

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL CHAMBER SUMMONS NO.999 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO.1543 OF 2018
IN
COMMERCIAL SUIT NO.885 OF 2018**

Arjun Atma SippyApplicant/Plaintiff

Vs.

Purshottam Associates and Ors.Defendants

Mr. Ranbir Singh a/w. Mr. Rushil Mathur I/b. M/s. Mulla and Mulla and CBC for applicant/plaintiff.

Mr. Anil D'souza for defendant nos.1 and 2.

Mr. Jinish Shah I/b. Divya Shah Associates for defendant nos.3 and 4.

Mr. Vivek Walawalkar I/b. Legal Associates for defendant nos.5 to 8.

Mr. Kevic Setalvad, senior advocate I/b. Mr. Yashodhan Gavankar for proposed defendant nos.10, 12, 13, 14, 15, 16, 20, 21, 22 and 23.

CORAM : K.R.SHRIRAM, J.

DATE : 5th FEBRUARY 2019

P.C.:

COMMERCIAL CHAMBER SUMMONS NO.999 OF 2018

1 This chamber summons is for leave to amend the plaint as per the Schedule annexed thereto. Mr. Ranbir Singh stated that all respondents have been served.

The amendment sought can be split into three parts, viz., (a) add one Indru Advani as proposed plaintiff no.2, (b) add respondent nos.1 to 18 as defendant nos.9 to 26 and (c) bring on record further facts post filing the suit.

2 So far as adding Indru Advani as co-plaintiff, Mr. Shah, counsel for defendant nos.3 and 4 states that he has no objection. Mr. Setalvad did not make any submissions regarding adding Indru Advani as co-plaintiff. Mr. D'souza and Mr. Walawalkar opposed stating that without plaintiff no.2 the suit is defective and plaintiff on his own could not have filed this suit. The counsel also submitted that by adding Indru Advani as plaintiff no.2, plaintiff is trying to get over the impediment.

3 In my view, there is nothing wrong in plaintiff attempting to do so because as stated in the affidavit in support, proposed plaintiff no.2 is the Executor of the Will of the late Atma H. Sippy. Atma H. Sippy was the father of plaintiff and was a partner in defendant no.1 firm. Defendant no.2 was the partner of Atma H. Sippy. Therefore, in my view, proposed plaintiff no.2 is a necessary party. This would also obviate multiplicity of proceedings because plaintiff no.2 could have, as executor of Will of Atma H. Sippy, independently filed a suit.

4 As regards respondent nos.1 to 18 are concerned, it has to be noted, at the outset, that no affidavit in reply opposing the chamber summons has been filed. Mr. Setalvad was permitted to make submissions without affidavit in reply. Mr. Setalvad submitted that when one reads the plaint and the proposed amendments, there is a change in the nature and character of the suit. Mr. Setalvad also submitted that a legal heir or representative of a deceased partner at the most is only entitled to seek

settlement of accounts in the absence of a contract to the contrary. Mr. Setalvad also submitted that the estate of the deceased partner is entitled only to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of 6% p.a. on the amount of his share in the property of the firm. Mr. Setalvad also submitted that the estate of a deceased partner also can only seek a direction to the surviving partner to hold for the benefit of the estate the pecuniary advantage that the partner gained for himself by entering into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person. Mr. Setalvad relied upon Section 37 of the Indian Partnership Act, 1932 as well as Section 88 of the Indian Trusts Act, 1882. Mr. Setalvad also relied upon a judgment of the Division Bench of the Madras High Court in ***S.K. Sahul Hamid and Anr. V/s. S.M. Sulthan and Ors.***¹ Mr. Setalvad also added that in the plaint, plaintiff is seeking for a declaration that the consent terms dated 5th February 2018 entered into and executed by and between defendants in Suit No.2330 of 2001 with respect to an immovable property was illegal, bad in law etc. and also seeking an injunction against defendants restraining defendants from acting upon or implementing the said consent terms apart from seeking rendition of accounts from defendant no.2 with respect to defendant no.1 firm. According to Mr. Setalvad, apart

1. 60 Law Week (L.W.) 24

from seeking rendition of accounts, plaintiff is not entitled to seek the other reliefs.

5 It has to be kept in mind what we are considering is an amendment application and not hearing the suit. Whether plaintiff is entitled to the relief as prayed for can be considered only at the hearing of the suit. The present amendment application is to amend the plaint to bring on record certain developments that have happened after the suit was filed. Therefore, none of the submissions made by Mr. Setalvad holds water.

6 Mr. D'souza submitted that by the amendment (a) plaintiff is seeking to enlarge the scope of the matter and (b) it changes the nature and character of the suit. Mr. Walawalkar submitted that by adding respondents to the suit, plaintiff is only trying to pressurize defendant nos.5 to 8 to settle with plaintiff. Mr. Walawalkar also submitted that the basis for taking out the chamber summons is that defendant nos.5 to 8 have committed breach of the injunction orders passed and defendant nos.5 to 8 have not committed any breach. Mr. Walawalkar submitted that the injunction order was only restricted to land and did not cover the building and therefore, the amendment application should not be allowed.

7 Admittedly, this is a pre-trial amendment. Order VI Rule 17 of the Code of Civil Procedure, 1908 reads as under :

“Amendment of Pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on

such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :

Provided 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.”

8 It is also settled law that while considering an amendment application, the Court cannot go into the questions of merit of such amendment (*Andhra Bank V/s. ABN Amro Bank N.V. and Ors.*²).

