

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 713 OF 2014

Smt Ramllamma w/o Ramlu Sayanna
And Others

...Applicants

Versus

Victory Blocks CHS Ltd.

...Respondent

....

Mr. V.Y. Sanglikar, Advocate for the Applicants.

Mr. Kunal Bhanage, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

RESERVED ON : 02nd AUGUST, 2018

PRONOUNCED ON : 08th AUGUST, 2018

ORDER :

1. Heard Mr.V.Y. Sanglikar, learned Counsel for the applicants and Mr.Kunal Bhanage, learned Counsel for the respondent, at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants who are the heirs and legal representatives of Ramaloe Sayanna, since deceased, hereinafter referred to as the 'original defendant', have challenged the judgment and decree dated 25.2.2011 passed by the learned Judge, Court Room No.35 of the Court of Small Causes at Bombay (Bandra Branch) in L.E. Suit No.35/48 of 1998 as also the judgment and decree dated 19.3.2014 passed by the Appellate Bench of the Small Causes

Court at Mumbai, Bandra Branch in P.S.C.C. Appeal No.18/2011. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as the 'plaintiff', and directed the applicants, hereinafter referred to as the 'defendants', to hand over vacant possession of hut admeasuring about 260 sq. ft. situate in the compound of Victory Blocks Co-operative Housing Society Limited, 31-B, Hill Road, Bandra (West), Mumbai – 400 050 (for short, 'suit premises') to the plaintiff.

3. In support of this application, Mr. Sanglikar submitted that in paragraph-1 of the plaint, the plaintiff asserted that the original defendant was in the employment of the plaintiff as a watchman. For carrying out efficient duties and because of the exigency of service, the original defendant was allowed to occupy the suit premises standing on the plaintiff's property gratuitously. In paragraph-2, the plaintiff asserted that the service of the original defendant was terminated long back. He has, however, not vacated the suit premises. In paragraph-3, the plaintiff made reference to the notice dated 13.4.1998 issued by their Advocate and it was contended that due to mistake in taking instructions, in that notice a case of service tenancy was made out. It was asserted that it cannot be a service tenancy because no amount was charged to the original defendant. The plaintiff's Advocate, therefore,

by another letter dated 11.7.1998 corrected the mistake and called upon the original defendant to remove himself from the suit premises. As the original defendant failed and neglected to vacate the suit premises, suit was instituted. In short, Mr.Sanglikar submitted that in the plaint the plaintiff specifically asserted that the original defendant was inducted gratuitously in the suit premises and it was not a case of service tenancy.

4. Mr.Sanglikar submitted that in the written statement, the original defendant specifically asserted that there is no relationship of licensor and licensee between the parties and, therefore, the suit is not maintainable under Section 41 of the Presidency Small Cause Courts Act, 1882 (for short, 'P.S.C.C. Act'). The original defendant further contended that the suit premises was constructed by the original defendant and was not inducted in the suit premises by the plaintiff. At the time of occupation of the suit premises, the original defendant was not in the service of the society. The original defendant contended that the suit premises is not in the plaintiff's property and, therefore, the Small Causes Court has no jurisdiction to entertain and try the suit as the title is in dispute between the parties.

5. Mr.Sanglikar invited my attention to the City Survey Plan (page.103 of the compilation) which shows that the suit premises is not

in the property of the plaintiff and in fact it is outside the plaintiff's property. He invited my attention to the extract of Property Register card in respect of C.T.S. No.F/1137 admeasuring 1526.8 square meters equivalent to 1826 square yards, which does not record name of the plaintiff in the column of holder, lessee. He invited my attention to the photo-copy of the ration card to contend that the original defendant was residing in the suit premises since 1971. He also submitted that the original defendant had paid non-agricultural assessment charges, as is evident from the N.A. Order dated 13.6.1994. Thus, the suit premises was constructed by the original defendant and does not belong to the plaintiff. He submitted that in the notice dated 13.4.1998 issued on behalf of the plaintiff through Advocate it was asserted that the defendant has illegally and unlawfully constructed the suit premises in the property of the plaintiff. In other words, the plaintiff did not come out with the case of gratuitous licensee. If it is the case of the plaintiff that the original defendant has illegally and unauthorizedly constructed the suit premises, they cannot institute a suit in the Court of Small Causes and the decree passed by the Courts below being without jurisdiction is a nullity.

