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

NOTICE OF MOTION NO.1751 OF 2017
IN
SUIT NO.3085 OF 1985

Hotel Empire Limited,
A company incorporated under the
Companies Act, 1956 and having its
Registered office at 1076, Dr. E. Moses
Road, Worli, Bombay 400 018 ..Applicant

In the matter of :

Hotel Empire Limited,
A company incorporated under the
Companies Act, 1956 and having its
Registered office at 1076, Dr.E. Moses
Road, Worli, Bombay 400 018 ...Plaintiff

vs.

1. Juhu Beach Resorts Private Limited,
A company incorporated under the
Companies Act, 1956 and having its
Registered office at Construction House "A",
24th Road, Khar, Bombay – 400 052.

2. Gaj Singhji II, Maharaja Saheb Bahadur of Jodhpur,

3. Krishna Kumarji, The Rajmata Sahiba of Jodhpur,

4. K. Jaswant Singh,

5. M. Prahlad Singh,

Defendant Nos.2 to 5 all of Jodhpur Indian
Inhabitants, the present Trustees of the
Trust named 'Her Highness Rajdadiji Smt.
Badan Kanwar Medical Trust'
Having their office at Umaid Bhavan
Palace, Jodhpur, in the State of Rajasthan ...Defendants

Mr. K.R. Bulchandani, a/w. Mr. Anoop Sharma, Mr. Amit Nikam, Mr. Avik Sarkar, i/b. S. M. Kazi, Advocates for Plaintiff/Applicant.

Mr. F. Devitre, Senior Advocate, a/w Mr. Rajesh Shah, Mr.Sanket Deshmukh, Adv.Sanidha Vedpathak, i/b. Maneksha & Sethna, Advocates for defendant Nos. 2 & 3.

CORAM : N.J. JAMADAR, J.

ORDER RESERVED ON : 13th JANUARY, 2020

ORDER PRONOUNCED ON : 26th MAY, 2020

JUDGMENT :

1. This Notice of Motion is taken out by the Plaintiff to recall the order dated 15th September, 2017 whereby the Suit was directed to be placed for final hearing and to allow the Plaintiff to lead further evidence and examine witnesses named in paragraph No. 16 of the affidavit in support of the Notice of Motion, for whom a witness summons is sought.

2. The Plaintiff has instituted the suit *inter alia* for a declaration that the Defendant No.1 is in a wrongful use and occupation of the land admeasuring 14292.81 sq.mtr bearing survey No. 33, Hissa No. 1 forming part of Pilchachi Bat situated at Juhu Mumbai (hereinafter referred to as "the suit property"). The Defendant No. 1 has in turn instituted a suit bearing No. 2841 of 1987 for specific performance of the agreement dated 16th January, 1974 whereunder the Plaintiff had agreed to assign its leasehold rights in the suit property in favour of the Defendant No. 1.

3. By an order dated 1st August, 2008 this Court directed that evidence in both the suits namely Suit No. 3085 of 1985 and Suit No.2841 of 1987 be recorded separately; the evidence in Suit No. 3085 of 1985 shall be recorded first. The Court in its order dated 15th January, 2014 recorded that the Plaintiff's evidence in Suit No. 3085 of 1985 was complete. After the Defendant No. 1 led its evidence the suit came to be posted before the Court on 11th April, 2016. The Court recorded a statement on behalf of Defendant Nos. 1 to 3 that Defendants were not desirous of leading further evidence. Thereupon, the suit came to be posted for arguments on 4th July, 2016.

4. In the aforesaid backdrop when the Suit was listed before the Court on 15th September, 2017 the learned single Judge recorded the statement on behalf of the learned counsels for the Plaintiff and Defendant that the evidence in Suit No. 3085 of 1985 is complete and matter was ripe for arguments. Thus, the matter was directed to be listed for arguments on 12th October, 2017.

