

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.257 OF 2019
IN
SUIT NO.44 OF 2017**

Marathon Era Co-operative Housing Society Ltd ..Plaintiff/Applicant
Vs.
Marathon Next Gen Realty Ltd. & Ors ..Defendants

**WITH
NOTICE OF MOTION NO.197 OF 2017
IN
SUIT NO.44 OF 2017**

Mr. C. S. Balsara a/w Mr. Ali Antulay, Mr. H. N. Vakil and Ms Suzan Vakil
I/b M/s Mulla and Mulla and Craigie Blunt and Caroe for Plaintiff
/Applicant
Mr. Virag Tulzapurkar, Senior Advocate a/w Mr. Karl Tamboly, Ms Bindi
Dave, Mr. Kashish Mainkar, Ms. Jyoti Pardeshi I/b Wadia Ghandy and co.
for Defendant Nos.1 and 2
Mr. R. Y. Sirsikar for MCGM

**CORAM : K.R.SHRIRAM, J.
DATE : 12th MARCH, 2019**

P.C.:

1 Though the chamber summons is not listed today, by consent
was taken up for hearing since plaintiff stated that the hearing of chamber
summons was required before the court hears the notice of motion.

2 At the outset, Mr. Balsara seeks leave to amend the schedule
annexed to the chamber summons. Mr. Balsara seeks leave to add an
alternative proposed amendment to the one already in the schedule annexed

to the chamber summons and the same reads as under :

Prayer in the Suit :

“(a) that this Hon'ble Court be pleased to declare that defendant nos.1 and 2 are not entitled to carry out any additional construction beyond the scope of the sanctioned plan annexed and marked Exhibit “A” hereto and that the IOD dated 8th September 2016 ~~that~~ and anything put up/proposed to be put up ~~is~~ contrary ~~thereto to~~ Exhibit A is totally illegal, mala fide and null and void and the same are liable to be set aside.”

{(Corrections proposed is made in track changes to prayer clause (a))}

Leave granted. Amendment to be carried out within one week.

3 Plaintiff has taken out this application for leave to amend prayer clause (a) in the plaint without prejudice to the pending notice of motion. This is the only amendment sought. According to plaintiff in prayer clause (a), the way it is worded, it may look like what plaintiff states is that defendant nos.1 and 2 are entitled to carry out construction activity as per IOD dated 8th September 2016. That was not the case. Hence, correction required.

4 Plaintiff's case, in short, is summarised in paragraph 19 of the plaint which reads as under:

“19. In the aforesaid circumstances, the plaintiff's say and submit that this Hon'ble Court be pleased to declare that Defendant Nos.1 and 2 are not entitled to carry out any additional construction beyond the scope of the sanctioned plan annexed and marked Exhibit-A hereto and that anything put up/proposed to be put up

contrary thereto is totally illegal, malafide and null and void.”

5 Plaintiff has filed this suit to restrict defendant nos.1 and 2 from carrying out the construction activities on the layout beyond what has been disclosed in the sanctioned plan dated 27th August 2003, copy whereof is annexed at Exhibit A to the plaint. According to plaintiff, that sanctioned plan is the plan disclosed to flat purchasers at the time of entering into the Agreement for Sale and annexed to the agreement for sale. Therefore, defendant nos.1 and 2 are not entitled to carry out any construction activities on the said layout beyond what has been disclosed to the flat purchasers in the Agreement for Sale. Plaintiff is seeking to restrict defendant nos.1 and 2 from carrying out construction activities on the said lay out as per any plan sanctioned after 27th August 2003, including such construction which entitle the defendant nos.1 and 2 to undertake any further construction activities, relying on the IOD dated 8th September 2016. The intention of plaintiff can be culled out from paragraphs 16 and 19 of the plaint. Paragraph 19 has already been reproduced above and paragraph 16 reads as under:

“16. The Plaintiff say that on MCGM's official website – the Plan Approval Management Syetem displayed 3 plans for approval. Hereto annexed and marked as Exhibit P Q and R respectively are copies of 3 layout plans in respect of New Proposed Additional Construction. Further it was displayed that the IOD was approved on 8th September 2016. Hereto annexed and marked as Exhibit S is a copy of IOD as displayed on the MCGM's official website. The Defendant No.1 have started to clear the site where the proposed new building is said to be construted. Hereto annexed and marked as Exhibit T are copies of photographs

showing that the construction site is being cleared for the additional construction”.

6 What plaintiff in fact is seeking, is to delete the words “IOD dated 8th September 2016” from prayer clause (a) or correct it to read to mean that for declaration that defendant nos.1 and 2 are not entitled to carry out any additional construction beyond the sanctioned plan of 27th August 2003 and that the IOD dated 8th September 2016 and anything put up or proposed to be put up contrary to the sanctioned plan of 27th August 2003, is illegal, malafide, null and void and liable to be set aside. Therefore, the challenge in the plaint is to anything done, which is beyond the sanctioned plan dated 27th August 2003, copy whereof was annexed to the sale agreement with various flat purchasers, who are members of plaintiff and leave of plaintiff has not been obtained.

