

**IN THE COURT OF CITY CIVIL FOR GREATER BOMBAY
AT BOMBAY**

**CHAMBER SUMMONS NO.224 OF 2019
IN
S.C.SUIT NO.406 OF 2014**

Kurla Malayalee Samajam,
A Charitable Trust ... Plaintiff

Versus

1.M/s.S.Rajesh & Associates & Ors. ... Defendants

**CORAM: HIS HONOUR JUDGE SHRI K.P.NANDEDKAR
(COURT ROOM NO.9)**

DATE : 5th FEBRUARY, 2020

Mr.Bobde, ld. advocate for plaintiff.
Mr.Subramaniam, ld. adv. for defendant nos.1, 3 to 6.
Mr.Ansari, ld. advocate for defendant nos.2 and 7.

O R D E R

1. At the outset, it is necessary to point out here that this is the suit to be decided in the time bound period given by the Hon'ble High Court. Said period is coming to an end in the month of June, 2020. Chamber Summons No.224 of 2019 is taken out on 23/01/2019 that time the suit was pending before the Court Room no.9 and it came to be transferred to this Court in the end of April, 2019.

2. The reply to the Chamber Summons is filed by contesting defendant nos.2 and 7, however it seems that till transfer of the suit the chamber summons was not heard by my learned predecessor and even after transfer of the suit to this Court

:2:

Ch/s.224/19 IN SUIT-406/14

on 02/07/2019 as there was heavy rainfall in Mumbai plaintiff and his advocate were unable to attend the Court and the matter was required to be adjourned and thereafter anyhow the argument of plaintiff was completed on 23/01/2020 and today the arguments of contesting defendant nos.2 and 7 are completed. It is pertinent to note here that advocate for defendant nos.1 and 3 to 6 submitted that those defendants have no objection to allow the amendment as prayed by plaintiff and process to that effect is also filed by those defendants on record.

3. In the backdrop of above facts now I proceed to the fact that plaintiff has taken out this chamber summons for amendment in the plaint as per the schedule annexed to the Chamber summons. Mr.K.P.Ravi the President of Plaintiff's Trust has filed his affidavit in support of Chamber contending that plaintiff has filed this suit for the reliefs set out in the plaint. It is pointed out that plaintiff had at the time of filing of the suit had inadvertently left certain events of the year, 2002 which prove plaintiff's uninterrupted possession over suit property and therefore, those facts about the construction of additional big office in suit property and filing of the application No.20/2002 before Charity Commissioner by plaintiff are necessary to be brought on record along with the fact that the huge amounts of plaintiff's trust are withdrawn by defendants from the account of plaintiff. Further plaintiff is intending that the fact of filing of writ petition NO.2766/2002 is also necessary to be brought on record. It is further contended that the fact about payment to security persons,

demand letters received from BMC and electricity bills etc are necessary to be brought on record. It is contended that plaintiff had mentioned those documents in the affidavit of evidence of plaintiff, however those documents are not pleaded in the plaint inadvertently therefore, plaintiff has sought the amendment. According to plaintiff, if the amendment in question will be allowed no prejudice will be caused to defendants.

4. Contesting defendant no.2 has resisted the Chamber summons by filing the affidavit of reply contending that the Chamber summons is grossly belated and its designed with a view to improve the case set out by plaintiff in the plaint of the above suit, subsequent to the trial having commenced. It is pointed out that Mr.K.P.Ravi, plaintiff's president has filed affidavit of examination chief and exercise of admission and denial of the documents is also over and thereafter this chamber summons is taken out when documents filed by plaintiffs were refused to be accepted by the Court. Hence, according to defendant nos.2 and 7 the chamber summons cannot be allowed. Reference of proviso of Order-6 Rule-17 also given in the reply and it is contended that it is general and most fundamental rule of the pleadings is that post trial amendment of pleadings is not to be allowed except the exception that parties seeking amendment had exercised due diligence before the commencement of the trial. According to defendant nos.2 and 7 such due diligence is a condition precedent for allowing amendment after commencement of the trial. However according to those defendants, plaintiff has miserably failed to

meet out said condition precedent. The facts shown in proposed amendment were within the knowledge of plaintiff much prior to commencement of trial. Hence, according to contesting defendant nos.2 and 7 the chamber summons is necessary to be dismissed as it is against letter and spirit of Order-6 Rule-17 of CPC and it is proviso. As already observed defendant nos.1, 3 and 7 have filed pursis on record that they have no objection to make absolute chamber summons.

