

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION St. NO.1375 OF 2015**

**Dada Annu Nandikurle
Vs.
Babasaheb Bandu Sutar & Ors.**

**..Petitioner
..Respondents**

Mr. Rahul Kulkarni for the Petitioner

**CORAM : R. M. SAVANT, J.
DATE : 3rd FEBRUARY, 2015**

P.C.

1 The order dated 20-11-2014 passed by the Learned District Judge-1, Jaysingpur, rejecting the application Exhibit 31 purportedly filed under Order XLI Rule 27 of the Civil Procedure Code, is taken exception to by way of the above Petition.

2 The Petitioner is the original Appellant and is also the original Plaintiff who had filed the Suit in question for specific performance. The Suit came to be dismissed by the Trial Court by Judgment and Order dated 26-2-2010. Against the said dismissal of the Suit, the Plaintiff has filed Regular Civil Appeal No.27 of 2010 which is pending for hearing and final disposal before the Lower Appellate Court.

3 The instant application Exhibit 31 has been filed on 9-1-2014. By the said application the Petitioner/Appellant prayed that he may be allowed to

depose in the Suit though his power of attorney has already depose in the Suit. The said application was opposed to on behalf of the Respondents/Defendants by filing their reply Exhibit 34. The sum and substance of the case of the Respondents is that the case of the Petitioner/Appellant does not qualify under Order XLI Rule 27 so as to enable the Petitioner/Appellant to now lead his own evidence in the Suit. The Lower Appellate Court considered the said application and has by the impugned order rejected the same. The Lower Appellate Court has observed that the Trial court has given ample opportunities to both the sides and decided the matter on merits having regard to the material placed on record. As stated hereinabove, the Plaintiff had chosen his power of attorney who was his son to depose in his place in the Suit as it is his case that he was unwell at the relevant time. If the power of attorney of the Plaintiff has deposed in his place, the Plaintiff obviously cannot now be permitted to depose as that would amount to granting the Plaintiff a second innings in the matter of leading evidence in the Court.

4 A grievance was sought to be made by the Learned Counsel for the Petitioner that the application Exhibit 31 was disposed of in the absence of the Advocate for the Petitioner in the Lower Appellate Court. In the said context, it is required to be noted that the Lower Appellate Court has observed that the Appeal is old being of the year 2010 and that the Advocate appearing for the

Petitioner/Appellant was absent when the matter was called out. In my view, even if the said application has been decided in the absence of the Advocate for the Petitioner/Appellant no fault can be found with the impugned order passed by the Trial Court as the case of the Petitioner/Appellant as contained in the said application Exhibit 31 does not fall within the ambit of Order XLI Rule 27 of the Civil Procedure Code, under which provision only additional evidence can be allowed to be led. In that view of the matter, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]