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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**CHAMBER SUMMONS NO. 610 OF 2019
IN
SUIT NO. 34 OF 2017**

Sunita Unni Nair	...Applicant (Deft.No.1)
In the matter between	
T.C.Santosh Menon	...Plaintiff
VS	
Sunita Unni Nair & Anr.	...Defendant

.....
Mr Ramesh Ramamurthy I/b Mr Saikumar Ramamurthy for the
Plaintiff
Mr Deepak Chitnis I/b Deepak Chitnis – Chiparikar & Co. for
Defendant No.1 – applicant to the Chamber Summons.

Dhanappa
I. Koshti

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**CORAM : B. P. COLABAWALLA, J.
JULY 10, 2019.**

P.C.:

This Chamber Summons has been filed by the applicant / defendant No.1 to allow her to carry out the amendment in her Written Statement as more particularly mentioned in the schedule annexed to the Chamber Summons. By virtue of this amendment, the applicant / defendant No.1 seeks to bring on record certain copies of the agreement of Leave and License dated 30th November, 2004 and 30th July, 2005. Additionally, she also wants to bring on record a copy of the letter dated 20th February, 2006 sent by the Secretary of defendant No.2/society. There is also other correspondence and other documents that are sought to be brought on record by virtue of the

amendment.

2 The amendment application is opposed by the learned advocate appearing on behalf of the plaintiff on two main grounds. The first ground is that the Written Statement changes the nature of the defence taken by the applicant/first defendant in her Written Statement, and therefore, cannot be allowed. The second contention raised is that the amendment is barred by virtue of the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short “**the CPC**”) as the trial of the suit has already commenced and the applicant / defendant No.1 has not complied with the condition of due diligence as more particularly set out in the said proviso.

3 After having heard the learned advocates for the parties at length, I am not impressed with the arguments canvassed on behalf of the plaintiff. On going through the Written Statement as well as the schedule annexed to the Chamber Summons, I do not think that the nature of the defence will in any way change by allowing the amendment as sought for by the applicant / defendant No.1. In any event it is well settled that the strict rules that apply to the amendment of the plaint do not apply to the amendment of the Written Statement. In fact in the Written Statement a party can even

canvass and take up inconsistent and mutually destructive pleas. This being the position, I do not find any merits in the first contention raised on behalf of the plaintiff.

4 As far as the second contention regarding commencement of trial is concerned, the same is disputed by the advocate for the applicant / defendant No.1. In this regard the learned advocate for defendant No.1 submitted that even though the affidavit of evidence has been filed in this Court, no further steps have been taken by the plaintiff for marking of documents etc. He, therefore, submitted that the trial has not commenced. I find that even this contention need not detain me any further. For the sake of argument, even if I were to assume that the trial has commenced as is contemplated under the proviso to Order VI Rule 17 of the CPC, I find that the conditions laid down therein for allowing amendment of the Written Statement are satisfied in the facts and circumstances of the present case. The proviso to Order VI Rule 17 of the CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In this regard it would be important to set out and reproduce paragraphs 3,4,5 and 6 of the affidavit in support to the Chamber

Summons. They read thus -

- “(3) I say that my mother Mrs. Leela Ramchandra Nair has expired on 21st November, 2003 and due to the sad demise of my mother Mrs Leela Ramchandra Nair, I was completely shocked and disturbed. I say that my mother during her lifetime has left behind various properties in India and I am the only daughter of my mother, who is the absolute owner of my mother's all properties. I say that after my mother's death, I could not come to India to protect my mother's right in various properties. I say that however I came to India on 22nd August, 2016 and left the country on 18th February, 2017. I say that during this period, I called upon the plaintiff to handover the possession of the said suit premises and was ready to return the interest free refundable security deposit to me however the plaintiff refused to hand over the possession and thereupon the plaintiff filed the aforesaid false, frivolous and bogus suit against me in respect of the said suit premises.
- 4) I say that thereafter I came to know on or about 31st March, 2017, that all the original documents relating to the said suit premises were kept by me in my mother's premises situated in Cochin, Kerala. I say that since I am alone and also to take care of my family, I could not able to concentrate on the above matter properly. I say that after the above suit was filed, I had not brought all the documents lying in my mother's premises in Cochin, Kerala and they were not handed over by me to my advocate for filing my written statement in the above suit. I say that I was informed by my advocate sometime in the month of December 2018 that this Hon'ble Court has passed an order on 22nd December, 2018 directing me to file my affidavit of documents and compilation of documents. I however could not come to India since I was to look after my children and was busy in attending some personal matters.

