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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.151 OF 2018

IN
APPEAL NO.289 OF 2015
IN
SUIT NO.353 OF 2009

- 1. Nusli N. Wadia]
- 2. Maureen N. Wadia]
- 3. Rajesh Batra]
In their capacity as Trustees of F.E.]
Dinshaw Trust having their Office at]
412, Churchgate Chambers 5,]
Sir Vithaldas Thackersey Marg,]
Mumbai – 400 020.]

... Applicants/
Org. Appellants

In the matter between

- 1. Nusli N. Wadia]
- 2. Maureen N. Wadia]
- 3. Rakesh Batra]
In their capacity as Trustees of]
F.E. Dinshaw Trust having their Office]
at 412, Churchgate Chambers 5,]
Sir Vithaldas Thackersey Marg,]
Mumbai – 400 020.]

... Appellants
Org. Defendants

V/s.

- Bastion Constructions]
A Partnership firm having its]
Registered office at B/11, Yuwan]
Apartment, Mount Mary Road,]
Bandra (West), Mumbai – 400 050.]

.....Respondent

ASHWINI H
GAJAKOSH

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ASHWINI H
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WITH
NOTICE OF MOTION NO.34 OF 2019
IN
APPEAL NO.289 OF 2015

**IN
SUIT NO.353 OF 2009**

Bastion Constructions]	
A Partnership firm having its]	
Registered office at B/11, Yuwan]	
Apartment, Mount Mary Road,]	
Bandra (West), Mumbai – 400 050.]Applicant (Respondent)

In the matter between

1. Nusli N. Wadia]	
2. Maureen N. Wadia]	
3. Rajesh Batra]	
In their capacity as Trustees of F.E.]	
Dinshaw Trust having their Office at]	
412, Churchgate Chambers 5,]	
sir Vithaldas Thackersey Marg,]	
Mumbai – 400 020.]	... Appellants/ Org. Defendants

V/s.

Bastion Constructions]	
A Partnership firm having its]	
Registered office at B/11, Yuwan]	
Apartment, Mount Mary Road,]	
Bandra (West), Mumbai – 400 050.]Respondent (Org. Plaintiff)

Mr. Navroz Seervai, Senior Advocate, a/w Mr. Yash Momaya, Ms. Rujuta Patil, Mr. Yahaan Shah, Adv. Hasan Mushabber, Mr. Masira Lulania, i/by Negandhi Shah and Himayatullah for the Appellant.

Mr. P. Chidambaram, Senior Advocate, a/w Mr. Vineet Naik, Senior Advocate, Mr. Mayur Khandeparkar, Mr. Bhushan Deshmukh, Mr. Dhawal Mehta, Ms. Jasmine Sheth Kachalia, Ms. Tanvi Shah, Mr. Aryan Shrivastava and Ms. Shubhada Khandekar, i/by Wadia Ghandhy and Co. for Respondent.

Mr. S.K. Dhekale, Court Receiver, Bombay High Court, present.

**CORAM : A. S. GADKARI AND
KAMAL KHATA, JJ.
RESERVED ON : 10th December 2024.
PRONOUNCED ON : 20th December 2024.**

ORDER (Per : Kamal Khata, J) :-

1) By this Chamber Summons, filed under the provisions of Order 41 Rule 27 read with Order 43 Rule 2 of the Code of Civil Procedure 1908 (CPC), the original Appellant seeks the following relief:

“(a) That this Hon'ble Court be pleased to permit the Appellants to produce the additional evidence viz. a certified copy of the Agreement of Joint Development dated 31st December 2005 details whereof is given in the schedule to the above Chamber Summons and/or that the said additional evidence be taken on the record of the above proceedings.”

