



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10478 OF 2022

1. Nikhilesh Kesarichand Jhaveri
2. Meera Keshrichand Jhaveri
3. Jayashree Jhaveri Lederman

*..Petitioners/
(Orig. Plaintiff Nos. 4 to 6)*

: Versus :

New Era Fabrics Limited and Others

}

*..Respondents/
(Orig. Defendants)*

Mr. Sharan Jagtiani, Senior Advocate with Mr. Vishal Narichania, Mrs. Sushma Singh and Ms. Sayali Sawant, for the Petitioner.

Mr. Chetan Kapadia, Senior Advocate with Ms. Vidisha Rohira, Mr. Devansh Bheda, Ms. Sneha Golecha and Ms. Amita Jasani i/b Purnanand & Co., for Respondent No. 7

Mr. Pradeep Thorat with Mr. Gaurang Mehta, Ms. Neelam Dedhia, Ms. Neha Bhosale, Ms. Anuja Divadkar and Mr. Abdul Basit K. i/b NDB Law, for Respondent No.1.

Mr. Sean Wassoodew with Ms. Ashna Shah, for Respondent No.4.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 6 May 2024

Pronounced on : 10 May 2024

JUDGMENT :

1) **Rule.** Rule is made returnable forthwith. With the consent of learned counsel appearing for rival parties, petition is taken up for final hearing and disposal.

THE CHALLENGE

2) By this petition, Petitioners challenge Order dated 19 April 2022 passed by the Court of Small Causes at Mumbai rejecting their Application at Exhibit-664 filed by them for preventing Defendant Nos. 7 to 14 from leading evidence in their suit seeking eviction of Defendant Nos.1 to 6. The broad issue involved in the present petition is whether Defendant Nos. 7 to 14, whose interests are not adverse to that of Plaintiffs, can be permitted to lead evidence only because Written Statements are filed by such Defendants.

A. FACTUAL MATRIX

3) A brief factual narration as a prologue to the judgment would be necessary.

4) Land bearing Final Plot No. 268, T.P.S. III, Mahim Division, Ward No. G/North 5546 (1-1A) situated at 16, Mogul Lane, Matunga (West), Mumbai is the subject matter of TE & R Suit No. 48/62 of 2009 (*suit premises*). The suit premises were originally owned by Mr. Navalchand Jhaveri, which was sold by his heirs to Baria Family by

Indenture dated 23 December 1938. On the same day, Barias entered into an Indenture of Lease with Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri granting lease of the suit property in their favour for a period of 999 years commencing from 23 December 1938. After death of the original Lessees-Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri, the lease of the subject property devolved on their heirs, who are collectively referred for the sake of convenience as '**Jhaveris**'. Jhaveris inducted New Era Textiles Pvt. Ltd. as their lessee in the subject property which claims to have sold its machinery to its successor in interest, M/s. New Era Fabrics Ltd. (**New Era**). Jhaveris filed Suit No. 236 of 1968 against New Era for illegal occupancy, in which Consent Terms were entered on 6 July 1977 in which Jhaveris recognised New Era as their monthly tenant. According to Petitioners, New Era illegally sublet certain portions of suit premises to Johnson Dye Works Pvt. Ltd. (**Johnson Dye**) and four other companies viz. Home Care Retail Marts (P) Ltd., Television 18 India Limited, Hanil Era Textiles Ltd. and Royal Energy Ltd., all of whom are impleaded as Defendant Nos.2 to 6 in TE & R Suit No. 48/62 of 2009.

5) Jhaveris terminated monthly tenancy of New Era in respect of the subject property and filed TE & R Suit No. 48/62 of 2009 against New Era and Defendant Nos. 2 to 6 described above, seeking their eviction from the time when the termination notice dated 11 February 2009 was issued. There were 12 Plaintiffs to the suit, all members of Jhaveri Family. The suit is filed under Section 41 of the Presidency Small Causes Courts Act, 1882 on the ground that paid up capital of New Era was more than Rs.1 crores. This aspect now stands confirmed on account

of Order passed by Small Causes Court on 26 March 2014, its Appellate Bench dated 27 February 2017, this Court by Order dated 7 June 2017 and by the Apex Court's Order dated 9 April 2018. New Era filed Contempt Petition No. 73 of 2009 alleging breach of consent terms dated 6 July 1977 which was withdrawn by New Era on 1 April 2011 making a statement that it would not raise a contention in the eviction suit about breach of consent decree dated 6 July 1977 by Jhaveris.

6) In the meantime, a development occurred where Johnson Dye claims to have purchased the entire suit premises from Barias and filed its first eviction Suit against Jhaveris bearing RAE suit No. 965/1427 of 2010. According to Petitioners, New Era and Johnson Dye are sister companies. Johnson Dye has also filed its second eviction suit bearing TE Suit No. 12/15 of 2014 against Jhaveris.

7) Issues were framed in Eviction Suit No.48/62 of 2009 on 1 April 2016. At this juncture, Jhaveris who were jointly prosecuting eviction Suit No. 48/62 of 2009 were split and Original Plaintiff Nos.2, 7, 8, 9, 10 and 12 claimed to have sold their share and interest in the leasehold rights of the subject property to M/s. Gnani Investment and Trading Co. Ltd. (**Gnani**). This is how the Jhaveris got split into two groups, one group led by Nikhilesh Jhaveri, who continues to own leasehold rights and the other group led by Daksha Jhaveri, who sold partly/fully their leasehold rights in favour of Gnani.

8) Gnani filed impleadment application at Exhibit-321 on 8 June 2016 seeking impleadment as co-plaintiff on the strength of

purchase of leasehold rights from Daksha Jhaveri Group, which was allowed by Small Causes Court by Order dated 19 October 2016 directing Nikhilesh Jhaveri Group to implead Gnani as co-plaintiff to eviction suit. By separate Order dated 14 March 2017, the Small Causes Court ordered deletion of Daksha Jhaveri group from eviction Suit No. 48/62 of 2009. Nikhilesh Jhaveri Group challenged Order of the Small Causes Court directing impleadment of Gnani to the eviction suit dated 19 October 2016 by filing Writ Petition No. 13794 of 2016 and Daksha Jhaveri group filed Writ Petition No. 5917 of 2017 challenging order dated 14 March 2017 directing their deletion from the suit. By common judgment and order dated 20 September 2017, this Court set aside Order dated 19 October 2016 to the extent it directed impleadment of Gnani as co-plaintiff and instead directed Gnani be impleaded as Defendant No.7 to the suit. This Court also set aside Order dated 14 March 2017 and directed Daksha Jhaveri Group be transposed as Defendant Nos.8 to 13 in the suit. Petitioner claims that this was done only to secure interest of Gnani to seek a decree of eviction against Defendant Nos.1 to 6. Supreme Court confirmed this Court's Order by its order dated 6 February 2018 observing that in case the Plaintiffs succeed in the suit, the benefit thereof shall enure to Gnani and Daksha Jhaveri Group, who were transposed as proforma Defendants by this Court.

9) In the meantime, Johnson Dye filed third eviction suit bearing TE Suit No. 185 of 2018 against Nikhilesh Jhaveri Group. After their impleadment as proforma defendants, Daksha Jhaveri Group and Gnani filed their respective written statements/amended written

statements questioning the authority of Nikhilesh Jhaveri Group to seek eviction of Defendant Nos.1 to 6.

10) On 29 November 2019, M/s. Goodwill Realtors and Properties Pvt. Ltd (***Goodwill***) filed application for impleadment as co-plaintiff in the eviction suit contending that it acquired certain leasehold rights in the subject property from other heirs of Jhaveris, who are not parties to the suit. Small Causes Court rejected Goodwill's application for impleadment on 16 December 2019. However, the Appellate Bench reversed the decision of the Small Causes Court and directed Goodwill to be impleaded as Defendant No.14 to the eviction suit. Goodwill filed Written Statement.

11) Gnani and Daksha Jhaveri Group desired cross-examination of Plaintiffs' witness which was denied to them. Therefore, Gnani and Daksha Jhaveri Group filed Writ Petition (St.) No. 5747 of 2021 and 6142 of 2021 in this Court challenging order denying them opportunity of cross-examination of Plaintiffs' witnesses. This Court passed Order dated 21 April 2021 dismissing both the petitions holding that the interest of Gnani and Daksha Jhaveri Group was not adverse to the Plaintiffs.

12) Goodwill filed application at Exhibit-601 for framing of additional issues in the eviction suit, which was rejected by the Small Causes Court by Order dated 2 August 2021 and the same was upheld by the Appellate Bench on 1 September 2021. This Court however reversed the decision of the Small Causes Court and the Appellate Bench and by

its judgment and order dated 13 April 2022, allowed application at Exhibit-601 filed by Goodwill and directed framing of additional issues in the eviction suit. Nikhilesh Jhaveri Group challenged this Court's Order before the Apex Court and when the SLP came up for hearing on 19 July 2022, Goodwill agreed for setting aside the judgment and order of this Court without recording reasons. The Apex Court accordingly allowed the appeal of Nikhilesh Jhaveri Group by imposing costs of Rs. 5 Lakhs on Goodwill.

13) In the above background, Nikhilesh Jhaveri Group filed application at Exhibit-664 for preventing Gnani, Daksha Jhaveri Group and Goodwill from leading evidence in the eviction suit. By Order dated 19 April 2022, the Small Causes Court has rejected the application at Exhibit-664, which is the subject matter of challenge in the present petition. It appears that during pendency of the present petition, so far evidence of Defendant Nos.8 and 14 is already complete and Defendant No.13 is under cross-examination and it appears that Defendant No.7 has also filed Affidavit of Evidence.

14) Before proceeding further, it must be noted that by now the Apex Court has passed total ten Orders directing expeditious decision of the eviction suit and the last Order passed on 30 October 2023 envisages disposal of the suit on/or before 30 September 2024 with further observation that failure to do so would result in serious view being taken by the Apex Court.

B. SUBMISSIONS

15) Extensive submissions are advanced by Mr. Jagtiani on behalf of Petitioners- Nikhilesh Jhaveri group, by Mr. Kapadia on behalf of Gnani, Daksha Jhaveri group and Goodwill, by Mr. Vashi on behalf of Johnson Dye and by Mr. Thorat on behalf of New Era.

B.1 SUBMISSIONS ON BEHALF OF PETITIONERS

16) Mr. Sharan Jagtiani, the learned senior advocate appearing for Petitioners/Plaintiffs would submit that Daksha Jhaveri Group were originally co-plaintiffs and desired eviction of Defendant Nos.1 to 6 alongwith Nikhilesh Jhaveri Group. That they have been retained in the suit by this Court by their transposition as '*proforma defendants*', meaning thereby that they do not have any adverse claim against Plaintiffs. So far as Defendant No.7-Gnani is concerned, Mr. Jagtiani would take me through his impleadment application to demonstrate that Gnani desired impleadment as Plaintiff No.13 in the suit to seek a decree against original Defendants. Thus, Gnani got itself impleaded in the suit by representing that his interest in the suit is same as that of Plaintiffs and he desired eviction of the original Defendants in his capacity as assignee of rights assigned to him by Daksha Jhaveri Group. So far as Goodwill is concerned, Mr. Jagtiani would submit that Goodwill has also got itself impleaded in the suit in its alleged capacity as landlord claiming that it also seeks eviction of original Defendants from the suit premises. Mr. Jagtiani would then take me through the evidence led by Daksha Keshrichand Jhaveri, Deepak Chandrakant Jhaveri (Defendant No.13)

and the witness of Goodwill to demonstrate that all of them have in fact sought dismissal of the eviction suit by raising various defences thereby taking a position adverse to that of Plaintiffs. He would therefore submit that Gnani, Daksha Jhaveri Group and Goodwill, who got themselves impleaded in the suit by representing that they seek eviction of original Defendants and that their position is not adverse to Plaintiffs have now changed their stance and have actually colluded with the original Defendants to ensure that Plaintiffs' suit for eviction is dismissed. He would submit that questioning the legality of termination notice by Daksha Jhaveri, on whose behalf the said notice was issued, leaves no manner of doubt that she has colluded with Defendant Nos.1 and 4 and has led evidence with the sole objective of frustrating Plaintiffs' suit for eviction.

