

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1061 OF 2015

Shri Mohan M.Bhogale, (HUF)	)
(since deceased, through LRs.)	)
1. Smt.Madhavi Mohan Bhogale & Ors.	)... Petitioners
V/s.	
Vishwas Gopal Navare	)... Respondent

Mr.Chandrakant P. Devgirikar for petitioners.

Mr.K.S.Dewal a/w Mr.P.A.Gokhale i/by Mr.Sanket G.Telang for
respondent.

CORAM: K.R.SHRIRAM, J.

DATED : 3.3.2015.

P.C. :

1 This petition is filed impugning an order passed by the appellate bench whereby the petitioners' application under Order 41 Rule 27 (1) (aa) of the Code of Civil Procedure for allowing the appellants viz. the petitioners herein to lead additional evidence in the form of documents came to be rejected.

2 On or about 23.9.2004 and 29.9.2004 the respondent herein filed a suit against the petitioners herein for recovery of possession of shops which was subject matter of the respective suits and for damages. In April-2005 the petitioners herein filed the

written statement. In December-2009, the evidence of the respondent(plaintiff) was closed. In January-2012 the evidence of the petitioners was closed. By a common judgment and order dated 27.2.2012, the trial court decreed the suits in favour of the respondent. Almost one year later i.e., on or about 20.2.2013 the petitioners herein filed an appeal before the learned Additional District Sessions Judge at Kalyan. The delay was condoned and the appeal was admitted.

3 On 11.9.2014, the arguments in the appeal commenced and the respondent herein concluded the arguments. The matter was stood over to 15.9.2014 for the petitioners to make their submissions. It was part-heard on that date and was stood over again on 21.9.2014 for further arguments. On 21.9.2014, the petitioners moved an application for leading additional evidence under Order 41 Rule 27 of the Code of Civil Procedure which is almost 5 years after the evidence was closed in the trial court, more than 2 & ½ years after the trial court decreed the suit and 19 months from the time the appeal was filed.

4 Order 41 Rule 27 sub-rule 1 of the Code of Civil Procedure reads as under :-

27. Production of additional evidence in Appellate Court- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
(a) the Court from whose decree the appeal is

preferred has refused to admit evidence which ought to have been admitted, or

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

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

(2).....

5 Therefore, the party seeking to produce additional evidence has to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed.

6 In the application, it is stated that the appellant no.3 searched for the documents at their residence at Vile Parle and found the documents from old record which were kept in the cupboard at the residence. It is also stated that the defendants viz. petitioners herein were in possession of the original documents. No explanation has been given as to why they could not produce earlier save and except the statement which reads as under :-

“However, despite the exercise of due diligence such evidence could not be produced by the defendants at the time when decree appealed against them was passed.”

7 The documents which the petitioner wishes to produce as additional evidence are according to the petitioner to prove that he was in occupation of the suit premises for six months prior to the date of filing of the suit. In the cross-examination of the petitioner, the petitioner has stated that they were in possession of the documents. When the documents were in possession of the petitioner and one of the ground in the suit was of non-user, the petitioner ought to have produced the documents before the learned trial Court or at least sought time to produce the same. In fact, in paragraph-2 of their application, it is also stated that the Advocate on record of the petitioner even directed the appellant no.3, one of the petitioners, to search for those documents. The only reason given in the application is that the appellant no.3 searched for the documents. If the documents were later found in the cupboard of the petitioners at their residence, it is quite obvious that the petitioners did not exercise due diligence even when they knew that the documents were material for their defence.

8 I have considered the impugned order and I find no infirmity or perversity in the order.

9 The jurisdiction exercised under Article 227 is supervisory in nature. It is exercised when the subordinate court has assumed the jurisdiction which it did not have or has failed to exercise the jurisdiction though available in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. The court may also step in and exercise its supervisory jurisdiction if there is an error which is manifest and apparent on the face of the proceedings and grave injustice or gross failure of justice has occasioned thereby. (Surya Dev Rai Vs. Ram Chander Rai & Ors.)¹. The scope of this Court under Article 227 is very limited.

10 In the circumstances, the petition stands rejected.

(K.R.SHRIRAM, J.)

¹ AIR 2003 SC 3044