

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 10569 OF 2016

Shri. Babulal Pukharaj Jain
And Anr.

...Petitioners

Versus

Shri. Satish Govind Jagtap
And Anr.

...Respondents

....

Mr.A.V. Anturkar, Senior Advocate i/b. Tanaji Mhatugade,
Advocate for the Petitioners.

Mr. A.B. Tajane, Advocate for Respondent Nos.1 & 2.

....

CORAM : R. G. KETKAR, J.

DATE : 14th OCTOBER, 2016

P.C.

1. Heard Mr. A.V. Anturkar, learned Senior Counsel for the petitioners and Mr.A.B. Tajane, learned Counsel for respondents No.1 & 2, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs' have challenged the judgment and decree dated 14.2.2008 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Civil Suit No.281/2001 as also judgment and decree dated 11.8.2016 passed by the learned District Judge-19, Pune in Civil Appeal No.166/2008. By these orders, the Courts below partly decreed the suit instituted by the plaintiffs against the

respondents, hereinafter referred to as the 'defendants' and restrained the defendants from obstructing or interfering with the possession and right of access of the plaintiffs over the suit premises only to the extent of three rooms, veranda, situate at C.T.S. No.682/10, Bungalow No.10, known as Ashirwad, Jedhe nagar, Bibve Wadi, Pune, except by following due process of law.

3. The plaintiffs instituted suit *inter alia* contending that the single storey bungalow type structure comprising of three rooms and a veranda totally admeasuring 3,600 sq. ft. situate at C.T.S. No.682/10, Bungalow No.10, known as "Ashirwad", Jedhenagar, Bibwewadi, Pune was let out to the plaintiffs since the year 1977. However, the rent receipts were issued only in the name of plaintiff No.1. The plaintiffs alleged that though they are lawful tenants of the entire bungalow, the defendants intend to dispossess them without following due process of law. The plaintiffs, therefore, instituted suit for perpetual injunction restraining the defendants from evicting the plaintiffs from entire bungalow otherwise than due process of law.

4. The defendants resisted the suit by filing written statement *inter alia* contending that the plaintiffs are not tenants in respect of entire bungalow. Plaintiff No.1 who is the tenant in respect of structure comprising of three rooms

and varahnda. Rent receipt is accordingly issued in favour of plaintiff No.1 by the husband of defendant No.1 and father of defendants No.2 & 3.

5. During pendency of the suit, the plaintiffs filed application Exhibit-5 for temporary injunction restraining the defendants from interfering with the plaintiffs possession and enjoyment over the entire bungalow. The learned trial Judge rejected the application Exhibit-5 on 7.3.2002. Aggrieved by that decision, the plaintiffs preferred Misc. Civil Appeal No.141/2002. That was allowed on 3.5.2002. Aggrieved by that decision, the defendants instituted Writ Petition No.439/2003. Initially by order dated 5.3.2003 notice was issued. Pending further orders, ad-interim relief in terms of prayer clause (c) was granted. By prayer clause (c) the defendants prayed for stay of the implementation and/or operation of the judgment and order dated 3.5.2002 passed by the learned District Judge. On 5.2.2004, by consent of parties, the Petition was disposed of. Ad-interim order 5.3.2003 was ordered to continue during pendency of the suit subject to further conditions.

6. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. Parties led evidence. After considering the evidence on record, the

learned trial Judge partly decreed the suit as indicated earlier. Aggrieved by that decision, the plaintiffs preferred appeal which was dismissed by the learned District Judge. It is against these decisions, the plaintiffs have instituted present Petition.

7. In support of this Petition, Mr. Anturkar strenuously contended that the Courts below committed serious error in partly decreeing the suit. He submitted that the Courts below also committed error in relying upon the order passed by this Court in interlocutory proceedings. He submitted that the Courts below have ignored the tenancy agreement at Exhibit-65 which clearly records that the entire bungalow was let out to the plaintiffs. He has invited my attention to tenancy agreement at Exhibit-65 and submitted that the Courts below ought to have decreed the suit by accepting case of the plaintiffs that entire bungalow was let out to the plaintiffs. He has taken me through the impugned orders as also the evidence adduced by the parties.