17) Mr. Jagtiani would then submit that the scope of participation by Gnani and Daksha Jhaveri Group is outlined by the two judgments of this Court dated 20 September 2017 and 21 April 2021. That while permitting impleadment of Gnani and transposition of Daksha Jhaveri Group, this Court has clarified by Order dated 20 September 2017 that their presence in the suit is permitted only to ensure that their right to seek eviction of original Defendants is protected in the event of abandonment of claim by Plaintiffs or collusion with the Defendants. That while upholding this Court's Order dated 20 September 2017, the Apex Court has clarified that the decree of eviction, if passed in favour of Plaintiffs, would also enure to the benefit of proforma Defendants. That the Apex Court has described Gnani and Daksha Jhaveri Group as

‘proforma defendants’ and that the same classification would apply to Goodwill also.

18) Taking me through the order passed by *Justice S.K. Shinde* on 25 April 2021 disallowing cross-examination of Plaintiffs by Gnani and Daksha Jhaveri Group, Mr. Jagtiani would contend that this Court repeatedly held that their interest in the suit is not adverse to that of Plaintiffs and for this reason, they cannot be permitted to cross-examine Plaintiffs’ witness. Mr. Jagtiani would therefore submit that the Orders passed by *Sonak J.* and *Shinde J.* clearly restrict the scope of participation by Gnani and Daksha Jhaveri Group in the eviction suit in their capacity as proforma Defendants having no interest adverse to Plaintiff. That therefore they cannot be permitted to lead any evidence in the suit, particularly evidence which seeks dismissal of the eviction suit.

19) Mr. Jagtiani would also rely upon Order of the Apex Court dated 19 July 2022 reversing the judgment and order passed on 13 April 2022 and not allowing Goodwill’s application for framing of additional issues. That the logic for not allowing Goodwill from having additional issues framed is again same viz. impermissibility for Goodwill to raise any contention adverse to the Plaintiffs. That despite filing of written statement by Goodwill, the Apex Court has not permitted Goodwill to have additional issues framed based on contentions raised by it in the written statement. That therefore the normal rule of permissibility to lead evidence by a party filing written statement would not apply to the present case. Also, according to Mr. Jagtiani, *Justice Shinde’s* Order denying cross-examination of Plaintiffs’ witness to Gnani and Daksha

Jhaveri Group has been passed after filing of written statements by them. That therefore the main reason for the Small Causes Court for passing the impugned order, of written statement being rendered merely a piece of paper in absence of evidence, is clearly erroneous.

20) Mr. Jagtiani would further submit that no issue has been framed by the Small Causes Court in respect of contesting claims between Plaintiffs and Defendant Nos.7 to 14 and that in absence of any issue, there is no question of leading any evidence by Defendant Nos.7 to 14.

21) Mr. Jagtiani would invite my attention to Affidavit filed by Mr. Sushil S. Jhaveri as constituted attorney of Defendant Nos. 2, 7 to 10 and 12 stating that they have no role in the suit property having given their rights to Gnani by registered Deed of Assignment. That contrary to such Affidavit, Daksha Jhaveri Group has been illegally permitted to lead evidence to ensure dismissal of Plaintiffs' suit.

22) In support of his contentions, Mr. Jagtiani would rely upon following judgments:

(i) ***Kanaklata Das and Others V/s. Naba Kumar Das and Others*¹**

In eviction suit it is not necessary for all co-owners to file suit and that the suit can be decreed without impleadment of one of the co-owners. Issue of title is not germane for decision of eviction suit. That only two persons are necessary parties viz. landlord and tenant and decree of eviction can be passed if landlord-tenant relationship is

¹ (2018) 2 SCC 352.

established and the ground on which eviction is sought, exists in the Rent Act.

- (ii) **Jainuddin Abdul Rehman Shaikh V/s. Sitaram Damodar Varvadkar and others**² - Only remedy for co-owner not satisfied with decree for exclusive possession in favour of other co-owner is to file separate suit for partition. He cannot resist suit filed by co-owner for eviction.
- (iii) **India Umbrella Manufacturing Co. and Ors. V/s. Bhagabandei Agarwalla (Dead) By LRs Savitri Agarwalla (Smt) and others**³ - One of the co-owners can file suit for eviction of tenant and rights of parties stands crystallised on the date of filing of the suit and entitlement of the co-owners to seek ejection must be adjudged by reference to the date of institution of the suit.
- (iv) **V. Prabha & Co. Pvt. Ltd. & Anr. V/s. Kuljit Singh Chadha & Anr.**⁴ - A Co-owner can file a suit for eviction of tenant without joining other co-owner when suit is not under Rent Act.
- (v) **Mumbai International Airport Private Limited V/s. Golden Chariot Airport and Another**⁵ - Parties securing benefit of an order cannot later claim that it is valid for one purpose and not valid for another. Impermissibility to blow hot and cold or to approbate and reprobate.

² 1981 Mh.L.J. 498.

³ (2004) 3 SCC 178.

⁴ 2006 SCC OnLine Bom. 858.

⁵ (2010) 10 SCC 422.

- (vi) **Rajendra Singh Chhatrasal Singh Kushwaha V/s. Jitendra Singh Rajendra Singh Kushwah and others**⁶ – Court cannot permit a party to lead evidence not related to an issue.
- (vii) **Ida Berta dos Remedios Cunha e Gomes and Others V/s. Victor Luis Monteiro and others**⁷ and **Harish Loyalka and Others V/s. Dileep Nevatia and Others**⁸- In an appropriate case, Court can strike off cross-examination already recorded in exercise of jurisdiction under Article 227.
- (viii) **Hussens Hasanali Phulavwala V/s. Sabbirbhai Hasanali Phulavwala**⁹ and **State of West Bengal V/s. Smt. Rama Devi and others**¹⁰ - Mere impleadment as Defendant in absence of status as adverse party does not entitle such Defendants to lead evidence.

B.2 SUBMISSIONS ON BEHALF OF GNANI, DAKSHA JHAVERI GROUP AND GOODWILL (DEFENDANT NOS. 7 TO 14)

23) Mr. Chetan Kapadia, the learned senior advocate appearing for Gnani (Respondent No.7), Daksha Jhaveri Group (Respondent Nos.8 to 13) and Goodwill (Respondent No.14) would oppose the petition and support the Order passed by the Small Causes Court. He would raise a preliminary objection to the maintainability of the petition submitting that Petitioners have alternate remedy of filing Revision before the Appellate Bench of Small Causes Court under provisions of Section 42(4) of the Presidency Small Causes Court Act, 1882. That the

⁶ 2013(6) Mh.L.J. 802

⁷ 2013 SCC OnLine Bom 1577.

⁸ MANU/MH/0249/2014.

⁹ 1981 SCC OnLine Guj 30.

¹⁰ 2002 SCC OnLine Cal 317.

impugned order has decided substantial rights of the parties finally and therefore the same cannot be considered as a procedural order. That therefore Petitioners ought to have pursued the remedy of revision. In support of his contentions, he would rely upon judgments in *Matsun Financials LLP V/s. OG Corporation*¹¹ and *Fizzah Navnitlal Shah V/s. Aura Alkalies and Chemicals Pvt. Ltd.*¹²

24) Mr. Kapadia, would further submit that this Court should not interfere in the impugned order in its jurisdiction under Article 227 of Constitution of India especially because the trial is under progress. He would rely on judgments in *Raj Kumar Bhatia V/s. Subhash Chander Bhatia*¹³, *Laxmikant Revchand Bhojwani and others V/s. Pratapsing Mohansingh Pardeshi*¹⁴ and *Bhartiben Shah V/s. Gracy Thomas and others*¹⁵. Relying on Section 105 of the Code of Civil Procedure, he would submit that orders passed in the course of trial can always be challenged at the stage of Appeal and in support he would rely upon *Jagat Singh V/s. Jaidev and Ors.*¹⁶ and *N.C. Jain and Ors. V/s. Aiets Com Pvt. Ltd.*¹⁷ and *Marigold Premises Pvt. Ltd. and Ors. V/s. Marigold Phase III Co-operative Housing Society Limited*¹⁸.

25) Mr. Kapadia would further submit that interference by this Court in exercise of jurisdiction under Article 227 at this stage would result in a truncated trial requiring re-opening of evidence in future.

¹¹ 2016 SCC OnLine Bom 744.

¹² 2016 SCC OnLine Bom 6260.

¹³ (2018) 2 SCC 87.

¹⁴ (1995) 6 SCC 576.

¹⁵ 2013 SCC OnLine Bom. 98.

¹⁶ MANU/UC/0082/2021.

¹⁷ 2023 SCC OnLine Del 8205.

¹⁸ 2023 (5) Bom.C.R.238.

That all arguments of Petitioner can be considered at the time of final hearing of the suit and in support he would rely upon **Kishor Kirtilal Mehta and others V/s. Lilavati Kirtilal Mehta Medical Trust and others**¹⁹.

26) Mr. Kapadia would further submit that since the suit is filed under Section 41 of the Presidency Small Causes Act, 1882 (PSCC) and since provisions of the Maharashtra Rent Control Act, 1999 are not applicable, the rights and liabilities of parties are governed by the provisions of the Transfer of Property Act. That the proceedings under Section 41 of the PSCC Act are no longer summary proceedings consequent to amendment of 1976 to PSCC Act as explained in **Prabhudas Damodar Kotecha and others V/s. Manhabala Jeram Damodar and Another**²⁰. That therefore suit is to be tried as a Regular Suit making the enquiry vast and wide in its ambit. He would also rely upon **Mansukhlal Dhanraj Jain and others V/s. Eknath Vithal Ogale**²¹ in support of his contention that the phrase 'relating to recovery of possession' as found in Section 41(1) of PSCC Act is comprehensive in nature and takes in its sweep all types of suits and proceedings concerned with recovery of possession. Relying on the judgment of the Apex Court in **Babulal Bhuramal and Another V/s. Nandram Shivram and others**²² he would submit that in a suit for recovery of possession, a question to title of premises, which arises out of the Act can be determined 'incidentally'. That a title which could not be established outside the Act, but which arises under the provisions of the Act by virtue of a claim made

¹⁹ (2007) 10 SCC 21.

²⁰ (2013) 15 SCC 358.

²¹ (1995) 2 SCC 665.

²² AIR 1958 SC 677.

thereunder, must be determined by the Small Causes Court and a title *dehors* the Act can be determined in any other Court of competent jurisdiction. He would also rely on judgments in *Dattatraya Krishna Jangam V/s. Jairam Ganesh Gore*²³, *Importers and Manufacturers Ltd. V/s. Pheroze Framroze Taraporewala and Ors.*²⁴, *Harswarup Khannamal and Others V/s. Nandram Shriram and others*²⁵ and *Devi Prasad Surju Mishra V/s. Arjun Manohar Mishra and another*²⁶. Mr. Kapadia would therefore contend that the jurisdiction under Section 41 read with Section 45 of the PSCC Act is such that any issue incidental or ancillary to the subject matter of the suit can and ought to be decided by the Small Causes Court.

27) Mr. Kapadia would submit that in the present case if a decree is to be passed in favour of Plaintiff and Defendant Nos. 7 to 14 as envisaged by the order of the Apex Court, the Small Causes Court is liable to decide whether Defendant Nos.7 to 14 are 'landlords' and are entitled to such a decree. He would submit that the order of the Apex Court does not operate as a determination on the issue whether Defendant Nos.7 to 14 are landlords or not, which issue arises incidentally in the course of the suit under section 41 of the PSCC Act.

28) Mr. Kapadia would further submit that Defendant Nos. 7 to 14 are entitled to lead evidence, being necessary parties, who are entitled to prove their pleaded case. That their rights are protected under the orders passed by *Sonak J.* That the Code does not define the expression

²³ AIR 1965 Bom 177.

²⁴ AIR 1953 SC 73.

²⁵ AIR 1956 Bom. 656.

²⁶ Writ Petition No. 726 of 1980 decided on 23 April 1982.

