Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 334 OF 1982

Gaurang Vinodchandra Merchant & Ors …Plaintiffs

Versus

Madhliso & Co Pvt Ltd & Ors …Defendants

WITH

CHAMBER SUMMONS NO. 316 OF 2019

IN

SUIT NO. 334 OF 1982

Mr Mustafa Doctor, Senior Advocate*, with Mr Gaurav Mehta, Mr Adwait Sethna & Ms Yashoda Desai, i/b M/s Shiralkar & Co, for the Plaintiffs/Appicants.*

Mr Mukesh Vashi, Senior Advocate*, with Mrs Prachi K, i/b MP Vashi & Associates, for Defendants Nos. 1, 4 and 5.*

CORAM: G.S. PATEL, J

DATED: 15th March 2019

PC:-

1. The amendment application is by the Plaintiffs. It is made at a extremely late stage in the trial of the Suit. Indeed, it is triggered by a question put by the Defendants to the Plaintiffs' first witness, the 1st Plaintiff, PW1, in cross-examination.

2. To appreciate this, a very brief background is necessary, and I take the liberty of setting this out but without in any way returning any finding on the merits of the suit.

3. The plaint opens saying that Madhliso, Madhliso & Co Pvt Ltd, was entirely controlled by Defendants Nos. 2 (Sorab S Batlivala), 3 (Leena R Jhaveri) and one Madhuri Desai. Defendants Nos. 4 and 5 (Kasamali Musani and Mumtaz Musani) are the principal contesting Defendants.

4. Madhuri, Sorab and Leena were Madhliso's only shareholders and directors. Madhuri died in Mumbai on 29th December 1974. She left a Will of which Sorab and Leena were appointed executors. Leena sought Probate. Sorab and Leena are joined as representing Madhuri's estate and as Madhliso's only other shareholders and directors. The Musanis are said to have purchased the entire shareholding in Madhliso from Madhuri, Sorab and Leena.

5. This sets the stage for what follows. The Plaintiffs' case is that Madhliso had a solitary asset, an ownership residential flats on the third floor of the Akash Ganga building at Warden Road, Mumbai 400026. From the time of its incorporation, Madhliso had an authorised capital of 5000 shares. The issued and paid up capital was divided into 1925 shares of the value of Rs.100 each. Madhuri owned 1875 shares. Sorab and Leena held 25 shares each.

6. Madhuri acquired the Akash Ganga flat and then transferred it in March 1970 to Madhliso along with the society's qualification or qualifying shares. At first, Madhliso let the flat out to the National Centre for the Performing Arts. The NCPA continued in occupation until 1974. The flat remained vacant until about September of that year. The Plaintiffs claim that M/s Dalal, Desai and Kumana, a firm of Chartered Accountants, knew Madhuri, Sorab and Leena. Vinodchandra Devidas Merchant (since deceased) learnt in September 1974 that Madhuri, Sorab and Leena were looking to dispose of the Akash Ganga flat. Vinodchandra expressed an interest in purchasing it. He approached Madhuri. The Plaint claims that Vinodchandra and his son, the present 1st Plaintiff, Gaurang, met with Madhuri, Sorab and Leena (representing themselves and Madhliso), and a partner of Dalal, Desai and Kumana at that firm's offices. The Plaintiffs claim that the parties reached an understanding or agreement that that the Plaintiffs would donate Rs. 50,000/- to a charity Madhuri nominated (which the Plaintiffs/Merchant did); and that Madhuri would transfer her shareholding in Madhliso i.e. her 1875 shares, at a predetermined rate of Rs.75 per share to the Plaintiffs. The agreement was so structured, the Plaintiffs say, because apparently there was by then already some pending litigation between the society and the original developers or builders and to which Madhuri, Sorab and Leena were also parties. The Plaint seems to proceed on the footing that the Akash Ganga flat would remain an asset of Madhliso; and that the Plaintiffs would acquire Madhuri's controlling interest in Madhliso thus enabling them to use, occupy and possess the flat. There is some mention of the Plaintiffs being put into possession on a rental or tenancy basis but my understanding of the Plaint, and, in particular, the narrative in paragraph 5 at pages 6 to 8 of the original plaint,[1] is that the agreement was structured like this so that Plaintiffs could continue in possession of the flat. The plaint says it was "so that the deceased Vinodchandra and the Plaintiffs as shareholders controlling the 1st Defendant company would be able to occupy the flat without any hindrance." The latter portion of paragraph 5 at page 8 also speaks of this arrangement being for the purchase "of the said flat in the shape of the purchase of the shares". This tells me that the agreement of which the Plaintiffs seek specific performance was *not* an agreement to purchase the flat in specie from Madhliso as a vendor but with Madhuri to purchase her controlling interest, i.e. her 1875 shares in Madhliso. The intended result, according to the Plaintiffs, would be that the flat would continue to vest in, belong to and be an asset of Madhliso. The control of Madhliso, according to the Plaintiffs, would pass to them, and they would thus, as the controllers and largest shareholders of Madhliso, be entitled to use or continue to use and occupy the Akash Ganga flat.