8. Apart from merits, Mr. Anturkar submitted that during pendency of appeal, the plaintiffs have filed application Exhibit-52 on 10.1.2014 under Order XLI Rule 27 of C.P.C. for production of additional evidence as also application at Exhibit-58 on 9.12.2014 under Order XXXIX Rule 11 of C.P.C. for striking out the defence of the

defendants and for initiating contempt proceedings against them for deliberate violation of the Courts order. The plaintiffs also filed application at Exhibit-73 on 13.4.2015 under Order XLI Rule 27 of C.P.C. for production of additional evidence. While disposing of the appeal finally, the learned District Judge however did not decide the applications Exhibits-52, 58 and 73.

9. Mr. Anturkar submitted that as the learned District Judge failed to decide these applications, the order passed by the learned District Judge deserves to be set aside thereby restoring the appeal. He submitted that Appellate Court may be directed to dispose of the applications Exhibits-52, 58 and 73 and also appeal afresh. Mr. Anturkar submitted that whether to allow application made Order XLI Rule 27 of C.P.C. or not is within the discretion of the District Court. When the lower Authorities, administrative, quasi judicial or judicial have been entrusted with discretionary powers then that discretion is available to that authority and it will be better that said discretion is left to that authority rather than High Court itself entering into merits of these applications and exercising discretion available to the lower authority.

10. Mr. Anturkar submitted that if this Court takes upon deciding the applications Exhibit-52, 58 and 73, it will deprive either of the party of the right to challenge said

order by way of filing Writ Petition or Civil Revision Application or by way of filing even the Appeal as against the final order in appeal as contemplated by Section 105(1) of C.P.C. He submitted that application under Order XLI Rule 27 of C.P.C. is required to be decided by the Court which is going to decide the appeal. In particular, Order XLI Rule 27(1)(b) enables the Appellate Court to permit production of additional evidence if the Appellate Court requires any document to be produced or any witness is to be examined to enable it to pronounce judgment, or for any other substantial cause.

11. He submitted that said question can be examined only by the Appellate Court and not by this Court. This Court will not be in a position to come to conclusion that the main matter cannot be disposed of properly without requiring the parties to lead additional evidence. He submitted that this Court, therefore, should not decide the applications which were pending before the learned District Judge and should leave it to the Appellate Court itself for deciding on their own merits. He relied upon following decisions :

- i] ***Vasant Mahadeo Gujar v. Baitulla Ismail Shaikh & Anr.*** **2016(4) ALL MR 174**, and in particular paragraphs-20 to 23 and 28.
- ii] ***Sanjiv Goel v. Avtar S. Sandhu***, **(2006) 9 SCC 748**.

iii] **Syed Abdul Khader v. Rami Reddy and others, (1979) 2 SCC 601.**

iv] **Mundri Lal v. Sushila Rani (Smt) and another, (2007) 8 SCC 609.**

v] **Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo, (2009) 5 SCC 713.**

vi] **Mahavir Singh and others v. Naresh Chandra and another, (2001) 1 SCC 309.**

12. In support of his proposition that when the authorities invested for discretionary powers, said authority alone should exercise that power, he relied upon the decision of this Court in ***Arun Nathuram Gaikwad v. Municipal Corporation of Greater Mumbai and others, 2006(3) Mh.L.J. 500*** which was set aside by Apex Court in ***Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad and others, (2006) 8 SCC 590.***

13. On the other hand Mr. Tajane supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below held that the plaintiffs are tenants in respect of structure comprising three rooms and varanda and not of entire bungalow. As the findings are recorded after appreciating the evidence on record this Court will not be justified in upsetting these findings while exercising power under Article 227 of the Constitution of India.

