.

1 (2012) 2 SCC 300

2 *Gajanan Jaikishan Joshi v Prabhakar Mohanlal Kalwar*, (1990) 1 SCC 166.

3 (2009) 10 SCC 84

9. What then is the potential prejudice to the Defendants by allowing this amendment at this stage? How best would the Defendants be compensated for the prejudice, if any, to them? These are the only two questions that remain, once we have seen that the proposed amendments must be allowed. In assessing this, it is as Mr Shukla points out, critical to note that the Defendants have completed the cross-examination of the Plaintiffs' first witness. Necessarily, the amendments will entail liberty to the Defendants to file an additional Written Statement if they so wish; to propose the addition of further issues if thought necessary; and, necessarily, allowing the Defendants to further cross-examine the Plaintiffs' first witness on the proposed amendments. The supplemental Evidence Affidavit of PW1 will be restricted to, and only to, the amendments that are now proposed. It will not even attempt to address any questions, facts or issues that are covered by the first Evidence Affidavit or the cross-examination on it. To ensure that there is no controversy, I will require the Plaintiffs as a further pre-condition to file and serve that Affidavit and then satisfy the Court that the further Evidence Affidavit meets these requirements. At that stage, the Defendants will be entitled to submit that portions of the Additional Affidavit that should be redacted or struck out.

10. Finally, because of the delay, there will be an order of costs against the Plaintiffs quantified in the amount of Rs.50,000/-.

11. The Chamber Summons is made absolute in these terms and subject to these is conditions. The aAmendments are to be carried out on or before 7th December 2018. The Additional Written Statement is to be filed and served on or before 7th January 2019.

The Additional Evidence Affidavit is to be filed and served on or before 7th January 2019; and I have compressed these time frames so as not to delay the trial further.

12. The matter will be listed on 16th January 2019 for considering the further Affidavit.

13. As to the question of whether the amendment relates to back to the date of the Suit, all contentions will be left open.

(G. S. PATEL, J)