5. Heard plaintiff's advocate Mr.Bobde who has submitted that plaintiff is intending to bring on record the documents like affidavit filed by BMC in writ petition before the Hon'ble High Court and subsequent electricity, tax demand letter etc. which were received after filing of the suit. Hence, according to plaintiff's advocate no new fact is going to be brought on record but a simple amendment for referring the documents is sought and therefore, according to plaintiff's advocate the chamber summons is necessary to be made absolute. Plaintiff's advocate placed reliance between the case **Sajjan Kumar V/s. Ram Kishan reported in (2005) 13 Supreme Court Cases at page 89** wherein it is observed that...

“4. The trial Court rejected the prayer for amendment. The civil revision filed under Section 115 of the Code of Civil Procedure has been rejected by the High Court. Feeling aggrieved, the plaintiff appellant has filed the present appeal by special leave.

5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial Court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial Court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff-appellant succeeding in the suit.”

6. Advocate Mr.Ansari representing contesting defendant nos.2 and 7 has vehemently argued that the facts pleaded in the proposed amendment paragraph 5A and 5B are the facts related to the events of the year, 2002. Thus, those facts are related to the period before 12 years of filing of this suit which was filed in the year, 2014. It is argued that Order-6 Rule-17 proviso is applicable

to present case and the amendment as prayed by the plaintiff cannot be allowed because said amendment is sought with intention to fill up lacuna from the pleadings of the plaintiff. It is submitted that facts of 2002 were known to Mr.K.P.Ravi, the President of plaintiff, who has filed his affidavit of examination in chief int his suit, but said witness has not pleaded those facts in the plaint even though he has filed same application in the year, 2002 before the Charity Commissioner. According to defendant's advocate, plaintiff has not explained as to how inspite of due diligence plaintiff was unable to plead those facts in the plaint and hence according to defendant's advocate merely because the facts were not pleaded inadvertently will not give right to plaintiff to amend the plaint as a right that also after trial in the suit is commenced. It is submitted that the case law cited by plaintiff is not applicable to present case because in said case the amendment even though at the end of the trial was sought it was material for the proper decision of the suit and proper execution of the decree because correction about the description of suit property was sought to be brought on record by way of amendment in said suit and therefore, the Hon'ble Apex Court considering peculiar circumstances of said case has allowed said amendment. According to defendant's advocate the facts of present case are totally different. Plaintiff has not taken any care, plaintiff was not due and diligent and it is not sufficient to say that inadvertently the facts were not pleaded in the plaint. Hence, according to contesting defendant's advocate the chamber summons is necessary to be dismissed. In respect of proposed amendment in paragraph-

7A, it is argued on behalf of defendants that the electricity bill or tax demand bills etc referred in said paragraph were also within well knowledge of the plaintiff prior to commencement of the trial. Hence, according to defendants' advocate the chamber summons is apt to be dismissed.

7. I have given serious consideration to the arguments advanced. This is the interesting case in which plaintiff has filed affidavit of evidence, compilation of documents with list of documents. Thereafter, admission and denial was given on the part of contested defendants and documents which were possible to be exhibited are also exhibited that time. Plaintiff realized that some of the documents filed by plaintiff cannot be exhibited because they are not referred in the plaint and hence plaintiff has sought the amendment in the plaint to give reference to such unexhibited documents in the plaint. The documents and facts referred in proposed paragraph nos.5A and 5B are noticed to be the facts of the year, 2002. This suit is filed in the year, 2014 and it seems that affidavit of evidence of PW-1 and documents were filed by him in December, 2018 and the documents Exhs.19 to 35 are exhibited by the Court on 20/01/2019 and thereafter this Chamber summons is taken out by plaintiff. Non pleading of the documents by plaintiff in the plaint and to refer those documents in affidavit of evidence in my opinion amounts to improving of the case by plaintiff. If really, plaintiff would have intended to refer those documents in the plaint which were available with plaintiff since, 2002, definitely plaintiff would not have avoided to plead those