14. As far as the contention that the learned District Judge did not decide the application under Order XLI Rule 27 of C.P.C. is concerned, he has taken me through the Rojnama of the appeal and submitted that on fifteen dates application at Exhibit-73 was kept for arguments. He submitted that perusal of the applications Exhibit-52 and 73 would reveal that the case made out in these applications is one falling under Order XLI Rule 27(1)(aa) and not under clause (b) of Order XLI Rule 27 of C.P.C. It is for the plaintiffs to request the Appellate court to decide the applications and they cannot sit tight over those applications and then find fault with the Appellate Court for not deciding those applications. Plaintiffs cannot sit on fence and allow the Appellate Court to decide appeal without pointing out pendency of such application. He also relied upon following decisions :

- i] ***P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002) 2 SCC 686***, and in particular paragraph-10 thereof.
- ii] ***Eastern Equipment & Sales Limited v. ING. Yash Kumar Khanna, (2008) 12 SCC 739***.
- iii] ***Jaipur Development Authority v. Smt.Kailashwati Devi, (1997) 7 SCC 297***.

15. Mr. Tajane relied upon the decision of Apex Court in ***Surya Dev Rai vs. Ram Chander Rai and others, (2003) 6 SCC***

675 which lays down the parameters for exercising power under Articles 226 and 227 of Constitution of India. He submitted that no case is made out even for remanding the matter before Appellate Court for deciding applications Exhibit-52, 73 as also application Exhibit-58 filed under Order XXXIX Rule 11 for striking out the defence and for initiating contempt proceedings against the defendants.

16. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record as also original record. As noted earlier, the moot question is whether the plaintiffs are tenant in respect of entire bungalow as claimed by them or that they are tenant in respect of a structure comprising of three rooms and varanda as claimed by the defendants. As noted earlier, during pendency of the suit, the plaintiffs filed application Exhibit-5 for temporary injunction. By order dated 7.3.2002, the learned trial Judge rejected the application. Aggrieved by that decision, the plaintiffs preferred Misc. Civil Appeal No.141/2002 before the learned District Judge. By order dated 3.5.2002, the learned District Judge allowed the appeal and set aside the trial Court's order. Operative part of order dated 3.5.2002 reads thus :

“ The appeal is allowed and the impugned order is set aside.

(2) Plaintiffs' application (Exh.5) is

allowed and the defendants are restrained from interfering in the plaintiffs' possession and enjoyment over the entire disputed bungalow, pending the suit.

(3) The defendants are at liberty to carry out their material i.e. stones, wooden doors, frames, tins and flooring stones etc. or keep it in a corner of the disputed bungalow, arranging it properly, pending the suit, without disturbing the plaintiffs' right to use the open site of the bungalow.”

17. Aggrieved by that decision, the defendants instituted Writ Petition No.439/2003. By order dated 5.3.2003 this Court issued notice and pending further orders granted ad-interim relief in terms of prayer clause (c). By prayer clause (c), the defendants prayed for stay of the effect, implementation and/or operation of the judgment and order dated 3.5.2002 passed by the learned IV Additional District Judge in Misc. Civil Appeal No.141/2002. Writ Petition was thereafter disposed of on 5.2.2004 by consent of parties. Ad-interim order 5.3.2003 was ordered to continue during pendency of the suit subject to further conditions. Thus the injunction issued by the District Court was stayed during the pendency of the suit. Injunction was not operating in favour of the plaintiffs and against the defendant.

18. While partly decreeing the suit, the learned trial Judge observed in paragraph-13 that it is admitted fact

that structure comprising three rooms and varanda in a property bearing C.S. No.682/18, Bibvewadi, Jedhe Nagar, Pune was let out to plaintiff No.1 as a tenant. The learned trial Judge referred to rent receipt at Exhibit-66 as also photocopy of the plaint in R.C.S. No.140/2007 which revealed that the defendants have instituted suit against the plaintiffs herein for recovery of arrears of rent and possession of three rooms, portion of toilet and bathrooms situate on ground floor of CTS No.682/18, Bungalow No.10, 'Ashirwad', Bibvewadi, Jedhe Nagar, Pune. The learned trial Judge, therefore, held that only three rooms, varanda and right of access was let out to the plaintiffs on rental basis and the plaintiffs have no concern with the remaining open space. The learned trial Judge then disagreed with the submissions advanced on behalf of the plaintiffs that entire bungalow admeasuring 3600 sq. ft was let out to the plaintiffs on rent. Accordingly, the learned trial Judge partly decreed the suit and issued injunction to defendants No.1 to 3 from obstructing and interfering with the possession of the plaintiffs and right of access to the extent of three rooms and varanda.

