

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5519 OF 2015**

Shri Narayan Pandurang Pawar and Ors	Vs	Petitioners
Shri Eknath Ganpati Suryawanshi		.. Respondent

Mr. Prabhanjan B. Gujar, Advocate for Petitioners.
Mr. Ajit Kenjale a/w Rajesh Dharap, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 11/02/2016

PC:

1. Heard Mr. Prabhanjan Gujar, learned counsel for the petitioners and Mr. Ajit Kenjale, learned counsel for the respondent at length.
2. Rule. Mr. Kenjale waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 3.12.2014 passed by the learned Adhoc District Judge-2, Satara below Exhibit 20 in Regular Civil Appeal No.226 of 2012 By that order, the learned District Judge allowed the application Exh.20 made by the respondent, hereinafter referred to as defendant, under Order XLI, Rule 27 of C.P.C. for production of additional evidence,i.e. list of partition dated 31.1.1937.
4. Mr Gujar submitted that the plaintiffs instituted suit for

possession, mesne profits as also perpetual injunction against the defendant. Trial Court decreed the suit on 4.5.2012 and directed the defendant to hand over possession. Aggrieved by that decision, the defendant preferred Regular Civil Appeal No.226 of 2012 before the District Court. Pending that appeal, the defendant took out application Exh.20 under Order 41, Rule 27 for producing additional evidence, i.e. list of partition dated 31.1.1937. He submitted that in the written statement filed in the trial Court, there are no pleadings about partition list dated 31.1.1937. Despite that the learned District Judge allowed the application for production of additional evidence, i.e. document dated 31.1.1937. He further relied upon paragraph 52 and 85.7 of Union of India Vs Ibrahim Uddin, (2012) 8 Supreme Court Cases 148, to contend that application for additional evidence ought to have been heard along with appeal.

5. On the other hand, Mr. Kenjale submitted that after application under Order 41, Rule 27 was allowed on 3.12.2014, defendant has filed application Exh.27 for amending written statement and the said is pending. He submitted that if application Exh.27 is allowed, then in that case it cannot be said that without there being any pleading, defendant wants to lead evidence. He, therefore submitted that no case is made out for interfering with the order.

6. I have considered the rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that written statement as originally filed by the defendant does not contain any averment based on partition list dated 31.1.1937. By allowing the application, the learned District Judge has permitted defendant to rely upon the document which is not even referred to and relied upon by the defendant in the written statement. That apart, having regard to the decision of the Apex Court in the case of Union of India (supra) and in particular paragraph 52 and 85.7, the learned District Judge was not justified in deciding the application under Order 41 Rule 27 before hearing main appeal. In view thereof, the impugned order cannot be sustained.

7. At the same time, the defendant has filed application Exh.27 for amending written statement. In view thereof, in my opinion, following order will meet ends of justice.

(i) The impugned order dated is set aside and the application Exh.,27 under Order 41 Rule 27 is restored to the file of the appellate Court. This application shall be heard along with Appeal.

8. Parties agree that they will appear before District Court on 22.2.2016 and for that purpose no fresh notice be issued to them. Learned District Judge is requested to decide application Exh.27 as expeditiously as possible and preferably within four weeks from the date of appearance of the parties. All contentions

in that regard are expressly kept open.

9. Liberty is reserved to the plaintiffs to apply for deciding the appeal in a time bound manner. If such application is made, the learned District Judge will pass appropriate order. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)