

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION**

**CHAMBER SUMMONS NO.1042 OF 2018**

**IN**

**COMM. SUIT NO.1128 OF 2018**

Zoeb Asgerali Dharwalla )....Applicant

**IN THE MATTER BETWEEN :**

Zoeb Asgerali Dharwalla & Anr. )....Plaintiffs

V/s.

Kalpavruksha Developers & Ors. )....Defendants

And

Vikram B.Trivedi & Ors. )....Respondents

**WITH**

**NOTICE OF MOTION NO.1966 OF 2018**

----

Mr.Sajid Shamim I/by Shamim and Co. for the applicant/plaintiffs.

Mr.Dipesh Siroya for defendant nos.1 to 5.

Ms.Swati Sawant a/w Ms.Gauri Joshi and Mr.Akshay Patil I/by  
S.K.Legal Associates for defendant nos.6 & 7.

Mr.Raju Modilal Jain for defendant nos.8 to 11.

Mr.Dinyar Madon, Senior Advocate a/w Mr.Chetak Kapadia,  
Mr.R.Mukherjee I/by Mulla & Mulla and CBC for respondent nos.1 &  
2.

Mr.S.Nagvadaria for respondent nos.3 & 4.

Mr.P.A.Jani for respondent no.3.

Mr.Rohaan Cama a/w Mr.Faran Khan I/by Tejas Shah for respondent  
nos.6 & 7.

----

**CORAM : K.R.SHRIRAM,J**

**DATE : 28.1.2019**

**P.C.:-**

1. This Chamber summons is for leave to amend the plaint to add the seven respondents as defendant nos.12 to 18 and for other amendments consequent thereto. There are prayers also being sought to be added particularly against the proposed defendants.

2. The suit filed is for specific performance of an agreement/allotment letter dated 13.9.2008 entered into between defendant nos.1 to 5 and plaintiffs and to complete and hand over the suit flat which is flat no.1001 on 10<sup>th</sup> floor admeasuring 2200 sq. ft. saleable area in Kalpavruksha Residency, a building being erected at Malabar and Cumbala Hill Division.

3. In the alternative, plaintiff is also seeking damages along with interest @ 18% p.a.

4. On 13.3.2018 this Court was pleased to direct, pending the hearing and final disposal of the Notice of Motion (L) No.482 of 2018 which is yet to be disposed, defendant nos.8 to 11 not to create any 3<sup>rd</sup> party rights in respect of the suit property without seeking prior permission of this Court. The ad-interim order is still in force. The

passport of defendant no.2 is also kept in the safe custody of the Prothonotary & Senior Master, High Court, Bombay.

5. It is the case of plaintiff that in a suit that was filed by respondent nos.1 & 2 against defendant no.1 being Commercial Suit No.1128 of 2018, an affidavit came to be filed by defendant no.2 where defendant no.2 has suppressed that the suit flat has been sold to plaintiff under the letter of allotment. Respondent nos.1 and 2 and defendant nos.1 to 5 entered into consent terms dated 7.3.2018 under which respondent nos.1 & 2 got possession of another flat being flat nos.301 & 401 in the same building. It has nothing to do with the suit flat. Under the same consent terms, respondent nos.3 & 4 got flat nos.201 & 601, respondent no.5 got flat no.701, respondent nos.6 & 7 got flat nos.1101 and 1201. None of the respondents have got the suit flat against which an injunction has been passed at the ad-interim stage of hearing of the Notice of Motion.

6. Plaintiffs want to add all these respondents as party defendants because by prayer clauses-(m), (n) & (o) in the plaint, plaintiffs are seeking (1) an order of injunction restraining defendants from creating 3<sup>rd</sup> party rights in respect of all their other assets and properties ; (2) the flats in suit project other than the suit flat stand

validly charged in favour of plaintiffs ; and (3) plaintiffs have valid charge of all other assets and properties of defendant nos.1 to 5 in order to recover the aforesaid damages/mesne profit from defendant nos.1 to 5.

7. It has to be noted that prayers- (m), (n) & (o) will basically come into effect after plaintiffs' obtain a decree. When one reads the plaint, what plaintiffs are seeking is specific performance of plaintiffs agreement/allotment letter with respect to flat no.1001. If plaintiffs succeed in the suit, plaintiffs can execute the decree against the estates of the defendants and at that stage flat no.1001 will continue to be estate of defendants, that may also be available to plaintiffs for satisfying the decree, they may have.

8. Moreover, a charge over a property can be either contractual or in law. Admittedly, allotment letter does not talk of any charge of flat no.1001. Section 55 (6) (b) of the Transfer of Property Act 1882 entitles a buyer, if he succeeds for a charge on the property which has been contracted to be sold by the seller to the buyer. If plaintiffs succeed, that charge can be only against flat no.1001.

9. Further there can be no cause of action against respondents

and even in the affidavit in support there is no explanation as to how plaintiffs have any cause of action against respondent nos.1 to 7. It is not even being disclosed. Therefore, respondents are not proper and necessary parties to the suit.

10. In the circumstances, Chamber summons dismissed.
11. Notice of Motion to be placed for hearing in due course.

**(K.R.SHRIRAM,J)**