documents. Any how, plaintiff has not pleaded those documents in plaint and therefore, plaintiff has not given a chance to defendants to give their reply about those documents and facts which plaintiff is intending to bring on record by way of proposed amendment, in my opinion amounts to improving of case because defendants have filed their written statement and thereafter considering the controversies raised by the parties and considering the documents filed by parties on record Court would have framed the issues and thereafter if plaintiff is intending to refer new documents or refer new facts in the evidence which will amount to give the evidence without pleadings. It is settled principle of law that evidence without pleadings is useless as well pleading which is not having the support of evidence also is useless. Therefore, only it seems that for the purpose of improving the case plaintiff has noticed that the documents filed by him are without pleading and plaintiff is intending to seek proposed amendment. Said proposed amendment is nothing but the surprise not only to defendants but to court also because at the time of framing of the issues all the essential controversies raised by the parties are necessary to be considered by the Court and if after framing of the issues if such controversial facts like proposed amendment are brought on record again Court will have to adjourn the matter for amending the written statement by defendants, again recasted issues will have to be framed and as such the trial in the time bound will get prolonged and there will be no end to the dispute between the parties in a stipulated time given by Hon'ble High Court. In such circumstances, I find that proposed amendment as like paragraph

nos.5A and 5B cannot be allowed. Further as plaintiff is intending to amend paragraph no.7A for bringing the record the subsequent electricity and tax demand bills issued by BMC or bills related to the payment made by security guard after filing of the suit, at the most those facts can be considered but again it will amount to prolong the matter because again defendant will have to be given with a chance to file amended written statement. Further Court has to decide the suit considering the facts as on the date of cause of action of the suit and therefore even if subsequent event and subsequent payment bills etc. will not be brought on record it will not cause any effect on the facts as on the date of cause of action. In such circumstances, for the decision of this suit considering the date of cause of action, I find that subsequent documents are not necessary to be brought on record because those documents are not going to materially affect the date of cause of action or the rights of parties in respect of suit property prior to the date of cause of action of this suit. In such circumstances, even though plaintiff has cited the case law from the case between **Sajjan Kumar V/s. Ram Kishan**, I find that plaintiff cannot take benefit of said case law. Mr.K.P.Ravi, PW-1, who is knowing all the facts which are shown in proposed amendment was expected at least to explain that what kind of due diligence plaintiff has shown to bring on record the facts from proposed amendment. Further plaintiff is Trust and the word 'inadvertently' is vague word and Mr.K.P.Ravi can blame any one from the Trust for such inadvertence. Any how Mr.K.P.Ravi, PW-1 being the President of plaintiff's Trust is responsible for said negligence of inadvertence and for not taking

:10: Ch/s.224/19 IN SUIT-406/14

care of the matter in proper sense and now he is using from vague word 'inadvertence', I am unable to understand that due to whose inadvertence the facts from proposed amendment were remained to be brought on record. If the plaintiff, who is the master of the suit is not taking the care for proper pleadings, it amounts to waiving of some of the facts by him. In such circumstances, at this belated stage of cross-examination of PW-1, I find that definitely proviso of Order-6 rule-17 of PC is necessary to be made applicable to the facts of present case. Hence, I proceed to pass the following order.

O R D E R

Chamber Summons No.224 of 2019 stands dismissed/disposed off.

05/02/2020

Sd/-
(K.P.NANDEDKAR)
JUDGE,
CITY CIVIL COURT, MUMBAI.

Dictated on : 05/02/2020
Transcribed on : 25/02/2020
Signed by HHJ on : 26/02/2020

:11:

Ch/s.224/19 IN SUIT-406/14

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGEMENT/ORDER”

UPLOAD DATE	TIME	NAME OF STENOGRAPHER
05/02/2020	1.57PM	B.R.HATEKAR S.G.
Name of the Judge	HHJ Shri K.P.NANDEDKAR(CR No.9)	
Date of Pronouncement of Judgment/Order.	05/02/2020	
Judgment/order signed by P.O on	26/02/2020	
Judgment/order uploaded on	26/02/2020	