

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Review Application No. 0180 of 2019
(In Second Appeal No. 0153 of 2016)

District : Jalgaon

Smt. Kantabai w/o. Mohan Pingle,
Age : 69 years,
Occupation : Pensioner,
R/o. Mundada Nagar,
Pimprala Shivar,
Taluka & Dist. Jalgaon.

.. Applicant
(Original
appellant/
plaintiff)

versus

1. Baburao s/o. Fakira Bhalerao,
Age : 65 years,
Occupation : Retired.
2. Vilas Damu Nikam,
Age : 47 years,
Occupation : Service.

.. Respondents
(Original
defendants)

Both R/o. Mundada Nagar,
Pimprala Shivar, Jalgaon,
Taluka & Dist. Jalgaon.

.....

Mr. Pramod P. Dhorde, Advocate, for the applicant.

Mr. G.V. Wani, Advocate, for respondents no.01 & 02.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 28TH AUGUST 2019

ORAL ORDER :

01. Present application has been filed for review of order passed on 21-11-2018 by this Court

(Coram : A.M. Dhavale, J.). Since the said Bench is not available, the matter is assigned to this Court as per present roster.

02. Heard learned Advocate Mr. P.P. Dhorde appearing for the applicant. Heard learned Advocate Mr. G.V. Wani appearing for respondents no.01 and 02.

03. It has been vehemently submitted on behalf of the applicant, that the application which was rejected by this Court, was under Order XLI Rule 27 of the Code of Civil Procedure, 1908. By virtue of the said application, present applicant intended to produce on record, copy of the sale deed dated 26-03-1997, sale deed dated 23-06-1995 and document dated 09-08-1995 pertaining to correction in sale deed dated 23-06-1995. It was categorically mentioned that the plaintiff could not procure those documents during the trial though due diligence prompted her to secure the information. In the said sale deed Exhibit 108, in respect of the suit land, it was written that there was an open space exclusively belonging to the owner of Block no.04. However, it was then corrected by scoring and adding words 'joint ownership', which was, in fact, illegal. Those documents had bearing on the dispute and production of those documents would be helpful to the Court for arriving at the conclusion. The said application was rejected by this Court without considering the basic

requirements those are required to be considered while dealing with application under Order XLI Rule 27 of C.P.C.

04. Per contra, learned Advocate appearing for the respondents submitted that a speaking order has been passed and perusal of the application would show that the basic requirements for an application under Order XLI Rule 27 of C.P.C. were not complied with. There was no explanation on the part of the applicant, as to why she could not procure those documents even before filing the suit.

05. At the outset, it appears that the present applicant, who was also the applicant in Civil Application No. 12171 of 2016, is the original plaintiff who had filed the suit for declaration and permanent injunction. The said suit was dismissed by the learned 4th Joint Civil Judge (Senior Division), Jalgaon, on 22-01-2008. Thereafter, learned Principal District Judge, Jalgaon, dismissed Regular Civil Appeal No. 73 of 2008 on 13-01-2015, which was filed by the present applicant. It is to be noted that the suit was filed on 07-03-2001. The documents which the applicant intended to produce were dated 26-03-1997, 23-06-1995 and 09-08-1995. That means, they were in existence much prior to the presentation of the plaint. Perusal of the civil application does not show that the applicant came to know about

existence of those documents for the first time recently after pronouncement of the judgment by the first appellate Court. Therefore, in order to succeed in an application under Order XLI Rule 27 of C.P.C., what was required to be shown by the present applicant was that, (1) in spite of exercise of due diligence, such evidence was not within his knowledge; (2) after exercise of due diligence, it could not be produced by him at the time when the decree appealed against was passed. Mere making a statement in consonance with the wording of the provision will not give a right to a party to adduce additional evidence. Which steps were taken in pursuant to exercising due diligence ought to have been mentioned. As aforesaid, in fact, from the contents of the application, it appears that the applicant had knowledge about existence of those documents. It has been tried to be explained on behalf of the applicant, at that time, that means, around 1995 - 1997, those documents used to be at Photo Zinco office at Pune. However, it is to be noted that the applicant has not stated that she had ever tried to obtain certified copies of those documents from the competent authority. Another mode that was available, was to examine the concerned person from Photo Zinco office or take summons for production of documents. When these methods or modes were available and they were not exercised, it cannot be said that in spite of due diligence, the applicant

could not produce those documents on record.

06. Perusal of the order passed by this Court on 21-11-2018 would show that speaking order was passed and reasons were assigned as to why the application cannot be allowed. Under such circumstance, this Court cannot sit in appeal under the guise of review of the order and therefore, review application is not maintainable.

07. In the light of above, the review application is hereby dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

.....