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*IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION**CHAMBER SUMMONS NO.219 OF 2013**IN**SUIT NO.1948 OF 1983*

Sociedade De Fominto Industrial Pvt. Ltd.

..Applicant.

IN THE MATTER BETWEEN

Sociedade De Fominto Industrial Pvt. Ltd.

..Plaintiff.

V/s.

Tulshidas V. Patel Pvt. Ltd. & Ors.

..Defendants.

Mr.Darius Khambatta, Senior Advocate with Mr.Erach Kotwal,
Mr.Jayendra Kapadia & Mr.Gaurangi Pujara i/b. Little & Co. for the
Applicant / Plaintiff.

Mr.Gaurav Joshi, Senior Advocate with Ms.Priyanka Kothari, Mr.
S.V.Doijode Ms.Flaguni Thakkar & Ms.Prakruti Joshi for the
Defendants.

*CORAM : S.C.GUPTE, J.**DATED : 6 July, 2017*

P.C.:-

Heard learned counsel for the parties. By this Chamber

Summons, the Applicant / Plaintiff seeks permission to lead additional evidence of a witness, who has already filed affidavit of evidence in lieu of examination-in-chief and is currently under cross-examination by the Defendants. The application is on the footing that subsequent to the filing of the affidavit of evidence, the Plaintiff learnt of certain additional facts which have a material bearing on the controversy before the Court.

2. The controversy in the present case is concerning a flat in a building owned by the first Defendant company. The suit is for specific performance of a memorandum of understanding in respect of this flat entered into by Defendant No.1 with the Plaintiff. It has been claimed in the written statement filed by Defendant No.1 that this flat was agreed to be sold by Defendant No.1 to Defendant No.2. The Plaintiff alleges that Defendant No.2 is an entity controlled by Defendant No.1 or its Directors and that this transaction is entered into only with a view to defeat the rights of the Plaintiff. After the filing of the original affidavit of evidence, the Plaintiff claims to have learnt of certain additional facts in

connection with Defendant No.2. Defendant No.2 is a company registered in United Kingdom and its shareholders and Directors include the Directors and Shareholders of Defendant No.1. This was found out by the witness himself when he went to the United Kingdom, and took search at the Company House, United Kingdom (which is equivalent to our Registrar of Companies). There is no doubt that this additional fact found out by the witness has a material bearing on the controversy in the suit. In fact, on that basis, the Plaintiff has been allowed to amend the plaint subsequent to the commencement of the trial by this Court by its order dated 28 September, 2016.

3. Learned senior counsel for Defendant No.7 submits that as a matter of law, this Court would be slow to recall a witness using its powers under Order 18 Rule 17 of the Code of Civil Procedure in a case like this. Learned counsel submits that besides, in this case what is sought is not recall of a witness after conclusion of his evidence but in the midst of his cross-examination to lead further examination-in-chief. Learned counsel submits that this would be an

unusual procedure not countenanced in the Code of Civil Procedure.

4. It is not doubted that recall of a witness under Order 18 Rule 17 of the Code of Civil Procedure is permissible on the application of the parties. This power is not to be exercised only in a case where the Court on its own wants to put questions to him, but also when a party seeks to recall a witness and applies to the Court for such recall. No doubt, the Supreme Court in the case of ¹ *Vadiraj Naggappa Vernekar (dead) V/s. Shardchandra Prabhakar Gogate* held that the main purpose of this Rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties and that the provisions of Order 18 Rule 17 are not intended to be used to fill up omissions in the evidence of a witness, who has already been examined. But then, the evidence to be led additionally through the present witness, who is under cross-examination, does not pertain to filling up of any omissions in his evidence. This evidence is in fact necessitated as a result of an amendment of the plaint which was allowed by this

¹ (2009) 4 Supreme Court Cases 410

Court after the trial had commenced and after the witness had already tendered his examination-in-chief and was actually even under cross-examination. In any event, it would be permissible for the Plaintiff to bring in another witness to prove the fact which is sought to be proved through this witness. If that is so, the objection that such evidence ought not to be allowed for filling up the omissions in the evidence, has no merit. If these facts could have been brought on record through another witness, there is no reason why the same cannot be brought by allowing additional evidence in chief through the same witness. Learned counsel for Defendant No.7 submits that interposing of this examination-in-chief would entail marking of further documents. Even that is not an unusual circumstance. There are times when a witness is interposed during the cross-examination of another witness for bringing documents on record.

5. Considering the overall facts and circumstances and in the light of the peculiar situation resulting from an amendment which has been allowed by the Court after hearing all the parties in

the midst of a trial, it will be in the interest of justice to permit the Plaintiff to lead further examination-in-chief of PW1. In fact, such interposition will enable the Defendants to finally and effectively cross-examine the witness.

6. In the premises, the Chamber Summons is allowed in terms of prayer clause (a). The Commissioner for recording evidence may allow further examination-in-chief of PW1 by taking on record the additional affidavit of evidence proposed to be filed.

7. The additional affidavit of evidence be served on the Defendants latest by 14 July 2017. The suit to appear on board for marking of further documents on 31 July 2017.

(S.C.GUPTE, J.)