7 Plaintiff has taken out this chamber summons in view of the stand taken by defendant nos.1 and 2 in their reply dated 21st January 2019 to plaintiff's Notice of motion no.197 of 2017, whereby, it is the stand of defendant nos.1 and 2 that in prayer clause (a), plaintiff has agreed / accepted to all construction/ development put up until the IOD dated 8th September 2016.

8 Defendant nos.1 and 2 filed an affidavit in reply opposing the

chamber summons. It is the case of defendant no.1 that the inclusion of words “IOD dated 8th September 2016” cannot be a typographical error and for almost three years, no steps were taken to rectify the alleged typographical error. It is stated that only after defendant nos.1 and 2 filed the written statement and pointed out to the apparent admissions of plaintiff, that it has recognised and accepted all construction/development put up by defendant nos.1 and 2 until the IOD dated 8th September 2016. Mr. Tulzapurkar submitted that the attempt is only to rescind from its clear admission and thereby defeat the defences taken by defendants which is impermissible. Mr. Tulzapurkar also submitted that in the affidavit in reply to the notice of motion, defendant nos.1 and 2 have pointed out the apparent admissions of plaintiff made in the plaint as it stands, i.e., plaintiff has admitted to all constructions / development put up until the IOD dated 8th September 2016 and in the affidavit in rejoinder nowhere it has been stated that it was a typographical error. Mr. Tulzapurkar stated that the stand in the rejoinder is, the defendants are misreading prayer clause (a), whereas the stand in the chamber summons is it was a typographical error. If according to plaintiff, as noted in rejoinder to notice of motion, defendants are only misreading the prayer clause (a), then plaintiff may argue its interpretation of prayer clause (a) in the final hearing of the suit and no amendment is required. It was also submitted that plaintiff cannot now rescind from its admission made in the plaint and that too, not after

defendant nos.1 and 2 pointed out such admissions in their written statement, and by seeking to amend the prayer clause (a), plaintiff is only seeking to explain the nature and scope of the relief which it has originally sought for. In short, the point that was really thrust upon by Mr. Tulzapurkar was an admission in pleadings is better than in any evidence and that admission cannot be backed out from.

9 Mr. Tulzapurkar relied upon a judgment of the Apex Court in **Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram & Ors**¹ to submit that admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. Mr. Tulzapurkar also relied upon a judgment of the Apex Court in **Revajeetu Builders and Developers Vs. Narayanswamy and Sons & Ors.**² to submit that plaintiffs cannot be now allowed to take a complete somersault by stating that the IOD dated 8th September 2016, is to be challenged. Mr. Tulzapurkar relying on this judgment also submitted that though court could be very liberal in allowing a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement, in a plaint, plaintiffs cannot alter materially or substitute cause of action or the nature of claim.

1 (1974) 1 Supreme Court Cases 242

2 (2009) 10 Supreme Court Cases 84

10 Mr. Tulzapurkar also relied upon judgment of the Apex Court in **Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria & Ors.**³ to submit that it is not permissible to seek to displace a party completely from the admissions made by the opponent and if such amendments are allowed, the other party will be irretrievably prejudiced. Mr. Tulzapurkar relying on this judgment also submitted that while plaintiffs cannot rescind from a categorical admission, plaintiff may if advised, explain or clarify that admission in its evidence.

11 Mr. Tamboly basically adopted Mr. Tulzapurkar's submissions. He also submitted that when one reads paragraphs 14, 16 and prayer clause (a) together, it would indicate that plaintiff had no objection with the construction activities being carried out until the IOD dated 8th September 2016.

12 In rejoinder, Mr. Balsara submitted that whether there was an admission, has to be seen by reading the plaint in its entirety and nowhere in the plaint, has plaintiff admitted that plaintiff is okay with the construction activities being carried out until IOD dated 8th September 2016. Mr. Balsara submitted that reading of prayer clause (a) which is only the

3 (2015) 10 Supreme Court Cases 203

relief, defendants cannot say that there has been any admission.

13 Admittedly this is a pre-trial amendment. Though Written statements have been filed, issues are yet to be framed. It is settled law that the court has very wide discretion in the matter of amendment of pleadings, particularly when they are at pre-trial stage. While deciding such applications for amendments, the court must not refuse bonafide / legitimate, honest and necessary amendments and should never permit malafide, worthless and/or dishonest amendments. One of the first conditions to be satisfied before the amendment can be allowed, is whether such amendment is necessary for the determination of the real question in controversy. The other important condition is the potential prejudice or injustice, which is likely to be caused to the other side. The third well established principle is to decide the rights of the parties and not to punish them for mistake they make in the context of their case by deciding otherwise than in accordance with their rights. An error or mistake, which is not fraudulent or intended to overreach, the court must permit amendment without injustice to other parties. It will be useful to reproduce paragraph nos. 63 and 64 of *Revajeetu* (Supra) which read as under:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.”

