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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 2721 OF 2018**

Mrs. Sushilabai Waman Kekane (Kulkarni)Petitioners
(Since deceased through legal heris)

V/s.

Mr. Arun Waman Kekani (Kulkarni)Respondents
and another

Ms. Tejas Kapre for the Petitioner
Mr. Mohan. B. Gawade a/w Mr. Madhav Kulkarni for respondent no.
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CORAM : NITIN W. SAMBRE, J.

DATE : OCTOBER 15th 2019.

P.C.

This petition is by original-plaintiff whose Regular Civil Suit No. 39 of 2008 for partition, separate possession and declaration came to be dismissed on April 12, 2012. Feeling aggrieved, petitioner preferred Civil Appeal No. 450 of 2012 which was renumbered as Civil Appeal No. 391 of 2014 after it is transferred from Pune to

Khed-Rajgurunagar.

2] Petitioner preferred application Exhibit 19 in Civil Appeal for amendment of plaint which was allowed on January 11, 2016. On 04/01/2016, Exhibit 21, production of documents was allowed.

3] In the aforesaid background, petitioner preferred application Exhibit 32 claiming that certain factual matrix which should have been proved by adducing evidence was not done, viz. place and source of income of the plaintiff/appellant since 1971-1972. He has also prayed for grant of an opportunity to cross-examine the respondent. As such, he sought remand of the matter.

4] Vide application Exhibit 34, petitioner sought production of certain documents in respect of his claim about service rendered by the appellant at various places. Both these applications i.e. Exhibit 32 and Exhibit 34 came to be rejected vide impugned order dated November 14, 2016. As such, this petition.

5] Heard learned counsel for the petitioner. The submissions are, the order impugned passed below Exhibit 32 & 34 are not sustainable in law as the same is not in tune with scope of jurisdiction which is exercised by Appellate Court under Section 96 of the Code of Civil Procedure, 1908 ('C.P.C.' for short). A further submission is, in the interest of justice and as the appeal is the continuation of the suit, the Court below should have granted permission to adduce additional evidence and for the said purpose should have ordered remand of the matter.

6] Considered said submissions in the light of provisions of Order 41 Rule 23, 23A and 27 of the C.P.C. which provides for remand of case by Appellate Court and production of evidence in Appellate Court.

7] As far as the application for remand is concerned, same is not supported by plea of violation of any legal provisions and as such, rejection of the same cannot be faulted with.

8] As far as production of additional evidence and liberty to adduce additional evidence is concerned, application moved by the petitioner was not in tune with the requirement under Order 41 Rule 27 of the C.P.C. The Appellate Court accepted his evidence in the form of affidavit which has been rightly rejected by the Court below.

9] In the aforesaid background, order impugned does not warrant any interference. If fresh claim, if so moved, in tune with the requirement under Order 41 Rule 27 of the C.P.C. before Appellate Court seeking permission to lead additional evidence, in my opinion, petitioner cannot be precluded from seeking such relief as permissible and available in law. Keeping such option open to the petitioner to move afresh before the Appellate Court through fresh proceedings, in tune with Order 41 Rule 27 of the C.P.C.

10] By reserving above liberty, petition stands disposed of with above observations.

[NITIN W. SAMBRE, J.]