‘proforma defendant’ and there are no restrictions attached to a proforma defendant in law and that therefore there is nothing in law to indicate that a proforma defendant cannot lead evidence. That there is no estoppel against law and it is permissible for parties to raise inconsistent pleas and lead evidence. In support of his contention about opportunity to prove what is contended in the written statement, Mr. Kapadia has relied on the judgments of the Apex Court in *Commissioner of Trade Tax, U.P. and another V/s. Kajaria Ceramics Ltd.*²⁷ and *Vidhyadhar V/s. Manikrao and another*²⁸. That Defendants are entitled to take contradictory pleas as well as to change their position with changed circumstances/developments. That several changed circumstances have resulted in Defendants raising contrary pleas such as (i) Defendant No.1 has become owner of subject property, (ii) Defendant No.8 has produced Memorandum of Declaration and Memorandum of Family Settlement showing that she will solely manage/deal with the suit property, (iii) Letters of Administration dated 20 December 2017 issued in favour of Defendant No.8 (iv) contention of Defendant No. 13 that he is the sole surviving lessor and landlord.

29) Mr. Kapadia would further submit that all parties to a suit are entitled to lead evidence and in support of his contentions, he would rely on the following judgments:

- (i) *Giani Zail Singh V/s Election Tribunal Ii, Chandigarh and ors*²⁹.
- (ii) *Jhumpa Bewa and others V/s. Sahadeb Rout and others*³⁰.

²⁷ (2005) 11 SCC 149.

²⁸ (1999) 3 SCC 573.

²⁹ AIR 1964 P&H 105.

³⁰ 1986 SCC OnLine Ori 31.

- (iii) ***Subhash Chander and others V/s. Shanti Swaroop and others***³¹.
- (iv) ***Shah Hiralal Himatlal and others V/s. M.G.Pathak and others***³².
- (v) ***Sunil Chhatrapal Kedar V/s. Y.S.Bagde and another***³³.

30) Mr. Kapadia would further submit that contrary to the order of the Apex Court directing that decree of eviction would enure benefits of Defendant Nos.7 to 13, Plaintiffs have consistently taken a plea in various proceedings even after the date of Apex Court order that they alone are entitled to the decree of eviction thereby denying rights of Defendant Nos.7 to 14 in respect of the suit premises. That therefore Defendant Nos.7 to 14 must stand on their own legs by proving their title in respect of the suit premises in the light of repeated assertions of Plaintiffs that they alone can enjoy fruits of the decree. In this regard he would take me through various contentions raised by Plaintiffs in various pleadings, affidavits etc.

31) Mr. Kapadia would further submit that Defendant Nos.7 to 14 must be permitted to protect their own interest by leading evidence. That Plaintiffs have embarked upon self-destructive journey by denying title of Defendant No.4 which may result in forfeiture of lease under Section 111(g) of Transfer of Property Act. That in such circumstances, Defendant Nos.7 to 14, who do wish to question landlord's title, must be permitted to protect the lease from being forfeited. In support he would rely upon ***Yadav Mahadu Koli and others V/s. Sumitrabai Popatlal Shah***³⁴, ***Lahu s/o Namdeo Ingale V/s. Kailash Matasaran Gupta***³⁵ and ***Gillan F.***

³¹ 1983 SCC OnLine P&H 75.

³² AIR 1964 Guj 26.

³³ 2004 SCC OnLine Bom 497.

³⁴ 2009 SCC OnLine Bom 1334.

³⁵ 2014 (5) Mh.L.J. 659.

Irani and others V/s. Parijat Hotels Pvt. Ltd.³⁶ That a specific issue is framed as to whether Defendant No.4 proves that his rights in the suit premises are merged in the higher rights under its Deed of Conveyance. That doctrine of merger would apply as held by the Apex Court in **Pramod Kumar Jaiswal and others V/s. Bibi Husn Bano and others**³⁷.

32) Mr. Kapadia would further submit that Defendant No.14 has acquired rights from Smt. Kantaben Gagiwalla, daughter of Tarachand Jhaveri, who inherited leasehold rights from the original lessee, Keshrichand Jhaveri. That Defendant No.14 therefore desires to lead evidence in support of the contention that Plaintiffs did not seek permission of predecessor in title of Defendant No.14 and therefore the notice of termination is bad in law. He would submit that it is a settled law that notice of termination under the Transfer of Property Act must be issued by all owners and in support he would rely upon on the following judgments:

- (i) ***Abdul Sami V/s. Mohammad Ashfaq and others***³⁸.
- (ii) ***Nanalal Girdharlal and another V/s. Gulamnabi Jamalbhai Motornwala and others***³⁹.
- (iii) ***Suchitra Pradhan and Ors. V/s. M/s. U.P. Twiga Fibreglass Ltd. and Ors***⁴⁰.
- (iv) ***Abdul Hamid V/s. Bhuvaneshwar Prasad***⁴¹
- (v) ***Mahboob Ullah V/s. Jwala Prasad Kajriwala and another***⁴²

³⁶ 2000 AIHC 3415.

³⁷ (2005) 5 SCC 492.

³⁸ AIR 1978 NOC 3 (ALL).

³⁹ 1972 SCC OnLine Guj 12.

⁴⁰ ILR (2001) I DELHI 520.

⁴¹ AIR 1953 Nag 18.

⁴² 1974 SCC OnLine All 298.

33) Similarly, Mr. Kapadia would urge that there are several other aspects on which Defendant Nos.7 to 14 desire to lead evidence. That they cannot be gagged by an order of the Court from leading evidence to prove various contentions raised in the written statement. That 'inconvenient evidence' is different than 'irrelevant evidence' and that merely because Plaintiffs believe that the evidence led on behalf of Defendant Nos.7 to 14 is inconvenient to them, the same cannot be a ground for preventing them from leading relevant evidence. He would submit that, evidence of most of the witnesses of Defendant Nos.7 to 14 is already recorded and this is yet another ground why this Court would be loathe in interfering in the impugned order. Mr. Kapadia would pray for dismissal of the petition.

B. 3 SUBMISSIONS ON BEHALF OF NEW ERA (DEFENDANT NO.1)

34) Mr. Thorat the learned counsel appearing for Respondent No.1-New Era, in addition to submissions canvassed by Mr. Kapadia would submit that the petition is filed after substantial delay and moved after perusal of Affidavits of Evidence. That such conduct would disentitle Petitioners of any relief by this Court under Article 227 of the Constitution of India. He would submit that once pleadings are filed, evidence must follow unless there is an exceptional circumstance such as striking off defence where a party is prevented from leading evidence. He would submit that a specific issue has been recast by the Small Causes Court about passing of decree in favour of Defendant Nos. 7 to 13, which casts burden on Defendant Nos.7 to 13 to lead evidence in support of the said issue. Mr. Thorat would submit that the entire evidence of

Defendant Nos.8 and 14 is already over and Defendant No.13 is under cross-examination and during evidence vital admissions are given in favour of Defendant No.1 which cannot be washed away by allowing the present petition thereby resulting in serious prejudice to Defendant No.1. That the application at Exhibit-664 was filed by Advocate which was not even signed by Plaintiffs. That Plaintiffs' reliance on evidence subsequently recorded cannot be a reason for allowing the application at Exhibit-664. That under the provisions of Order XVIII Rule 2 of the Code, all defendants are entitled to lead evidence including proforma defendants.

35) Mr. Vashi the learned senior advocate appearing for Respondent No.4 would adopt the submissions of Mr. Kapadia.

B.4 SUBMISSIONS IN REJOINDER ON BEHALF OF PETITIONERS

36) In rejoinder, Mr. Jagtiani would submit that the objection of availability of alternate remedy has not been raised by Respondent Nos.7 to 14 in their reply. That the said Defendants have invoked jurisdiction of this Court directly against order passed by Small Causes Court on several occasions. Relying on *Surya Dev Rai V/s. Ram Chander Rai*⁴³, he would submit that this Court would be justified in intervening in orders where grave injustice or gross failure of justice is caused and also in a situation where the error is such that, if not corrected, the same would result in travesty of justice. He would submit that the rule of alternate remedy is a rule of discretion. That relegating Petitioners to an alternate remedy at

⁴³ (2003) 6 SCC 675.

this stage would further delay decision of the suit which has already been expedited atleast on 10 occasions by the Apex Court.

37) Mr. Jagtiani would further submit that the conduct of Plaintiffs would not be a determinative factor in expanding the scope and role of Defendant Nos.7 to 14 which is restricted as mere *proforma defendants* without having any role adverse to that of Plaintiffs. On the aspect of argument of forfeiture, Mr. Jagtiani would submit that mere questioning the title of the fourth Defendant cannot result in forfeiture of title as Plaintiffs never recognised such right since the inception. That Section 111(g) of the Transfer of Property Act has no application in the present fact situation. That various events on the basis of which adverse evidence is sought to be led by Defendant Nos.7 to 14 are existing right since inception and the alleged subsequent event is a mere ruse by them for colluding with Defendant Nos.1 and 4 to frustrate Plaintiffs' claim.

38) Referring to provisions of Section 41 of PSCC Act, Mr. Jagtiani would submit that all issues, including incidental issues must be determined between a 'landlord and a tenant' and that there is no scope for determination of any issue between different persons claiming to be tenants. That therefore so-called disputes between Plaintiffs and Defendant Nos.7 to 14 relating to their title to the suit premises cannot be decided in the suit for eviction.

C. REASONS AND ANALYSIS

39) The short issue that arises for consideration in this petition is whether Defendant Nos. 7 to 14, who are taken on board as 'proforma defendants' whose role is not adverse to Plaintiffs while seeking a decree of eviction, but according to Plaintiffs, who have now taken position adverse to Plaintiffs, can be permitted to lead evidence in the suit seeking eviction against Defendant Nos.1 to 6 ?

40) Before proceeding to answer the issue, it would be first necessary to decide the objection of availability of alternate remedy of filing revision by the Petitioners. It must be observed at the very outset that the objection of alternate remedy is not raised in the Affidavit in Reply filed by Defendant Nos. 8, 10 to 13. It must also be noted that the objection of alternate remedy was not raised when hearing of the petition commenced. The same was raised only when Mr. Jagtiani concluded his arguments and Mr. Kapadia commenced his arguments. By that time, this Court had already invested considerable amount of time for hearing of the petition. In addition to above reasons, there are variety of other reasons why I am not inclined to entertain the objection of alternate remedy and to relegate the parties to the remedy of revision at such a belated stage. Firstly, Daksha Jhaveri Group cannot be permitted to raise this objection when they themselves filed Writ Petition No. 5917 of 2017 challenging the Order passed by the Small Causes Court directing their deletion. At that time, Daksha Jhaveri Group did not avail the alternate remedy of Revision. It appears that in the past, parties have filed Writ Petitions directly against the orders of the Small Causes Court against

which no appeals can be preferred. Mr. Kapadia does not dispute the position that the order impugned in the present petition is not appellable under Section 42(1) of the PSCC Act. The remedy of revision under Section 42(4) of the PSCC Act would not be akin to the remedy of Appeal. Furthermore, the last order passed by the Apex Court on tenth occasion, directs decision of the suit by 30 September 2024. If at this stage, Petitioners are relegated to the remedy of Revision, the aggrieved parties may again approach this Court thereby making it virtually impossible for the Small Causes Court to decide the suit within time limit specified by the Apex Court. Considering the facts and circumstances of the present case, I am not inclined to dismiss the petition only on the ground of availability of alternate remedy of Revision. Therefore, this judgment is not burdened by discussing various case laws cited by the rival parties on the issue of alternate remedy.

41) This unique situation is created in the eviction suit on account of multiple persons/entities claiming leasehold rights in respect of the suit premises. As observed above, initially Mr. Tarachand Navalchand Jhaveri and Mr. Ratanchand Navalchand Jhaveri were apparently the owners in respect of the suit premises, who sold the same to Baria family by Indenture dated 23 December 1938. On the same day, Barias granted lease in favour of Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri for 999 years. After death of Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri, various members of Jhaveri family claim leasehold rights in the suit premises in their capacity as heirs of the original lessees. The said Jhaveri family members came together and instituted TE & R Suit No.48/62 of 2009 against New Era.