2) Mr. Navroz Seervai, learned Senior Counsel representing the Applicants/Original Appellant (“Wadia”), submitted that Wadia seeks to introduce the Joint Development Agreement dated 31st December 2005 (“JDA”) as additional evidence, which, despite exercising due diligence, could not be produced before the Trial Court. He argued that, had the trial Court considered the JDA, it might have reached a different conclusion regarding issue no 5, which read as follows:

“5. Whether the Plaintiff proves that they have taken effective control and possession of the suit properties as

alleged in paragraph 14 of the plaint?

He emphasized that, the conclusion that “the Plaintiff was put in effective control and possession of the suit properties and continues to be so ever since” would likely have been different.

2.1) He categorically asserted that, this application falls under Order 41 Rule 27(1)(aa). He therefore, contends that the Court has two options: i) to hear the Chamber Summons and decide whether the matter should be remanded to the Trial Court or (ii) to take the document on record and deal with it as contemplated under Order 41 Rule 28 of CPC, before finally deciding the Appeal. He further submits that if this is not done, the Appellants case would suffer severe prejudice.

2.2) Mr. Seervai argued that, when a party seeking to introduce additional evidence satisfies the requirements of Order 41, Rule 27 (1) (aa), the party has the right to present such additional evidence before the final hearing of the Appeal to avoid prejudicing its case. He argued that, in such a scenario, the Court has no discretion in the matter. To support his argument, he relied on the decision of the Division Bench of this Court in the case of *Hasanate Taheriyah Fidayyah V/s Mahesh s/o Kishor Saran reported in 2014 (2) Mh.L.J. 884* which approved the decision of the Himachal Pradesh High Court in *Himanshu V/s. Bishnu Dutt reported in 2006 (3) Civil LJ 396*. He submitted that the principles laid down in *Hasanate's* case squarely apply to present case, holding that an application

under Order 41 Rule 27 (1) (aa) must be decided before the Appeal is heard. Furthermore, he distinguished the judgment in *Union of India V/s. Ibrahim Uddin & Anr. reported in (2012) 8 SCC 148*, by asserting that it applies solely to cases under Order 41 Rule 27 (1) (b).

2.3) Mr. Seervai relied on another judgment of the Division Bench of this Court, in *Ferani Hotels Pvt. Ltd. V/s. Nusli Neville Wadia reported in 2013 (3) MhLJ 509*. In this case, the Division Bench, after considering the principles laid down in *Ibrahim Uddin (supra)*, decided an application under Order 41 Rule 27 (1) (aa) before hearing the Appeal. He highlighted that, while the application under Order 41 Rule 27 (1) (aa) was resolved in 2012, the Appeal itself is still pending before this Hon'ble Court.

2.4) Mr. Seervai further submitted that, the judgment in *Ferani Hotels (supra)* was challenged before the Hon'ble Supreme Court, but the Special Leave Petition (SLP) against it was dismissed as withdrawn by Order dated 12th August, 2016. He also referred to the judgement of the Hon'ble Supreme Court in *J. Balaji Singh V/s. Diwakar Cole, reported in (2017) 14 SCC 207*, particularly paragraphs 4, 5 and 10. In this case, the Supreme Court endorsed the practice of Appellate Courts first considering and deciding applications under Order 41 Rule 27 (1) (aa) before proceeding to hear the appeal.

2.5) He submitted that, *Ibrahim Uddin (supra)* relied on several judgments, but all of them pertained to Sub-rule (b) of Order 41 Rule

27(1). Therefore, he argued that since his case falls under Order 41 Rule 27 (1) (aa), the application should be heard and decided first, in accordance with the specific provision applicable in his case.

2.6) Relying on the JDA between the Respondent and a developer, he argued that, the Respondents had falsely claimed to be in actual possession of the suit property, contrary to their assertions, whilst JDA explicitly stated that they were not in possession. He contended that, had this document been presented before the learned Single Judge during the trial, the conclusion reached would likely to have been different.