7. In this context, it is perhaps necessary to have a quick overview of the prayers in the Plaint. Prayer clause (a) seeks a decree against the Defendants to specifically deliver Madhuri's 1875 shares in Madhliso to the Plaintiffs. Prayer clause (b) is a consequential prayer. Prayer clause (c) seeks an injunction restraining Defendants Nos. 2 to 5 from disposing of, dealing with, alienating or encumbering these 1875 shares. Prayer clause (d) seeks a restraint

[1] I have allowed the Plaintiffs to file a retyped copy of the Plaint. The page numbers vary slightly between the original court record and the convenience retyped copy.

against the Defendants from disposing of the flat or ejecting the Plaintiffs from the said flat. Prayer clause (e) is in the alternative and seeks the assignment of flat with the society qualifying shares to the Plaintiffs. Prayer clause (g) contains the usual alternative prayers for damages. The only other prayer of consequence at this stage is prayer clause (j). This perhaps foresaw the possibility of the Defendants' raising the share capital of Madhliso and diluting Madhuri Desai's original shareholding and seeks an injunction against any such increase in share capital.[2]

8. The Plaintiffs say that they were unaware of any change in the shareholding or capital of the company until very recently, when, in the latter half of 2018, during the cross-examination of the 1st Plaintiff, two questions were put to him. Question 188 was whether the Plaintiffs had obtained an injunction in terms of prayer clause (j) that I have mentioned earlier. He answered that the Plaintiffs had not. The very next question was whether the Plaintiff No. 1 was aware that the paid up share capital of Madhliso had increased to 4925 shares each. He said he did not know.

9. The Plaintiffs then filed Chamber Summons No. 1384 of 2018 seeking to amend the plaint. On 31st January 2019 I allowed that Chamber Summons to be withdrawn but clarified that the Plaintiffs needed no special liberty to file a fresh Chamber Summons. Any fresh Chamber Summons would be considered on its own merits. This Chamber Summons was filed thereafter in February 2019.

[2] The suit seems to have been decreed ex parte on 18th December 2001. There is no dispute that the decree was set aside on 2nd March 2009.