All Jhaveri family members claiming to be heirs of Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri, except Smt. Kantaben Gajiwala, were initially Plaintiffs in the eviction suit and jointly sought eviction of New Era, Johnson Dye and other four entities from the suit premises. During pendency of the suit, one group of Jhaveri family which is being referred as 'Daksha Jhaveri Group' assigned their leasehold rights in the suit premises either fully or partly in favour of Gnani. The assignee-Gnani, in his capacity as owner of leasehold rights assigned by Daksha Jhaveri Group, also desired eviction of Defendant Nos.1 to 6 and filed application for his impleadment as Plaintiff to the suit. As observed above, Order passed by this Court on 20 September 2017 (*Sonak, J.*) has resulted in a situation where Gnani is impleaded as Defendant No.7 to the suit, whereas Daksha Jhaveri Group is transposed from their capacity as original Plaintiffs to Defendant Nos.7 to 13. There is a new addition to the suit in the form of Goodwill who claims that Smt. Kantaben Gajiwala had either full or part of leasehold rights in the suit premises, which Goodwill has purchased from Kantaben. On the basis of his claim as being owner of either full or part of leasehold rights through Kantaben, Goodwill also wants to assert its rights as a landlord in the suit for securing a decree of eviction against Defendant Nos.1 to 6. But following the ratio of *Justice Sonak's* judgment, though Goodwill desired impleadment as Plaintiff, it is impleaded as Defendant No. 14 to the Suit. Thus there are four sets of persons/entities who claim to be landlords in respect of the suit premises as under :

- (i) Nikhilesh Jhaveri Group, who continued to prosecute the suit as Plaintiff.
- (ii) Gnani, who claims leasehold rights assigned by Daksha Jhaveri Group and who is impleaded as Defendant No.7.
- (iii) Daksha Jhaveri Group (original co-Plaintiffs), who still desire to participate in the suit possibly on account of dispute about assignment of complete or partial rights in favour of Gnani and who are transposed as 'Defendant Nos.8 to 13'.
- (iv) Goodwill, who claims to have purchased leasehold rights of Smt. Kantaben Gajiwala, daughter of Tarachand Jhaveri and who is impleaded as Defendant No.14 to the suit.

42) Thus, the position of the eviction suit, as it stands today, is that Nikhilesh Jhaveri Group is prosecuting the same as Plaintiffs to seek eviction of Defendant Nos.1 to 6 and according to Plaintiffs, Gnani, Daksha Jhaveri Group and Goodwill (together impleaded as Defendant Nos.7 to 14) are merely 'proforma defendants', without having any claim adverse to Plaintiffs. Plaintiffs therefore contend that in their capacity as mere proforma defendants, Defendant Nos.7 to 14 cannot lead any evidence prejudicial to the interest of Plaintiffs to seek eviction of Defendant Nos.1 to 6. On the contrary, it is the case of Defendant Nos.7 to 14 that there is no concept of proforma defendants under the Code and that their impleadment to the suit is in their capacity as 'necessary parties', that they are permitted to file written statements and therefore they have right to lead evidence to prove what is pleaded by them in the written statements.

43) In the present case, there are both internal as well as external aids available to decide the issue at hand. The internal aid is in the form of various orders passed in the proceedings between the parties arising out of same suit, whereas external aid is in the form of various judgments relied upon by the rival parties.

44) For the purpose of examining whether Defendant Nos.7 to 14 can be permitted to lead evidence in Plaintiffs' suit for eviction of Defendant Nos.1 to 6, it would be necessary to first understand the purpose for which they have been permitted either to be impleaded or retained in the suit. Gnani, who claims to be the assignee of leasehold rights of Daksha Jhaveri Group filed impleadment application on 8 June 2016 for being impleaded as Plaintiff No.13. It would be necessary to consider the pleadings made by Gnani for seeking his impleadment as Plaintiff No.13 in the suit. In paragraphs-3 and 4 of his application, Gnani pleaded as under:

3. I say that in pursuance to the said Registered Deed of Assignments dated 31.03.2016 executed between the Plaintiff Nos. 2, 7 to 10 and 12 on one hand and the Applicant on the other hand, the Applicant has become entitled to all the rights, title and interest and shares in respect of the suit premises. **I say that the Applicant is therefore entitled to continue with the above suit against the Defendants and also entitled to get the decree of eviction against the Defendants in respect of suit premises.** I, therefore, say and submit that the Appellant is necessary and the proper party and required to be joined as party Plaintiff Nos. 13.

4. I say and submit that the right to sue and the cause of action continues in favour of the Appellant and against Defendants. I, therefore, say and submit that it is just, proper, necessary and also in the interest of justice that the Hon'ble Court be pleased to direct the Plaintiffs to join the Applicant, **as party Plaintiff No.13** in the above suit.

(emphasis and underlining supplied)

45) Thus, Gnani represented before the Small Causes Court that he is entitled to continue the suit against the Defendants and also entitled to get the decree of eviction against them. Thus, Gnani's impleadment application was premised on its assertion that it desired a decree of eviction against Defendants. As observed above, Gnani's impleadment application was allowed by Small Causes Court on 19 October 2016 and he was directed to be impleaded as a 'co-plaintiff'. On the other hand, Nikhilesh Jhaveri Group sought deletion of Daksha Jhaveri Group as Plaintiffs in the suit. Though Daksha Jhaveri Group admitted the assignment in favour of Gnani, they opposed their deletion as Plaintiffs meaning thereby that they still desired to act as Plaintiffs for the purpose of seeking a decree of eviction against Defendant Nos.1 to 6. The application was allowed on 14 March 2017 directing deletion of Daksha Jhaveri group. When Daksha Jhaveri Group filed Writ Petition No. 5917 of 2017 before this Court, they expressed an apprehension alongwith Gnani before this Court that Nikhilesh Jhaveri group might either abandon the suit or compromise the same with Defendant Nos.1 to 6 which would prejudice not just Gnani but also Daksha Jhaveri Group. It was contended that only 75% rights were assigned by Daksha Jhaveri Group in favour of Gnani and that they had right to remain in the carriage of the suit. Thus, both Gnani and Daksha Jhaveri Group made specific representation before Small Causes Court as well as before this Court that they apprehended abandonment of suit by Nikhilesh Jhaveri Group and that therefore they must be permitted to prosecute the suit as 'Plaintiffs' and secure a decree of eviction against original Defendants.

46) In the light of the above position, single judge of this Court (*Justice Sonak*) considered the questions as to whether Daksha Jhaveri Group could be retained in the suit and if yes, in what capacity. Similarly, *Justice Sonak* has also decided the issue as to whether Gnani had a right to be impleaded in the suit and if yes, in what capacity. In judgment and Order dated 20 September 2017, *Justice Sonak* held in paras-19, 20, 21, 22 and 24 as under :

19] Applying the aforesaid principles to the fact situation in the present case, the direction issued to plaintiff Nos. 4 to 6 in the impugned order dated 19th October 2016 to implead GITCPL as co-plaintiff in the suit is quite unsustainable and is hereby set aside. However, as noted earlier, since GITCPL claims assignment from plaintiff Nos. 2, 7 to 10 and 12 there can be no difficulty in ordering the impleadment of GITCPL as a defendant No. 7 in the suit. Plaintiff Nos. 4 to 6 are accordingly directed to implead GITCPL as defendant No. 7 in the suit. Necessary amendment to be carried out within a period of two weeks from the date of this order.

20] Since, there is a dispute as to whether the plaintiff Nos. 2, 7 to 10 and 12 have assigned their entire rights to the suit premises in favour of GITCPL or not and further even assuming, that they have, there is no reason to strike out these plaintiffs from the array of the parties. However, considering the changed scenario where, these plaintiffs, have assigned a major portion of their interest in favour of GITCPL and further considering that it is only appropriate that GITCPL is impleaded as a defendant in the suit, it will be only appropriate that the plaintiff Nos. 2, 7 to 10 and 12 are also transposed as defendants in the suit. Such a course of action is permissible under Order I Rule 10 of CPC. On account of the assignment of their rights or in any case their substantial rights, there has arisen a conflict of interest between them and plaintiff Nos. 4 to 6 who have not chosen to assign their rights in the suit premises in favour of GITCPL. If continuance of GITCPL and plaintiff Nos. 4 to 6 as 'co-plaintiff' will result in embarrassment to the further proceedings in the suit, by the same logic, the continuance of plaintiff Nos. 2, 7 to 10 and 12 who have on their own say, assigned 75% of their rights to the suit premises in favour of GITCPL, will also constitute an embarrassment to the further progress in the suit. The same issue of representation by separate set of lawyers is bound to arise apart from several other inevitable complications. Since, the plaintiff Nos. 4 to 6 have chosen not to assign their rights, it is only appropriate that they continue in the carriage of the suit the GITCPL

as well as the plaintiff Nos. 2, 7 to 10 and 12 are impleaded as defendants in the suit.

21] In this case, the suit is for eviction of the tenants. In such a suit, there is really no scope to adjudicate in inter se disputes between the plaintiffs themselves. Therefore, the presence of GITCPL or for that matter plaintiff Nos. 2, 7 to 10 and 12 who have on their own say assigned 75% of their rights to the suit premises in favour of GITCPL, as defendants may really make no substantial difference or impact. However, it is obvious that disputes have arisen between plaintiff Nos. 2, 7 to 10 and 12 on one hand and plaintiff Nos. 4 to 6 on the other, mainly on account of the former set assigning their rights or substantial portion of their rights to GITCPL. It is also possible that the former set and GITCPL seek to pressure plaintiff Nos. 4 to 6 to also assign their rights and in furtherance of this, seek carriage of this suit. However, the interests of justice will be met if both the impugned orders are modified and plaintiff Nos. 4 to 6 are directed to implead GITCPL as defendant No. 7 and to transpose plaintiff Nos. 2, 7 to 10 and 12 as defendant Nos. 8 to 13 in the suit.

22] There is really no basis for the apprehension that plaintiff Nos. 4 to 6 might abandon the suit or collude with the defendant tenants. In any case, suitable directions can always be issued to allay such apprehensions. In the light of apprehensions expressed by Mr. Dhakephalkar and Mr. Godbole, the directions are issued to the trial Court not to grant leave to plaintiff Nos. 4 to 6 to withdraw or abandon the suit without furnish giving at least 30 days prior to notice to GITCPL and plaintiff Nos. 2, 7 to 10 and 12 (who are ordered to be impleaded as defendants) of their intention to do so. In such an eventuality the GITCPL as well as the plaintiff Nos. 2, 7 to 10 and 12 can always apply to the court for their transposition as plaintiffs if they wish to continue with the suit against the original defendants.

24] It is settled position in law that the civil court has ample powers to mould the relief. In the suit as instituted, there is really no scope for resolution of inter se disputes between the plaintiffs. However, in case there are any apprehensions that in the course of resolution of disputes with the tenants, there might arise some impact upon the inter se rights between the plaintiffs, the civil court, has ample powers to mould the reliefs and clarify the position. The mere circumstance that some of the landlords are impleaded as defendants, will really not make any significant impact. If ultimately, a case is made out to secure eviction of the original defendants – tenants, the trial Court can always mould relief and direct the delivery of possession of the suit premises, not just to plaintiff Nos. 4 to 6 but also to plaintiff Nos. 2, 7 to 10 and 12 and GITCPL, who are now ordered to be impleaded as defendant Nos. 7 to 13. This is yet another reason as to why powers under Order I Rule 10

of CPC are required to be exercised so as to implead GITCPL and plaintiff Nos. 2, 7 to 10 and 12 as defendants Nos. 7 to 13.

47) Thus, Order passed by *Justice Sonak* leaves no manner of doubt that this Court considered the prayer of both Gnani as well as Daksha Jhaveri Group to prosecute the suit in their capacity as 'Plaintiffs'. The said prayer would have been virtually accepted by this Court, but for difficulties in the carriage of the suit, where various Plaintiffs were to insist upon engaging different advocates. It is for this reason that this Court directed impleadment of Gnani and Daksha Jhaveri Group as Defendants holding that their impleadment as Defendants would really make no substantial difference or impact. While impleading them as Defendants, this Court has recognised and protected their rights to be transposed as Plaintiffs in the event of abandonment or compromise of the suit by Nikhilesh Jhaveri Group. Thus though Gnani and Daksha Jhaveri Group are directed to be impleaded as Defendants to the Suit, their real capacity is in the nature of co-plaintiffs.