2.7) He asserted that the Respondents deliberately, dishonestly and fraudulently suppressed the JDA despite it being within their special knowledge. He argued that, in the ordinary course of human conduct, the existence of such a JDA could never have been anticipated or imagined by the Appellants, the owner of the suit property, who were never informed of its execution. Additionally he emphasized that, the conveyance of the suit property was contingent upon several preconditions, including statutory clearances, which were never obtained. Consequently, the Appellants had lawfully terminated the suit agreement.

He therefore submitted that the Chamber Summons be made absolute with costs.

3) Mr. Chidambaram, learned Senior Counsel representing Respondent (“Bastion”), submitted that, the Appeal should be heard in its

entirety alongwith the Chamber Summons, rather than in a piecemeal manner. He argued that the Court must consider the case as a whole to arrive at a proper conclusion. He further submitted that Order 41 Rule 27 requires the Court to determine whether the evidence sought to be introduced would assist in pronouncing judgement or is necessary for any substantial cause.

4) Mr. Naik, learned Senior Advocate appearing for the Respondent, while supplementing the arguments of Mr. Chidambaram contended that, while the Appellants strongly emphasized possession as a major criterion for granting specific performance, this issue is in fact irrelevant and merely incidental to the grant of specific performance. He argued that, the learned Single Judge's finding regarding possession of the suit property had no bearing on the decision to grant of specific performance of the suit contract.

4.1) He relied on the judgment in *Babu Lal V/s. M/s Hazari Lal Kishori Lal & Ors. reported in (1982) 1 SCC 525* particularly paragraphs 9 and 11, as well as *M/s Siddamsetty Infra Projects Pvt. Ltd V/s. Katta Sujatha Reddy & Ors. in Review Petition (C) No.1565 of 2022 in C.A No. 5822 of 2022, specifically paragraph 10(b)*, to submit that, it is settled law that in a suit for specific performance, the question of possession is not central to the main controversy. He emphasized that the delivery of possession is inherent and ancillary to the relief of specific performance

under Section 55 of Transfer of Property Act, 1882.

4.2) He submitted that Section 55 of Transfer of Property Act, 1882, delineates the rights and liabilities of buyers and sellers in the context of the sale of immovable properties. He emphasized that, sub-section 1(f) of Section 55 expressly mandates that the seller is obligated to deliver possession of immovable property to the buyer upon completion of the sale.

4.3) He submitted that a claim for specific performance is not contingent upon determining the factum of who was in possession of the Suit properties. He argued that the decree in this case is not predicated on the issue of possession. Referring to paragraph 7 of the Judgment (page 46/Appeal), Mr Naik highlighted this point to support his contention.

“7. this being, a suit for specific performance, praying for transfer of the suit properties in enforcement of an agreement for sale, the question as to whether or not the Plaintiff was at any time actually put in possession of the properties is hardly of any crucial importance from the point of granting of final reliefs.”

4.4) Mr. Naik submitted that, an application under Order 41 Rule 27 of the Civil Procedure Code (CPC) for introducing additional evidence is not an absolute right but a discretionary power vested in the Court which discretion is to be exercised only in exceptional circumstances and strictly in accordance with the stipulated requirements. He further emphasized that relief under Order 41 Rule 27, in all the three scenarios, viz. under sub-Rule

1(a), (aa) and (b) are entirely discretionary and not a matter of right.

4.5) Referring to Order 13 of CPC which governs the production impounding and return of documents he submitted that Order 13 Rule 1 (1) requires parties to produce documentary evidence along with written statement and Order 13 Rule 1 (1) stipulates that, the Court shall receive documents so produced. He therefore contended that unlike under Order 13 of CPC it is not mandatory for the Hon'ble Court to take the JDA on record or in evidence merely because an application has been filed by the Appellants under Order 41 Rule 27 (1) (aa). He concluded that the Chamber Summons must be tested rigorously against the strict parameters outlined above.