5. As the matter thus stood posted for arguments, the Plaintiff has taken out this Notice of Motion.

(a) The Plaintiff asserts that when the matter was listed before the Court on 15th September, 2017 Mr. Kazi, the learned Advocate of the Plaintiff was not properly briefed and on account of the personal difficulties the learned counsel had not had the meetings with the counsel who was briefed in the matter and therefore on 15th September, 2017 proper submissions regarding the intent of the Plaintiff to lead further evidence were not made. The fact that both the suits were tagged and were taken up for hearing together was also not appropriately brought to the notice of the Court. Thus Suit No. 3085 of 1985 was directed to be listed for arguments whereas the evidence in companion Suit No. 2841 of 1987 is yet to be recorded. When the attention of the counsel for the

Defendant No. 1 was invited to this aspect of the matter the Defendants gave an evasive reply that the submissions made before the Court on 15th September, 2017 were restricted to Suit No. 3085 of 1985 alone. The said stance of the Defendant No. 1 is in derogation of the earlier orders passed by this Court on 1st August, 2008 whereby evidence was directed to be recorded in both the suits one after the another and the order dated 15th January, 2014, wherein the said position was reiterated.

(b) The Plaintiff has further asserted that after the evidence of the Defendants was closed the Plaintiff had taken out Notice of Motion 1409 of 2016 seeking permission to lead further evidence. The said Notice of Motion came to be rejected by this Court by an order dated 14th July, 2017; however the Court had made it clear that the rejection of the said Notice of Motion shall not prejudice any application which may be made by the Plaintiff later in the suit for issuance of witness summons to Mr. Vasu Bijlani or Government or Revenue officials or to any other witness if permissible in law. Thus the right of the Plaintiff to examine further witnesses in support of its claim was expressly reserved by the order dated 14th July, 2017. As the Plaintiff were in the process of making an appropriate application for issuance of

witness summons and on account of personal difficulty the Plaintiff could not properly brief the advocates, the matter was listed before the Court on 15th September, 2017 on which date the direction for listing the Suit No. 3085 of 1985 for arguments came to be passed. Thus the Plaintiff is constrained to file the Notice of Motion to recall the order dated 15th September, 2017 as a material error has crept in, in the proceedings, and it would cause grave prejudice to the rights of the Plaintiff.

(c) The Plaintiff proposes to examine Mr. A.H. Parpia or any of the authorized representative of M/s. A.H. Parpia & Co. Advocates and Solicitors to prove the authenticity of the typed copy of the letter dated 27th March, 1978 at Exhibit 103; (ii) Mr. H.H. Tapia, partner of M/s. P.C. Hansoti & Co., Chartered Accounts to prove and verify the signature on documents at Exhibit P-102 colly. authenticity of certain entries relating to the subject matter of the suit, particularly Note No. 1 to the Statement of Accounts for the year ended December, 1975, December, 1976, December, 1977 and December, 1979; (iii) Executive Engineer (Building Proposals and Dy. Chief Engineer), Bombay Municipal Corporation, Bandra for the action taken on the letters of Defendant No. 1

(Exhibit - P-54, P-55, P-56, P-60) and P-61, undertaking (P-57) and affidavit (P-58); (iv) Municipal Commissioner for deposing as to action taken by the Mumbai Municipal Corporation on the letter dated 2nd January, 1979 and 22nd December, 1980 addressed by the Plaintiff and the Plaintiff's advocate respectively at Exhibit P-51 and P-52A; (v) City Survey Officer No. 9, Bombay Sub Urban Districts with regard to mutation of the name of Defendant No. 1 as a sub lessee in the record of right at Exhibit P-64.

(d) The Plaintiff asserts that the examination of the witnesses is imperative as D.W. No.1 has feigned ignorance about the events and documents with reference to which the witnesses are sought to be examined. Thus, in order to advance the cause of justice the Plaintiff be permitted to examine the abovenamed witnesses and witness summons be issued to those witnesses.

(e) By filing an additional affidavit the Plaintiff has affirmed that after the passing of the order dated 14th July, 2017 and taking out the instant Notice of Motion the Plaintiff could lay its hands on an old file titled as, "complete old file" in eastern office file No. 1 containing typed and