48) When the order of *Justice Sonak* was challenged before the Apex Court by both Daksha Jhaveri Group as well as Gnani, the Apex Court passed following order :

After hearing the learned counsels for the parties we are of the opinion that the order of the High Court does not call for any interference. The Special Leave Petitions are disposed in limine.

However, it is made clear that in case the plaintiffs succeed in the suit the benefit thereof shall enure to the petitioners as well, who are transposed as perma defendants by the High Court.

49) The fact that Gnani and Daksha Jhaveri Group challenged the Order of *Justice Sonak* before the Apex Court would clearly indicate their insistence and desire to prosecute the suit as Plaintiffs as they were unhappy on account of their impleadment as Defendants to the suit. Filing of SLPs before the Apex Court by both of them shows that they wanted to act as Plaintiffs in the suit alongwith Nikhilesh Jhaveri Group. The issue is that if this was the desire and insistence of Gnani and Daksha Jhaveri group to prosecute the suit as Plaintiffs, can they be permitted to lead evidence not just in addition to evidence of Plaintiffs but prejudicial or detrimental to the decree of eviction sought in the suit ? If this Court or the Apex Court was to allow the petitions/SLPs of Gnani and Daksha Jhaveri Group, they would have carried the suit forward in capacity as Plaintiffs and could not have been in a position to lead evidence detrimental to the decree of eviction sought in the suit. Therefore, does the capacity in which they are impleaded viz. 'proforma defendants' changes the position ? In my view, the direction given by the Supreme Court in its Order dated 6 February 2018 provides a complete answer to the controversy in hand. The Apex Court has directed that irrespective of their impleadment as 'proforma defendants' Gnani and Daksha Jhaveri Group would still be entitled to the benefit of decree of eviction if passed in favour of Nikhilesh Jhaveri Group. Thus, the order of the Apex Court infact puts Gnani and Daksha Jhaveri Group virtually on par with Plaintiffs in the suit for the purpose of enjoying the fruits of decree of eviction, if and when passed in the suit.

50) Further clearer answer to the controversy at hand can also be found in the order of *Justice Shinde* passed in Writ Petitions (St.) No.

5747 of 2021 and 6142 of 2021. The said petitions arose out of denial of opportunity of cross-examination of Plaintiffs' witness to Defendant Nos.8 to 13. What is the most highlighting factor here is the factum of filing of written statements by Defendant Nos.8 to 13 at the stage where cross-examination of Plaintiffs' witness was sought by them. *Justice Shinde* however has held that Gnani and Daksha Jhaveri Group cannot cross-examine Plaintiffs witness by its order dated 21 April 2021. The findings recorded by this Court are as under:

10. In consideration of the facts of the case, it is to be affirmed that, interest of petitioners in the suit is not adverse to the interest of plaintiffs. Although, there is a dispute between the plaintiffs no.4 to 6 on one hand and defendants no.8 to 13 (original plaintiffs no.2, 7 to 10 and 12), on the other hand, as to whether they have assigned their entire interest in the suit property to GITCPL or whether they have assigned only 75% of their interest in the suit premises, there is no scope for resolution of this inter-se dispute in the suit for eviction filed under the Rent Act.

13. ... In so far as, the case of *Ida Berta* (supra) is concerned, therein petitioners, defendants no.5 and 6, were supporting the case of the plaintiffs, on most of the facts, but were disputing Deed of Gift and Power of Attorney executed in favour of plaintiffs, on the basis of which, half right was asserted in the suit property. Thus, defendants were permitted to cross-examine plaintiff's witnesses. However, after cross-examination was partly recorded, they were further barred from cross-examining P.W.1. Therefore, in the cited case, interest of petitioners-defendants was adverse, to interest of the plaintiffs. So is not the case in hand.

....

14. Whereas in the case of *Thota Suryanarayana* (supra), application under Order 38 Rule 1 Civil Procedure Code and Section 38 of the Evidence Act was filed with a prayer to expunge or delete the cross-examination of P.W.1 to 3 by defendants no.13 and 14 in the suit. The said application was allowed and the cross-examination of P.W.1 to 3 by defendants no.13 and 14 had been expunged mainly on the grounds that these parties cannot be treated as adverse parties and hence, they have no right to cross-examine these witnesses. This order was challenged in a revision. Relying on the judgment of **Karumanchi Subbarao Versus. Yarlagadda Venkatappaiah**, reported in AIR 1978 AP

193, the revision was not entertained. Mr. Ankad, therefore submits, petitioners, not being adverse party, they have no right to cross-examine plaintiff's witnesses.

17. Thus, to be asserted that, it is the right of the litigant to cross-examine the witness, whose testimony can be used against him in the trial or the party against whom the statement is intended to be used and further cross-examination is the examination of a witness by an adverse party. In the case at hand, the interest of the petitioners is not adverse to the interest of the plaintiffs. It is a suit for eviction of tenants under the Rent Act. Petitioners are claiming their rights in the suit property alongwith the plaintiffs. Therefore, inter-se dispute between the plaintiffs in respect of quantum of their divided/undivided share in the suit property, cannot be addressed in the eviction suit under the Rent Act and there is no scope to adjudicate this inter-se dispute. Strictly speaking, the petitioners are not "adverse parties" within the meaning of Section 137 of the Evidence Act. Moreover, neither testimony of the plaintiffs and their witnesses, is to be used against the petitioners, nor testing truthfulness of plaintiffs witnesses, would assist the Court in rendering finding on issue/s framed in the suit. In essence, it is to be affirmed that, no reliefs are sought by the plaintiffs against the petitioners, the material, even if elicited in the cross-examination of the plaintiff's witness by these petitioners would have no bearing over while answering the issues framed by the trial Court. It is in these circumstances, the petitioners have no right to cross-examine the plaintiff's witnesses.

18. One more fact may be stated. M/s. GITCPL (petitioners in Writ Petition (St.) No. 5747/2021) have instituted Suit No. 858/2019 against the respondents (plaintiffs no.4 to 6 in the instant petition), in March 2019, seeking partition of the suit property (tenanted property) by metes and bounds claiming 75% share in the leasehold rights therein. Thus, petitioner M/s. GITCPL has taken a step to assert its right in the suit property. Thus, to be affirmed, suit in question is not a "former suit" to Suit No.858/2019, for all purposes.

51) Thus, the broad reasons why *Justice Shinde* denied opportunity of cross-examination to Gnani and Daksha Jhaveri Group was their interest not being adverse to the interest of the Plaintiffs. This Court held that Gnani and Daksha Jhaveri Group are not '*adverse parties*' within the meaning of Section 137 of the Indian Evidence Act and that no reliefs

were sought by Plaintiffs against them. This Court also took note of the fact that Gnani has instituted Suit No. 858 of 2019 against Plaintiffs seeking partition of the suit property by metes and bounds claiming 75% share in leasehold rights therein.

52) I do not see any reason why the reasonings adopted by *Justice Shinde* while denying opportunity of cross-examination to Gnani and Daksha Jhaveri Group cannot be followed for denying opportunity to them to lead evidence as well. It must be borne in mind that conduct of cross-examination is also for the purpose of recording of evidence during trial of the suit. Therefore, it becomes quite inconceivable that Gnani and Daksha Jhaveri Group cannot extract evidence (about their assertions in the written statements) in the form of cross-examination of Plaintiffs' witness, but can lead their own evidence by filing Affidavit of Evidence.

53) There is yet another internal aid in the form of orders passed in the present proceedings, which throws light for resolution of the dispute involved in the petition. After its impleadment as Defendant No.14, Goodwill desired framing of additional issues. Goodwill insisted that since it was permitted to file written statement and that since it has raised various defences therein, additional issues must be framed arising out of such pleadings in the written statement. The Small Causes Court however rejected Goodwill's application and the Appellate Bench upheld the order recording following reasons :

11. ... In the case in hand, no relief is claimed and there are no averments against defendant No.14. Therefore, authorities cited by applicant are not applicable to the case in hand.

12. The appellant has further submitted they have right in the property and their contention needs to be considered. The appellate Court while deciding the Appeal No. 32 of 2020 has taken into consideration all the aspects about the presence of defendant No. 14 alongwith defendant No. 14 along with defendant No. 7 to 13 in the suit. But, mere existence of right itself cannot be a ground to frame any additional issues.

18. Thus we have considered all the aspects raised by applicant. The plaintiff has not claimed any relief against defendant No. 14 and no averments are made against defendant no. 14. Therefore, the question of framing issues on the basis of contention raised only in the written statement filed by defendant No.14 does not arise. The Learned Trial Court has already observed that whatever proposed issues suggested by defendant no.14 are already covered in the issues framed on record. Therefore, we are of the opinion that the additional issues cannot be framed.

54) This Court however reversed the Orders of the Small Causes Court and its Appellate Bench and allowed Goodwill's application for framing of additional issues, essentially holding that since Goodwill was impleaded as party and was permitted to file written statement, its *locus-standi* was accepted by Plaintiffs. This Court further held that no prohibition was imposed on Goodwill from raising 'additional pleas'. The Apex Court however set aside the order of this Court and restored the Order passed by the Small Causes Court on 19 July 2022 by observing as under :

We have heard Shri Amit Sibal, learned Senior Advocate appearing for the appellant and Ms. Meenakshi Arora, learned Senior Advocate appearing on behalf of respondent No.1 at length and approximately for more than 3 hours. After elaborate submissions were made, Ms. Meenakshi Arora, learned Senior Advocate, under instructions of her client, has stated at the Bar that respondent No.1 herein (original defendant no.14) had no objection if the impugned judgment and order passed by the High Court is set aside and the order passed by the learned Trial court refusing to frame the additional issues is restored. She does not invite any further reasoned order while quashing and

setting aside the impugned judgment and order passed by the High Court of framing the additional issues, as above.

55) Thus, mere filing of written statement or lack of prohibition on raising additional pleas was not accepted as a valid ground by the Apex Court for framing of additional issues at the instance of Goodwill. The Small Causes Court while passing impugned order has held that *'without having an opportunity to lead any evidence, their written statement would be nothing but a piece of paper ?'*. If mere filing of written statement did not give rise to similarly placed Goodwill to have additional issues framed, it is incomprehensible as to how mere filing of written statements by Gnani, Daksha Jhaveri Group and Goodwill will confer upon them right to lead evidence. It must be borne in mind that evidence is to be led on issues framed. If mere filing of written statement or raising of 'additional pleas' raised therein is recognised not a good ground for framing of additional issues in the facts of the present case, I do not see any reason why those factors would become germane for deciding the issue of leading additional evidence.

56) It also appears that Plaintiffs desired cross-examination of Defendant No.14 which is declined by the Small Causes Court by order dated 3 August 2022 holding that Plaintiffs are not adverse to that of Defendant No.14. It thus appears that the witnesses examined by Defendant Nos. 7 to 14 are being cross-examined only by the contesting Defendants i.e. Defendant Nos. 1 to 6 and not by Plaintiffs.

57) The Court of Small Causes Court has held that Defendant No.14 is not a proforma defendant and that it has inherent right to lead

evidence. The finding appears to have been recorded on account of Goodwill not being party to SLPs decided by the Apex Court by order dated 6 February 2018. In my view, the role of Defendant No.14 does not appear to be different than that of Gnani and Daksha Jhaveri Group atleast *qua* the suit for eviction filed by Plaintiffs. Therefore, for the purpose of eviction suit the role of Goodwill is that of a proforma defendant. Mr. Jagtiani does not dispute this position.

58) It would be now necessary to consider the nature of evidence that is sought to be led by Gnani, Daksha Jhaveri Group and Goodwill. Ms. Daksha Keshrichand Jhaveri has examined herself on behalf of Daksha Jhaveri Group. In her Affidavit of Evidence affirmed on 8 October 2022 she has stated as under:

12. I say that since the Plaintiffs have, purposely and with the malafide intentions not only disputed the right, title and interest of the Defendants No. 8 to 13 in the suit premises by denying and disputing the said Registered Deed of Assignments dated 31.03.2016 but also the Defendants Nos 6 to 13s' balance rights in respect of the suit premises, in these changed circumstances, the Defendant No. 8 to 13 objects to the Plaintiffs No.2 to 4 to continue with the above suit against the Defendants No. 1 to 6 and/or object for the alleged termination or determination of tenancy in respect of the suit premises. **I say that Defendants No.8 to 13 therefore, objects to the Hon'ble Court to pass decree of eviction against the Defendants No. 1 to 6 in favour of the Plaintiffs.**

29. I say that since the Plaintiffs do not have any right, title and interest in respect of the suit premises, the Plaintiffs did not have any authority instruct the Advocate to issue a notice of termination dated 11.02.2009 to the Defendant No.1 in respect of the suit premises. In addition thereto, I say that the Defendants No.8 to 13 had not given any permission or authority to the Plaintiffs to instruct an Advocate to issue the said termination notice dated 11.02.2009 to the Defendant No.1.