4.6) Referring to the case of *Ferani Hotels Pvt. Ltd.* (supra), he submitted that if a party fails to exercise diligence in producing evidence during the trial, such negligence cannot be remedied by introducing evidence at the Appellate stage. He further argued that the Appellants, having failed to demonstrate due diligence or establish that JDA was not within their knowledge or could not have been discovered with reasonable effort during the trial, cannot insist on its production at this belated stage. He emphasized that the Respondents cannot be faulted for the Appellants clear failure in this regard. Additionally, he pointed out that the JDA was a part of the public record, and the Appellant's could have discovered it through reasonable diligence. Drawing attention to paragraphs 6 to 11 of

the Chamber Summons, he highlighted the Appellants' case and contended that the pleadings in these paragraphs fail to meet the criteria under Order 41 Rule 27 (1) (aa).

4.7) Responding to the reliance on *Hasnate* case (supra) he argued that the judgement does not support the Appellants's case but instead bolsters the Respondent's position. He referred to paragraph 15 of *Hasnate's* case, which states: "We therefore find that the application filed under Order 41 Rule 27 (1)(a) or (aa) 'could be decided' at the stage prior to the hearing of the appeal" to submit that, this observation underscores the Appellate Court's discretion to decide such applications either before the appeal hearing or during the hearing, depending on the facts and circumstances of each case.

4.8) Mr. Naik submitted that while the decree was passed by the learned Single Judge on 4th March, 2016 the Appeal was filed on 18th April, 2016. However, it was two and half years later, on 23rd February, 2018, that this Chamber Summons was filed. Furthermore, this Chamber Summons was heard and an Order was passed on 11th December, 2018, observing that the Chamber Summons would be considered at the stage of hearing of the Appeal. This order attained finality as the Appellants did not prefer an Appeal challenging it. He vehemently argued that, the Appellants insistence on arguing the Chamber Summons prior to hearing of the Appeal, citing *Hasnate* judgement, is undermined by their failure to challenge the 11th

December, 2018 Order. This, he contended, demonstrates a lack of bona fide intent on the part of the Appellants and supports the Respondents' assertion that the move is a deliberate attempt to delay the proceedings and deny the Respondents the fruits of the decree. He emphasized that the timeline of events clearly indicates bad faith and characterized the Appellants' actions as a sophisticated form of extortion. He further submitted that the Chamber summons ought to be heard along with the Appeal, as hearing it separately would result in a sheer waste of Courts valuable time as well as that of the parties.

4.9) On the issue of possession, Mr. Naik submitted that there was substantial material on record to demonstrate that the Respondent was in effective control and possession of the Suit properties. This evidence was carefully considered by the learned Single Judge when determining the factum possession at the relevant time as referenced in paragraph 18 of the decree/page 61 and 62. Furthermore, he pointed out that the learned Single Judge had relied on several documents to reach the conclusion regarding possession. Mr Naik argued that the introduction of the JDA would have no bearing on the outcome, rendering its production inconsequential.

4.10) He further submitted that a perusal of the plaint, particularly paragraphs 16 to 18 and 25 (at page 121 of the Appeal) clearly reveals that the Appellants had admitted that the Respondent, upon making the fully

payment of consideration in November 2003, had immediately assumed effective control and possession of the suit properties followed by deploying security service guards, erecting a board identifying the Respondent, constructing a fence, reinforcing the nalla wall and carrying out filing work amongst other activities.

4.11) He further argued that there is a distinction between *de facto* and *de jure* possession. The Respondents, he submitted, were in *de facto* possession, but to perfect their possession and to elevate it to *de jure* possession, a decree of specific performance was required. He also emphasized another key factor that bolstered his position, the Respondents were appointed as agents of the Court Receiver for the suit property pursuant to an Order dated 17th February, 2009, which was later confirmed by an Order dated 7th December, 2010 which continues to this day, as the order was never challenged.

4.12) He contended that merely proving material irregularity or fraud would not suffice for the Appellants. Instead, they were required to demonstrate that such irregularity or fraud resulted in substantial injury. He further submitted that no arguments were made nor any pleadings presented in the Chamber Summons to substantiate such a claim.