zerox copies of certain relevant and important documents which bear upon the subject matter. The Plaintiff claimed that in the said file they have found the typed office carbon/ Photostat copies of the documents Exhibit P-7, P-8, P-18A, P-34, P-41, P-42, P-103, P-105 and typed office carbon copy of the letter dated 6th February, 1978 addressed by the advocate of Chandru L. Raheja, to the advocate of Defendant No. 1 and typed carbon copy of the original letter dated 9th March, 1978 from the advocate of Chandru L. Raheja and others to the advocate of Defendant No. 1, which documents have been relied upon by the Plaintiff in support of the agreement dated 16th January, 1978 and the letter dated 6th February, 1978 and the supplementary agreement entered into between the Plaintiff and the Defendants. The Plaintiff further claimed that they have got these documents examined by a hand writing expert namely Dr. V.C. Mishra, who has vouched for the authenticity, correctness and age of those documents. The Plaintiff thus seeks to examine Dr. V.C. Mishra, the Forensic Expert, besides the persons named in para No. 16 (i to v) of the affidavit in support of the Notice of Motion and liberty to lead further evidence as may be required on the documents at Exhibit P-41, P-103, P-34 and also document at Exhibit P-42 and to prove the existence of the letters dated 6th February, 1978 and 9th March, 1978 addressed by advocate of Chandru Raheja to Defendant No. 1.

6. The Defendant No. 1 has resisted the application by filing an affidavit in reply. At the outset the tenability of the instant Notice of Motion is called in question. It is submitted that Plaintiff had taken out Notice of Motion No. 1409 of 2016 wherein the Plaintiff had sought permission to lead further evidence and examine witnesses. During the course of the hearing of the said Notice of Motion the Plaintiff had confined the dispute to three specific aspects as recorded in the order dated 14th July, 2017 and the Court had expressly rejected the prayer of the Plaintiff to lead further evidence on those three aspects. The Plaintiffs are now thus precluded from reagitating the same matter which stood concluded by the order passed by this Court on 14th July, 2017 in Notice of Motion No. 1409 of 2016.

7. On merits the Defendant No. 1 contents that the instant Notice of Motion is another instance of the dilatory tactics adopted by the Plaintiff to delay the disposal of the suits. The Plaintiff had closed its evidence on or about 20th April, 2012 after leading evidence of as many as 7 witnesses. The Defendant No. 1 closed its evidence on or about 28th March, 2016. On 11th April, 2016 this Court recorded the statement made on behalf of Defendant Nos. 1 to 3 that they were not desirous of leading any further evidence in support of their case. The matter

was at that point only directed to be listed for arguments on 4th July, 2016. Thereafter, the Plaintiff took out the aforesaid Notice of Motion No. 1409 of 2016 and sought identical relief which are now sought in the present Notice of Motion. The said Notice of Motion came to be dismissed by this Court by order dated 14th July, 2017. In the circumstances, when the matter was listed before the Court on 15th of September, 2017, no submission was made on behalf of the Plaintiff to examine any witness. In the aforesaid backdrop the prayer of the Plaintiff seeking permission to examine further witnesses does not deserve countenance.

8. Dealing with the additional affidavit whereby the Plaintiff sought to examine hand writing expert Mr. V.C. Mishra and lead further evidence in respect of the documents which do not form part of the record, the Defendant No. 1 has asserted that the Plaintiff professes to re-open the entire matter. The claim that the Plaintiff has led hands on an old file is unworthy of credence. The Defendant No. 1 has contested the averments made by the Plaintiff as regards the circumstances in which the old file containing the documents was allegedly traced out and the authenticity, age and correctness of those documents. On these, amongst other, grounds the Defendant No. 1 has prayed for the dismissal of the Notice of Motion.

9. I have heard Mr. Bulchandani, the learned counsel for the Plaintiff and Mr. Devitre, the learned Senior Counsel for the Defendant No. 1, at some length.

10. Mr.Bulchandani, the learned counsel for the Plaintiff submitted that the order dated 15th September, 2017 whereby the suit No. 3085 of 1985 alone came to be posted for arguments deserves to be recalled as the said order makes a complete departure from the earlier orders passed by this Court whereby the both the suits were tagged together and evidence was directed to be recorded one after the other. Final hearing and disposal of Suit No. 3085 of 1985 without recording evidence in the companion Suit No. 2841 of 1987 will not only cause serious prejudice to the rights of the parties but even the Court would not be in a position to completely and effectually adjudicate the disputes between the parties once and for all. Inviting the attention of the Court to the orders passed by this Court on 1st August, 2008 whereby it was directed that evidence in both the suits shall be recorded separately and the evidence in Suit No. 3085 of 1985 shall be recorded first, and a subsequent order dated 15th January, 2014 wherein the same arrangement was reiterated, Mr. Bulchandani submitted that at this stage the order dated 15th September, 2017 has the effect of suddenly snapping the bond between Suit No. 3085 of 1985 and Suit No. 2841 of 1987.