19. Aggrieved by this decision, the plaintiffs preferred appeal. While dismissing the appeal, the learned District Judge also referred to Regular Civil Suit No.140/2007 instituted by the defendants against plaintiffs No.1 and 2 as

also rent agreement at Exhibit-65. The learned District Judge noted that it was in the name of Ghevarchand. Before filing of the suit, the plaintiffs had issued notice. Neither in the notice nor in the suit, reference was made to tenancy agreement in writing. In other words, the learned District Judge did not accept the case of the plaintiffs based on rent agreement at Exhibit-65. On the other hand, learned District Judge observed that the rent receipt at Exhibit-66 clearly shows that it is in respect of only three rooms. Perusal of original rent receipt at Exhibit-66 also records that said receipt pertains to three rooms. The learned District Judge, therefore, held that the plaintiffs did not prove that open land adjacent is given on rent. The plaintiffs have right to use only that much open land required for ingress and egress, and beneficial enjoyment of tenanted premises. They cannot claim their possession over the land as tenant. The learned District Judge accordingly dismissed the appeal. Thus the findings recorded by the Courts below are based upon appreciation of evidence on record.

20. Mr. Anturkar submitted that as Appellate Court did not decide the applications Exhibit-52 and 73 made under Order XLI Rule 27 of C.P.C. as also application Exhibit-58 made under Order XXXIX Rule 11 of C.P.C., the order passed by Appellate Court has to be set aside thereby

directing Appellate Court to decide the Appeal along with these applications. Before I consider this submission, it is necessary to make a reference to the decision of Apex Court in the case of **P. Purshottam Reddy** (supra) and in particular paragraph-10 thereof. In paragraph-10, Apex Court has observed thus :

“10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 the CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 11 of the CPC. In cases where

additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*, AIR 1965 SC 364, it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand dehors the Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation

an undeserved lease of life and, therefore must be avoided.”

21. Perusal of paragraph-10, extracted hereinabove, shows that the Apex Court considered insertion of Rule 23-A in Order 41 by 1976 Amendment. Apex Court considered the provisions of Rules 23, 23-A, 25 of Order XLI and observed that after insertion of Rule 23-A in Order XLI, the Appellate Court can remand the matter if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23-A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand by taking recourse to Section 151. Recourse to Section 151 can be made only when there is no express provision in the Code. At the same time, Apex Court observed that the Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. **An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.** [Emphasis supplied]

22. Applying the tests laid down in **P. Purshottam Reddy** (supra), it is necessary to find out whether the petitioners have made out a case for remanding the matter solely on the ground of Appellate Court not deciding the applications Exhibits-52 and 73 made under Order XLI Rule 27 and Exhibit-58 made under XXXIX Rule 11 of C.P.C.

23. Perusal of application Exhibit-52 under Order XLI Rule 27 shows that it was made on 10.1.2004. Paragraphs- 3 & 4 of said application read thus :

“3. The appellants states and submits that the Respondent has filed suit for eviction bearing no.140/07, in which the Respondent has filed an application at Exh.122. In this application they have categorically mentioned that they want to inspect the suit property, as they have not inspected the suit premises since filing of the suit, which is filed in 2007. The appellants state that relation of the Appellants and Respondents are still smooth, they are on the talking terms, and if they have visited the suit property they could have enter the suit premises even without the order of the Court. But since they are not in possession of the property and the entire 3600 sq. ft. area of the appurtenant land and the bungalow are in possession of the Appellant, the Respondent had no chance to inspect the bungalow. This contention clearly shows that the Respondent have not visited the suit property. Thus this contention in the said application falsifies their claim of possession of partial suit property.

4. The Appellant states and submits

that the Appellant wants to produce the copy of this application on record of this appeal. The Appellant states that this crucial evidence was not available at the time of the trial of the case and therefore could not be produced on record.”

