

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.954 OF 2015

IN

PSCC APPEAL NO.320 OF 2014

IN

L.E.SUIT NO.56/72 OF 2009

Santosh Gurav

)... Petitioner

V/s.

Pushpaben Nemchand Shah

)... Respondent

Mr.Pradip Rajaram Kadam for the petitioner.

Ms.Leena Shah i/by Shah & Furia Associates for the respondent.

CORAM: K.R.SHRIRAM, J.**DATED : 4.2.2015.****P.C. :**

1 This petition is filed by the petitioner challenging an order dated 8.12.2014 passed by the appellate bench rejecting the application of the petitioner (original defendant) to bring on record further documents in evidence under Order 41 Rule 27 of the Code of Civil Procedure 1908. Order 41 Rule 27 is an exception to the general rule that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. One such exception is under sub rule 1(aa) where the party seeking to produce additional evidence establishing 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.

2 The contention of the petitioner is that the respondent (original plaintiff) had instituted a suit against him for eviction from room no.3, Pitruhhaya Building No.2C, Banganga Cross Lane, Opp. Ganga Lahri Building, Walkeshwar, Mumbai-400 006, on the ground that his father and himself were gratuitous licensees of the suit premises. The petitioner resisted the suit on the ground that the original plaintiff was not his landlord and there exists no relationship between the respondent and the petitioner as landlord and tenant. The plea taken in the suit by the petitioner was that the earlier owner Rameshchandra Dharamdas Mehta had allotted the suit premises permanently and therefore, respondent cannot ask him to vacate the suit premises. The trial court negated the plea raised by the petitioner and decreed the suit against him directing him to vacate the suit premises.

3 Against the said order the petitioner filed an appeal before the appellate bench of Small Causes Court. At this stage after filing the appeal, the petitioner claims to have found the document executed on 13.5.1992 by the erstwhile owner Rameshchandra Dharmdas Mehta which according to the petitioner show that the suit premises was allotted to the petitioner's father free of cost. In fact the suit premises was sold by Rameshchandra Dharmdas Mehta to the

respondent some time in the year 1999.

4 In the application filed by the petitioner to permit the petitioner to produce additional evidence, the explanation given is that when he informed his sisters who are married, about the fact that the trial court has passed a decree against him, his elder sister informed him that the owner has allotted the suit premises to their father and there is a document which is with another sister. The petitioner claims to have met his other sister and inquired about the document and she told him that the owner had indeed executed the document in her presence. She told him that the document was with her and the same was in her file and her father had asked her to keep it in safe custody. The petitioner also states his sister never knew that the suit in the Small Causes Court was pending.

5 The respondent naturally opposed this application and also filed an affidavit of said Rameshchandra Dharmadas Mehta the earlier owner affirmed on 10.10.2014 in which Rameshchandra Dharmadas Mehta has categorically stated that he never executed the document which the petitioner wishes to introduce as evidence in the appellate stage. He has categorically stated that it was not in his handwriting and not signed by him. He has also stated after reading the said document that the same could not have been written by him because the writing had so many mistakes. Considering these points, the appellate bench by its impugned order has rejected the petitioner's application.

6 I have considered the application, the affidavit of the “sister of the petitioner”, the affidavit of Rameshchandra D. Mehta and a copy of the document that was to be introduced in evidence at the appellate stage with the assistance of the respondents’ counsel. The said document is unregistered, written by hand in Gujarati language purportedly by Rameshchandra D. Mehta in the presence of “sister of the petitioner” on a Rs.10/- stamp paper issued to the petitioner on 21st September 1992. The petitioner states that he was not aware at all about the said document, whereas in the affidavit of his “sister-Seema Dyandev Gaikwad” affirmed on 16th October 2014, the sister states that the petitioner was asked by their father to bring the stamp paper and it is the petitioner who purchased the stamp paper. In the application, it is stated that the petitioner was not aware of any such document and he came to know about the document for the first time when his sister said about the existence of the document. According to the applicant, from the document it is obvious that Rameshchandra D. Mehta had permitted his parents and their heirs to use and occupy the suit property but cannot sell the same.

7 At this point, it is necessary to quote what the petitioner has stated in his cross examination on 11th February 2014. He has stated that his father never made any Will and “after the death of my father, I am the only heir”. If this is what has been stated in the cross-examination, how did “sister” emerge. It is very difficult even to accept that the petitioner has a “sister”. Moreover, the said Rameshchandra M. Mehta has categorically denied having executed

any such document. In his affidavit affirmed on 10th October 2014 and relied upon by the respondents, the said Rameshchandra D. Mehta has, after having gone through the copy of the document, stated that the handwriting was not his and the same has not been signed by him. He has also stated that the document which is written in Gujarati has so many mistakes and that it could never be his. In short, he had denied having executed any such document. The fact that the petitioner in his cross-examination has stated that he is the only legal heir of his parents, coupled with Rameshchandra D.Mehta having denied having executed any such document, it gives the impression that the document could be a forged document and the attempt is to delay the proceedings. It is difficult to believe that the plaintiff never knows the existence of such a document when the “sister” states that it is the petitioner who went and purchased the stamp paper. It is also to be noted that the petitioner had brought as his witnesses one S.J.Gurav and one Ganpat Sakharam Dhadve as DW.2 and 3 to prove his stand but never thought it necessary to bring his “sister” as witness or even discussed with them during the pendency of the suit. In my view, he did not do either of this because it is possible that he never had a sister as claimed by him. Moreover, in the document it says the suit premises is room no.2 whereas in the evidence and other places, the suit premise is shown as room no.3. In paragraph 5 of the application, the petitioner states that he was never aware about the existence of such document until his sister told him about the existence of the same, whereas, the petitioner has also stated in the application that he made diligent search of the

document but could not find the same. If he was diligent, he would have contacted his “sister” when he thought it fit to get the two other witnesses to support his case.

8 Moreover, the document which is on Rs.10/- stamp paper is not registered under the provisions of the Indian Registration Act. Therefore, in any event, it has no evidentiary value.

9 There are various other points in addition to this which the appellate bench has considered while arriving at this conclusion in the impugned order rejecting the application. The appellate bench has also seen through the game of the petitioner to delay the matter. The appellate bench has also come to a conclusion that the additional document does not in any case help the petitioner because it does not create any ownership right of the petitioner over the suit property and the status of the petitioner as determined by the trial court was a gratuitous licensee that will not be affected if the said document is allowed by the Court. The appellate bench has also come to a conclusion that the document in any event is not admissible in evidence and therefore it would serve no purpose.

10 After considering all these points, the impugned order has been passed. This court's power under Article 227 is very limited and the court will not go into such disputed question of facts. I also find there is no illegality in the order passed by the appellate bench. The appellate bench has considered the application, affidavits filed by the

parties and has come to the conclusion that no case has been made out for receiving the document in evidence at the appellate stage.

11 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 function of High Court under Article 227 of the Constitution is limited to see that subordinate court or Tribunal functions within its limit or authority and not to see whether the order passed by the Trial court or Tribunal was the correct order or not. I find no perversity or infirmity on this.

12 In the circumstances, writ petition is rejected with no order as to costs.

(K.R.SHRIRAM, J.)

¹ AIR 2003 SC 3044