32.I say that therefore, on the aforesaid grounds the Defendant Nos.8 to 13 are objecting to pass a decree of eviction in favour of the

Plaintiffs as the Plaintiffs are not entitled to get decree of eviction against the Defendant Nos.1 to 6. **Therefore, the above suit is liable to be dismissed** on aforesaid various grounds, which are in nature prejudice to each other.

(emphasis and underlining supplied)

59) In answer to Question No.11 of her cross-examination, Ms. Daksha Jhaveri has stated as under :

Q.11. I put it to you that you are entitled to get decree of eviction against the Defendant No. M/s. New Era Fabrics Ltd. ?

Ans. It is not true.

60) In Affidavit of Evidence of Defendant No.13-Deepak Chandrakant Jhaveri, he has stated in paras-7, 20, 22, 29 and 36 as under:

7. I say that after the demise of last surviving joint tenant, I being the only heir and legal representatives of the late Chandrakant Tarachand Jhaveri, was only entitled to succeed to the leasehold rights in respect of the demised premises and has thus only succeeded to the leasehold rights in respect of the demised premises. I say that therefore I only became the lessor/landlord of the Defendant No.1 in respect the demised premises. I say that therefore the Plaintiffs do not have any right, title and interest in respect of the demised premises.

20. I say that a family arrangement was arrived at amongst (1) Smt. Mankorbhal Tarachand Jhaveri; (2) Shri.Keshrichand Tarachand Jhaveri; (3) Shri. Pratap Tarachand Jhaveri; (4) Shri. Dilip Tarachand Jhaveri and (5) Shri.Chandrakant Tarachand Jhaveri, being the heirs and legal representatives of Tarachand Jhaveri. I say that therefore, a Declaration & Memorandum of Family Arrangement dated 25.03.1975 was reduced into the said writing recording the said Family Settlement. I say that in the Declaration & Memorandum of Family Arrangement dated 25.03.1975, it was decided that Ms.Daksha K.Jhaveri shall alone manage/deal with the suit premises to the extent of share of her father i.e. Shri.Keshrichand Jhaveri. I say that the said original Declaration & Memorandum of Family Settlement dated 25.03.1975 is already exhibited by the Hon'ble Court at Exhibit No.811.

22. I say that the Plaintiffs are claiming their alleged right, title and interest in the suit premises through Keshrichand Jhaveri. I say that in view of the said Declaration and Memorandum of Family Arrangement, signed and executed by Keshrichand himself and also the said Letter of Administration dated 20.12.2017, the Plaintiffs do not have any right, title and interest in the suit premises. **I say that the Plaintiffs also do not have any right to prosecute the above suit.**

29. I say that thus it is amply clear from the said letter dated 27/07/2018, that they have not given their consent to issue notice of termination to Defendant No.1. **I say that they have also objected to file the above suit and/or to issue notice of termination to Defendant No.1.** I say that they have also objected to file the suit against Defendant No.4, who is an owner in respect of the suit premises.

36. **I say that since the Plaintiffs do not have any right, title and interest in respect of the suit premises, the Plaintiffs did not have any authority instruct the Advocate to issue a notice of termination dated 11.02.2009 to the Defendant No.1 in respect of the suit premises.** In addition thereto, I say that the Defendants No.8 to 13 had not given any permission or authority to the Plaintiffs to instruct an Advocate to issue the said termination notice dated 11.02.2009 to the Defendant No.1.

(emphasis supplied)

61) In Affidavit of Evidence of Mr. Vimal Kashinath Choudhary, who is Goodwill's witness, it is stated as under :

20. I say that as the above notice as well as the above suit filed by Plaintiffs against the Defendant Nos.1 to 6 is not in consonance with the Consent Decree dated 06.07.1977 passed by the Hon'ble Bombay High Court in suit no.236 of 1968 and Consent Decree dated 07.11.1977 passed by this Hon'ble Court in RAD suit 4081 of 1977, the predecessor in title of Defendant No.14 have specifically objected for the above suit and have also objected for passing any decree of eviction in respect of the suit premises. I say that terms of the said Consent Terms and Consent Decree are binding upon the all the parties. I say that thus the said joint tenants have waived/abandoned and given up their right to file the suit against the Defendant No.1 in the present suit except on the ground of arrears of rent. I say that thus the Defendant No.1 has become perpetual tenant, I say that the Defendant No.14 has stepped into the shoes of its predecessor in title and therefore, the said objection taken by the predecessor in title the Defendant No.14 of the Defendant No.14 are binding upon the Defendant No. 14. **I say that**

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the Defendant No.14 objects for the above suit and also objects for passing any decree of eviction in respect of the suit premises against the Defendant Nos. 1 to 6.

21. I say that it is absolutely clear from the alleged notice of termination dated 11.02.2009 that permission and/or consent of the predecessor in title of the Defendant No.14 not obtained by the Plaintiffs to issue the said notice. I say that the above suit is based on the said notice of termination dated 11.02.2009. **I am advised to submit that therefore as the said notice dated 11.02.2009 does not satisfy the requisite condition under the provisions of law, the said notice is bad, illegal, void and not binding upon the Defendant No. 1.** I say that therefore, the above suit suffers from non issuance of the valid and legal termination notice for giving rise to the cause of action in favour of the Plaintiffs to institute the above suit against the Defendant No.1.

22. I say that during the pendency of the above suit, the Defendant No.4 has become an owner in respect of the suit premises under a Registered Deed of Conveyance dated 10.11.2009 for valuable consideration. I say that the Plaintiffs have continued the above suit against the Defendant No.4 who is the rightful owner in respect of the suit premises and has thus denied the title of the Defendant No.4 in respect of the suit premises. I say that this act has given rise to the Defendant No.4 to terminate the tenancy of the Defendant No.14 in respect of the suit premises and has thus become entitled to get the decree of eviction in respect of the suit premises from the Defendant No.14 also. I say that the said act on the part of the Plaintiffs show the malafide intent to jeopardise the rights of the Defendant No.14 in respect of the suit premises by purposely and wrongfully denying the title of the Defendant No.4 in respect of the suit premises.

23. I say that the Defendant No.4 is in possession of the suit premises as an owner thereof. I say that as the Defendant No.4 has become owner in respect of the suit premises, the rights of Defendant No.4 have merged into the higher rights of ownership and thus **the Plaintiffs are not entitled to seek the decree of eviction in respect of the suit premises from this Hon'ble Court by filing and continuing the above suit.**

25. I say that from the alleged termination notice dated 11.02.2009, it is clear that the Plaintiffs have not terminated the tenancy of the Defendant No.1 in respect of the suit premises in consonance with the Consent Terms dated 06.97.1977, filed by the Hon'ble Bombay High Court in Suit No.236 of 1968 and Consent Decree dated 07.11.1977, passed by this Hon'ble Court in RAD Suit No.4081 of 1977. I,

therefore, **submit that the termination of tenancy of Defendant No.1 is not legal, valid and as per the provisions of law.**

35. **I object for passing of any decree of eviction in respect of the suit property** as particularly mentioned in the Plaint against the Defendant Nos.1 to 6. In view of this submission and also whatever stated in the foregoing paras, I say that the above suit is not maintainable and the same is liable to be dismissed with heavy compensatory cost.

(emphasis and underlining

supplied)

62) Perusal of the evidence that is adduced by the witnesses of Defendant Nos. 8, 13 and 14 would leave no manner of doubt that their real endeavour now appears to have Plaintiffs' suit for eviction dismissed rather than seeking a decree of eviction against Defendant Nos.1 to 6. Thus, the representation on which Gnani, Daksha Jhaveri Group and Goodwill got themselves impleaded/retained in the suit, appears to have now been materially altered. Earlier it was represented by them that they must be impleaded as Plaintiffs in the suit as they not only desired a decree of eviction against Defendant Nos.1 to 6, but carried an apprehension that Nikhilesh Jhaveri Group may abandon or compromise the suit. Now what they essentially seek is dismissal of the suit by raising various contentions. Whether such nature of evidence can be permitted to be led by *proforma defendants* which are impleaded/retained in the suit with a specific clarification that the decree of eviction would enure to their benefit becomes questionable.

63) Having considered the internal aid for answering the question involved in the Petition, it is now necessary to consider the external aid in the form of statutory provisions and judgments on the

issue. The suit is filed by Plaintiffs seeking eviction of Defendant Nos.1 to 6 under Section 41 of the PSCC Act, which reads thus:

41. Suits or Proceedings between licensors and licensees or landlords or tenants for recovery of possession of immovable property and license fees or rent, except to those to which other Acts apply to lie in Small Causes Court.

(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.

(2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply.

64) Thus, jurisdiction is vested in Small Causes Court to try all suits and proceedings between a licensor and licensee or a landlord and tenant relating to the recovery of possession of any immovable property. There are two requirements for exercise of jurisdiction by Small Causes Court under Section 41 viz. (i) the suit or proceedings must be between a licensor and licensee or a landlord and tenant and (ii) the suit or proceedings must relate to recovery of any immovable property situated in Greater Bombay or relating to recovery of licence fees or charges or rent.

65) In the present case, Defendant Nos.7 to 14 assert their right to lead evidence essentially to protect their own rights in respect of the suit premises. As observed above, there are four sets of parties who assert shares/rights in leasehold rights relating to suit premises viz. Nikhilesh Jhaveri Group, Daksha Jhaveri Group, Gnani and Goodwill. It is contended by Gnani, Daksha Jhaveri Group and Goodwill that Plaintiffs are denying their title in the suit premises and contrary to the directives given by the Apex Court, are seeking decree for eviction as well as recovery of possession of suit premises exclusively for them to the exclusion of Gnani, Daksha Jhaveri Group and Goodwill. According to Mr. Kapadia, while deciding the suit for eviction against Defendant Nos. 1 to 6, the Small Causes Court is bound to decide the issue as to whether who exactly are the landlords. According to him, the dispute of title amongst various claimants are 'incidental' to the issue of eviction of Defendant Nos.1 to 6. He has placed reliance on Section 45 of PSCC Act which provides thus:

45. Savings of the suits involving title.

Nothing contained in this Chapter shall be deemed to bar a party to a suit, appeal or proceeding mentioned therein in which a question of title to any immovable property arises and is determined, from suing in a competent court to establish his title to such property.

66) According to Mr. Kapadia, Section 45 proceeds on a premise that Small Causes Court can decide the question of title to any immovable property to the extent it is incidental to the issue of recovery of possession. According to him, so long as the issue of title which arises under the provisions of PSCC Act, the same has to be decided by the Small Causes Court and only such issue of title which is *de-hors* the Act,

the same can be decided by Court of competent jurisdiction. Mr. Kapadia has relied upon several judgments in support of his contentions, such as *Mansukhlal Dhanraj Jain, Babulal Bhuramal, Dattatraya Krishna Jangam, Importers and Manufacturers Ltd., Harswarup Khannamal* and *Devi Prasad Surju Mishra* (supra).

67) In my view, it is not necessary to decide the issue of title raised by Gnani, Daksha Jhaveri Group and Goodwill against Plaintiffs in the present suit in view of the clarification issued by the Apex Court. I am in full agreement with Mr. Kapadia that the issue of title only for the purpose of deciding the issue of recovery of possession would fall within jurisdiction of the Court of Small Causes. He may even be right in contending that while ordering eviction of a tenant, the Small Causes Court may undertake an enquiry, in an appropriate case, to determine as to which of the persons, claiming to be landlords, are entitled to seek possession of the tenanted premises. However, in the present case it is not necessary for the Small Causes Court to undertake that enquiry on account of clear direction of the Apex Court that in the event of decree of eviction being passed in favour of Plaintiffs, the same would enure to the benefit of Gnani and Daksha Jhaveri Group. I do not see any reason why the said direction would not apply to Goodwill as well.