24. Perusal of paragraph-3 shows that the plaintiffs intended to produce application at Exhibit-122 filed by the defendant in R.C.S. No.140/2007 against plaintiffs No.1 and 2 herein as also order passed below Exhibit-122. Perusal of application Exhibit-122 filed in R.C.S. No.140/2007 shows that the plaintiffs therein prayed for direction to the defendant to permit them to inspect the premises in terms of Section 28 of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). By order dated 24.1.2013, the learned trial Judge rejected that application.

25. The plaintiffs thereafter filed application Exhibit-73 on 13.4.2015. Paragraphs-2 and 3 of the application read thus :

“2. It is pertinent to note that the Defendant has filed a suit bearing no.140/2007 against the Plaintiff whereby part of the suit property is claimed by the Defendant as tenanted premises. In this suit the deposition of the Defendant and his witness have taken place. In this depositions both of them clearly admitted that the entire bungalow and open space is in possession of the plaintiff Appellant and therefore this evidence is crucial for adjudication of the present appeal.

3. The Appellant has already filed for

the certified copy of the witness depositions on record along with least at Exh.60. Since the evidence is absolutely necessary for proper adjudication of the matter and since the same has come into existence recently the Appellant wants to rely on the same as additional evidence in this appeal.”

26. In paragraph-2 the plaintiffs made reference to the deposition of the defendant and his witness. In these depositions, according to the plaintiffs, the defendants admitted that entire bungalow and open space is in possession of the plaintiffs and, therefore, that evidence was crucial for adjudication of present appeal. Mr. Anturkar submitted that the cross-examination of defendant's witness was over on 13.11.2013. Suit was decided on 14.2.2008 and the said development is after disposal of the suit and, therefore, Appellate Court should have allowed the application for production of testimony of defendant's witness. I do not find any merit in this submission. As noted earlier, in paragraph-13, after considering the evidence on record, the learned trial Judge observed that it is admitted fact that structure comprising three rooms and varanda in a property bearing C.S. No.682/18, Bibvewadi, Jedhe Nagar, Pune was let out to plaintiff No.1 as a tenant. Perusal of appeal memo filed by the plaintiffs before the District Court does not show that any ground was raised attacking said finding. Thus it is an admitted position in the present suit that the structure

comprising three rooms and varanda was let out to the plaintiff No.1. Plaintiffs want to wriggle out of this admitted position by producing testimony of defendants witness in suit No.140/2007. The said so called admission is required to be put to defendants witness and seek his explanation.

27. That apart if the plaintiffs were of the view that the learned trial Judge wrongly recorded their admissions in paragraph-13 of the judgment, the only course open to the petitioners was to file Review Petition before the very Judge as held in the case of ***State of Maharashtra v. Ramdas Shrinivas Nayak and another, AIR 1982 SC 1249***. In that case the Apex Court has held that the Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in

the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment. As in the present suit it is an admitted fact that the structure comprising three rooms and varanda was let out to the plaintiffs, I do not find any merit in the submission of Mr. Anturkar that said evidence was crucial for deciding the appeal.

28. Perusal of applications Exhibit-52 and 73 shows that the plaintiffs have come with the case falling under Order XLI Rule 27(1)(aa) of C.P.C. Order XLI Rule 27 reads thus :

“ ORDER XLI
APPEALS FROM ORIGINAL DECREES

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) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

29. Perusal of applications Exhibits-52 & 73 shows that the plaintiffs did not come with the case either falling under Clause (a) or clause (b) of Order XLI Rule 27(1) of C.P.C. and only came with the case falling under Clause (aa). Perusal of Clause (aa), extracted hereinabove, shows that a party to an appeal is not entitled to produce additional evidence, unless it 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. It is, therefore, necessary for the party seeking to produce

additional evidence to establish that notwithstanding exercising due diligence such evidence was not within his knowledge. In order to establish this case, it is for the party seeking to produce additional evidence to request the Appellate Court to decide such application. Such party cannot sit as a mute spectator and allow the Appellate Court to decide the appeal without deciding the application for additional evidence. The beneficiary of such application is squarely the party who intends to adduce additional evidence. In my opinion, the very fact that the plaintiffs did not request the Appellate Court to decide applications at Exhibits-52 and 73 shows that they have deemed to have not pressed these applications. In fact, it was necessary for the plaintiffs to invite Appellate Court's attention to pending applications. By failing to do so is also a circumstance showing lack of due diligence on the part of the plaintiff. It is, therefore, not permissible for the plaintiffs now to turn around in this Court and complain about Appellate Court not deciding the applications for adducing additional evidence.