11. The learned counsel for the Plaintiff submitted that the order dated 14th July, 2017 passed by this Court in Notice of Motion No. 1409 of 2016, which is pressed into the service by Defendant No. 1 to contest the prayer in the instant Notice of Motion, in fact, in express terms reserves the liberty to the Plaintiff to examine the witnesses which are necessary for the just decision of the case. Inviting the attention of the Court to the, observations, especially in the concluding paragraph of the said order, to the effect that “the said order will not prejudice any application which may be made by the Plaintiff later in the suit for issuance of witness summons to Mr. Vasu Bijlani or Government / Revenue officials being item No. 11 and 12 in the list of witnesses furnished across the bar at the hearing of the said Notice of Motion and that the said order will not prejudice any application that may be made by the Plaintiff for issuance of witness summons to any other witness if permissible in law”, Mr. Bulchandani urged that the said order dated 14th July, 2017 does not preclude the Plaintiff from examining the witnesses in support of its claim.

12. Mr. Bulchandani further submitted that in view of the provisions contained in Rule 1 of Order 16 of the Code of Civil Procedure (the Code) as amended by Bombay High Court, a party can examine a witness at any time after the institution of the suit and before the pronouncement of the judgment. The

predominant consideration is whether the examination of the witnesses is necessary for a just decision of the case. From this stand point, according to learned counsel for the Plaintiff the alleged ground of delay in examination of the witnesses sought to be urged by the Defendant No.1 is of no salience. Even otherwise the Plaintiff is constrained to seek examination of the proposed witnesses as the Defendant's witness feigned ignorance about those events and documents with which the D.W. No. 1 was confronted during the course of cross examination. Faced with such stubbornness, the Plaintiff has no other go but to examine the proposed witnesses in support of its claim, urged Mr. Bulchandani.

13. Per contra, Mr. Devitre urged with a degree of vehemence that the instant application for issuance of witness summons is actuated by a desire to reopen the entire trial and delay the disposal of the suits. Amplifying the submission Mr. Devitre would contend that the very premise of the application that on 15th September, 2017 (when the matter was directed to be listed for argument on express statements having been made by the counsel for the both the parties), the learned counsel for the Plaintiff was not properly and adequately instructed is fraught with untrustworthiness. It does not appeal to human credulity that the learned counsel would have missed to make the stand clear that the Plaintiff still wanted to examine more witnesses especially in the backdrop of the order passed by this Court on 14th July, 2017 in Notice of Motion No. 1409 of 2016.

14. It was further submitted that the said order dated 14th July, 2017 precludes the Plaintiff from agitating a issue which was expressly given up during the course of the hearing of the said Notice of Motion. Laying emphasis on the opening paragraph of the said order wherein this Court has in terms recorded that other than the specified three aspects, the other matters forming part of said Notice of Motion were not pressed by the Plaintiff, Mr. Devitre urged that the Plaintiff cannot now turned around and seek the very same prayers in an indirect manner. Mr. Devitre further submitted that the observations of the Court in paragraph No. 5 to the effect that the said order will not prejudice any application that may be made by the Plaintiff for issuance of witness summons to any other witness, if permissible in law, does not give a *carte blanche* to the Plaintiff to examine any witness *de-hors* the relevancy of the evidence proposed to be led and the stage of the trial. The claim of the Plaintiff that the Plaintiff has found out an old file containing a number of documents, including the documents copies of which were never placed before the Court while leading evidence, under the caption, “complete old file” is inherently unworthy of credence. The very title of the file “complete old file” belies the claim of the Plaintiff as when those documents were allegedly stored in the said file, the file could not have been “old” at that point of time. Lastly, Mr. Devitre raised a legal challenge to the endevour of the Plaintiff to lead evidence after the completion of the evidence of

the Defendant. It was submitted that the Plaintiff cannot as a matter of right lead evidence in rebuttal on issues, the onus of which is on the Plaintiff and in proof of which the Plaintiff has already led the evidence.