68) Under the guise of asserting share in the leasehold rights, Gnani, Daksha Jhaveri Group and Goodwill cannot be permitted to convert the nature of the suit to a title dispute amongst alleged co-owners. *Justice Sonak* in his judgment dated 20 September 2017 has more than once clarified that '*there is really no scope for resolution of inter se disputes*

between the Plaintiffs’ and that *‘in this case, the suit is for eviction of the tenants. In such a suit, there is really no scope to adjudicate inter-se disputes between the Plaintiffs themselves’*. Thus, in the present case there is no scope for adjudication of title dispute between the Plaintiffs, Gnani, Daksha Jhaveri Group and Goodwill. The order passed by the Apex Court makes it absolutely clear that Gnani and Daksha Jhaveri Group would also enjoy the fruits of decree of eviction. Though Mr. Kapadia has taken me through various pleadings, affidavits etc. denying rights of Gnani, Daksha Jhaveri Group and Goodwill in the suit premises after passing of order by the Apex Court, in my view, such pleadings, affidavits etc. filed by the Plaintiffs cannot have the effect of overriding of directions of the Apex Court. *Qua* Plaintiffs, Gnani and Daksha Jhaveri Group, the deal is sealed, where in the event of decree of eviction of Defendant Nos.1 to 6 being passed, such eviction decree would enure to the benefit of all of them.

69) In my view therefore, pendency of disputes inter-se between Plaintiffs on one hand and Gnani, Daksha Jhaveri Group and Goodwill on the other, cannot be a reason for permitting Defendant Nos. 7 to 14 to lead evidence which virtually results in frustrating Plaintiffs’ suit for eviction of Defendant Nos.1 to 6. After going through the evidence, I am not inclined to accept the submissions of Mr. Kapadia that evidence is led only for protecting the interest of Gnani, Daksha Jhaveri Group and Goodwill *qua* Plaintiffs in respect of title dispute. They have apparently travelled much outside the said role and have sought dismissal of Plaintiffs’ suit for eviction of Defendant Nos.1 to 6. Ms. Daksha Jhaveri has gone to the extent of giving an admission in the cross-examination

that she is not entitled to get decree of eviction against New Era. In fact, reliance by Mr. Kapadia on judgment of Delhi High Court in *Navin Chander Anand V/s. Union Bank of India and Others*⁴⁴ in support of proposition that opposition by one co-owner to termination of tenancy results in dismissal of suit actually bares out the real objective of his clients in leading evidence, which appears to ensure dismissal of Plaintiffs' suit for eviction.

70) Mr. Jagtiani has relied upon judgments in *Kanaklata Das, Jainuddin Abdul Rehman Shaikh, India Umbrella Manufacturing Co. and V. Prabha & Co. Pvt. Ltd.* (supra) in support of his contentions that a co-owner cannot oppose suit for eviction filed by another co-owner on any ground whatsoever. Considering the limited issue involved in the present petition, I do not think it necessary to burden this otherwise lengthy judgment in quoting the paragraphs of those decisions. In the present case, curtains on the issue of right of co-owners to enjoy the fruits of the decree of eviction are already drawn by the Apex Court and therefore it is neither necessary for Defendant Nos.7 to 14 to raise the contest relating to title in the eviction suit nor it is necessary for the Small Causes Court to render any decision thereon. This clarification would also save precious time of the Small Causes Court, which is under directions of the Apex Court to decide the Suit by 30 September 2014.

71) Mr. Kapadia has contended that interference by this Court at this stage of recording of evidence would result in a truncated trial and that adequate mechanism is provided under Section 105 of the Code to

⁴⁴ 2018 SCC OnLine Del 9902.

raise all issues relating to errors committed in conduct of trial by filing a substantive appeal against the decree. While there can be no dispute about this proposition in ordinary circumstances, however considering various Orders passed by this Court and by the Apex Court in previous proceedings between the parties, particularly where Defendant Nos.7 to 14 are not permitted to cross-examine Plaintiffs' witness and where Defendant No.14 is not permitted to raise additional issues on account of position of Defendant Nos. 7 to 14 not being adverse to that of Plaintiffs, in my view, it is necessary to interject the trial at this stage so that the direction in which the suit is sought to be taken by proforma Defendant Nos. 7 to 14 is controlled and the suit is brought back on its original track, which is eviction of Defendant Nos. 1 to 6. Therefore, reliance by Mr. Kapadia on judgments in *Jagat Singh, N.C. Jain* and *Marigold Premises Pvt. Ltd.* (supra) would not assist the case of his clients.

72) Considering the overall conspectus of the case, I am of the view that permitting Gnani, Daksha Jhaveri Group and Goodwill to lead evidence prejudicial to the interest of Plaintiff in seeking recovery of possession from Defendant Nos. 1 to 6 cannot be permitted in the peculiar facts and circumstances of the present case where they are merely '*proforma defendants*' and their role is not adverse to that of Plaintiff at least *qua* the suit for eviction. The adversarial nature of relations between persons/entities claiming leasehold rights in the suit premises has nothing to do with landlords' right to seek eviction of Defendant Nos.1 to 6. That enquiry can be conducted outside the eviction suit and the eviction suit cannot be permitted to be taken to a different direction and converted into a suit for title especially when the

Apex Court has already clarified that the decree of eviction shall enure to the benefit of not just the Plaintiff but also all *proforma defendants*. As recorded by *Justice Shinde*, Gnani has already instituted Suit No. 858 of 2019 against Plaintiffs seeking partition of the suit property by metes and bounds claiming 75% share in leasehold rights therein. If Goodwill believes that Smt. Kantaben had exclusive rights to manage the suit premises, which is assigned by her to it and that based on such assignment Goodwill wants to challenge rights of Plaintiffs, Gnani and Dakha Jhaveri group, that inquiry cannot be conducted in the present suit for eviction, and it is for Goodwill to initiate appropriate proceedings in that regard. Similarly, if Defendant No. 13 believes that he is the sole owner of the entire leasehold rights in the suit premises, it is for him to assert the same outside the suit for eviction.

73) In *Hussens Hasanali Phulavwala*, a Single Judge of Gujarat High Court has held that mere reflection of a party as Defendant in the cause-title of the plaint does not assume his/her character as adverse party. That the adverse party is only the one who is a contesting party and who disputes the case put by the Plaintiff in the plaint. It is held in para-3 as under:

3. It would appear from the scheme of the aforesaid provisions of the Evidences Act that in order to cross-examine a witness, it must be shown that the party seeking cross-examination is an 'adverse party'. Merely because a party is shown as a defendant in the cause title of the plaint, that party cannot be styled as an adverse party unless it is further shown that the party is a contesting party in the sense that he disputes the case put up by the plaintiff in the plaint. If a party accepts the plaintiff's case, there is no contest between the plaintiff and that party and such a defendant cannot be styled as an 'adverse party' and would, therefore, not be entitled to cross-examine the plaintiff. In the instant case, it is clear from the written statement filed by defendant

Nos. 4 and 5 that they wholly supported the plaintiff's case and prayed that the estate of the deceased be administered as desired by the plaintiff. Such persons cannot be said to be adverse parties merely because they appear to be pro forma defendants in the cause title of the plaint.

74) In *State of West Bengal* (supra), the learned Single Judge of the Calcutta High Court has held in para-13 as under :

13. Admittedly, Mr. Das's client is not an adversary to the plaintiff, so he cannot examine witness of the plaintiff. In the scheme of the Evidence Act there is no provision for friendly cross-examination by the pro forma defendant. The proforma defendant, in my view has to play a role akin to a witness and it cannot have any stake in the result of the hearing of the suit. Its right by any stretch of imagination will not be affected in any manner. Mr. Sharma has appropriately placed judgment of Gujarat High Court reported in AIR 1981 Guj. 190. This judgment of Justice Ahmadi (as His Lordship then was) in paragraph 3 has explained amongst other that, "in order to cross-examination a witness it must be shown that the party seeking cross-examination is an 'adverse party'. Merely because a party is shown as a defendant in the cause title of the plaintiff, that party cannot be styled as an adverse party, unless it is further shown that the party is an contesting party in the sense that he disputes the case put up by the plaintiff in the plaint. **If a party accepts the plaintiffs case, there is no contest between the plaintiff and that party and such a defendant cannot be styled as an 'adverse party' and would, therefore, not be entitled to cross examine the plaintiff.** I respectfully adopt and accept observation of Justice Ahmadi, I hold in this case Mr. Das's client has no right to examine either adversely or friendly the witness of the plaintiff, nor his client has any right to bring his own witness and cross-examine adversely the witness which might be produced by the defendant, as his client has put forward any case by filing written statement.

(emphasis added)

75) Above two judgments undoubtedly assist Petitioners' case, but the internal aids available in the present case in the form of various orders passed by this Court and the Apex Court clearly outline the role of Defendant Nos. 7 to 14, who are merely proforma Defendants, having

no adversarial role *qua* Plaintiffs in seeking a decree of eviction against Defendant Nos. 1 to 6.

76) Mr. Kapadia has contended that it is permissible to take inconsistent pleas by parties and to lead evidence in that regard. He has submitted that rather than preventing Gnani, Daksha Jhaveri Group and Goodwill from leading any evidence or striking off the evidence already recorded by allowing the present petition, the entire evidence be permitted to be placed before the Trial Court, which shall ultimately decide the relevancy of such evidence by answering issues framed by it. He has submitted that the Trial Court will have basket of evidence before it and that the jurisdiction of the Trial Court cannot be controlled or circumscribed by issuing directions before pendency of trial. While in ordinary circumstances, the propositions advanced by Mr. Kapadia could be accepted, in the facts and circumstances of the present case, considering the limited role assigned to Defendant Nos. 7 to 14 in view of various orders passed in the proceedings, they cannot be permitted to derail Plaintiff's suit for eviction in their quest to get their title disputes adjudicated in an eviction action. The nature of evidence that is sought to be adduced by Gnani, Daksha Jhaveri Group and Goodwill is such that the same is aimed at seeking dismissal of the suit. Gnani, Daksha Jhaveri Group and Goodwill took a position that they desired to seek a decree of eviction against Defendant Nos. 1 to 6 and even represented that they will be prejudiced in the event of Plaintiffs abandoning or compromising the suit. However, now they appear to have taken a complete *volte-face* and are seeking dismissal of the suit. In this regard, reliance by Mr. Jagtiani on judgment of *Mumbai International Airport*

Private Limited (supra) appears to be apposite wherein the Apex Court has held in paras- 43 to 51 as under:

43. Now the question is whether the contesting respondent on a complete volte-face of its previous stand can urge its case of irrevocable licence before the Estate Officer and now before this Court? The answer has to be firmly in the negative.

44. Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?

45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. 56. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in *Scarf V. Jardine*, wherein the learned Lord formulated: (AC p.361)

“...a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act...the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.”

46. In *Tinkler v. Hilder* Parke, B. stated that **where a party had received a benefit under an Order, it could not claim that it was valid for one purpose and invalid for another.** (See p. 190)

47. In *Clough v. London and North Western Railway Co.* the Court referred at All ER p.651 to *Comyn's Digest*, wherein it has been stated: **“If a man once determines his election, it shall be determined forever.”** In the said case, the question was whether in a contract of fraud, whether the person on whom the fraud was practiced had elected to avoid the contract or not. The Court held that as long as such party made no election, it retained the right to determine it either way, subject to the fact that an innocent third party must not have acquired an interest in the property while the former party is deliberating. If a third party has acquired such an interest, the party who was deliberating will lose its right to rescind the contract. Once such party makes its election, it is bound to its election forever. (See All ER p.652)

48. In *Harrison v. Wells Salmon*, L.J., in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Salmon, L.J. by holding: (QB p.277G)

“It is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord”. (See All ER p.530)

49. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.*, the Privy Council held that: (AC p.1018)

“... a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.”

