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

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**INTERIM APPLICATION NO. 2890 OF 2021
IN
SUIT NO. 1695 OF 2012**

Asoo K. Nihalani ...Applicant

In the matter between

Asoo K. Nihalani ...Plaintiff

Shekhar Dadarkar & anr. ...Defendants

Mr. Deepak Thakare, i/b Mr. Gopal Parab, for the Applicant.
Mr. Aditya Kanchan, i/b K. K. Tiwari, for Defendant no.1.
Mr. Viraj Maniar, i/b Maniar Srivastava and Asso., for
Defendant Nos.3 and 4.

CORAM: N. J. JAMADAR, J.

DATED : 10th JANUARY, 2023

ORDER:-

1. The applicant – plaintiff has preferred this application seeking permission to amend the plaint so as to incorporate averments as regards the alleged cheating committed by defendant nos.1, 3 and 4, and unearthed by the Investigating Agency during the course of investigation in CR No.698 of 2015 (Goregaon Police Station) and CR No.102 of 2018 (Economic Offence Wing, Mumbai Police (“EOW”)), culminating in filing of the charge-sheet on 24th September, 2021. The applicant has

instituted the suit, *inter alia*, for a declaration that there is a valid and subsisting contract between the plaintiff and defendant no.1 as evidenced by the allotment letter dated 14th July, 2009, whereby and whereunder defendant no.1 agreed to allot an area admeasuring 9805 sq. ft. super built up in the building Goregaon Unnati Co-operative Housing Society Limited, defendant no.2, of which defendant no.1 was the developer. The applicant has also prayed for a decree for specific performance of the said contract. Defendant nos.3 and 4 came to be impleaded in the capacity of the assignees of defendant no.1.

2. The plaintiff claims that defendant no.1 represented to the plaintiff that it had entered into an agreement for redevelopment with defendant no.2 Society. Defendant no.1 had agreed to allot an area admeasuring 9805 sq. ft. in the building to be redeveloped for a total consideration of Rs.2,41,22,500/-. The agreement was evidenced by the letter of allotment dated 14th July, 2009, wherein defendant no.1 had acknowledged the receipt of Rs.50,00,000/- as and by way of earnest money. However, defendant no.1 failed to perform its part of the contract despite repeated request. Hence, the suit for specific performance.

3. In the instant application, the applicant avers that the applicant had also lodged a report with Goregaon police for the alleged offences of cheating, criminal breach of trust, forgery and use of forged document as genuine. Eventually the investigation in the said crime i.e. CR No.698 of 2015 came to be transferred to EOW. Post completion of investigation, the Investigating Agency has lodged a charge-sheet for the offences punishable under Sections 420, 409, 465, 467 and 471 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code"). The conclusions arrived at by the Investigating Officer demonstrate the falsity of the defence of the defendants that there was no agreement for sale and no portion of the suit property was ever allotted to the applicant.

4. It is, therefore, necessary to bring these subsequent developments on the record of the Court. Since the documents and material now sought to be pressed into service, were not within the knowledge of, and available to, the plaintiff before filing affidavit in lieu of examination-in-chief, the applicant deserves grant of permission to amend the plaint.

5. An affidavit-in-reply is filed on behalf of defendant no.1. At the outset, it is contended that since the trial has commenced

with the filing of the affidavit in lieu of examination-in-chief the bar under the proviso to Order VI Rule 17 comes into play and the Court cannot grant permission to the plaintiff to amend the plaint. It is contended that there is a disconnect between the averments in the application and the schedule of the proposed amendment. In any event, from the perusal of the documents sought to be relied upon alongwith the schedule of proposed amendment it becomes evident that the the plaintiff was aware of the existence of those documents much before lodging of the charge-sheet. The application is thus preferred to fill in the lacuna.

6. Defendant nos.3 and 4 have also contested the application by filing an affidavit-in-reply. It is contended that the proposed amendment does not stem from the subsequent developments. All the facts allegedly unearthed by the police and documented in the charge-sheet, according to defendant nos.3 and 4, were within the knowledge of the plaintiff. Therefore, the plaintiff cannot take mileage from the fact that the charge-sheet came to be lodged subsequent to the filing of the affidavit in lieu of examination-in-chief. According to defendant nos.3 and 4, issues sought to be urged by way of amendment are not germane to the

determination of the suit as the principal prayer of the plaintiff is of a direction to the defendants to specifically perform the contract.

7. I have heard Mr. Thakare, the learned Counsel for the applicant, Mr. Kanchan, the learned Counsel for defendant no.1 and Mr. Maniar, the learned Counsel for defendant nos.3 and 4, at some length. I have perused the material on record.

8. Mr. Thakare, the learned Counsel for the applicant, submitted that the fact that the charge-sheet came to be lodged in EOW Case No.102 of 2018 on 24th September, 2021 is a matter of record. According to Mr. Thakare proposed amendment simply professes to bring the said fact alongwith the consequences which it entails on the defence of defendant no.1. There is no element of prejudice to the defendants as the lodging of the charge-sheet is a matter of record. In contrast, in the absence of the said pleadings, the real question in controversy between the parties cannot be effectively adjudicated.