6. Mr. Sanglikar invited my attention to the evidence of the plaintiff's witness Shri Vishram Narayan Parab. He was examined on the

ground that he was the oldest member and original person who came to occupy flat in the plaintiff's building and, therefore, was fully aware of the facts of the case. In paragraph-3, he deposed that the suit premises are described in the property tax bills and inspection extracts issued by the Mumbai Municipal Corporation as "shed/society office". In paragraph-4, he referred to the inspection extract of 2002-03 issued by the Mumbai Municipal Corporation showing the suit premises i.e. shed with one Gala as belonging to the plaintiff. He submitted that whereas the area of society's office was shown as 12 square meters, the suit premises admeasures 260 sq. fts. In paragraph-13, he referred to the extract of inspection reports of the suit premises. A perusal of this extract at Exhibit-M shows that the suit premises is described as "shed with one gala by society' admeasuring 10 ft. x 10 ft. i.e. 100 sq. ft. as against the area of the suit premises which is admittedly 260 sq. ft. In paragraph-16, the witness reiterated that the plaintiff society had allowed the original defendant to occupy the suit premises by way of service tenancy and that his service tenancy was duly terminated by the plaintiff society. He submitted that the plan enclosed to the plan at page-54 of C.R.A. shows that the society's office and the suit premises are not one and the same, but they are different structures.

7. Mr. Sanglikar invited my attention to the issues framed by

the learned trial Judge and in particular issue No.2. Issue No.2 was as to whether the plaintiff proves that they have allowed the original defendant to occupy the suit premises by way of service tenancy and it was answered in the affirmative. Insofar as the points framed by the Appellate Court are concerned, the Appellate Court framed point No.1 as to whether the plaintiff proves that the relationship between it and the original defendant is that of licensor and licensee. He submitted that this reflects total non-application of mind on the part of the Courts below. In the plaint, the plaintiff specifically asserted that this is not a case of service tenancy and the original defendant was inducted gratuitously, in the evidence said case was given a total go-bye by the witness examined by the plaintiff and the witness came out with the case of service tenancy. He submitted that though the defendants specifically asserted that the structure is not in the property of the plaintiff as also the structure was constructed by the defendant, the Courts below did not touch this aspect at all. The Courts below did not record a finding that the original defendant was inducted in the suit premises.

8. Mr. Sanglikar submitted that during pendency of the appeal, the defendants filed application No.13/2013 under Order XLI Rule 27 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for production of

additional evidence at Exhibit-B collectively (pages-93 to 107 of C.R.A.). On 30.11.2013, the Appellate Court passed order and directed that the application will be heard along with the main appeal. However while disposing of the appeal, the Appellate Court did not decide the application. He, therefore, submitted that the order passed by the Appellate Court deserves to be set aside thereby remitting the appeal to the Appellate Court to decide it along with application No.13/2013. In the alternate, he submitted that present Civil Revision Application may be kept open and the Appellate Court may be directed to decide that application and transmit the finding thereon to this Court.

