

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.913 OF 2026

M/s. Creation, a Partnership Firm

...Petitioner

Versus

Kirti Sohan Modi & Ors.

...Respondents

Mr. Prasad Dhakephalkar, Senior Advocate a/w. Mr. Tanvir Shaikh
i/b. Mr. Sanjay Manek, for the Petitioner.

Mr. Mohan Bir Singh a/w. Ms. Pooja Jalan i/b. MBS & Co., for the
Respondent No.3.

CORAM: MADHAV J. JAMDAR, J.

DATED : 28th JANUARY 2026

PC:-

1. Heard Mr. Dhakephalkar, learned Counsel appearing for the
Petitioner and Mr. Singh, learned Counsel appearing for the
Respondent No.3.

2. By the present Writ Petition filed under Article 227 of the
Constitution of India, the challenge is to the legality and validity of
the order dated 9th September 2025 passed by the learned Judge of
the Small Causes Court, Mumbai below Exhibit-41 in L.E. & C. Suit
No.142 of 2016 as also to the order dated 8th January 2026 passed
by the learned Appellate Bench of the Small Causes Court, Mumbai

in Revision Application No.288 of 2025 in Order Below Exhibit No.41 of 2025 in L.E. & C. Suit No.142 of 2016. The Operative Part of the said order dated 9th September 2025 reads as under:

“ORDER

- 1. The application is allowed.*
- 2. The plaintiff in L.E. & C. Suit No.142 of 2016 is permitted to defer the recording of his evidence until the defendant in the present matter, who is the plaintiff in L.D. Suit No.52 of 2008, has completed filing his evidence.*
- 3. It is directed that the evidence of witnesses shall be recorded commonly in L.D. Suit No.52 of 2008.*
- 4. The common evidence so recorded shall be read in both suits at the stage of final disposal.*
- 5. The plaintiff in L.D. Suit No.52 of 2008 is directed to file any additional evidence, if any, in light of the decision to record evidence commonly for both suits.*
- 6. The cross-examination of PW-1 in L.D. Suit No.52 of 2008 shall continue.*
- 7. The Judicial Clerk is directed to maintain a clear and organized record of all evidence and exhibits, properly tagged for use in both suits at the time of final disposal.”*

(Emphasis added)

3. By the impugned order dated 8th January 2026 of the learned Appellate Bench of the Small Causes Court, Mumbai, Revision challenging the said order dated 9th September 2025 has been dismissed.

4. By the impugned order dated 9th September 2025 it is directed that the evidence of witnesses shall be recorded commonly in L.D. Suit No. 52 of 2008. Thus, in effect what the learned Trial Court has directed by the impugned order dated 9th September 2025 that common evidence will be recorded in L. E. & C. Suit No.142 of 2016 filed by the present Respondents and L.D. Suit No. 52 of 2008 filed by the present Petitioner.

5. In the meanwhile, by further order dated 16th January 2026 passed by the learned Judge of the Small Causes Court, Mumbai, adjournment application filed by the present Petitioner has been rejected and further evidence of the present Petitioner is closed and the matter was posted for evidence of the Respondent.

6. One of the apprehensions expressed by Mr. Dhakephalkar, learned Senior Counsel is that the burden which is on the

Respondent i.e. Plaintiff in L. E. & C. Suit No. 142 of 2016 to prove his case is shifted to the present Petitioner i.e. Plaintiff in said L.D. Suit No.52 of 2008.

7. For appreciating the said contention, it is necessary to set out the issues framed in L.D. Suit No. 52 of 2008 and L. E. & C. Suit No. 142 of 2016. The learned Trial Court by order dated 10th April 2018 framed the following issues in L.D. Suit No. 52 of 2008:

“ISSUES

- 1. Does Plaintiff prove that it has legal right in Suit Premises?*
- 2. Does Plaintiff prove obstruction at hands of Defendants?*
- 3. Is Suit bad for want of permission of Charity Commissioner under Section 5 of BPT Act, 1950?*
- 4. Is Plaintiff entitled to relief of perpetual Injunction as prayed?*
- 5. What order and decree?”*

8. Learned Trial Court by order dated 28th February 2020 framed the following issues in L. E. & C. Suit No. 142 of 2016:

“ISSUES

- 1. Do Plaintiffs prove that the Defendants unilaterally extended agreement dated 26/9/1996 from 1/4/2007 to 31/3/2015?*

2. Do Plaintiffs prove that the Defendants are liable to pay compensation/damages of Rs.1,27,88,182/- for the period from 01/04/2007 to 30/11/2009 @ 3.74,000/- pm along with service tax @ 10.317 towards use of the suit premises.

