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

CHAMBER SUMMONS NO.29 OF 2016
IN
SUIT NO.793 OF 2014

K. Patel & Co. & Anr.

...Applicants

IN THE MATTER BETWEEN :

K. Patel & Co. & Anr.

...Plaintiffs

V/s.

Shailesh M. Parekh & Ors.

...Defendants

And

Municipal Corporation of Gr.Mumbai & Anr.

...Respondents

Mr.Vishal Kanade with Ms.Anupa Mehta and Mr.Rajesh Chainani I/b
M/s.S. Pathak & Co. for the Plaintiffs / Applicants in the Chamber
Summons.

Mr.Abhijit Desai i/b Mr.Prashant Kulkarni for the Defendant Nos.1 to
3.

Mr.Rajesh Sharma I/b Rajesh Sharma & Associates for the
Defendant Nos.7 to 10.

Mr.R.Y. Sirsikar for the proposed Defendant Nos.11 and 12.

CORAM : R.D. DHANUKA, J.

DATE : 29TH NOVEMBER, 2018.

P.C. :-

1. By this chamber summons, the applicants (original
plaintiffs) have prayed for condonation of delay in filing the chamber

summons and seek amendment to the plaint as per Schedule – I appended to the chamber summons. The plaintiffs have filed a suit for specific performance of the Deed of Joint Venture dated 6th April, 2008, for a declaration that the said Deed of Joint Venture is valid and subsisting and is binding and for several other reliefs. Pursuant to the said agreement which was entered into between the plaintiffs and the defendant nos.1 to 3, the defendant nos.1 to 3 entered into an agreement with the defendant no.4. The defendant no.4 entered into an agreement with the defendant nos.7 to 10. All the agreements are subject matter of the suit filed by the plaintiffs.

2. It is the case of the plaintiffs in the affidavit in support of the chamber summons that during the pendency of the suit, certain events transpired which are required to be brought on record by way of this chamber summons. It is also the case of the applicants that in the written statement filed by the defendants, a plea is raised that the plaintiffs have not raised any plea under section 16(c) of the Specific Relief Act, 1963 to the effect that the plaintiffs were ready and willing to comply with their part of obligation under the Joint Venture Agreement. The written statement by the defendant nos.7 to 10 came to be filed on 16th November, 2015. On 17th December, 2015, the applicant filed this chamber summons *inter-alia* praying for amendment.

3. Insofar as the additional prayers sought to be impleaded in the chamber summons are concerned, it is the case of the applicants that those prayers are required to be inserted in the plaint filed by the plaintiffs which are in furtherance of the Joint Venture Agreement and in view of the subsequent events transpired between the parties.

4. Insofar as impleadment of the defendant nos.11 and 12 is concerned, it is the case of the applicants that the Municipal Corporation has sanctioned various plans in favour of the developers, who are carrying on with the construction on the said plot which was the subject matter of the Joint Venture Agreement and thus the defendant nos.11 and 12 also would be necessary and/or proper parties to the suit.

5. Mr.Kanade, learned counsel appearing for the applicants invited my attention to the prayers in the plaint, some of the objections raised by the defendants in the written statement and more particularly on the issue that a specific objection came to be raised by the defendants that there was no plea under section 16(c) of the Specific Relief Act, 1963 in the suit for specific performance. He submits that the said plea was raised only in the written statement filed on 16th November, 2015. Thereafter within a period of one month, this chamber summons came to be filed by the applicants so as to add such averments in the plaint. In support of this submission,

learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Gajanan Jaikishan Joshi vs. Prabhakar Mohanlal Kalwar, (1990) 1 SCC 166** and in particular paragraphs 3 and 6 to 8. He submits that the trial has not commenced in the suit and thus this being one of the pre-trial amendment and the applicants having acted with due diligence and having applied for the amendment within one month from the date of such plea having been raised by the defendants in the written statement, the same be allowed.

6. Insofar as the additional prayers in support of issue no.4 sought to be inserted as prayers (b-1) and b-2) are concerned, it is submitted that these prayers are also arising out of subsequent events having been transpired after filing of the suit and that the said prayers are in furtherance of the Joint Venture Agreement in respect of which the plaintiffs have already applied for specific performance.

7. Insofar as impleadment of the defendant nos.11 and 12 is concerned, it is submitted that those defendants also would be necessary parties in view of the defendants having sanctioned the plan in favour of the contesting defendants.

8. Learned counsel appearing for the defendant nos.1 to 3 in reply submits that his clients have also raised specific plea in the written statement that there was no specific averment under section

16(c) of the Specific Relief Act, 1963 in the plaint and on that ground itself, the suit is not maintainable.

9. Learned counsel appearing for the defendant nos.7 to 10 also raises a plea that there was no averment in the plaint that the plaintiffs were always ready and willing to comply with their part of obligation under the Joint Venture Agreement, as is mandatory under section 16(c) of the Specific Relief Act, 1963 and thus the defendants having raised this plea specifically in the written statement, the plaintiffs cannot be allowed to cure such material defect in the plaint by seeking the amendment to the plaint.

