

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2629 OF 2014

Shri Keshav Daulat Kale

...Petitioner

vs.

Shri Ramesh Pandurang Kale (Decd) through

Lrs. and Ors.

...Respondents

Mr. Girish R. Agrawal for the Petitioner.

Mr. Milind Sathaye for Respondent Nos.1A, 1B, 2,3,4,5, 2A and 2B.

Mr. Rameshwar N. Gite for Respondent Nos.9 & 10.

Mr. Swapnil V. Walve i/b Mr. Sham V. Walve for Respondent Nos.28 to 35.

Mr.Vivek V. Salunke for Respondent Nos.36 and 37.

Ms. Saina Ansari for Respondent No.38.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 10th October, 2017

P.C.:

. Heard respective counsel. Rule. Rule returnable forthwith with the consent of the parties.

2. In the present case, the Petitioner is the original Plaintiff in Special Civil Suit No.340/1992. The suit was for partition and possession. The suit was dismissed by judgment and order dated 18/10/2000. Being aggrieved by the said judgment and order, the original Plaintiff i.e. the present Petitioner has filed Civil Appeal No.462/2000. The Petitioner filed an application under Order 41 Rule 27 of CPC seeking permission to file additional documents on record to be read in evidence in Appeal. The contention in the said application was that in the written statement filed by the Defendants the rights of the parties were denied and it was contended that they have no share in the joint family property. According to the original Plaintiff during the pendency of the Appeal they had learnt that the original defendant had filed an application seeking occupancy in the

suit property. It was mentioned that he had learnt it from reliable sources and, therefore had filed application for seeking certified copies of the same and had obtained the same and has requested the Court to read the said documents in evidence.

3. The list of documents is as follows:

1. In the daily newspaper Gavkari there was a public notice dated 1/8/2012 that the defendant Nos. 1 to 8 had admitted their 1/4th share;
2. The Respondent had filed an application before the Deputy Director of Land Record on 25/10/2010;
3. The 7/12 extract filed by Respondent before DILR; 6D Certificate;
4. The Consolidation Certificate dated 31/5/2011;
5. The City Survey Record after the demise of Pandurang Kale;
6. The order passed by City Survey Officer dated 16/5/1989;
7. The Revenue note dated 31/12/1940 which is at Exhibit 81 in the original Suit and
8. The Sale Deed.

4. It is pertinent to note that the Petitioner has not given specific details as to who took out application before DILR, what was the date of the order passed by DILR, what were the documents considered by DILR. In any case the Defendants were in possession of the suit property and their names had also appeared in the 7/12 extract of the suit property which were the part and parcel of the original record in Special Civil Suit No.340/1992. It is therefore claimed that no specific details were mentioned although an application was filed and, therefore revenue extract was read in evidence by the Trial Court. An application was filed by the heirs of Pandurang Kale on 10/5/1989 which is much prior to the decision

of the suit. It is further pertinent to note that there was no prayer for remanding the matter. Secondly, there were lack of details and, thirdly, delay in filing the application was not explained in the said application. Reliable sources from whom he had learnt is also not stated in the application. The application was made under Order 41 Rule 27.

5. The learned counsel for the Petitioner has vehemently urged that in fact the Court could read the said documents in evidence since they are subsequent to the passing of the judgment and the decree. It is not the case of the Petitioner that he had taken any steps to challenge the order passed by the Revenue Authorities as the appeal would be maintainable against the said order. It is the contention of the learned counsel for the Petitioner that he could not challenge the said order only because he was not a party to the proceedings before the Director of Land Records.

6. Learned counsel for the Respondent 1A and 1B has subsequently contended that in the present case Order 41 Rule 27 needs to be read. It is submitted that it begins with a negative clause i.e. "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court unless the conditions contemplated in clause (a), (aa) and (b) are fulfilled." It is also stated that the said power is within the discretion of the Appellate Court and cannot be exercised unless specific reasons are given.

7. After perusing the application filed by the Petitioner it is also clear that there was no prayer under Order 41 Rule 28 and no sufficient cause was shown as to why the said facts could not be brought to the notice of the Trial Court during the pendency of the suit. The learned counsel for the Petitioner has placed reliance upon judgment of this Court in the case

of *Hasanate Taheriyah Fidayyah vs. Shri Mahesh s/o Kishor Saran*¹
and *Union of India vs. Ibrahim Uddin & Anr.*²

8. The facts of the case are altogether different and, therefore, the ratio would not be applicable in the given set of facts. In the present case, the learned Trial Court has rightly considered that the Applicant had not stated the eventualities of due diligence on his part and no case was made out and, therefore, the Court could not travel beyond the statutory provisions under Order 47 Rule 27.

9. According to the learned counsel for the Petitioner in fact the Court ought not to have rejected the Application and ought to have kept it pending to decide the same at the stage of pronouncement of judgment. The Court could not have been oblivious of the fact that the suit seeking partition and possession was of the year 1992 and said suit was decided after 8 years and the hearing of the Appeal was pending since 2000 and for the first time on 27/8/2008 application was made under Order 41 Rule 27.

10. In view of this, the finding recorded by the Trial Court calls for no interference, the same is rejected however in the course of oral argument and submission at the stage of final hearing the Petitioner cannot be precluded from bringing it to the notice of the Court that subsequently the Defendants had entered their names in the occupancy and the same may be considered without being influenced by the observations made by this Court as it has to decide the application for maintainability of additional evidence and not admissibility of the documents.

11. In any case, the statute mandates that it is the discretion of the

1 2014(3) ALL MR 497

2 2012(5) ALL MR 462 (S.C.)

Appellate Court to consider the submissions in accordance with law. Rule is discharged. The Petition is dismissed.

12. At this stage, the learned counsel for the Petitioner has prayed for staying this order for a period of 4 weeks. The said prayer is rejected keeping in view the fact that the hearing of the Appeal is pending since last 17 years. Whereas the Hon'ble Apex Court has directed the High Court to take effective steps to curtail the pendency of the matters before the Trial Courts as well as the lower Appellate Courts.

(SMT. SADHANA S. JADHAV, J.)