9. In support of his submissions, Mr. Sanglikar relied upon the decision in **Malayalam Plantations Limited v. State of Kerala and another, (2010) 13 SCC 487** to contend that the application filed for adducing additional evidence before the Appellate Court must be considered on merits. In paragraph-13, on behalf of the appellate request was made before the Apex Court to scrutinize each and every document and if it is scrutinized the claim made by State of Kerala is liable to be rejected in toto and the stand of the appellant is to be accepted, was considered. In paragraph-14, the Apex Court observed that it was not inclined to go into the validity or acceptability of those documents/material filed by both sides before the High Court. Relying

upon this decision, Mr. Sanglikar submitted that whether to allow the application under Order XLI Rule 27 of C.P.C. or not is within the discretion of the Appellate Court. When the authority is entrusted with the 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 going into merits of the application and exercising discretion available to the Appellate Court. If this Court takes upon deciding the application, 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.. In short, he submitted that where 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, same 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 appeal cannot be disposed of properly without requiring the parties to lead additional evidence. He submitted that this Court should not decide the application which was pending before the Appellate Court. Mr. Sanglikar, therefore, submitted that the application requires consideration.

10. On the other hand, Mr. Bhanage supported the impugned orders. He submitted that the original defendant was working as a Watchman with the plaintiff and as such the society had inducted him in the suit premises gratuitously. His services were terminated and during pendency of the suit the original defendant also died and his L.Rs are presently occupying the suit premises. They have, however, not vacated the suit premises even after termination of the original defendant's service tenancy as also after his death. He invited my attention to Section 13(1)(f) of the Act which lays down that the landlord shall be entitled to recover possession of any premises if the Court is satisfied that the premises were let to the tenant for use as a residence by reasons of his being in the service or employment of the landlord and that the tenant has ceased, whether before or after coming into operation of the Act, to be in such service or employment. In other words, he submitted that the moment the landlord establishes that its a case of service tenancy and the service tenancy is over, the service tenant has to hand over possession of the suit premises. In the present case, the plaintiff asserted that the service tenancy of original defendant came to an end and he was inducted gratuitously in the suit premises. Thus, there was a relationship of licensor and licensee between the plaintiff and the original defendant.

11. Mr. Bhanage invited my attention to the examination-in-chief by affidavit by defendant No.1(a) Smt. Ramalamma widow of Ramaloo Sayanna. In the opening paragraph, it is stated that she is residing at Survey No.2, Hissa No.31 (part), C.T.S. No.1138 (part), which is the property of the plaintiff. He invited my attention to the letter dated 29.6.1978 addressed by the City Survey Officer, Suburban District to the Secretary of the plaintiff informing the later that the structure shown in the North-East corner of City Survey No.1137 is part of C.T.S. No.1137 of village Bandra belonging to the plaintiff's society (Exhibit-E, page-28 of the compilation). He also invited my attention to the City Survey map showing that on the North-East corner the suit premises is situate (page-29 additional compilation).

12. Mr. Bhanage invited my attention to the cross-examination of DW-1 Ramalamma Sayanna. She admitted that her husband was working as Watchman of the plaintiff society. She further admitted that in the ration card, the address of the original defendant is mentioned as Victory Block, behind Bandra Police Station. She also admitted that the ration card is issued in the name of the original defendant where his residential address is mentioned as Survey No.2, Hissa No.31, City Survey No.1138, Victory Block Co-op. Housing Society, Bandra, which is the address of the plaintiff society. DW-1 admitted that the portion

shown in the map with red ink is of the constructed premises of Victory Block. She deposed that she does not know the City Survey number on which the premises occupied by her and shown with blue ink in the map Exhibit-58. She admitted that access to the premises shown in blue colour in map Exhibit-58 is made available from the compound of the premises of plaintiff's society. She further admitted that though in the affidavit she stated that the suit premises does not stand on the property of the plaintiff and is standing over the Government land, it is true to say that the premises occupied by her might be standing over the property described in Exhibit-59. The property described in Exhibit-59 does not belong to the Government. DW-1 admitted that on termination of services of her husband as Watchman, he had filed proceedings in the Labour Court. She admitted that she does not have any documentary evidence to show that her husband (original defendant) has constructed the suit premises. She also admitted that during the tenure of service of her husband as Watchman of the plaintiff he was residing in the suit premises.