15. To lend support to the aforesaid last submission, Mr. Devitre placed a strong reliance upon a Division Bench Judgment of Punjab and Harayana High Court in the case of **Jagdev Sing Anr. vs. Darshan Singh and Ors.**[1]. In the said case the Punjab and Harayana High Court was confronted with the question whether the Plaintiff-Respondent could examine the hand writing expert in the rebuttal evidence after having led their evidence in the affirmative on the issues, the onus of which was on them ? After adverting to its previous pronouncement in the case of **Surjit Singh and Ors. vs. Jagtar Singh and Ors.**[2] and the construction put on the text of Rule III of Order 18 of the Code therein, the Punjab and Harayana High Court answered the question in the following terms :

16.

> *"6 In terms of the aforesaid dictum, it is evident that the plaintiffs-respondents cannot as a matter of right lead evidence in rebuttal on issues, the onus of proof of which is on them. The plaintiffs-respondents had concluded their evidence in the affirmative on 11.3.1998 and reserved their right to produce*

1 AIR, 2007 Punjab and Harayana 118

2 AIR 2007, Punjab and Haryana 1

> *evidence in rebuttal. However, the onus to prove the memo of partition dated 12.5.1989 and the rapat roznamcha which was got entered with the Halqa Patwari on 29.7.1994 was on them (plaintiffs-respondents). Therefore, they could not examine the handwriting expert as a matter of right. Therefore, it is to be seen in the facts and circumstances of each case whether the plaintiffs can examine a handwriting expert in rebuttal. The ground for examination of the handwriting expert is that the defendant- Jagdev Singh while appearing in the witness box did not give clear answer as regards his signatures on the memo of partition dated 12.5.1989 and the rapat roznamcha which was got entered with the Halqa Patwari on 29.7.1994. In this regard, it is appropriate to note that it is for the plaintiffs to prove their case in accordance with law on the basis of evidence. The fact that Jagdev Singh in his cross-examination did not make clear the point as to whether the said documents bear his signatures would not per se entitle the plaintiffs to examine a handwriting expert in rebuttal although for not giving answers to the questions posed during cross-examination may entail the drawing of an adverse inference for the purposes of appreciation of evidence. However, it would not give a right to the plaintiffs to make clear the point by producing a handwriting expert at that stage. In the circumstances, the learned trial Court while passing the impugned order has violated the procedure provided for leading evidence which has resulted in causing prejudice to the petitioners and would vitiate the impugned order."*

17. Mr. Bulchandani joined the issue by canvassing a submission that the opposition to the prayer of the Plaintiff to examine witnesses, which is essentially rooted in the stage of the suit and the aspect of delay, does not hold much ground. Mr. Bulchandani submitted that in law, there is more flexibility as regards the stage of the proceedings in view of the Bombay High Court Amendment to Order 16 Rule 1 of the Code. Inviting the attention of the Court to Rule 1, as amended by the Bombay High Court, which provides that 'at any time after the

Suit is instituted, parties may obtain, on an application to the Court or to such officer as it appoints in this behalf summons to persons whose attendance is required either to give evidence or to produce documents,' it was submitted that the Rule 1 as amended by the Bombay High Court does not envisage the obligation on the party to submit a list of witnesses which Rule 1 of Order 16 of the Code (Principal) casts.

18. To bolster up this submission, Mr. Bulchandani placed a strong reliance on a judgment of learned single judge of this Court in the case of **Rajendra Mohanlal Rathi vs. Shamabai Ramsingh Punjabi and Anr.** [3], wherein the learned single judge of the Bombay High Court had considered the effect of the Bombay amendment. It was inter alia observed that in terms of Sub rule (3) of Rule 1, Order 16 it is within the discretion of the Court, for the reasons to be recorded, to permit a party to call whether by summons through Court or otherwise any witness other than those whose names appear in the list referred to in sub Rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. Hence, in terms of Rule 1(3) the Court is sufficiently possessed with the power to summon a witness if the same is necessary for the adjudication of the issue before the Court. It was further observed that the rejection of the

3 2011 (6) Bombay C.R. 569

application by the trial Court by placing reliance upon the original Rule 1 of Order 16, which is not applicable in view of Bombay Amendment, was unsustainable.