I say that I was mentally disturbed after the death of my mother and particularly when plaintiff has refused to hand over the possession of the said suit premises to me and also after plaintiff has filed the aforesaid false, frivolous and bogus suit in this Hon'ble Court.

- 5) I say that I have, therefore, come to India on 2nd April, 2019 and discussed the matter with my advocate and while discussion I have informed my advocate that I kept all the original documents in Cochin, Kerala, thereupon I had gone to Cochin, Kerala on 10th April, 2019 and collected the said documents and brought those documents / gave it to my advocate in Mumbai. I say that after perusing the said documents, my advocate has advised me that I should have produced the copy of the original agreement which was signed by the plaintiff on 17th August, 2006 and also signed by me wherein the plaintiff had agreed to renew the said agreement for leave and license for a further period of 3 years from 28th June, 2006 to 27th June, 2009 by agreeing to pay the license fee at the rate of Rs.11,000/- per month and further agreed to pay a sum of Rs.4000/- towards compensation for using the furnitures and fixtures as provided in the agreement dated 30th September, 2003.
- 6) I say that after reading the contents of the said agreement for leave and license, my advocate has advised me that I should have annexed or referred to the said subsequent agreement for leave and license dated 17th August, 2006 and other documents, which were executed by and between me with the plaintiff or signed by Mr N. Govind. I say that accordingly my advocate has informed me that I may have to move an application for amending the written statement before this Hon'ble Court that the plaintiff has filed a false, frivolous and bogus suit and that it was never my and mother's intentions to sell the said suit premises to the plaintiff as mischievously and wrongly contended by him in the above suit. I crave leave to refer to and rely upon (I) Boarding Pass of Air India

in respect of my flight from Newark, USA to Mumbai dated 1st April, 2019, (ii) Boarding Pass issued by the Air India for flying from Mumbai to Cochin dated 10th April, 2019, (iii) Boarding Pass issued by Go Air for flying from Cochin to Mumbai dated 10th April, 2019 along with the ticket issued to me by the said Airlines, when produced.”

5 It is not in dispute that defendant No.1 is a resident of the United States. It is also not in dispute that she came to India sometime in March 2017 and left back for USA sometime in September 2017. Thereafter, she has come back to India only on 2nd April, 2019. This is clearly evidenced by the passport that was produced before me today and which the advocate for the plaintiff has also perused. This is further fortified by the fact that the Written Statement of defendant No.1 was affirmed in New York and which is on record. In these circumstances and considering the averments made in the paragraphs reproduced above, even if I was to assume that the trial of the suit has commenced, I am satisfied that the case for allowing the amendment is made out.

6 In these circumstances, the Chamber Summons is allowed in terms of prayer clauses (a) and (b) which reads thus -

“(a) that the defendant No.1 may be permitted to carry out amendment

in her Written Statement as more particularly mentioned in the schedule of the Chamber Summons annexed herewith.

- (b) That the delay if any in taking out the above Chamber Summons be condoned.”

7 The Chamber Summons is allowed subject to the condition precedent of the applicant / defendant No.1 paying costs of Rs.25,000/- to the Tata Memorial Hospital, Mumbai and receipt showing compliance of the payment of costs being filed on the record of this Court within a period of two weeks from today. Once the costs are paid, the applicant/ defendant No.1 shall carry out the amendment to her Written Statement within a period of two weeks thereafter and serve a copy of the amended Written Statement on the advocates for the plaintiff. Needless to clarify that if the costs are not paid within time, the Chamber Summons shall stand dismissed without further reference to the Court.

8 The Chamber Summons is disposed of in the aforesaid terms.

9 Place the suit on board for directions on 7th August, 2019.

(B.P.COLABAWALLA, J.)