3. Whether the Plaintiffs are entitled to get vacant and peaceful possession of the suit premises?

4. Whether the Plaintiffs are entitled to get compensation as prayed? If Yes, How Much?

5. Whether the Plaintiffs are entitled to get permanent injunction against the Defendants as prayed?

6. What order and decree?"

(Emphasis added)

9. At the outset, it is required to be noted that Mr. Singh, learned Counsel appearing for the Respondent No.3 submitted that the burden to prove the issues in L. E. & C. Suit No. 142 of 2016 will always remain on the Respondents i.e. Plaintiffs in the said suit and he submits that for the purpose of clarity, his statement to that effect made on behalf of the Plaintiffs in said L.E. & C. Suit No.142 of 2016 be recorded.

10. In any case, even if two suits are clubbed together as some of the issues and the suit property is the same, by clubbing both suits together it cannot be said that burden to prove issues in L. E. & C.

Suit No. 142 of 2016 stands shifted on the Defendants in the said suit. However, this point need not be considered in detail as Mr. Singh, learned Counsel appearing for the Respondent has clarified the position as recorded earlier.

11. Mr. Singh, learned Counsel submits that the order dated 16th January 2026 passed by the learned Judge, Small Causes Court, Mumbai below Exhibit-1 in L.D. Suit No.52 of 2008 and below Exhibit-146 in L. D. Suit No. 52 of 2008 be quashed and set aside and by consent the Petitioner be granted liberty to file additional evidence, if any.

12. Accordingly, by consent, order dated 16th January 2026 passed by the learned Judge, Small Causes Court, Mumbai below Exhibit- 1 in L. D. Suit No. 52 of 2008 as also the order dated 16th January 2026 passed by the learned Judge of the Small Causes Court below Exhibit- 146 in L. D. Suit No. 52 of 2008 are quashed and set aside. The Petitioner is at liberty to file additional evidence if any, on or before 17th February 2026.

13. The other apprehension expressed by Mr. Dhakephalkar, learned Senior Counsel is that the burden is on the Plaintiffs with respect to issue No.2 framed in L. E. & C. Suit No. 142 of 2016 to prove that the Defendants are liable to pay the amount of compensation/damages. He submits that burden as far as issues framed in L. E. & C. Suit No. 142 of 2016 is always on the Respondents i.e. Plaintiffs in said suit. On the basis of the decision of this Court in the case of *Bhagirath Shankar Somani & Anr. vs. Rameshchandra Daulal Soni & Anr.*¹, he submits that the Petitioner be given right to lead evidence in rebuttal after the Defendant in L. D. Suit No. 52 of 2008 leads his evidence. He submits that Order XVIII, Rule 2, of the Code of Civil Procedure, 1973, gives power to the Court to allow the Plaintiff to lead evidence in rebuttal after the Defendant leads his evidence.

14. In the context of the above submissions raised by Mr. Dhakephalkar, learned Senior Counsel, it is necessary to see Bombay Amendment of Order XVIII, Rule 2 of the CPC. The Bombay Amendment shows that the Madras Amendment is adopted by the Bombay Amendment. As far as Madras Amendment

1 2007 (5) Mh.L.J.

is concerned, under Order XVIII, Rule 2, at the end of the said provision following explanation is inserted:

“Explanation.— Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage.”

(Emphasis added)

Thus, power is given to the Court for reasons to be recorded in writing to direct any party to examine any witness at any stage.