4.13) Mr. Naik further highlighted a significant fact that, the Appellants, being a Trust, had made an application to the Charity Commissioner for the sale of the property. The sale to the Respondents was

subsequently approved and confirmed by the Charity Commissioner. Thereafter, the Appellants received the entire consideration under the agreement from the Respondents. He argued that, having received the full consideration, the execution of conveyance in favour of the Respondents is merely a formal consequence necessary to conclude the contract. Mr. Naik also pointed out that it was the Respondents who took the risk of purchasing the property, despite it being subject to restrictions under the Urban Land Ceiling Act (“ULCA”) as well as various encumbrances and reservations affecting the suit property.

4.14) He argued that it was only because the ULC Act was repealed that the Appellants are now trying to deprive the Respondents of the benefits that have accrued to them. He argued that the benefit of the risk taken in purchasing can rightfully accrue only to the Respondents, as the entire consideration for the property was paid by the Respondents and received by the Appellants as far back as 2003.

4.15) He further contended that the Appellants are unjustly and improperly attempting to extract additional consideration from the Respondents, despite having sold the property to them nearly two decades ago. Mr. Naik also emphasized that in this case, the question of readiness and willingness does not arise. The procurement of ULC clearance, he submitted, did not in any way affect the terms of the contract. The payment of consideration by the Respondents would have been a relevant factor only

if the Respondents had placed an obligation on the Appellants to procure ULC clearance for purchase of their property.

4.16) He argued that, since the entire consideration had been paid, the procurement of ULC clearance could not have any bearing on the contract, as any loss arising from this would solely fall on the Respondents. Therefore, no prejudice has been or could be caused to the Appellants in this matter. This was a risk the Respondents willingly undertook and they are now exclusively entitled to any benefits arising therefrom.

4.17) He concluded by submitting that, there are no merits in the Chamber Summons and it be dismissed.

Reasons and conclusion:-

5) In our view, this Chamber Summons appears to be an afterthought. The Wadia's are beneficiaries of an Order dated 28th November 2016, which granted stay on the execution and operation of the decree issued by the learned Single Judge of this Court against them. Nearly eight years have passed and the appeal remains unheard. It is evident that, the Applicant is likely interested in delaying the matter, as they have nothing to loose. Conversely, Bastion has been unable to enjoy the benefits of a decree secured over seven years ago.

5.1) Additionally, the Appeal was listed for final hearing and after hearing Mr. Seervai briefly, we suggested that he argue both Chamber Summons and the Appeal to save Court's time. While, Mr. Naik readily

agreed, Mr. Seervai declined, stating that doing so would deprive them of the opportunity to appeal in the event of an adverse order.

Accordingly, we proceed to decide the legal issue.

For ease of reference, the provision under consideration is reproduced below:

“27. Production of additional evidence in Appellate Court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

[Emphasis supplied]

5.2) The prefatory clause of Order 41 Rule 27 (1) adopts a negative

framing, signifying that under ordinary circumstances, parties in an Appeal are not entitled to produce additional evidence.

5.3) The subsequent sub-clauses (a), (aa) and (b) of Rule 27(1) delineate the specific circumstances under which such evidence may be considered.

5.4) The concluding lines of the section: “*the Appellate Court **may allow** such evidence or document to be produced or witnessed to be examined*” are both critical and significant, as they clearly establish the discretionary authority of the Appellate Court to allow or refuse such evidence or witness examination at the time of the appeal hearing. We are of the view that the phrase indicates that the Appellate Court retains discretion to determine whether the additional evidence is essential and, consequently should be permitted for the purpose of considering the Appeal.

6) A careful reading of Order 41 Rule 27(2) suggests that, any court admitting additional evidence must explicitly reference the Rule and provide reasons that demonstrate an awareness of the exceptional nature of the power being exercised. In other words, allowing the production of additional evidence requires the court to record its reasons, which should take into account the cause and nature of the suit, the entire context of the impugned decision, the grounds of appeal, and the relevance of the additional evidence the party seeks to produce. Such consideration must

align with the circumstances mentioned in Rule 27(1)(a), (aa), and (b).