19. Mr. Bulchandani also placed reliance upon the judgments of the Supreme Court in the case of **Mangeram vs. Brij Mohan**[4] and **Vidyadhar vs. Manikrao**[5]**.** In the case of ***Vidyadhar vs. Manikrao*** (Supra), the pronouncement in the case of ***Mangeram*** (Supra) was followed and the interplay between Rule 1 and Rule 1A of Order 16 was expounded as under:

> *"30 These two Rules read together clearly indicate that it is open to a party to summon the witnesses to the Court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Sub-rule (3) of Rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by a party in the Court, it may allow the party to produce a witness though he may not have been summoned through the Court. Rule 1A which was introduced by the CPC (Amendment) Act, 1976 with effect from 1.2.1977 has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is subject to the provisions of Sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the Court may be necessary but this by itself will not mean that Rule 1A was in derogation of Sub-rule (3) of Rule 1……"*

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4 AIR 1983 S.C. 925

5 AIR 1999 S.C. 1441

20. From a conjoint reading of Rule 1 of Order 16, as amended by the Bombay High Court, and sub Rule (3) of Rule 1 and Rule 1A, it becomes abundantly clear that the discretion is conferred on the Court to permit a party to examine a witness at any stage after the institution of the suit but before the pronouncement of the judgment so as to advance the cause of substantive justice. The power is vested in Court to permit a party to examine a witness if the Court comes to the conclusion that the evidence of the said witness is necessary to elucidate the matters in controversy and facilitate the just decision of the case. Ordinarily a prayer to examine a witness is not rejected on the count of delay alone unless the Court finds that the application is not made bonafide or it is made with an oblique motive to abuse the process of the Court or otherwise tends to defeat the ends of justice.

21. On the aforesaid touchstone, reverting to the facts of the case, undoubtedly the Plaintiff had not pressed the prayers except the three counts which were dealt with by this Court in Notice of Motion No. 1409 of 2016 by order dated 14th July, 2017. If the combined effect of the instant Notice of Motion coupled with the additional prayer made in the additional affidavit is taken into account, then it becomes evident that the Plaintiff desires to lead evidence even

in respect of those matters, on which the permission to examine the witnesses was expressly rejected by this Court by the aforesaid order dated 14th July, 2017. The Plaintiff has to surmount a further challenge as by way of additional evidence the Plaintiff seeks to place on record certain documents which were not tendered hitherto. Nay, the existence of some of the documents was not even made known to the adversary.

22. In the aforesaid peculiar situation, it is imperative to note the real question in controversy between the parties. A brief resume of the suit would be apposite. The Plaintiff claimed that an indenture of lease in respect of the suit premises was executed in its favour on 24th February, 1972. Subsequently, a deed of settlement came to be executed on 25th March, 1972 between Defendant Nos. 2 and 3 under which a trust namely "'Her Highness Rajdadiji Smt. Badan Kanwar Medical Trust', came to be settled. The reversionary interest in the suit property came to be transferred to the said trust. Thereafter, by an agreement of assignment dated 16th January, 1974 (the suit agreement) the Plaintiff agreed to assign to Defendant No. 1 its leasehold right in the suit property in consideration of sum of Rs. 50,37,400/-. Defendant No. 1 paid Rs. 12,37,400/- under the terms of the said agreement. Thereupon possession of the suit property was delivered by the Plaintiff to Defendant No. 1 on 16th January, 1974. A power of attorney for

developmental rights was also executed by the Plaintiff in favour of the Directors of Defendant No. 1 on 16th January, 1974. It is the claim of the Plaintiffs that the Defendant No. 1 failed and neglected to pay the balance consideration of Rs. 38 lakhs, in two installments, as agreed. Thus the Plaintiff cancelled and terminated the suit agreement of assignment of leasehold rights dated 16th June, 1974, revoked the power of attorney and the license granted to Defendant No. 1 to enter upon the suit property.

23. In the meanwhile, the Defendant Nos. 2 to 5 purported to transfer their reversionary interest in the suit property in favour of the Defendant No. 1. An agreement dated 6th September, 1984 transferring the revisionary interest in the suit property, subject to the leasehold rights of the Plaintiff, in favour of Defendant No. 1 came to be executed. The Defendant No. 1 instituted a suit, being Suit No. 1965 of 1985, for specific performance of the said agreement dated 6th September, 1984. Within a couple of days of the institution, a consent decree was obtained in Suit No. 1965 of 1985 on 9th August, 1985. The Plaintiff alleged that this consent decree is a fraudulent and collusive decree obtained with a desire to defeat the legitimate leasehold rights of the Plaintiff.