13. In support of his submissions Mr.Bhanage relied upon following decisions :

- (i) **Shrikrishna Bhau Parab and others v. Dr. Mrs. Roshan S. Boyce, (1995) 1 Bom CR 429** and in particular paragraphs-15

and 22 thereof;

- (ii) **A. Andisamy Chettiar v. A. Subburaj Chettiar, (2015) 17 SCC 713;**
- (iii) **Maria Margarida Sequeira Fernandes and others v. Erasmo Jack De Sequeira (dead) through Lrs, (2012) 5 SCC 370;**
- (iv) **A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others, (2012) 6 SCC 430; and**
- (v) **Unreported decision of this Court dated 14.10.2016 in Writ Petition No.10569/2016, Shri Babulal Pukharaj Jain and another v. Shri Satish Govind Jagtap and another.**

14. Mr. Bhanage finally submitted that the suit premises is situate in H-Ward Nos.6117(3), (4) and (6), Street Nos.158E, 158F and 158G of Hill Road, Bandra, Mumbai-400 050. He invited my attention to the letter issued by the Ward Officer, Slums (II) to the plaintiff's society wherein it is informed that the structure of hut does not stand on the land belonging to the Collector of Bombay. For all these reasons, he submitted that no case is made out for interfering with the impugned orders.

15. 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 the original defendant was working as a Watchman in the plaintiff's society. Though the original defendant came with the case that the suit premises is not in the property of the plaintiff as also he had made construction of the suit premises, DW-1 clearly admitted that she has no documentary evidence to substantiate that her husband had made construction. In fact the admission given by DW-1 during the course of cross-examination are fatal and totally destroys the case of the defendants. The address in the ration card shows the address of the plaintiff's society. Though she deposed that the suit premises is in the property card at Exhibit-59 and not in the society's property, she admitted that the property card Exhibit-59 does not belong to the Government. She even did not know the City Survey number on which the premises occupied by her is standing. She also admitted that access to the premises shown in blue colour in map Exhibit-58 is made available from the compound of the premises of the plaintiff's society. She further admitted that during the tenure of service of her husband as Watchman of the plaintiff, he was residing in the suit premises. The plaintiff specifically came out with the case that the original defendant was working as Watchman and his

service tenancy was terminated. It is also their case that he was residing in the suit premises gratuitously.

16. In the case of **Shrikrishna Parab** (supra), the learned Single Judge of this Court observed thus:

“15. Then as far as the question of licensor and licensee is concerned, it has to be stated that originally, Mr. Parab was permitted to occupy the property as he was in occupation under the plaintiff. Hence, it can be said that the possession of Mr. Parab was that of a licensee. In common law, a licensee has only a personal right or a privilege, to do something permitted by the owner of the property. It is not a heritable right. Further, it is in evidence that Mr. Bhau Parab left the services of the plaintiff during his life time. Since it was a special privilege attached to his office, he lost that privilege when he left the job. Even otherwise, that right came to an end after his death. There is no allegation nor proof that defendants were granted permission by the plaintiff to occupy or continue to occupy the premises. On the other hand in the life time of Mr. Parab a notice had been issued to him to vacate the property. Either this is a case of termination of the license or a case where the license has come to an end on the death of a licensee. In common law, this right of the licensee was something personal to him and it comes to an end on his death and the defendants cannot claim any right as a licensee. Therefore, the argument that the suit purports to be between licensor and licensee and therefore, the suit is not maintainable in Civil Court under section 41(1) of the Presidency Small Cause Courts Act, 1882 has no merit and is accordingly rejected.”