While considering whether an application for amendment should be allowed or not, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits. The averments sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment (*Rajesh Kumar Aggarwal and Ors. V/s. K.K. Modi and Ors.*³)

9 The Apex Court in *M/s. Revajeetu Builders & Developers V/s. M/s. Narayanaswamy & Sons & Ors.*⁴ in paragraphs 63 and 64 has listed the factors which have to be kept in mind while considering the amendment application.

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.

2. AIR 2007 SC 2511

3. AIR 2006 SC 1647

4. (2009) 10 SCC 84

(1) Whether the amendment sought is im-perative 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 malafide, worthless and/or dishonest amendments.

10 I have considered the proposed amendments. The proposed amendments are certainly to introduce only subsequent developments. It is nobody's case that the amendment sought is not bonafide or malafide.

11 The suit has been filed assailing and impugning the consent terms dated 5th February 2018 filed in Suit No.2330 of 2001. The subject matter of the said Suit No.2330 of 2001 was a piece of land in Bandra, Mumbai together with the building constructed thereon. Until filing/acceptance of the consent terms, there was an interim injunction operating against defendants in Suit No.2330 of 2001 from in any manner dealing with, disposing off, selling, alienating, encumbering or creating any

third party rights in respect of the suit property and/or the premises or parting with possession of the premises. Paragraph 3 of the order dated 26th April 2011 in Appeal No.468 of 2008 in Notice of motion No.2927 of 2007 in Suit No.2330 of 2001 reads as under :

3. In this appeal, at the time of admitting the appeal, interim order was made by the Court in terms of prayer clause (c) of Notice of motion no.2662 of 2009. Prayer clause (c) of Notice of motion no.2662 of 2009 reads as under:-

(c) that pending the hearing and final disposal of the Appeal, this Honble Court be pleased to restrain the Respondents and their respective servants, agents and/or any other person or persons claiming under any one of them by an order of temporary injunction from in any manner dealing with, disposing of, constructing, selling alienating, encumbering or creating any third party rights in respect of the suit property and/or the premises or parting with the possession of the premises to be constructed on the suit property described at Exhibit-A to the Plaint or any part or portion thereof to the third party;

That order, it appears, was challenged before the Supreme Court in Petition for Special Leave to appeal (Civil)no.13821 of 2009. That was decided by order dated 1.6.2009 by the Supreme Court. The order of the Supreme Court reads as under:-

Heard learned Counsel for the parties. On the facts of the case we dispose of this petition with a direction that the petitioner may make construction in the disputed land but this will be at their own risk and subject to the decision of the appeal pending in the High Court. We request the High Court to dispose of the appeal expeditiously.

The SLP is disposed of accordingly.

In our opinion, in these circumstances, it will be appropriate to direct that during the pendency of notice of motion before the learned Single Judge, interim order passed in this appeal as modified by the order of the Supreme Court quoted above, shall operate. However, the defendants shall be at liberty to apply to the learned Single Judge for modification of the interim order in case there is change in the circumstances.

12 Therefore, there was an injunction running against defendants in that suit as stated above. Defendants in that suit were defendant nos.3 to 7 in the present suit. When plaintiff came to know about the consent terms dated 5th February 2018 having been entered into in Suit No.2330 of 2001,

the present suit came to be filed and an ad-interim order dated 28th March 2018 came to be passed in which the parties were directed to maintain status quo as on 28th March 2018 in respect of the suit property.

13 Plaintiff also caused a public notice/caution notice issued on 8th April 2018 and also filed *lis pendens* on or about 24th April 2018. It is plaintiff's case that plaintiff subsequently learnt that defendant nos.5 to 7 have executed an Agreement for Sale dated 23rd April 2018, 23rd May 2018, 4th June 2018 with proposed defendant nos.9 to 14. It is also stated in the affidavit in support that during the search it came to light that defendant nos.5 to 7 had executed six Agreement for Sale dated 27th January 2017, 27th January 2017, 24th April 2017, 5th May 2017, 8th November 2017, 30th July 2015 and 21st May 2018 with proposed respondent nos.15 to 26, respectively.

14 Therefore, plaintiff is seeking in the proposed amendment for a declaration that these agreements with proposed defendants be also declared illegal and quashed since according to plaintiff these agreements have been entered into in breach of orders passed. In my view, therefore, there is no change in the nature and character of the suit. The amendment being sought is only consequent to acts committed by defendants after the suit was filed and an order of injunction was passed. I must hasten to add, I am not opining at this point of time whether there is any contempt of Court

committed by defendant nos.5 to 7 and that will be considered in the contempt petition that is pending. At the same time, having observed that the amendment sought do not change the nature and character of the suit, any order passed to declare the agreements entered into by defendant nos.5 to 7 subsequent to the order dated 28th March 2018 or those agreements that came to plaintiff's knowledge after order dated 28th March 2018 was passed will certainly effect the rights of the proposed defendants and amendments sought is imperative for proper and effective adjudication of the case. They are also proper and necessary parties to the suit.

15 In the circumstances, keeping open the rights and contentions of defendants to be raised in the written statement to be filed, chamber summons is allowed and accordingly disposed in terms of prayer clause – (a).

16 Amendment to be carried out and copy of the amended plaint to be served within three weeks from today.

17 Writ of summons need not be served, except on those who were not represented today. Writ of summons on those who have not appeared today will be served within two weeks, returnable on 29th March 2019.

18 Written statement to be filed and copy served within 30 days of receiving copy of the plaint/amended plaint.

19 Suit to be listed for case management hearing on 29th March
2019.

(K.R. SHRIRAM, J.)