6.1) The general rule is that an Appellate Court should ordinarily confine itself to the record of the lower court and refrain from admitting additional evidence, whether oral or documentary. However, Section 107(d) of the Civil Procedure Code (CPC) provides an exception to this rule, empowering the Appellate Court to admit or require additional evidence, subject to prescribed conditions and limitations. The conditions under which this discretion may be exercised are outlined in Order 41 Rule 27 of the CPC.

6.2) Importantly, the Court is not obligated to permit additional evidence merely because the circumstances outlined in the rules are met, and parties do not have a right to such admission by default. The decision to admit additional evidence is entirely at the discretion of the Court. Additional evidence can only be admitted if the circumstances specified in this Rule are satisfied. The discretion must be exercised judiciously, considering the relevance of the document to the issues in the case and the reasons why such evidence could not be presented before the lower court. These provisions are directory, not mandatory. If a court fails to comply with the requirements of Order 41 Rule 27(2), the burden falls on the party seeking to rely on the additional evidence to justify its admission. Merely stating in the application that additional evidence was necessary for reaching a decision or that there was no reason to deny the request does

not constitute sufficient compliance with the Rule. Thus, in our opinion, Order 41 Rule 27 must be interpreted in its entirety.

7) We are unable to accept Mr. Seervai's contention that, if the requirements of sub-clause (aa) are satisfied, the Court '*must entertain*' the evidence and consider the application before the final hearing of the appeal. Such an interpretation, in our view, fails to account for overall facts and the purpose of the Suit. If accepted, it would invariably provide a means for prolonging litigation, which a judgement debtor would exploit to delay the execution of the decree, thereby depriving the decree holder of its implementation.

8) Admittedly, the present case pertains to specific performance. It cannot be disputed that the criteria for granting specific performance must be considered by the Appellate Court.

8.1) We fully concur with Mr. Naik's submission that the delivery of possession is inherent and ancillary to the relief of specific performance under Section 55 of the Transfer of Property Act, 1882. The legal position on this point is well settled and on this ground alone, the Appellants could be non-suited.

9) Furthermore, Order 41 Rule 27 is unambiguous. In *Hasnate* case, which dealt with possession under the Maharashtra Rent Control Act, the documents supporting or opposing possession were deemed relevant as their inclusion or exclusion could prejudice a party.

10) In our view, since this case pertains to specific performance, the JDA sought to be introduced to challenge the Respondent's possession has no bearing on the decree. Upon perusing the judgement of the learned single Judge, prima faice it appears that, possession of the land was not the sole criterion relevant to the impugned judgment.

10.1) The mere fact that an issue has been framed by the Judge does not necessarily imply that possession was the sole basis on which the suit for specific performance was granted in favour of the Respondent. Other critical factors, such as payment of full consideration, effective control of the land, and the absence of obligations on the part of the Respondent for the completion of the contract, were also taken into account.

11) Notably, applications for the ULC clearance were required to be filed by the original owners, as the Respondents could not file such applications. The Respondents can only approach the concerned authorities after obtaining a registered conveyance for the property, as the authorities would not entertain applications filed by *de facto* owners. These factors were thoroughly considered by the learned Single Judge while deciding the case of specific performance.

12) In light of the above, we respectfully disagree with Mr. Seervai and consequently dismiss the Chamber Summons.

13) We are of the view that this application constitutes an abuse of the process, intended to delay the adjudication of the Appeal - a goal that,

in hindsight, the Appellants have achieved. To deter such conduct, the Chamber Summons is dismissed, with costs of Rs.5 lakhs to be paid to the Respondents within two weeks from the date of uploading of this Order on the official website of High Court of Bombay.

14) List the Appeal for final hearing on 13th February, 2025 at 2.30 pm.

(KAMAL KHATA, J.)

(A.S. GADKARI, J.)