24. The Plaintiff has thus instituted the suit for declaration that the Defendant No. 1 is in wrongful use and occupation of the suit property; the Defendant No. 1 has no right, title and interest therein; the consent decree in suit No. 1965 of 1985 is void, illegal and does not bind the Plaintiff. The Plaintiff has also sought the consequential reliefs of quashing and setting aside the said decree and a direction to the Defendant No. 1 to quit and vacate the suit premises and handover its possession to the Plaintiff. The damages are also sought by the Plaintiff.

25. The tenor of the suit instituted by the Plaintiff is that the Defendant No. 1, in whose favour the suit agreement was executed, neglected and failed to perform its part of the contract and thus the Plaintiff lawfully cancelled and terminated the suit agreement. Resultantly, the Defendant No. 1 has no right, title and interest to hold on to possession of the suit property and the Defendant No. 1 be thus ordered to vacate the suit property.

26. In contrast to this, the Defendant No. 1 in the companion suit seeks the specific performance of the said agreement. The obvious case of the Defendant No. 1 is that the suit agreement is still legal, valid and binding upon the assignor

and it has not been lawfully terminated and thus the Defendant No. 1 is legally entitled to a decree for specific performance of the said agreement.

27. Commonality of the issues which have been framed in both the suites can be appreciated if the relevant issues are compared and contrasted. The issues in suit No. 3085 of 1985 and Suit No. 2841 of 1987 are thus extracted below in a tabulated form for convenience of appreciation.

Suit No. 3085 of 1985	***Suit No. 2841 of 1987***
11. Whether the plaintiffs were entitled to cancel and terminate the said agreement as alleged in paras 11 and 13 of the plaint? *12. Whether the plaintiffs prove that the actual transaction for sale of shares of plaintiffs fell through and that concerned persons had been repaid the amounts paid by them as contended by plaintiffs by letter dated 27.04.1981 at Exhibit DD to the plaint and referred to by the defendant no.1 in para 11(r) of the written statement?*	*9. (a) Do the defendants prove whether there was mutual termination of agreement for sale of shares dated 16.1.1974?* *(b) If answer on (a) is in affirmative whether the said agreement dated 16.1.1974 was terminated as set out in para 7(iv) of Supplementary Written statement? 26 of the plaint?*
13. Whether the consent decree obtained by the Defendant no.1 in Bombay High Court suit no.1965 of 1985 is not binding on the plaintiffs as alleged in para 27 of the plaint?	*10. Whether the plaintiffs prove that the agreement dated 16.1.1974 is still valid, subsisting and binding on the parties?*
14. Whether the plaintiffs are estopped from denying the rights of Defendant no.1 to specific performance of the agreement dated 16.1.1974 as alleged in para 11(w) of the written statement?	*8. Do the defendants prove that agreement dated 16.1.1974 was never to be acted upon as the real transaction was the takeover of the defendant company by plaintiffs by agreement for sale of shares dated 16.1.1974l as set out in para 7 of the*

	supplementary written statement?
15. Whether the defendant no.1 is entitled to specific performance of the agreement dated 16.1.1974 as alleged in para 11 of the written statement?	*12. Whether the plaintiffs prove that the defendants are estopped from denying the plaintiffs right to obtain specific performance of the agreement dated 16.1.1974 as stated in para 29 of the plaint?*
16. Whether plaintiffs are entitled to possession of the suit property for the reasons alleged in para 26 of the plaint?	*13. Whether the plaintiffs are entitled to specific performance of the agreement dated 16.1.1974?*
17. Whether the plaintiffs are entitled to damages and mesne profits as alleged in para 26 of the plaint?	*4. Whether the plaintiffs prove that their continuing to be in possession of the suit property and the foreshore land gives right to the plaintiffs to claim part performance of the agreement dated 16.1.1974 as stated in paragraphs 8 and 27(e) of the plaint?*
	5. If the answer on issue no.4 is in the affirmative are plaintiffs entitled to protection under section 53A of the Transfer of Properties Act?

