

SAHARA INDIA COMMERCIAL

CORPORATION LTD. ... Plaintiff

Versus

B. JEEJEEBHOY VAKHARIA &

ASSOCIATES ... DefendantS

**Court:**

High Court of Judicature at Bombay

**Decided on:**

24<sup>th</sup> June 2008

**Judge(s):**

A. P. Deshpande, J

**Judgment:**

Sahara India Commercial Corporation Ltd.

v/s.

B. Jeejeebhoy Vakharia and Associates & Ors.

Chamber Summons No. 587 of 2007 in Suit No. 3376 of 2005 decided  
on 24.6.2008

In the High Court of Judicature at Bombay

Counsel:

For plaintiff: Gaurav Joshi a/w J. Rais i/b Satyam Vora and Ms.  
Tanvi Gandhi

For defendants  
no. 1-3, 5,6,8: Mohammed Akram i/b Harilal Thakkar and CO.

For defendant  
no. 4: Vivek Kantawala a/w Ms. Amrim Saheed i/b Vivek  
Kantawala & Co.

For defendant  
No. 7 and 11: K . P Jain i/b Tushar Goradia and Bhavik Manek.

P.C.: -

1. By this Chamber Summons the plaintiff is seeking amendment of  
the plaint. The proposed amendment is very unusual in as much as what

is prayed is deletion of the name of the defendant no. 4 and simultaneously a prayer is also made to permit addition of the name of the defendant no. 4 in the suit. The obvious purpose for seeking the said amendment which relates to deletion of defendant no. 4 in the first instance and then addition thereafter is aimed at circumventing the provisions of section 164 of the Co-operative Societies Act which postulates notice prior to the institution of the suit.

2. The defendant no. 4 is a society registered under the Maharashtra Co-operative Societies Act. Without issuing a notice as contemplated by section 164, the suit came to be filed. In para 62 of the plaint, there is a categorical assertion made that notice under section 164 of the Maharashtra Co-operative Societies Act is not necessary, so far as the defendant no. 4 is concerned. Thus it is obvious that the suit came to be filed under an assumption that no notice as required by section 164 is necessary to be served before filing of the suit. At a later point of time, it is the submission of the learned counsel for the plaintiff, by way of an abundant precaution, the present Chamber Summons has been taken out with a view to delete the defendant No. 4/Cooperative Society and a further prayer is made to permit addition of the said Society. By this method, the Plaintiff seeks to avoid compliance of Section 164 of the Act to the detriment of the interest of the Plaintiff.

3. It is not being disputed that this Court had held that section 164 is mandatory and the non-compliance thereof would non-suit the plaintiff,

provided the suit is covered by section 164. The learned counsel for the defendant has placed reliance on the judgment of this Court in the case of *Gurudev Developers vs. Kurla Konkan Nivas Co-operative Housing Society*, reported in 2000(3)Mh.LJ 131 and a judgment in *Suprabhat Co-operative Housing Society Ltd. and anr. Vs. Span Builders and anr.*, reported in 2002(3)Mh.LJ 837. Section 164 of the Act, provides that no suit can be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after the notice in writing has been delivered to the Registrar stating the cause of action and other particulars. In the present case, the suit has been filed without issuing a prior notice as is contemplated by section 164 and thus in the facts of the case, if notice under section 164 had to be issued but had not in fact been so issued, the suit would not be maintainable. According to the plaintiff, at a latter point of time a notice came to be served on 8-2-2007 to the Registrar of the Co-operative Society, with a view to contend that the suit has been filed after a valid notice on the Registrar of the Co-operative Societies. Deletion of defendant no. 4 is asked for with simultaneous prayer for its addition as a party defendant thereafter. In view of the fact that section 164 is mandatory in nature, the court is expected to seek compliance of the said provision, and the court cannot have recourse to the inherent power, as suggested by the learned counsel for the plaintiff for circumventing section 164. It is a settled position of law that if a thing cannot be done directly, it cannot be permitted to be done indirectly. Thus as the suit cannot be instituted without prior issuing a notice under section 164, by

allowing the present Chamber Summons, the suit cannot be made tenable. The learned counsel for the plaintiff has placed reliance on the judgment of the Apex Court in *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal*, reported in AIR 1962 SC 527 to contend that as the situation emerging in the present suit is not regulated by any other provision of the Code of Civil Procedure, recourse need to be taken to section 151 of the Civil Procedure Code, so that the plaintiff does not suffer irreparable loss and hardship. Inherent powers can be resorted to in furtherance of cause of justice and there cannot be any doubt about that. However, if the prayer made in the Chamber Summons is to be granted, the same in my view, would go to circumvent the mandatory provision contained in section 164 of the Maharashtra Cooperative Societies Act, and allowing the prayer would not be in furtherance of cause of justice. In the result, the Chamber Summons is rejected.

*Order accordingly.*