9. As against this, the learned Counsel for defendant no.1 would submit that the bar under the proviso to Order VI Rule 17 squarely applies. Inviting the attention of the Court to the various orders passed in the instant suit, Mr. Kanchan, the

learned Counsel for defendant no.1, submitted that the endeavour on the part of the plaintiff to seek interim relief has been twice repelled by the Court. In fact, in the order dated 29th March, 2017 passed in Notice of Motion No.1805 of 2012 this Court categorically recorded a finding that the rival contentions raised in the said Notice of Motion clearly made it imperative to take evidence. By the said order issues were directed to be settled.

10. Post settlement of issues by order dated 31st March, 2017, the plaintiff has tendered affidavit in lieu of examination-in-chief of its first witness on 18th April, 2017. It, therefore, cannot be said that trial has not commenced. Moreover, there have been two subsequent amendments. Even the endeavour of the plaintiff to obtain interim orders against the newly impleaded defendant nos.3 and 4 did not yield any result. Yet, by the proposed amendment, the applicant seeks to again renew the prayer of interim relief by adding prayer Clause C1(2). This is clearly impermissible, urged the learned Counsel for defendant no.1.

11. Mr. Maniar, the learned Counsel for defendant nos.3 and 4 supplemented the submissions of Mr. Kanchan, the learned Counsel for defendant no.1. Mere filing of the charge-sheet does

not constitute such an event of which the Court ought to take cognizance. Questioning the very propriety in proceeding against defendant nos.3 and 4 the learned Counsel prayed for rejection of the application.

12. First and foremost, it is imperative to note that the fact that the plaintiff had lodged FIR bearing No.698 of 2015 with Goregaon Police Station and, eventually, post completion of investigation, EOW lodged the charge-sheet for the offences punishable under Sections 420, 409, 465, 467 and 471 read with Section 34 of the Penal Code on 24th September, 2021 has not been put in contest. Indisputably, the said FIR was lodged before the commencement of the trial and charge-sheet came to be lodged after the plaintiff filed affidavit in lieu of examination-in-chief of its first witness. Thus, completion of investigation and its culmination into report under Section 173 of the Code do constitute subsequent events. It is trite that a Court is required to conscious cognizance of the subsequent events which bear upon the determination of *lis*.

13. Keeping in view of the aforesaid backdrop, the prayer in the instant application for amendment deserves to be appreciated. It is trite that all amendments which are necessary for

determination of real question in controversy between the parties ought to be allowed. This overarching principle is qualified by the consideration of potentiality of the prejudice to the opponent. This potentiality of prejudice may take the shape of the opponent being deprived of an accrued right or the opponent being not in a position to be compensated for any loss or inconvenience which may be occasioned by the amendment by payment of costs.

14. In the case at hand, by way of proposed amendment, the plaintiff professes to bring on record the outcome of the investigation in an offence registered at his instance. Undoubtedly, the finding of a Criminal Court much less the opinion arrived at by the Investigating Officer may not be of determinative significance. However, the fact that such an investigation had been carried out and it reflects upon propriety and probability of the defence of the defendants bears upon the adjudication. From this standpoint, the proposed amendment appears to be necessary for the determination of real question in controversy between the parties.

15. Since the genesis of the proposed amendment is in the subsequent development of completion of investigation and lodging of the charge-sheet, the bar contained in the proviso to

Order VI Rule 17 may not operate with full force and vigour. In any event, the defendants would have the opportunity to meet the case sought to be pleaded by way of the proposed amendment.

16. However, the contention on behalf of the defendants that by introducing the amendment in the plaint the plaintiff - applicant desires to renew the prayer for interim relief cannot be brushed aside lightly. Upon the perusal of the schedule of the proposed amendment, it becomes evident that by incorporating paragraph 13(G)(O) the plaintiff professes to plead urgency and seek interim relief in terms of proposed prayer Clause C1(2). This endeavour of the plaintiff does not merit countenance as the subsequent event which is the basis of the proposed amendment does not sustain a renewed effort to have interim relief.

17. I am, therefore, persuaded to partly allow the application. Hence, the following order.

: O R D E R :

- (i) The application stands partly allowed.
- (ii) The plaintiff is permitted to amend the plaint in accordance with the Schedule of the amendment excluding the averments in paragraph 13(G)(O) and prayer Clause C1(2).

- (iii) The plaintiff shall carry out the necessary amendment in accordance with the Schedule excluding proposed paragraph 13(G)(O) and prayer Clause C1(2), within a period of three weeks.
- (iv) Amended copy of the plaint be served on the defendants within a period of two weeks thereafter.
- (v) The defendants are at liberty to file an additional written statement within 30 days of being served with the copies of amended plaint.

[N. J. JAMADAR, J.]