

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

**CHAMBER SUMMONS NO.421 OF 2019
IN
COMMERCIAL SUIT NO.242 OF 2019**

Babulal Harakchand Shah ...Plaintiff
vs.
Vasawani Projects Pvt. Ltd.& Ors. ...Respondent

**WITH
NOTICE OF MOTION NO.551 OF 2019
IN
COMMERCIAL SUIT NO.242 OF 2019**

Babulal Harakchand Shah ...Plaintiff
vs.
Vasawani Projects Pvt. Ltd. and Ors. ...Respondents

Ms. Pallavi Bali a/w Vishal Dhasade, Advocate for the Plaintiff.

Mr. Siddhart Samantray a/w Mr. Anston Vaz, Mr. Abhishek S. Bhosle i/b. Glenn Mendonca, Advocate for the Defendant No.3.

Mr. Vyom Shah a/w Shah i/b. Divya Shah Associates for Defendant Nos.1 and 2.

CORAM : S. M. MODAK, J.

DATE : 6th OCTOBER 2023

P. C. :-

1. Heard learned Advocate for the plaintiff and learned Advocate for Defendant Nos.1 and 2 – Developer and learned counsel for the Society/defendant No.3. Additional affidavit filed by defendant No.3 is taken on record.

2. Chamber Summons for amendment is annexed by two Schedules; Schedule - I and Schedule – II. It is true that they are amended as per order dated 11th August 2023, so also as per order dated 20th October 2020. When I have gone through proposed amendment in those Schedules, it relates to following details :-

- (a) To rehabilitate the plaintiff in the redeveloped premises including registration of the Agreement dated 22nd October 2012 i.e. flat purchaser agreement with defendant Nos.1 and 2;
- (b) To compensate the plaintiff @ Rs.36,000/- per sq. ft. for getting flat less than agreed area. There is direction to defendant Nos.1 and 2 to provide certain amenities which are to be provided as per Development Rights Agreement dated 19th November 2010. This was executed with the defendant Nos.1 and 2.
- (c) To provide two stilt ground floor car parking to the flat purchasers as per agreement dated 22nd October 2012. This prayer is against defendant Nos.1 and 2.
- (d) To direct defendant Nos.1 and 2 all other acts, deeds and things necessary to rehabilitate the plaintiff in the redeveloped premises including furnishing of

necessary documents and for giving out the flats on leave and license basis.

3. There is a submission on behalf of the learned counsel for the developers and the learned counsel for the Society that these reliefs are sought by way of afterthought and they are sought against the defendant who is not bound to comply them. They can be specified as follows:

- (i) These reliefs were not sought when the suit was filed;
 - (ii) Developer has already completed the project and handed over it to the Society;
 - (iii) On making a complaint initially to the Registrar of Societies the plaintiff has approached this Court belatedly.
 - (iv) Certain prayers are also time barred as the Development Agreement in between these defendants is of 19th November 2010.
 - (v) The car parking cannot be provided by the developer.
- There is reliance on the observations in the case of *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd.*¹, which says that promoter has no right to sell any portion of such building which is

1. (2010) 9 SCC 536

not a “*flat*” within the meaning of Section 2(a-1) of M.O.F.Act.

7. By way of reply the learned counsel for the plaintiff drew my attention to certain clauses of the Flat Purchase Agreement and Development Agreement.

8. It is settled law that the merits of the amendment cannot be considered while deciding the application for amendment. The Court has only to see :-

- a. at what stage amendment is made and ;
- b. whether this is for deciding the real controversy in between the parties.

The principles are laid down in Order VI Rule 17 CPC. This is pretrial amendment. Yet the defendants have to file written statements. Even though it may be true that the learned Registrar under the Co-operative Societies Act has rejected the complaint of the applicant, it is on two grounds; one that the suit is pending in this Court and second for not furnishing the documents. It can not be said that said order was passed on merits.

9. The defendants have not filed written statements. Both set of defendants have filed notice of motion for condonation of delay. I feel that this amendment can be allowed. Ultimately, whether the

reliefs can be claimed against particular defendant or not, plaintiff is the best Judge. If as per provisions of MOFA Act, particular relief cannot be granted and in spite of plaintiff asking for it, ultimately he will be loser. This issue relates to the merits of the amendment and it can not be considered now. So I am inclined to allow the Chamber Summons.

It is true that there is repetition about certain details in both Schedules of amendment and it is not happily drafted. However can't be a ground for rejection. Hence, order :--

ORDER

- a. Chamber Summons is allowed in terms of prayer clause (a) and is made absolute.
- b. Amendment be carried out within three weeks.
- c. Copy be served on learned Advocate for the defendants.
- d. Both sets of defendants are at liberty to file additional written statement to the amended plaint.
- e. All rights and contentions of the parties to oppose the averments and prayers in the amended plaint allowed today are kept open.

[S. M. MODAK, J.]