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

CHAMBER SUMMONS NO.496 OF 2017

IN

SUIT NO.188 OF 2015

**The Board of Managers of the Association of
Apartment Owners of Banarasi Heritage**

**...Applicants /
Plaintiffs**

Versus

M/s. Bairagra Builders Pvt. Ltd. & Ors.

...Defendants

Mr. Rohaan Cama with Mr. Anish Karande and Ketan Mutha and Ms. Neha Achliya i/b. Sapana Rachure for Applicant / Plaintiff.

Mr. Cyrus Ardeshir with Mukul Taly and Sayali Gharpure i/b. S. Mahomedbhai and Co. for the Defendants.

CORAM : R.I. CHAGLA J

DATE : 24 March 2023

ORDER :

1. By this Chamber Summons, the Applicants / original Plaintiffs are seeking permission to amend the Plaint in the above Suit in terms of schedule annexed to the Chamber Summons. Further, relief has been sought in the Chamber Summons which is not pressed at this stage. Liberty is granted to the Applicant / Original Plaintiff to

file appropriate Interim Application seeking such relief which, if filed, will be considered on its own merits.

2. The proposed amendment which is sought is in respect of Deed of Apartment dated 19th May, 2008 which had been executed between Defendant No.1 with his wife who is sought to be joined as Defendant No.3. The Applicant / Plaintiffs states that they were not aware of any such Deed of Apartment by which the 6th floor along with the terrace of the Suit building had been transferred by Defendant No.1 to proposed Defendant No.3. It only came to their knowledge when the Notice of Motion No.356 of 2015 came up before this Court for ad-interim relief. This Court had observed that the apartment and terrace on the sixth floor was first sold on 19th May, 2008 for which the Plaintiffs took no action. It is further observed by this Court that, the Plaintiffs claim to have been unaware of the transaction. The Deed of Apartment / Document of Sale is a registered document. It is also of no assistance to the Plaintiffs to say that the sale of the sixth floor apartment and terrace in 2008 was to the wife of one of the developers directors. This Court had noted that once that person acquired that flat, she acquired all the incidents of ownership including the right to sell it further, if she so desired. This

Court had held that if the Plaintiffs succeed ultimately, they will be entitled to make such claim as permissible in law against Defendants but this does not entitle the Plaintiffs to any ad-interim relief of the nature sought. Accordingly, ad-interim relief was refused.

3. The Applicants / Plaintiffs by taking out the present Chamber Summons for amendment of the Plaint has sought to challenge the Deed of Apartment dated 19th May, 2008. The Plaintiffs in the original Suit have claimed that they have the right to use the common areas facilities which included the terrace on the sixth floor. By the Deed of Declaration dated 4th April, 2006 and in particular Clause 5 thereof the Plaintiffs have been deprived the use and enjoyment of said sixth floor terrace. The Applicants / Plaintiffs have by way of proposed amendment stated that the Defendants in connivance with one another got up a fabricated document i.e. Deed of Apartment with a bid to defeat the legitimate rights of the Plaintiffs in respect of the said terrace (forming part of the common areas) on the sixth floor. Further, averment is made in the proposed amendment that the purported Deed of Apartment dated 19th May, 2008 is vitiated and rendered into a sham and bogus document engineered by the Defendants as part of a concerted strategy to

deprive the Plaintiffs of their legitimate rights in the Banarasi Heritage Condominium. Accordingly, by proposed amendment the Plaintiffs have sought a declaration that the Deed of Apartment dated 19th May, 2008 is invalid, illegal, bad in law, non-est and not binding upon the Plaintiffs to the extent that it purports to transfer the terrace on the sixth floor, (earmarked as common area space in the sanctioned plans) in favour of Defendant No.3. The relief sought is for a declaration that the Deed of Apartment dated 19th May, 2008 executed by Defendant No.1 in favour of Defendant No.3 is invalid, bad in law and not binding upon the Plaintiffs. There is a further relief sought for injunction restraining the Defendants from in any manner acting upon or taking any steps in furtherance of the Deed of Apartment dated 19th May, 2008. Further, relief is for an order and decree against the Defendants to deliver up the Deed of Apartment dated 19th May, 2008 for cancellation and that the said document be cancelled by the directions and orders of this Court.

4. Mr. Rohaan Cama, learned Counsel for the Applicant / Plaintiff has made various submissions in support of the Chamber Summons. However, it would be first necessary to note the objections raised by Mr. Cyrus Ardeshir, learned Counsel appearing for the

Defendants. There is a two fold objection raised, one is with regard to limitation and the other is that the proposed amendment changes the cause of action in the Suit.