10. It is submitted by the learned counsel that insofar as impleadment of the proposed Municipal Corporation in the suit is concerned, those defendants being third parties, cannot be allowed to be impleaded in the suit for specific performance.

11. The next submission of the learned counsel for the defendant nos.7 to 10 is that on the date of filing of the suit by the plaintiffs for specific performance, the suit itself was already barred by law of limitation. In support of this submission, learned counsel invited my attention to paragraph 11 of the plaint. He submits that since the original cause of action itself was barred by law of limitation, this Court cannot allow the amendment to the plaint on that ground itself. He submits that the plea of limitation is specifically

raised by the defendants in their respective written statement.

12. Mr.Kanade, learned counsel for the applicants submits that the issue of limitation sought to be raised by the defendants in the written statement is mixed question of facts and law and cannot be decided by this Court in this chamber summons which is filed for seeking amendment to the plaint. He also invited my attention to paragraph 12 of the plaint in support of the submission that the suit was not barred by law of limitation.

13. Insofar as impleadment of the defendant nos.11 and 12 as parties to the suit is concerned, learned counsel fairly submits that if these defendants are impleaded as parties to the suit, the issue as to whether it would amount to misjoinder of cause of action or parties or not cannot be kept open by this Court.

14. A perusal of the plaint clearly indicates that the plaintiffs had applied for specific performance of the Deed of Joint Venture Agreement dated 16th April, 2008 and have also impugned the transactions between the defendants *inter-se*. The suit was filed on 3rd July, 2014. In the written statement filed by the defendant nos.1 to 3 and 7 to 10, a specific plea was raised that the applicants had not raised any such plea under section 16(c) of the Specific Relief Act, 1963. The said written statement was filed on 16th November, 2015. On 17th December, 2015 itself the applicants filed this chamber

summons *inter-alia* praying for various amendments including to add such averments under section 16(c) of the Specific Relief Act, 1963.

15. The Hon'ble Supreme Court in case of **Gajanan Jaikishan Joshi** (supra) has dealt with this issue at great length. The Hon'ble Supreme Court considered the situation whether such plea was raised by the defendants in the written statement. The Trial Court had also framed a preliminary issue to try the said plea raised by the defendants in view of the provisions of section 16(c) of the Specific Relief Act, 1963. At that stage the application for amendment was made by the plaintiffs so as to insert the said plea in a suit for specific performance. With these facts in hand, the Hon'ble Supreme Court allowed the said application for amendment. Though in this case, the defendants had raised such plea in the written statement, it is not in dispute that no application under Order VII Rule 11 of the Code of Civil Procedure, 1908 has been filed by the defendants till date. The trial has not commenced in the suit. I am thus inclined to allow the chamber summons insofar as insertion of this plea sought to be raised in paragraph 22-A of the proposed amendment *inter-alia* forming part of Schedule – I to the chamber summons.

16. Insofar as the averments proposed to be inserted in the plaint so as to bring subsequent events are concerned, which are sought to be inserted by paragraphs 16-A, 16-B, 20-A to 20-E and

25-A to 25-D are concerned since these averments are sought to be added to bring the subsequent events transpired during the pendency of the suit, I am inclined to allow this chamber summons in view of the fact that the trial has not commenced and these amendments are sought to be brought on record at the earliest point of time.

17. Insofar as impleadment of the defendant nos.11 and 12 is concerned, I am inclined to accept the objection raised by the defendants that in the suit for specific performance, the Municipal Corporation cannot be impleaded as party defendant on the ground that the Municipal Corporation has sanctioned various plans in favour of the defendants. In my view, if the defendant nos.11 and 12 are allowed to be impleaded as parties to the suit, it would amount to misjoinder of causes of action and parties. The said plea of the applicants in the chamber summons is accordingly rejected.'

18. It is made clear that if there is any separate cause of action against the Municipal Corporation, the plaintiffs would be at liberty to file such appropriate proceedings as are permissible in law. This Court has not expressed any views on the maintainability of such proceedings.

19. I therefore, pass the following order :-

a). Except the amendment sought to be inserted in

paragraphs 25-D, 30-B and (c-4), (h-2) and (b-3), the rest of the amendments sought in the Schedule to the chamber summons are allowed.

b). The chamber summons is disposed of in aforesaid terms. There shall be no order as to costs.

c). The amendment to be carried out within two weeks from today. The amended copy of the plaint shall be served upon all the defendants through their respective advocates within two weeks from the date of carrying out amendment. The defendants would be permitted to file additional written statement within four weeks from the date of service of the amended copy of the plaint. It is made clear that merely because the amendments are partly allowed by this Court, none of the contents of the amendments are deemed to have been accepted. All issues on merits including the plea of limitation are kept open.

20. Mr.Kanade, learned counsel for the applicants invited my attention to an inadvertent error crept in paragraph 5 of the order dated 15th November, 2017 passed by Shri Justice K.K. Tated in this chamber summons. Learned counsel appearing for the plaintiffs fairly states that no such liberty was actually granted to the plaintiffs to carry out the amendment. The chamber summons was still pending on the date of passing of the said order. Paragraph 5 of the said

order is accordingly clarified that no such liberty was granted to the plaintiffs.

(R.D. DHANUKA, J.)