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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1514 OF 2018
IN
SUIT NO. 202 OF 2009**

Kukreja Construction Company ... Plaintiff
Vs
Ganesh Sharma & Ors. ... Defendants
And
Surinder Singh Vijan & Ors. ... Respondents

Mr. Abhinav Chandrachud with Mr. Nilesh Tated I/b. M/s. DSK
Legal for the Plaintiff / Applicant.
Mr. Kunal M. Damle, for Respondent Nos.1 and 2.
Mr. Vishal Phal with Ms. Sunita Sonawane for Defendant No. 6.

**CORAM: R. I. CHAGLA, J.
DATE: 27TH AUGUST, 2019**

PC:-

1. This Chamber Summons has been taken out in the above Suit for amendment of the Plaint in the terms of the schedule annexed to the Chamber Summons. By the amendment, the Plaintiff seeks to implead three parties as Defendant Nos. 7, 8 and 9. Defendant Nos. 7 and 8 are the brothers of Defendant No.6 and Defendant No.9 is the Municipal Corporation of Greater Mumbai (MCGM). The Suit has been filed for Specific Performance of the Memorandum of Understanding assigning development rights to the Plaintiffs in respect of the Suit property.
2. In the proposed amendment it is alleged that Defendant No.6 together with Defendant Nos. 7 and 8 had carried out certain

unauthorised construction on the Suit property and in respect of which the Plaintiff had complained to Defendant No.9. Thereafter, the Plaintiff has sought to challenge the in action on the part of Defendant No.9 in addressing the complaint of the Plaintiff. It is the Plaintiffs case that by such illegal construction, the development rights of the Suit property, which was agreed to be assigned to the Plaintiff would be affected by the Defendant No.6 consuming the available FSI on the Suit property. Further, Defendant Nos. 7 and 8 have been introduced in the Suit property thereby creating third party rights.

3. The proposed amendment which beings on record the event subsequent to the filing of the Suit. Prayers have been sought to be added which are for permanent injunction restraining the Defendant Nos.7 and 8 from putting up illegal unauthorised construction on the Suit property and directing Defendant No.9 not to grant permission and / or approval to the Defendants in respect of the further construction on Suit property without prior leave of this Court. A prayer for appointing the Court Receiver in respect of the Suit property has been sought as well as interim injunction and other consequential relief, for preventing such illegal unauthorised construction being carried out by Defendant Nos.7 and 8 and for Defendant No.9 to demolish the same as per the provisions of law.

4. The learned Counsel for the Plaintiff has relied upon the judgment of the Supreme Court in ***Raj Kumar Bhatia Vs. Subhash Chander Bhatia***¹ where the Supreme Court has held that at the stage of considering whether an amendment is to be granted, it was impermissible for the Court to consider the merits of the case. He has also relied upon the judgment of the Supreme Court in ***Baldev Singh and Ors. Vs. Manohar Singh and Anr.***², where this Court had considered the proviso to Order 6 Rule 17 CPC which provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. The Supreme Court in that case had construed the trial of the Suit meaning the final hearing of the Suit, examination of witnesses, filing of documents and addressing of arguments. He has submitted in the present case issues were framed in the above Suit on 6th January, 2017 and although the Affidavit in lieu of Evidence has been taken on record, the examination of the witness has not commenced. The Chamber Summons had been taken out on 5th December, 2018. He, therefore, submits that as the trial of the Suit by examination of witnesses is yet to commence, the amendment at this stage is required to be allowed and no prejudice will be caused to the Defendants.

1 2018(2) Bom.,C.R. 328.

2 (2006) 6 Supreme Court Cases 498.

5. The learned Counsel for the proposed Respondents who are sought to be added as Defendants in the Plaint has vehemently opposed the allowing of the amendment of the Plaint. They have referred to an order passed by the learned Single Judge of this Court (S.C. Dharmadhikari,J.) wherein although interim relief had granted by way of injunction, the words “dealing with” was not granted. The Defendant No.6 was thus not prevented from dealing with the Suit property as the proposed Respondents were already in occupation of the Suit property. He has further submitted that Defendant No.6 was not restrained from carrying out the repairs and maintenance to the structure on the Suit property which is the only act done by Defendant No.6 together with the proposed Respondents. He has also relied upon the Suit filed in the City Civil Court at Mumbai, which has challenged the notice issued under Section 354 of the Mumbai Municipal Corporation Act for demolition of the structure on the Suit property which was considered unauthorised under Section 354A of the MMC Act. He has submitted that in the Suit filed in the City Civil Court, the Municipal Corporation was restrained by interim order of the Court from acting upon the Notice. He has submitted that the Plaintiffs in the present Suit is taking out the Chamber Summons only to circumvent the proceedings in the City

Civil Court, particularly since they were not allowed to intervene in that Suit, the Chamber Summons taken out by them having been rejected on the ground there was no cause of action against the Plaintiffs herein in that Suit. He has submitted that the subject matter of the present amendment sought in the Plaint is the same as in the Suit filed in the City Civil Court. He has, therefore, submitted that the amendment should not be allowed as the proposed Respondents are nowhere connected with the MoU entered into between the Plaintiff and Defendant Nos.1 to 6 in respect of which specific performance is sought.