17. Section 13(1)(f) of the Act reads thus :

“13. When landlord may recover possession.--
(1)Notwithstanding anything contained in this Act but subject to the provisions of sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(f) that the premises were let to the tenant for use as a residence by reasons of his being in the service or employment of the landlord, and that the tenant has ceased, whether before or after the coming into operation of this Act, to be in such service or employment; or”

18. In the present case it is not in dispute that original defendant was in the service or employment of the plaintiff and that said employment came to an end. The landlord is, therefore, entitled to recover possession of the suit premises from the original defendant. Even after termination of service of the original defendant and after his death, the defendants have not handed over possession of the suit premises. The defendants have not established that they are paying any licence fee or charge to the plaintiff. Thus, the defendants are occupying the suit premises as a gratuitous licensee. The Small Causes Court will, therefore, have jurisdiction to entertain and try the suit under Section 41 of the P.S.C.C. Act. I, therefore, do not find any merit in the submission of Mr. Sanglikar that as in the notice dated 13.4.1998 it was alleged that the original defendant had made illegal and

unlawfully constructed the suit premises, the Small Causes Court will have no jurisdiction. The issue of jurisdiction has to be decided on the basis of the averments made in the plaint and not on the basis of the contents of notice issued on behalf of the plaintiff.

19. The Courts below after appreciating the evidence on record have concurrently decreed the suit. While answering the issue No.2, the learned trial Judge, after considering the evidence on record, held that there is a scope to infer that the original defendant being in the service of the plaintiff was given the suit premises and that he was permitted to occupy the suit premises without any charge. The learned trial Judge accordingly decreed the suit. Insofar as the Appellate Court is concerned, it was observed that though the original defendant disputed the relationship of licensor and licensee, there is no dispute that the original defendant was working as a Watchman with the plaintiff and that his services were terminated. The Appellate Court also held that the suit premises is situate in the plaintiff's property and not in the property belonging to the Government. Thus the Courts below after appreciating the evidence on record have concurrently decreed the suit. It is, therefore, not possible for this Court to reappreciate the evidence on record.

20. That brings me to the submission of Mr. Sanglikar that as the

Appellate Court did not decide the application under Order XLI Rule 27 of C.P.C., the order of the Appellate Court deserves to be set aside thereby restoring the appeal for deciding the same along with application or in the alternate keeping this Civil Revision Application pending with a direction to the Appellate Court to transmit findings on the application under Order XLI Rule 27 of C.P.C.. Mr. Sanglikar relied upon the decision in the case of **Malayalam Plantations Limited** (supra) and in particular paragraphs-13, 14 and 16 thereof. In paragraph-16 it was observed that if any application is filed under Order XLI Rule 27 in an appeal, it is incumbent on the part of the Appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing on the issue involved. He submitted that the Apex Court declined to go into the validity of those documents/materials filed by both the parties before the High Court. In that case, the appellants had filed application before the Forest Tribunal, Kozhikode in respect of five Wayanand estates challenging the vesting of 2588 ha out of the 5131 ha. By the impugned order dated 13.3.1979, the Forest Tribunal exempted the entire 2588 ha from the vesting provisions of the Kerala Private Forests (Vesting and Assignment) Act, 1971. Aggrieved by that order, the State of Kerala

filed appeal before the High Court. The appellant also filed appeal. It is not necessary to refer to the facts in detail. Suffice it to observe that the Apex Court remitted the matter to the Forest Tribunal, Kozhikode. After hearing both sides, by common judgment dated 15.12.1994, the Tribunal exempted and excluded 1400 ha of land from the vesting provisions of the said Act as areas required for firewood purposes. The State of Kerala filed appeal before the High Court. The appellant also filed Cross-Appeal. The State of Kerala had filed application under Order XLI Rule 27 of C.P.C. before the High Court and said application was not decided.

21. In paragraph-13, the Apex Court noted the request made on behalf of the appellant to scrutinize the documents. Said request was turned down as is evident from paragraph-14. In paragraph-15 it was noted that when the application under Order XLI Rule 27 of C.P.C. was filed it was duty of the High Court to deal with the same on merits.