5. In so far as the issue of limitation is concerned, the learned Counsel for the parties have substantially argued this issue including whether the Deed of Apartment being a registered document would be notice to the world that the said document had been executed. Mr. Cama has relied upon Explanation 1 to Section 3 of the Transfer of Property Act, 1882 and submits that deemed notice of an executed document upon its registration applies only to the purchasers acquiring the immovable property. However, this issue of limitation is not being considered at this stage by keeping open the rights and contentions of the parties. In the event this Court considers it fit to allow the proposed amendment, the issue of limitation will be gone into at the appropriate stage.

6. The other objection on behalf of the Defendants is with regard to the proposed amendment changing the cause of action in the present Suit.

7. Mr. Ardeshir on behalf of the Defendants has taken this Court to the averments in the Plaint as well as the prayer. He has submitted that the original Suit has been filed by the Plaintiffs as Board of Managers of Association of Apartment Owners of Banarasi Heritage Condominium. The Suit proceeds on the premise that the Defendants are preventing the effective management of the affairs of the Suit property by the legally constituted Board of Managers. The averments with regard to the common areas of the subject building as well as the declaration sought against the Defendants for payments to the Plaintiffs of monies towards purported amenities and property tax as well as sums payable by Defendant No.1 towards share of maintenance and property taxes are all aspects of management of the Condominium. Further, the Plaintiffs have sought declaration that they are legally constituted Board of Managers formed in respect of Association of Apartment owners of the Banarasi Heritage Condominium as per the powers vested in them pursuant to the bye laws annexed to the Deed of Declaration dated 4th April, 2006, without any interference, obstructions or impediments of any nature whatsoever from the Defendant, his servants, agents or anyone claiming through or under it. One of the prayers is for a declaration that the Deed of Declaration to the extent it seeks to, in

paragraph (5) limit the use and enjoyment of the common area and facilities including the Clause 5 of the Deed of Declaration dated 4th April, 2006 and which provides that the terrace at 6th floor level admeasuring 3894.6 Sq.ft. being for the exclusive use of apartment on the 6th floor is illegal, null, void ab-initio and not binding on the Plaintiffs or the apartment owners of the Banarasi Heritage Condominium.

8. Mr. Ardeshir then referred to the proposed amendment which he submits changes the nature of the cause of action in the Suit as the Plaintiff now seeks to challenge a registered Deed of Apartment dated 19th May, 2008, entered into between Defendant No.1 and proposed Defendant No.3 who is not party to the Suit. The registered Deed of Apartment dated 19th May, 2008 was executed much prior to the filing of the Suit for transferring the flat on the 6th floor together with terrace on the 6th floor. By the proposed amendment the Plaintiffs are seeking order, direction and decree against the Defendants to deliver up the registered Deed of Apartment dated 19th May, 2008 for cancellation and for the said document to be cancelled by directions and orders of this Court. The amendment proposed thus entirely changes the cause of action in the

present Suit.

9. Mr. Ardeshir has submitted that the challenge to the registered Deed of Apartment as being fabricated and a got up document would require the Plaintiffs to file a separate Suit. The proposed amendment is foreign to the present Suit and by which the entire cause of action in the Suit is altered. Accordingly, he has submitted that the proposed amendment cannot be granted.

10. Mr. Rohaan Cama, learned Counsel appearing for the Plaintiff has submitted that the cause of action is not required to be seen from the prayers in the Complaint but from the body of the Complaint and from which it is clear that the Plaintiffs have averred that the Defendants are illegally preventing the Plaintiffs from using the common areas and facilities of the subject building including the terrace at the sixth floor admeasuring 3894.6 sq. ft. The access of the members of the Plaintiff No.1 to the said terrace is being prevented by the Defendants illegally creating private access from the unit / flat on the sixth floor so as to treat the terrace as a part of the sixth floor. The Plaintiffs have in the present Suit averred that the Defendants are blocking the sanctioned access of common areas such

as said terrace and is insistent on selling the apartment on the sixth floor by advertising that the same has a 3000 sq.ft. terrace area attached thereto. The said advertisement dated 28th September, 2014 is annexed at Exhibit 'O' to the Plaint. Accordingly, the cause of action in the Plaint is with regard to the Plaintiffs entitlements to use the common areas such as the terrace and which cannot be taken away. The Plaint also contains the prayer restraining the Defendant from selling or in any manner dealing with the terrace on the sixth floor and / or represent the same to be a facility for exclusive enjoyment of the apartment on the 6th floor of the said building.

11. Mr. Cama has submitted that the cause of action in the present Suit and the cause of action in the proposed amendment are the same. The Plaintiffs by the proposed amendment challenge the said Deed of Apartment entered into by Defendant No.1 with proposed Defendant No.3 as being a further step taken by the Defendant No.1 – Builder in an attempt to block access of members of Plaintiff No.1 to the common areas such as the terrace and render the same inaccessible. Hence, it is one further event arising out and in respect of the very same cause of action pleaded in the Plaint. In the proposed amendment it is averred that by entering

into the said Deed of Apartment the Defendant No.1 purports to transfer the terrace on the sixth floor (earmarked as common area space in sanctioned plans) in favour of Defendant No.3. It is in this context that the Plaintiffs have sought by way of the proposed amendment to challenge the said Deed of Apartment which they contend is a fabricated and got up document with a bid to defeat the legitimate rights of the Plaintiffs in respect of the terrace (forming part of the common area situated in 6th floor in the said Condominium). Further, averment is made that the Deed of Apartment is vitiated and rendered into a sham and bogus document engineered by the Defendants as part of a concerted strategy to deprive the Plaintiffs of their legitimate rights in the said Condominium.