6. The learned Counsel for the Defendant No.6 has supported the arguments of the proposed Respondents and contended that in the said MoU which was entered into between the Plaintiff and the Defendants, it is mentioned that the Defendant No.6 was only occupying part of the Suit property i.e. 4000 square feet approximately. He has submitted that the proposed Respondent at all times was in occupation of that part of the Suit property together with Defendant No.6. He has submitted that the Defendant No.6 is not obliged to remove all the encumbrances on the Suit property particularly since Defendant No.6 was only in possession of part of the Suit property. He has submitted that the Suit property had at all times been encumbered and this has been

mentioned in the said MoU. This factual position has at all times been known to the Plaintiff. He has accordingly submitted that the relief now sought in the amendment is going beyond the subject matter of the present Suit filed and the Chamber Summons should not be allowed. He has relied upon a decision of this Court in ***The Liquidator, Maratha Market People's Co-Op Bank Ltd. (in liquidation) Vs. M/s. Jeejaee Estate & Ors.*** which decision is dated 11th January, 2019. This decision relies upon the Supreme Court decision in ***Vidyabai & Ors. Vs. Padmalatha & Anr***³. in which is held that the commencement of trial is when a party files an Affidavit of himself or his first witness in lieu of Examination-in-Chief. This decision has been followed in a subsequent decision of the Supreme Court in ***Mohinder Kumar Mehra Vs. Roop Rani Mehra***⁴. He has submitted that the position is clear from these decisions as to when a trial has commenced and that in the present case as the Plaintiff has filed the Affidavit in lieu of Examination-in-Chief which has been taken on record.

7. Having considered the submissions, in my view, the amendments sought are of events subsequent to the filing of the Suit. These amendments are being sought at a stage when the examination of the witnesses has not yet taken place. The

3 (2009) 2 SCC 409.

4 (2018) 2 SCC 132.

Supreme Court in **Baldev Singh (Supra)** has held that the proviso under Order 6 Rule 17 of the CPC must be understood in the limited sense as meaning the final hearing of the Suit, examination of witnesses, filing of documents and addressing of arguments. Although the Supreme Court in **Vidyabai (Supra)** and **Mohinder Kumar Mehra (Supra)** have taken a different view, considering that the examination of the witnesses of neither the Plaintiff nor the Defendants has commenced, in my view, the Defendants will in no way be prejudiced by granting the amendment at this stage.

8. Further, it is clear from the decision of the Supreme Court in **Raj Kumar Bhatia (Supra)** that the merits of the case cannot be gone into when considering whether the amendment should be allowed. The Defendants as well as proposed Respondents always have the opportunity to deal with the merits of the amendment by filing additional Written Statement to the amended Plaint. The contention of the proposed Respondents that the subject matter of the Suit filed in the City Civil Court covers the amendment which is now proposed to be made cannot be accepted. The present Suit concerns the MoU in respect of which the Plaintiff has sought Specific Performance. By the said MoU, the development rights of the Suit property has been assigned to the Plaintiff. It is an agreed position that construction has been

carried out by the proposed Respondents together with Defendant No.6 *albeit* they have referred to the construction as repairs and maintenance. This has been carried out subsequent to the filing of the Suit. The work carried out on the Suit property may have a material bearing on the present Suit considering that the MoU assigns development rights of the Suit property in favour of the Plaintiff. It is a possibility that the development potential of the Suit property may be affected by such works / construction carried out by the Defendant No.6 together with the proposed Respondents. Further, the order of the learned Judge of this Court (S.C. Dharmadhikari, J) also granted interim relief in the Notice of Motion taken out in the present Suit and which had restrained the Defendants including Defendant No.6 from alienating, encumbering, parting with possession and / or creating third party rights and / or inducting third parties in the Suit property. Though the words “dealing with” has not been granted by the learned Judge, the proposed Respondents together with the Defendant No.6 are alleged to have carried out illegal construction on the Suit property and hence would be necessary parties in the Suit considering that the said MoU makes no mention of their having been in possession of the Suit property. Further, the Mumbai Municipal Corporation would be a necessary party as they have

failed to take any action other than issuing notice against the works carried out on the Suit property which in their view is unauthorised. The entirety of the facts have also been learnt of by the Plaintiff recently in the proceedings in the City Civil Court where they had sought impleadment.

9. Accordingly, in view of my above findings, it would be appropriate to grant prayer clause (a) sought for in the Chamber Summons. The Plaintiffs are accordingly permitted to amend the Plaint in terms of the schedule annexed to the Plaint. The Plaintiffs shall carry out the amendment within a period of two weeks from the date of this Order.

10. The Plaintiff shall reverify the amended Plaint.

11 Chamber Summons is accordingly disposed of in the above terms.

12. The learned Counsel for the proposed Respondents applies for a stay of this order for a period of two weeks. The application is allowed and the order is stayed for a period of two weeks.

(R I. CHAGLA, J.)