50. Ashutosh Mookerjee, J. speaking for the Division Bench of Calcutta High Court in *Dwijendra Narain Roy v. Joges Chandra De*, held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

77) In the present case, Gnani and Goodwill have got themselves impleaded in the suit on an express representation that they wanted the suit to be decreed and to enjoy the fruit of the decree. Similar is the position of Daksha Jhaveri Group, who insisted for their retention in the suit to ensure that the suit is decreed. In fact both Gnani and Daksha Jhaveri group were unhappy with their impleadment as Defendants in the suit and insisted that they must participate in the carriage of suit as Plaintiffs and knocked the doors of the Apex Court. Having secured the benefit of such representation, they cannot now be permitted to lead evidence for the purpose of seeking dismissal of Plaintiffs' suit. If they were to give slightest of indication that to any of the courts that they

actually desired dismissal of the suit, their applications for impleadment/retention applications would have been dismissed. It is in this context, the principle of estoppel becomes relevant and the usual plea of permissibility to raise inconsistent pleas by parties cannot be accepted.

78) Mr. Thorat has contended that most of the evidence on the part of Defendant Nos. 7 to 14 is already complete and therefore it would not appropriate for this Court to now intervene in the impugned order. He has sought to blame Petitioners for delay, particularly laches, considering that the Writ Petition was filed four months after passing of the impugned order and was moved on 20 September 2022 after filing of Affidavits of Evidence. That in absence of any interim order by this Court, proceedings of the suit have progressed and accordingly evidence of Defendant Nos.8 and 14 is already complete and Defendant No.13 is now under cross-examination. That only evidence of Defendant No.7 is left to be led. It is contended that the evidence which is already on record cannot now be deleted or discarded and it is for the Trial Court to decide relevancy of that evidence. The submission is somewhat similar to what Mr. Kapadia has contended about Trial Court being presented with basket of evidence with liberty to decide its relevancy. So far as the ground of delay and laches is concerned, in my view, Petitioners cannot be accused of laches in view of the fact that the petition has been filed within four months of passing of order dated 19 April 2022. What has transpired during pendency of the present petition cannot be a reason for dismissal of the petition, especially after this Court has arrived at a conclusion that Gnani, Daksha Jhaveri Group and Goodwill cannot be permitted to lead evidence in the suit. If leading of evidence to seek

dismissal of suit by Gnani, Daksha Jhaveri Group and Goodwill is impermissible, mere recording of some evidence cannot be a reason for dismissal of the Petition.

79) Mr. Kapadia has contended that 'inconvenient evidence' is different than 'irrelevant evidence'. In my view this proposition, though undoubtedly correct, has no application to the present case. The issue here is not about 'relevancy' of evidence led by contesting parties. The issue is whether Defendant Nos.7 to 14 are adverse parties and therefore whether they can be permitted to lead evidence in the first place. Once it is held that, they cannot be permitted to lead evidence, the issue as to whether the evidence led by them is 'relevant' or 'inconvenient' actually becomes immaterial. This Court is ordering discarding of evidence of proforma Defendants because it is inconvenient to Plaintiffs, but it is being directed to be discarded because they should not have been permitted to lead evidence in the first place. If proforma Defendants so not have right to cross-examine Plaintiffs' witnesses or to insist for framing of issues based on assertions made in written statement, they obviously cannot lead their evidence. As observed above, in their quest to prove their title/rights in the suit premises, Defendant Nos. 7 to 14 are actually seeking dismissal of the suit. Once the Apex Court has already clarified that the decree shall enure to the benefit of proforma defendants, it is not at all necessary for Defendant Nos.7 to 14 to lead evidence to prove their rights in respect of the suit premises. In the light of this position, their assertion that they must be permitted to lead evidence and in the process must also be permitted to seek dismissal of the suit, is something which is clearly inconceivable.

80) Reliance by Mr. Kapadia on judgment in *Kajaria Ceramics* and *Vidyadhar* is referable to his contention about opportunity to prove what is contended in the written statement. I have already held that mere filing off written statement has not been considered as the adequate ground by this Court for letting Gnani and Daksha Jhaveri Group to cross-examine Plaintiffs' witness and for framing of additional issues based on contentions in written statement of Goodwill by the Apex Court. Therefore, mere filing of written statement cannot be a ground for permitting Gnani, Daksha Jhaveri Group and Goodwill to lead evidence, that too prejudicial to the suit for eviction. Mr. Kapadia, has thus relied upon judgments in *Giani Zail Singh, Jhumpa Bewa, Subhash Chander, Shah Hiralal Himatlal* and *Sunil Chhatrapal Kedar* (supra) in support of his contention that all parties are entitled to lead evidence under Order XVIII of the Code. While this might be true in ordinary circumstances, the same cannot be permitted in the present case where interest of Gnani, Daksha Jhaveri Group and Goodwill are not adverse to that of Plaintiffs.

81) Much is argued by Mr. Kapadia on the issue of possible forfeiture of lease on account of provisions of Section 111(g) of Transfer of Property Act on account of Plaintiffs denying the title of Defendant No.4 (*Johnson Dye*) who has apparently purchased the suit premises from original owners-Barias. He has relied on decisions in *Yadav Mahadu Koli, Lahu s/o Namdeo Ingale* and *Gillan F. Irani* (supra) to demonstrate as to how the doctrine of merger would apply and how Plaintiffs are running a risk of forfeiture of lease by denying title of the fourth

Defendant. On the contrary, Mr. Jagtiani has made submissions to demonstrate as to how denial of title of Defendant No.4 would not affect leasehold rights. In my view, this controversy is unnecessary to be resolved at this stage and in the present case. Though Mr. Kapadia does not desire decision of the issue as to whether denial of title of Defendant No.4 by Plaintiffs has actually resulted in forfeiture of lease or not, what he essentially contends is that Gnani, Daksha Jhaveri Group and Goodwill must be permitted to prove their assertions in this regard by leading evidence. I am unable to agree. It is already held that Gnani and Daksha Jhaveri Group are not adverse parties to the suit. In my view even Goodwill is not adverse party to the suit considering the frame thereof and considering the nature of relief sought therein. In that view of the matter, coupled with clarification given by the Apex Court that decree of eviction would enure to the benefit of proforma defendants, I do not think it necessary that Gnani, Daksha Jhaveri Group and Goodwill should be permitted to lead evidence to prove forfeiture or otherwise of lease on account of denial of title of the fourth Defendant by the Plaintiffs.

82) Mr. Kapadia has also contended that the notice of termination of lease is faulty on account of the fact that the predecessor in title of Defendant No.4 did not issue it. Firstly, I do not understand the anxiety on the part of Gnani, Daksha Jhaveri Group and Goodwill in getting the suit dismissed by proving that the notice of termination of lease is invalid. This is a task of Defendant Nos.1 to 6 and the enthusiasm shown by Defendant Nos.7 to 14 to take upon themselves this burden in this regard is not appreciated. Secondly, once it is held that

Gnani, Daksha Jhaveri Group and Goodwill are not adverse parties and that they are merely 'proforma defendants', I do not see any difficulty why it becomes necessary for Defendant No.14 to lead any evidence about alleged fault in the notice of termination of lease for the purpose of proving its claim of ownership which may result in dismissal of the entire suit itself. Therefore, reliance by Mr. Kapadia on judgments in *Abdul Sami, Nanalal Girdharlal, Sucharita Pradhan, Abdul Hamid* and *Mahboob Ullah* (supra) is not relevant to the issue at hand.

83) Thus in view of outlining of role of Defendant Nos. 7 to 14 as proforma Defendants not having interest adverse to that of Plaintiffs in suit for eviction of Defendant Nos. 1 to 6 and particularly in view of order of the Apex Court that the decree of eviction, if passed, would enure to the benefit of proforma Defendants, which in my view would also include Goodwill, it is not necessary for Small Causes Court to institute inquiry into the dispute of title of landlords *inter se*.

84) The next issue is about the nature of order to be passed in respect of evidence that has already come on record. It is Mr. Jagtiani's contention that this Court has necessary powers to strike off the evidence which has been erroneously led and has come on record. On the contrary, it is the contention of Mr. Thorat that Court cannot discard the evidence already recorded except in rare circumstances where defence of a party is struck off. Mr. Jagtiani has relied upon judgment of this Court in *Harish Loyalka* (supra). This Court held in para-20 and 23 as under:

20. Consequently matters that are (i) argumentative or in the nature of submissions and pleadings etc.; (ii) matters that are wholly irrelevant

and also not to the personal knowledge of the deponent or witness; and (iii) matters that are demonstrably hearsay, must all be excluded. They cannot form part of the examination-in-chief on affidavit required by CPC Order 18, Rule 4. Where an evidence affidavit purports to contain such material, a court must endeavour to bring that affidavit into conformity with the provisions of the Order 18 and Order 19 of the CPC and of the Evidence Act. A non-conforming evidence affidavit is anathema to our system of law.

23. How should a court approach such a non-conforming affidavit, i.e., one that contains material that is clearly inadmissible or demonstrably irrelevant? A party may, in a given case, be permitted to replace his affidavit with one that conforms. It is not in every case that a party is required to attest to the correctness of the contents of that affidavit, as the Supreme Court has held. *Rasiklal Manikchand Dhariwal v. Ms Food Products*, MANU/SC/1408/2011 : (2012) 2 SCC 196 But where an affidavit contains material that, even had the witness attested to it, could not have formed part of his 'testimony' properly so-called, it would plainly defeat the interest of expedition to prevent a party from substituting that affidavit with one that meets the rigour of CPC Order 18 Rule 4. Of course, this does not mean that a party should be continually permitted to 'test the waters' by filing one non-conforming affidavit after the other. Replacing such an affidavit must, surely, be in a court's discretion. On the footing that a court's power to 'delete' any portion of an evidence affidavit (even portions that are inadmissible) is completely taken away, a court may still rule on portions of the affidavit to which objections are taken and direct that those portions be excluded from consideration as testimony; i.e., that a cross-examiner will be at liberty to ignore those portions without fear of an adverse inference being drawn.

85) Though the judgment in *Harish Loyalka* is on the issue of deletion of portion of Affidavit in Evidence which is inadmissible, it discusses power of a Court to exclude such evidence. Though ratio of judgment in *Harish Loyalka* may not strictly apply to the facts of the present case, in my view, once this Court arrives at a conclusion that Defendant Nos.7 to 14 could not have been permitted by the Trial Court to lead evidence, the evidence already led by them during pendency of the present petition is required to be discarded as failure/refusal to do so will result in erroneously recorded evidence remaining on record even

after this Court reaches to the conclusion that such evidence could not have been led. In my view, therefore the evidence already recorded on behalf of Defendant Nos. 7 to 14 is required to be discarded from record as a natural consequence of setting aside the impugned order dated 19 April 2022.

86) Mr. Thorat has contended that discarding of already recorded evidence would take away vital admissions given by the concerned witnesses in favour of Defendant No. 1-New Era and would cause prejudice to it. As observed earlier, mere recording of some evidence during pendency of the petition cannot be a ground for retention of the same, after this court has reached a conclusion such evidence should not have been permitted to be led. Defendant No.1 must stand on its own legs to defend the eviction action and cannot be permitted to rely on evidence of proforma Defendants led by taking a *volte-face* from position earlier taken and representation earlier made while seeking impleadment/retention in the suit.

D. ORDER

87) After considering the overall conspectus of the case, I am of the view that the impugned order dated 19 April 2022 passed by the Court of Small Causes at Mumbai suffers from palpable error. It is indefensible and is liable to be set aside.

88) Writ Petition accordingly succeeds. Order dated 19 April 2022 passed by the Court of Small Causes at Mumbai on application at Exhibit-664 is set aside and Plaintiffs' application at Exhibit-664 is allowed by not permitting Defendant Nos.7 to 14 from leading evidence in the suit. Consequently, the evidence already led by any of the witnesses on behalf of Defendant Nos.7 to 14 shall be discarded. With the above directions, the Writ Petition is **allowed**. Rule is made absolute. There shall be no order as to costs.

SANDEEP V. MARNE, J.

89) After the judgment is pronounced, the learned counsel appearing for Respondent/Defendant Nos. 7 to 14 would pray for stay of the judgment for a period of 10 weeks. The request is opposed by Mr. Jagtiani, the learned counsel appearing for Petitioners. The Apex Court has directed disposal of the eviction suit by 30 September 2024. In that view of the matter, request for stay of the judgment is rejected.

SANDEEP V. MARNE, J.