10. What this Chamber Summons seeks is to add two further persons as Defendants Nos. 6 and 7, one Tapinder Tucker and Pinky Tucker. The Tuckers are said to be, respectively, the Musanis' son-in-law and daughter. The proposed amendment says there has been a further increase in the share capital and the further transfer of equity to the two Tuckers. Proposed paragraphs 24B to 24F set out some of the factual background. Paragraph 25A sets out when the Plaintiffs learnt of these increases in share capital. Paragraph 25B contains the Plaintiffs' submission that these share increases are all unauthorized. Then there are paragraphs 25C and 25D, which read thus:

> "25C. The Plaintiffs submit that the entire purpose behind purchasing the 1875 shares of the said Madhuri Desai was in order that, the deceased and the Plaintiffs enjoy the exclusive use and possession of the said flat by becoming the controlling shareholders of and acquiring controlling interest in Defendant No. 1 Company. The impugned increase in the shares and allotment were the acts subsequently done by defendant Nos. 4 and 5, who had themselves illegally purchased the shares belonging to the said Madhuri and Defendant Nos. 2 and 3, with a view to defeat the rights of the Plaintiffs to obtain the controlling interest in Defendant No. 1 Company.
>
> 25D. Without prejudice to the above, it is submitted that, in the present Suit, the rights in respect of the said flat are directly and specifically in question and it is the case of the Plaintiffs that since the said flat was only underlying assets of the said Company, the transaction of the said flat was intended and agreed to be consummated by transferring of controlling shares in the said Company. It is submitted that the provisions of doctrine of lis-pendens clearly applies in

the present case. In fact, notice of lis-pendens was duly registered by the Plaintiffs in the office of Sub-Registrar of Assurances on or about 13th June 1983 and the Defendants including the proposed Defendant Nos. 6 and 7 had notice of the pendency of the above Suit. It is submitted that the principles of lis-pendens are the principles of public policy, equity and good conscience. The Defendant Nos. 4 to 7 by their action could not have indulged in the aforesaid acts and attempted to remove the subject matter of the suit outside the power and jurisdiction of this Hon'ble Court which is fully seized of the lis dealing with it and thereby attempt to make the proceedings infructuous. The acts of Defendant Nos. 4 to 7 amounted to circumventing jurisdiction of the Court in which a dispute relating to right and interest in the said flat is pending by private dealings which is an attempt to remove the subject matter of litigation from the ambit of the power of this Hon'ble Court to decide the pending dispute or frustrate its' decree. The Defendant Nos. 4 to 7 are thus bound by the application of the said doctrine of lis-pendens and its principles and cannot utilize this subterfuge of increasing the share capital and transferring shares, so as to defeat the rights of the Plaintiffs in the said flat as is sought to be done by the Defendants. The said actions have been taken by the Defendants mala-fide and with a view to defeat the rights of the Plaintiffs under any decree or Order, which may be passed. It is further submitted that, in any case, the provisions and principles of Section 52 of Transfer of Property Act apply. It is submitted that the transaction of increasing the shares and transfer narrated above is non an act done in good faith or bona-fide and the principles of public policy, equity and good conscience and justice as enshrined in the provisions of Section 52 of Transfer of Property Act squarely apply in the present case and the purported increase of the share capital and its' transfer in

> favour of the Defendant Nos. 4, 5, 6 and 7 deserves to be quashed and set aside and nullified."

11. Further prayers are sought to be added as prayer clauses (a)(1)(a)(ii), (a)(iii) and prayer (ka).

12. Mr Doctor for the Plaintiffs says that the fact of any share capital increase was never earlier disclosed at any time to the Plaintiffs or even to the Court. With the assistance of a chart which I have taken on record and marked (for reasons it is perhaps best not to explain, but which is entirely of Mr Doctor's doing) "FC1", he states that it was not until 2018, for the first time after Madhliso was incorporated in 1967, that any of these Defendants thought it fit to disclose this. There were sudden and inexplicable three share capital increases in 2018.

13. Mr Doctor submits that not allowing the proposed amendment would effectively put paid to the suit. Even if they succeeded in getting a decree, it would be inconsequential, ineffective and entirely illusory. His suit, he says, is clearly for the acquisition not of a fixed number of shares in Madhliso, but for the acquisition of Madhuri;s controlling interest represented by those 1875 shares. It is only in the alternative that the plaint seeks, as it must, a decree for transfer of the flat. The entire narrative, in his submission, and I think he is correct in this, is that the Plaintiffs transacted with Madhuri and her fellow shareholders to acquire her controlling interest in Madhliso, i.e. to take over her shares in Madhliso. This was the arrangement devised by agreement to allow the Plaintiffs to continue using and occupying the flat.