28. If the aforesaid issues are compared and contrasted, it becomes evident that the issues revolve around the enforceability of the suit agreement dated 16th January, 1974. The Plaintiff claimed that the said agreement has been lawfully terminated and cancelled. In contrast the Defendant No. 1 asserts that the said agreement is still valid, subsisting and binding on the parties. Ultimately, the controversy boils down to the issue of enforceability of the suit agreement and

the entitlement of the Defendant No. 1 to the specific performance of the said agreement.

29. In the light of the aforesaid nature of the controversy, it is pertinent to note that the two suits, in a sense, reflect two different versions and interpretation of the consequences which emanate from the acts and omissions of the parties in the context of the suit agreement. This Court has therefore directed that the evidence in both the suits be recorded separately. However, evidence in suit No. 3085 of 1985 was directed to be recorded first. This direction is required to be construed in the light of the fact that the fate of the suits is inextricably intermingled. A definitive finding in suit No. 3085 of 1985 on the issues extracted above will seal the fate of the issues in Suit No. 2841 of 1987.

30. From this standpoint, the order passed by this Court on 15th September, 2017 in Suit No. 3085 of 1985, which implies that the said suit alone be listed for arguments, has the effect of virtually deciding the Suit No. 3085 of 1985 as a standalone suit. In the backdrop of the nature of the issues, which arise in the companion Suit No. 2841 of 1987, it is in the fitness of the things that the evidence in Suit No. 2841 of 1987 be also recorded and arguments in both the

suites be heard, one after another, and thereafter both the suits are adjudicated simultaneously. Proceeding with the hearing and adjudication of Suit No. 3085 of 1985 alone will have the effect of foreclosing the fate of Suit No. 2841 of 1987. Thus, to this extent, I am inclined to recall the order dated 15th September, 2017 to mean that the arguments in Suit No. 3085 of 1985 would be heard after the conclusion of the evidence in the companion suit, i.e., Suit No. 2841 of 1987.

31. The second prayer is to permit the Plaintiff to lead further evidence by examining witnesses as proposed in paragraph 16 of the affidavit in support of the Notice of Motion. In my considered opinion, the prayer made in the additional affidavit seeking permission to tender the documents, some of which have not seen the light of the day, and examine a hand writing expert in support of the genuineness, authenticity and age of those documents, completely changes the complexion of the prayer to examine the witnesses. There is substance in criticism advanced on behalf of Defendant No. 1 that Plaintiff endevours to reopen the entire trial.

32. The fact that the evidence in Suit No. 2841 of 1987 is yet to be led opens another dimension. As indicated above, the crux of the matter is the

enforceability of the suit agreement. The Plaintiff will have an opportunity to lead evidence in Suit No. 2841 of 1987, in the capacity of defendant therein. The documents which are now sought to be produced can be tendered by the Plaintiff in Suit No. 2841 of 1987 and the evidence which the Plaintiff proposes to lead can very well be led in the companion suit. As the controversy revolves around the validity and enforceability of the suit agreement, no prejudice would be caused to the Plaintiff, if the prayer to lead further evidence in Suit No. 3085 of 1985 is declined as the Plaintiff will have efficacious opportunity to lead evidence in Suit No. 2841 of 1987 on the very same facts in issue. This course would obviate further delay in disposal of the suits.

33. Hence, I am inclined to pass the following order:

O R D E R

a] The Notice of Motion stands partly allowed.

b] The order dated 15th September, 2017 to post Suit No. 3085 of 1985 alone for arguments stands recalled.

c] The arguments in Suit No. 3085 of 1985 would be heard after the conclusion of the evidence in Suit No. 2841 of 1987.

d] The prayer of the Plaintiff to allow the Plaintiff to lead the further evidence in the instant suit and examine witnesses stands rejected. However, the Plaintiff will have the liberty to lead said evidence and examine the said witnesses, in the capacity of Defendant No. 1 in Suit No. 2841 of 1987 wherein identical issues arise for adjudication, subject to the orders of the Court.

e] It is hereby made clear that in the event Suit No. 2841 of 1987 is withdrawn or otherwise disposed of, the Plaintiff will have the liberty to renew the prayer to lead further evidence and examine the witnesses in Suit No. 3085 of 1985.

f] The Notice of Motion stands accordingly disposed of.

g] The Suit No. 2841 of 1987 be listed before the Court for directions as regard recording of evidence therein.

(N.J. Jamadar, J.)