30. Even otherwise I have dealt with the averments made in the applications Exhibits-52 and 73. The question is whether the plaintiffs have made out a case for production of additional evidence. In the case of ***Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148,***

Apex Court has exhaustively dealt with the provisions of Order XLI Rule 27 of C.P.C. from paragraphs-36 to 51. In paragraph-36, it was observed that the general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 Code of Civil Procedure enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

31. In paragraph-38 it was observed that Order XLI, Rule 27 does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. In paragraph-39 it was observed that It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. In the absence of

satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. In paragraph-41 it was observed that the words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment. Apex Court held that an application for taking additional evidence has to be considered with circumspection, provided it is covered under either prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new

evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case.

32. Applying the tests laid down by Apex Court in the aforesaid decision and considering the averments made in the applications Exhibit-52 and 73, no case is made out for adducing additional evidence. As noted earlier, by application Exhibit-52, the plaintiff intended to produce application at Exhibit-122 filed by the defendant in R.C.S. No.140/2007 against plaintiffs No.1 and 2 herein as also order passed below Exhibit-122. I have perused the application Exhibit-122 as also order passed thereon. In my opinion, said documents are wholly irrelevant for deciding the controversy raised in the present proceedings. As held in the case of **P. Purshottam Reddy** (supra), Appellate Court should be circumspect in ordering the remand and an unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

33. Mr. Anturkar relied upon the decision of this Court in **Vasant Gujar** (supra) and in particular paragraphs-20, 22, 23 and 28. In paragraph-20, the learned Single Judge observed that the tenants applications under Order XLI Rule 27 of C.P.C. were not considered and disposed of by the Appeal Court at the stage of making the impugned orders, which clearly amounted to failure to exercise

jurisdiction. The learned Single Judge thereafter observed in paragraph-23 that as the suits were instituted in the year 2002 and the tenants have made out a case to upset the eviction orders upon other substantive grounds, remand, in the circumstances, would only prolong the life of litigation and accordingly order of remand was not passed. In my opinion, said decision does not advance the case of the plaintiffs as the learned Single Judge was of the view that on other grounds the case could be decided.

34. In the case of **Sanjiv Goel** (supra), Apex Court observed that in the Second Appeal before the High Court, the appellant had taken a ground that his application under Order XLI Rule 27 was not disposed of by Additional District Judge before deciding the appeal pending before him. In spite of grievance have been made about non-disposal of application under Order XLI Rule 27, High Court while disposing of the appeal did not advert to this aspect. There was no mention about the grievance of the appellant about his application under Order XLI Rule 27 having not been disposed of in the order of High Court. I have considered the submissions advanced by the plaintiffs based on applications under Order XLI Rule 27. In view thereof, said decision also does not advance the case of the plaintiffs.

35. Mr. Anturkar relied upon the decisions of Apex Court in the case of **Syed Abdul Khader** (supra), **Mundri Lal** (supra), **Vimal Chand Ghevarchand Jain** (supra) and **Mahavir Singh** (supra). There is no dispute with the propositions laid down in these decisions pertaining to Order XLI Rule 27. I have already referred to the decision of Apex Court in the case of **Union of India** (supra) in extenso. Applying those principles, I have already held that no case is made out by the plaintiffs for production of additional evidence.

36. That brings me to the application Exhibit-58 made by the plaintiffs under Order XXXIX Rule 11 of C.P.C.. Perusal of that application shows that the plaintiffs alleged that the application was made by the defendants at Exhibit-114 in the trial Court on 7.7.2007. Status quo order was made in appeal on 5.6.2008 and was extended from time to time till 2011 and was not vacated till date of making application on 9.12.2014. Despite the order of status quo the defendant deliberately committed breach by entering the suit property and digging up holes on the side margins and on the back side which clearly amounted to violation and breach of the Courts orders. It is in those circumstances, the plaintiffs filed application for striking out the defence. As noted earlier, the Courts below have concurrently found that plaintiff No.1 was tenant in respect

of structure comprising of three rooms and varanda and not in respect of open space. I have already upheld those findings. That apart by consent of the parties, this Court had stayed injunction issued by the Appellate Court. In other words, injunction was not operating pending the suit. In view thereof also, no case is made out for striking out the defence of the defendants.