14. On this, his submission is, first, that the entire target of the arrangement was the flat itself. This, and only this, is the object of the Plaintiffs' affections. They are not particularly interested in Madhuri's shares per se or even a controlling interest in Madhliso save and except that this is the agreed method of allowing them to use, occupy and possess the flat. If for any reason this is not possible, then, and strictly in the alternative, the prayer is for a decree directing the Defendants, including Madhliso, to transfer the flat to the Plaintiffs. This, Mr Doctor submits, is the 'real matter in controversy', and it is for this reason that he places emphasis on the well known decision of the Supreme Court in *Rajesh Kumar Aggarwal & Ors v KK Modi & Ors*,[3] where the Supreme Court said that the 'real controversy test' was both basic and cardinal. A court's primary duty is to assess whether the amendment is necessary to decide the real controversy. If it is, the amendment must be allowed. If not, it must be rejected. Secondly, in his submission, the proposed amendment does not introduce anything different, new or inconsistent; nor can it be said to lack good faith. The amendment is necessitated by a disclosure made by the Defendants during cross-examination, and never revealed earlier. It goes to the root of the controversy. If not permitted, the suit is virtually eviscerated.

15. In *Revajeetu Builders & Developers v Narayanaswamy & Sons & Ors*,[4] the Supreme Court also cited the English law in *Cropper v Smith*[5] to this effect. If an amendment necessary to decide the real

[3] (2006) 4 SCC 385.

[4] (2009) 10 SCC 84.

[5] (1884) 26 Ch D 700 (CA).

controversy can be granted without injustice, then it must be allowed. There is an instructive summation in paragraph 63 of *Revajeetu Builders*.[6]

16. Mr Vashi for the Defendants says that the amendment does precisely that which is prohibited. It introduces a wholly new case. This can never be allowed; and in a suit for specific performance, third parties, that is to say those who are not party to the agreement sought to be enforced, is impermissible.[7]

17. If the suit is one for specific performance of an agreement with Madhliso for sale of the Akashganga flat, that is to say the suit seeks a decree ordering Madhliso to convey its title to the Plaintiffs, then Mr Vashi is undoubtedly correct, and it then follows that the addition of any other parties who may have taken shares in Madhliso is wholly unnecessary. But this, as I have noted, is not in fact the Plaintiffs' case at all (except at best in the alternative; and it is best left to the final hearing of the suit whether any such relief, even if worded in the alternative, can ever be granted). It is not the amendment that seeks this alternative relief for a decree against Madhliso to transfer the flat. That prayer for a transfer of the flat in specie already existed at the date of the institution of the suit in prayer clause (e). Nobody is seeking to introduce it now. If anything, and in view of what is stated in proposed paragraph 25C, I believe this amendment puts the Plaintiffs' position beyond all doubt, viz.,

[6] Among the factors that must weigh with a Court is whether the amendment is imperative for proper and effective adjudication; whether the amendment application is bona fide; whether its refusal would lead to injustice; and whether the amendment fundamentally changes the nature and character of the case.

[7] AIR 2005 SC 2813.

there was a certain trifecta in the agreement with Madhuri and her fellow shareholders: (i) to take up Madhuri's 1875 shares; (ii) to take up not just that number of shares per se but that number of shares *as representing the controlling interest in Madhliso*; and (iii) that this was done to allow the Plaintiffs to continue in use, occupation and possession of the Akash Ganga flat without ever having to buy the flat itself in specie from its owner, Madhliso.