22. With the assistance of the learned Counsel appearing for the parties, I have perused the application made by the defendants under Order XLI Rule 27 of C.P.C. A perusal of this application shows that it does not fall either in clause (a) or (b), but, it falls in clause (aa) of Order XLI Rule 27(1) of C.P.C. With the assistance of the learned Counsel appearing for the parties, I have perused the documents which

are sought to be produced by the defendants (pages-93 to 107 of the additional compilation). A perusal of these documents shows that the defendants intend to establish (1) that the suit premises is not situate in the property of the plaintiff; and (2) that the construction was made by the original defendant. I have already dealt with the admissions given by DW-1 during the course of cross-examination. In my opinion, this application is made with a view to wriggling out of the admissions given by DW-1 during the course of cross-examination.

23. In the case of **Babulal Jain** (supra), this aspect was dealt with. The decision of Apex Court in the case of **P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002) 2 SCC 686** and in particular paragraph-10 was referred. In paragraph-10, the Apex Court 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.”

24. The Apex Court has observed that the Appellate Court should be circumspect in ordering a remand. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided. Applying the tests laid down in **P. Purshottam Reddy's** case (supra) to the facts of the present case, it is necessary to find out whether the defendants have made out a case for remanding the matter solely on the ground that the Appellate Court did not decide the application under Order XLI Rule 27 of C.P.C. In paragraph-10 of the application, the defendants contended that the information contained in Exhibit-B collectively came to their knowledge when they were asked to approach the Corporation for repairs of their own structure. In paragraph-11, it was contended that the record evidence was not available with them for adducing before the trial Court and was only available when they applied for permission to repair their hut.

25. 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.

26. Applying the tests laid down by the Apex Court and after considering the averments made in the application, no case is made out for adducing additional evidence. As the case falls under Order XLI Rule 27(aa) of C.P.C., the defendants are not entitled, as a matter of right, to produce the additional evidence unless they establish that notwithstanding the exercise of due diligence, such evidence was not

within their knowledge or could not, after the exercise of due diligence, be produced by them at the time when the decree appealed was passed. Such party cannot sit as a mute spectator and allow the Appellate Court to decide the appeal without deciding the application for additional evidence. In order to establish this case, it is for the party to invite Courts attention to pending application under Order XLI Rule 27 of C.P.C. and request the Court to decide the same. The beneficiary of such application is squarely the party who intends to adduce additional evidence. The party cannot sit on fence and allow the Appellate Court to decide appeal without pointing out pendency of such application. In my opinion, the very fact that the defendants did not request the Appellate Court to decide application shows that they have deemed to have not pressed this application. In fact, it was necessary for the defendants to invite Appellate Court's attention to pending application. By failing to do so is also a circumstance showing lack of due diligence on the part of the defendants. It is, therefore, not permissible for the defendants now to turn around in this Court and complain about Appellate Court not deciding the application for adducing additional evidence.

27. In view thereof, I do not find that any case is made out either for setting aside the order passed by the Appellate Court or keeping

present Civil Revision Application pending in this Court by directing the Appellate Court to decide the application under Order XLI Rule 27 of C.P.C. and transmit the finding to this Court.

28. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same are dismissed with no order as to costs. Order accordingly.

29. At this stage, Mr. Sanglikar orally applies for stay of this order for a period of eight weeks from today. Mr. Sanglikar states that the applicants are in possession of the suit premises and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the applicants and all adult family members residing in the suit premises are ready and willing to give usual undertaking within two weeks from today, with copy in advance to other side. Learned Counsel for the respondent opposes said prayer.

30. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be met by staying operation of this order for a period of eight weeks

from today subject to the applicants and all adult members residing in the suit premises giving usual undertaking to this Court within two weeks from today incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that in case the applicants are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

31. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of eight weeks from today, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicants do not file undertaking in the above terms with the aforesaid period, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance on 29.8.2018 at 3:00 p.m.. Order accordingly.

(R.G. Ketkar, J.)