15. In this case, the facts are peculiar. The Petitioner filed L. D. Suit No. 52 of 2008 *inter alia* seeking the following reliefs:

“a) for a permanent Order and injunction restraining the Defendants, their servants and agents and any other persons claiming under them from taking any steps otherwise than in due course of law to obtain possession of the suit premises or interfere in any manner with the Plaintiffs' possession of the suit premises and/or the Plaintiffs' rights to use and enjoy the same and carry on their business from the suit premises, viz. an area/site of 24'x13" x 49x6" on the terrace on the top of the third floor of the Girikunj building situate at 11, N.S. Patkar Marg, Mumbai - 400 007, including the structure constructed thereon by the Plaintiffs with cement concrete foundation and with height of about 30 ft., length 37 ft., and average depth of 15 ft. with permanently affixed two illuminated

hoardings one of 40x20 and other of 20'x20' from the Plaintiffs;

(b) pending the hearing and final disposal of the suit for an Order and injunction restraining the Defendants, their servants and agents and any other persons claiming under them from taking any steps otherwise than in due course of law to obtain possession of the suit premises or interfere in any manner with the Plaintiffs' possession of the suit premises and/or the Plaintiffs' rights to use and enjoy the same and carry on their business from the suit premises, viz. 24' 13" x 49' 6" on the terrace on the top of the third floor of the Girikunj building situate at 11, N.S. Patkar Marg, Mumbai 400 007, including the structure constructed thereon by the Plaintiffs with cement concrete foundation and with height of about 30 ft. length, 37 ft. and average depth of 15 ft. with permanently affixed two illuminated hoardings one of 40'x20 and other of 20'x20' from the Plaintiffs;

(c) pending the hearing and final disposal of the suit for a direction and order permitting the Plaintiffs without prejudice to all the rights and contentions of both the Plaintiffs and Defendants to deposit the said amount of Rs.30,000/- p.m. in this Hon'ble Court, subject to the final decision of any Hon'ble Court, as to the amount of the fair and equitable enhancement if any which is payable in law by the Plaintiffs to the Defendants w.e.f. 1/4/2007."

16. In the meanwhile, in the year 2010 the suit is filed by the present Respondents in the High Court and the same was thereafter transferred to the Small Causes Court, Mumbai and

numbered as L. E. & C. Suit No. 142 of 2016. The said suit has been filed seeking injunction and direction to the Defendant i.e. Petitioner to pay a sum of Rs.1,27,88,182/- as compensation/damages and other reliefs. Both these suits have been thereafter consolidated by order dated 29th November 2017 passed by the learned Judge of the Small Causes Court, Mumbai. In these peculiar facts, the Petitioner i.e. the Defendant in L. E. & C. Suit No. 142 of 2016 has also required to lead evidence concerning issues which are framed in L. E. & C. Suit No. 142 of 2016 at the time of giving evidence in said L.D. Suit No.52 of 2008.

17. In view of consolidation of both the suits and in view of the direction contained in the impugned order that evidence of witnesses shall be recorded commonly in both these suits and therefore, in peculiar facts after evidence of the Respondents is recorded commonly in L. D. Suit No. 52 of 2008 and L. E. & C. Suit No.142 of 2016, the Petitioner is at liberty to lead evidence in rebuttal in terms of the law laid down by this Court in the decision in the case of ***Bhagirath Shankar Somani*** (supra) read with proviso to Order XVIII, Rule 2 of the CPC.

18. Accordingly, for above reasons, the Writ Petition is disposed of by passing the following order:

ORDER

- a) By consent of the parties, order dated 16th January 2026 passed by the learned Judge, Small Causes Court, Mumbai below Exhibit- 1 in L. D. Suit No. 52 of 2008 as also the order dated 16th January 2026 passed by the learned Judge of the Small Causes Court below Exhibit- 146 in L. D. Suit No. 52 of 2008 are quashed and set aside. The Petitioner is at liberty to file Affidavit of Additional Evidence if any, on or before 17th February 2026.
- b) In view of consolidation of both the suits and in view of the direction contained in the impugned order that evidence of witnesses shall be recorded commonly in both these suits and in peculiar facts of this case, after evidence of the Respondents is recorded commonly in L. D. Suit No. 52 of 2008 and L. E. & C. Suit No.142 of 2016, the Petitioner is at liberty to lead evidence in rebuttal in terms of the law laid

down by this Court in the decision in the case of *Bhagirath Shankar Somani* (supra) read with proviso to Order XVIII, Rule 2 of the CPC.

19. Thus, the Writ Petition is disposed of in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]

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