18. If this is true, then what is to be made of the addition of paragraph 25D in the proposed amendment? Here the Plaintiffs speak, as we have already seen from the quotation reproduced earlier, of applying the doctrine of lis pendens or some principle analogous to it, invoking public policy, equity and good conscience. This paragraph claims that this increase in share capital is a device or a subterfuge to defeat the suit. But that does not change the *nature* of the suit. Indeed, the paragraph is perhaps strictly not necessary and may not even qualify as a pleading, being more in the nature of an argument. But since we have travelled a very great distance since the time of K Subba Rao J's dissent in *Badat & Co v East India Trading Co*,[8] and it is, I fear, no longer possible to make any meaningful distinction between the pleadings in this court on its Original Side and those in district and mofussil courts — often sharper and less prolix —it is perhaps best to see this only as a submission and to leave it for consideration at the final hearing of the suit.

[8] (1964) 4 SCR 19 : AIR 1964 SC 538.

19. What is more material is the proposed addition of prayer clause (a)(iii). This is not in deviation from the principal case espoused in paragraph 25C. It is in the alternative, to the preceding two prayers which seek to invalidate the subsequent increases in share capital. In other words, what the Plaintiffs propose to say by this amendment is what they have said all along, simply this: "Give us the controlling interest in Madhliso, and it does not matter how you do this, whether by reversing or cancelling subsequent increases in share capital or ordering the transfer of those additional shares to us. So long as we gain controlling interest of Madhliso, that is enough." Everything in the plaint points in, and only in, this direction.

20. In my view these amendments sought are necessary from this perspective. The contentions of the Defendants must, however, necessarily be left open as to the alternative relief in the original prayer clause (e) and whether this can be granted. Further, all contentions as to the validity and otherwise of these share capital increases are also kept open to the final hearing of the suit.

21. I will, therefore, allow the amendment as sought in prayer clause (a) of the Chamber Summons.

22. That amendment is to be carried out on or before 25th March 2019. A copy of the amended plaint will be served on the Advocates for the Defendants within one week thereafter. Mr Vashi states that his attorneys have instructions to enter appearance for the newly added Defendants Nos. 6 and 7, the Tuckjers. They will file their

Written Statement as well. The Additional Written Statements by the existing Defendants and the Written Statements by the new Defendants will be filed and served on or before 22nd April 2019.

23. List the suit for re-framing issues or casting further issues on 25th April 2019.

24. The trial of the suit will necessarily have to be interrupted by allowing this amendment. Therefore, the trial before the Commissioner is not to proceed until further orders. Further directions will then be necessary as to further examination-in-chief and further cross-examination.

25. There remains the question of an interim relief in terms of prayer clause (b) of the Chamber Summons, which reads thus:

> "(b) that pending the hearing and final disposal of the present Suit, the Defendant Nos. 1, 4 and 5 and the Respondent Nos. 1 and 2 herein and their agents, servants and/or any other person(s) claiming from through or under them or any of them be restrained by an Order of injunction from altering/increasing the share capital of the company by issuing any further shares and/or making any further allotment of Shares of the Defendant No. 1 Company or from dealing with or disposing of and/or transferring or alienating or creating any third party rights in respect of the shares of the said Company including the said Further/ Additional Shares that is 5,000 equity shares described in (Exhibit "E" to the Affidavit in Support) and from exercising any rights or acting in any manner whatsoever under the shares of the Defendant No. 1 Company;"

26. Mr Vashi on instructions from the 5th Defendant, who is present in Court, makes a statement in terms of prayer clause (b) but states that this will necessarily have to be limited in time. He has no instructions to make a statement in these terms pending suit but only to say that if the Plaintiffs apply by means of a formal Notice of Motion for these reliefs, he will respond appropriately. Given the fact that this injunction is sought in a Chamber Summons, I will accept his statement in terms of prayer clause (b), and I direct that it will continue till 29th April 2019, a few days after the next scheduled date.

27. The typed copy of the Plaint submitted by Mr Doctor is taken on record. It will be placed in file 1 above the original Plaint.

(G. S. PATEL, J)