14 It is true that in the affidavit in rejoinder in notice of motion no.197 of 2017, when pointed out about the alleged admissions in affidavit in reply, plaintiff's stand was that defendant nos.1 and 2 are misreading the prayer clause (a). It is true that applicant did not take the stand of typographical error. At the same time what we have to see is not just reading the prayer in the plaint but the plaint as a whole. In the entire plaint, the grievance of plaintiff is that defendant nos.1 and 2 sold flats by annexing to the agreement the sanctioned plan of 27th August 2003 and if defendant nos.1 and 2 carried out or apply plans for further constructions beyond the scope of the plan sanctioned in 2003 as disclosed to the

individual flat purchasers, as also loading of additional FSI without previous declaration to the plaintiff of their intention to do so at the time of execution of their individual agreements, the same would be in breach and violation of provisions of MOFA Act and Rules. It is plaintiff's case that defendant nos.1 and 2 should not be permitted to carry out any additional construction beyond the scope of sanctioned plan of 27th August 2003, copy whereof is at Exhibit A to the plaint, and anything put and proposed to be put up is malafide and null and void. When I read the whole plaint and prayer clause (a), it is quite obvious that plaintiff wish to seek a declaration also to the effect that the IOD dated 8th September 2016, is also illegal, malafide and null and void and liable to be set aside. This can be culled out from prayer clause (b), where plaintiff is seeking a permanent order of injunction restraining defendant nos.3 and 4 from further processing or granting any further permissions beyond the sanctioned plan annexed at Exhibit A to the plaint. This is also obvious from prayer clause (d), where plaintiff is seeking an interim relief to restrain defendant nos.1 and 2 from seeking permission or put up any additional construction beyond the scope of the sanctioned plan, copy whereof is at Exhibit A.

15 Therefore, by no stretch of imagination, can it be termed that prayer clause (a) as it reads, amounts to an admission by plaintiffs that it has admitted to all construction / development put up until the IOD dated

8th September 2016. Therefore, the question of plaintiff resiling from any admission to the prejudice of defendants, does not and cannot arise.

Paragraphs 35, 36 and 37 of *Revajeetu* (Supra) read as under:

35. The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

36. In the leading English case of Cropper v. Smith [(1884)26 Ch.D.700(CA)], the object underlying amendment of pleadings has been laid down by Browne, L.J. in the following words:

"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

37. In Tildersley v. Harper [(1887)10 Ch D 393] which was decided by the English Court even earlier than the Cropper's case (supra), in an action against a lessee for setting aside a lease, in the statement of claim it was alleged that the power of attorney of donee had received specified sum as a bribe. In the statement of defence, each circumstance was denied but there was no general denial of a bribe having been given. A prayer for amendment of the defence statement was refused. The Court of Appeal held that the amendment ought to have been allowed. Bramwell, L.J. made the following pertinent observations:

"I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the

party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."

(Emphasis added)

16 I am satisfied from the application that plaintiff was not acting malafide and the application to correct the error or mistake in prayer clause (a), cannot be termed as fraudulent or intend of overreach. It seems to me that the way in which plaint was framed it will not lead to a decision of the real matter in controversy, if prayer clause (a) is not corrected. When I have concluded that there is no admission, the question of defendants being prejudiced or injustice would be caused to them by this amendment or correction, also would not arise. It is, therefore, clear that there is a mistake /drafting error in prayer clause (a). In my view, refusing the amendment/correction would in fact lead to injustice to plaintiff. The application for amendment is legitimate, honest and necessary for effective adjudication of the suit. Amendment also does not change the nature and character of the suit.

17 Chamber summons, therefore, is allowed. Prayer clause (a) allowed to be corrected and the corrected prayer clause (a) will read as under:

“(a) that this Hon'ble Court be pleased to declare that defendant nos.1 and 2 are not entitled to carry out any additional construction beyond the scope of the sanctioned plan annexed and marked

Exhibit "A" hereto and that the IOD dated 8th September 2016 ~~that~~ and anything put up/proposed to be put up ~~is~~ contrary ~~thereto to~~ Exhibit A is totally illegal, malafide and null and void and the same are liable to be set aside."

18 Plaintiff to pay costs of Rs.20,000/- each to defendant nos.1 and 2 by way of cheque drawn in favour of their advocates.

19 Chamber summons accordingly disposed.

20 Amendment to be carried out and amended plaint to be served within three weeks from today. Defendants to file additional written statement within three weeks of receiving the amended plaint.

21 Notice of motion be taken up for hearing after four weeks.

(K.R. SHRIRAM, J.)