12. Mr. Cama has accordingly submitted that the relief sought for in the Interim Application be granted as the amendment being a pre-trial amendment and there being no change in the nature of the Suit or cause of action thereof, the amendment be allowed. He has relied upon *Life Insurance Corporation of India Vs. Sanjeev Builders Pvt. Ltd. & Anr.*¹ in this context.

¹ 2022 SCC OnLine SC 1128.

13. Having considered the submissions, in my view the proposed amendment does not in any manner alter the cause of action in the present Suit. The submission of Mr. Cama for the Applicants / Plaintiffs that the execution of Deed of Apartment by which the said terrace with flat on the 6th Floor was conveyed to Defendant No.3 being yet another step taken by the Defendant builder with an attempt to block access to the common area / terrace and render the same inaccessible for which the present Suit also has been filed has much merit. It can be seen from the proposed amendment that the Plaintiffs have stated that they had learnt of the said Deed of Apartment dated 19th May, 2008 when the Notice of Motion bearing No.356 of 2015 had been filed by the Plaintiffs present in Suit seeking urgent injunction relief and in which Notice of Motion a Reply had been filed by the Defendants to state that the apartment on the sixth floor along with pocket terrace had been sold by Defendant No.1 in favour of Defendant No.3. This according to the Plaintiffs was first time they had notice of the said Deed of Apartment. Accordingly by way of the proposed amendment the Deed of Apartment that is challenged on the ground that it is a sham and bogus document engineered by the Defendants as part of a concerted strategy to deprive the Plaintiffs of the legitimate rights in

the Banarasi Heritage Condominium. Thus, the proposed amendment does not in any manner alter the nature of the Suit filed for deprivation of the Plaintiffs of their legitimate rights to the common areas such as the sixth floor terrace of the said Condominium.

14. There has been a submission by Mr. Ardeshir with regard to the proposed addition of a party who was not an original party in the Suit and thus ought not to be permitted. However, in view of the above finding that the proposed amendment not changing the cause of action or nature of the Suit, this submission has no merit.

15. The Supreme Court in the case of ***Abdul Rehman and Anr. Vs. Mohd Ruldu and Ors.***² has in context of the proposed amendment altering the claim / cause of action of the Plaintiffs held that it is well settled that if the necessary factual basis for amendment is already contained in the Plaint, the relief sought on that basis would not change the nature of the Suit. The Supreme Court had also considered on the facts of that case that though it was not in dispute that the relief sought by way of amendment by the

² (2012) 11 Supreme Court Case 341.

Appellants therein could also be sought by them by way of a separate Suit on the date of filing of the Application. In view of avoiding multiplicity of litigation, the amendment was allowed. The Supreme Court has further held that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The Supreme Court in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimize the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case.

16. In *Life Insurance Corporation of India (supra)* relied upon by Mr. Cama, the Supreme Court has in a recent decision held that a prayer for amendment is generally required to be allowed unless the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint. The Supreme Court in this decision has laid

down the well settled principle that where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed.

17. In my view, these principles clearly apply to the proposed amendment sought which is a pre trial amendment and cannot be said to be foreign to the case set up in the Plaint and thus a liberal approach is required to be adopted. Further, it is to be borne in mind that the Advocates would have a chance to meet the case set up in the amendment.

18. I do not find any merit in the contentions of Mr. Ardeshir with regard to the aforementioned decisions of the

Supreme Court being decided in light of the facts before it. On the contrary these are well settled principles applicable to Courts considering an application for amendment under Order VI Rule 17 of the Code of Civil Procedure and thus would very much apply in the present case.

19. Accordingly, keeping the rights and contentions on the issue of limitation open, the relief sought for in that Chamber Summons is granted.

20. The Chamber Summons is made absolute in terms of prayer clauses (a). The Plaintiff shall carry out the amendment in the Plaint in terms of the schedule annexed to the Chamber Summons within a period of four weeks from the date of this Order.

21. Liberty is granted to the Plaintiff to take out appropriate application seeking the remainder of the relief as sought for in the Chamber Summons.

22. The Chamber Summons is accordingly disposed of.

23. An Application is made for the stay of this Order. In view of the above findings and particularly with respect to proposed amendment neither changing the nature nor the cause of action in the present Suit as well as keeping the issue of limitation open, the application is rejected.

[R.I. CHAGLA J.]