37. Mr. Anturkar relied upon the decision of Apex Court in the case of **Muni Suvrat-Swami Jain S.M.P. Sangh** (supra). In that case, the Apex Court was considering the provisions of Sections 354-A and 351 of the Mumbai Municipal Corporation Act, 1888 and in particular Sub-section (2) of Section 351. Sub-section (2) provides that if person to whom notice under Section 351(1) has been issued fails to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person. Apex Court considered the decision of this Court and observed that discretion is vested in the Commissioner whether to take action of demolition and removal of the building in question and that discretion has to be exercised by the Commissioner alone. In paragraph-53, Apex Court has observed thus :

“53. It is seen that no notice under the provisions of Section 351 has been issued by the Municipal Commissioner in this matter against the appellant. In the special leave petition, it is clearly mentioned by the appellant that the Corporation had issued a notice to stop the work under Section 354-A of the BMC Act. No reference is made to any notice under Section 351 of the Act. It is specifically mentioned that the affidavit which was filed on behalf of the Corporation had categorically stated that after the service of stop work notice under Section 354-A no work was carried out. Respondent No. 1 is fully aware that the provisions of Section 354-A of the Act deals with stop work notice whereas the provisions of Section 351 of the Act deals with show cause notice for demolition of unauthorized structure. The grievance of the appellant herein has been that without issuing a notice under Section 351 of the Act and without giving an opportunity to the appellant of being heard the structure of the temple could not be ordered to be demolished by the High Court. The power under Section 351 of the Act, in our opinion, has to be exercised only by the Municipal Commissioner and it is left to the Municipal Commissioner under the provisions of Section 351(2) either to order or not to order the demolition of the alleged unauthorized temple. In fact, respondent No. 1 by himself through his advocate's letter dated 16.04.2005 (annexed to his counter affidavit) requested the Municipal Authorities to take action under Section 351 of the Act. At the time of admission of this special leave petition, the provision of Section 351 of the Act was pointed out by the learned senior counsel to show that the Municipal Commissioner had only been conferred the power under the said provisions to demolish or not to demolish unauthorized structure and, therefore, the High Court ought not to have issued a mandamus for demolition of the temple

before any order was passed by the Commissioner on the question of demolition. The provisions of Section 354-A have nothing to do with the question of demolition. It is specifically averred and contended at the time of hearing that respondent No. 1 is an agent set up by the developer who is developing the adjoining land and who is interested in dividing the right of way claimed by the appellant through the said adjoining plot bearing CTS No. 206.”

38. In the instant case, as observed by the Apex Court in ***Union of India*** (supra) a party cannot, as a matter of right, claim production of additional evidence and even the discretion is vested in the Appellate Court, said discretion has to be exercised judicially and with circumspection.

39. In the case of ***Surya Dev Rai*** (supra), the Apex Court has dealt with powers of High Court under Articles 226 and 227 of the Constitution of India. It is also held that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised *suo moto*. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of

procedure or traditional fetters which are to be found in certiorari jurisdiction. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned. The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Applying the tests laid down by the Apex Court in the case of **Surya Dev Rai** (supra), I am more than satisfied that this is a fit case for invocation of powers under Article 227 of the Constitution of India.

40. For all these reasons, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

41. At this stage, Mr.Mhatugade orally applies for continuation of the status quo order. Perusal of the orders passed by this Court in the Writ Petition shows that no status quo order was passed and, therefore, there is no question of continuation of the status quo order. Even otherwise, during pendency of the Suit, the injunction order was stayed by this Court by order dated 5.3.2003 and said order was continued during pendency of appeal also. In view thereof, request for continuation of ad-interim order is rejected. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)