

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3415 OF 2020

KESHARBAI DASHARATHLAL AGRAWAL THROUGH LRS PUSARAM
DASHRATHLAL AGRAWAL AND ANOTHER
VERSUS
SURESH ALIAS RAJYYA SHIVRAM BASATWAR AND ANOTHER

Mr.S.S.Rathi, Advocate for the petitioners.

Mr.V.V.Bhavthankar, Advocate for respondent No.1.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 02/03/2020

PER COURT :

1. Respondent No.2 / Municipal Council, original defendant No.1 is not a contesting respondent in so far as the dispute between the parties emerging from this petition is concerned.

2. The petitioner is original defendant No.2 and appellant before the First Appellate Court in Appeal No.78/2009. RCS No.207/2007 was decreed by judgment dated 07/11/2008. The Regular Civil Appeal was filed by the petitioner appellant on 17/02/2009. On 09/01/2020, the Appellate Court recorded the final oral submissions of the litigating parties and posted the matter on 20/01/2020 for arguments in rebuttal. The appellant preferred application Exh.32

under Order 41 Rule 27 of the CPC seeking leave to lead additional evidence. There is no dispute that the appellant failed to lead oral evidence before the Trial Court and did not even cross examine the plaintiff.

3. The learned Advocate for the petitioners strenuously submits that he has been alleged to have constructed a shop in excess of the sanctioned building permission to the extent of 1 Sq.Mtr. Oral evidence was not led before the Trial Court and the moment the appellant as well as his Advocate noticed the deficiency, Exh.32 was filed. The appellant does not desire to delay the proceedings and he derives no benefit by keeping his appeal pending before the Court. It is further submitted that no loss or prejudice would be caused to the original plaintiff if Exh.32 is allowed. The Appellate Court has erroneously rejected Exh.32 by concluding that there is no merit in the said application.

4. The learned Advocate for the original plaintiff submits that the foundation of the petitioner's appeal is that he did not get a sufficient opportunity to lead evidence. The suit is sought to be remanded to the Trial Court to enable the petitioner to lead oral evidence. When there was no evidence adduced at all, the question of leading

additional evidence under Order 41 Rule 27 would not arise.

5. He relies upon the judgments delivered by this Court in Sadrudin s/o Jeevanlal Dobriya Vs. Parshuram Mahadeo Bramhankar [2011(6) Mh.L.J.329] and in Tejibai w/o Dhanji Chavan (died) through LR's x Mohanlal s/o Devram Parmar (died) through LR's and others [2019(6) Mh.L.J.60] to support his contention that after the final oral arguments have commenced, such an application cannot be filed. So also, the appeal is 11 years old and though the suit is decreed, the appellant desires to keep the appeal pending.

6. I find from the record that the petitioner has not cited any specific reason as to why he could not lead oral evidence before the Trial Court and as to the circumstances which restrained him from preferring an application under Order 41 Rule 27. Moreover, the application was filed when the parties had concluded their oral final arguments and the matter was posted to 20/01/2020 for rebuttal submissions of the petitioners.

7. Another issue that is raised is as to whether Order 41 Rule 27 of the CPC could be pressed into service under the following 2

circumstances :-

[a] When the party making such an application for leading additional evidence, has not led any evidence before the Trial Court.

[b] When the basis of the appeal is that the appellant did not get a sufficient opportunity to lead oral evidence and on account of such a reason, a remand of the suit is sought.

8. In my view, if the petitioner can make out a case of a genuine difficulty in being unable to lead oral evidence before the Trial Court, the Appellate Court would consider such circumstances while deciding the appeal and only if it is convinced that the appellant was prevented on account of a just and reasonable cause in leading oral evidence, it would pass appropriate orders.

9. In Sadrudin (supra), this Court has held in paragraph Nos. 8 and 9 as under :-

“8. In the instant case, as the facts disclosed, the suit was filed in the year 2003, which came to be decreed in the year 2005 and the Appeal thereafter against the said decree came to be filed in the year 2005, which is as yet pending in the year 2011. The contention of the learned Counsel for the petitioner that the petitioner is an illiterate person, who is educated only upto 4th Standard and, therefore, in spite of the said documents being

available, the same could not be produced on account of default of his Counsel, in my view, cannot be accepted. Though the appellant has signed in vernacular, the manner in which he has been conducting the proceedings disclose that he is aware of the requirements of law and cannot be said to be ignorant. The fact that he has changed as many as four Advocates is a pointer that the instant application to produce additional evidence might have been filed with a view to delay the proceedings and prolong the litigation. It is pertinent to note that the petitioner is also not aware of the relevancy of the documents, which are now sought to be produced, as the learned Counsel for the petitioner submitted that once they are allowed to be produced, the relevancy can thereafter be gone into by the first appellate Court. In my view, such course of action cannot be allowed to be entertained more so in view of the fact that the Appeal was finally heard on 27/4/2011 on which day the application in question came to be filed.

9. Having perused the impugned order dated 27/4/2011, in my view, the grounds on which the said application (Exh.60) has been rejected cannot be found fault with in the background of the facts as narrated above, I do not find any jurisdictional error or infirmity in the order passed by the first appellate Court. In that view of the matter, no case for interference is made out. The writ petition is accordingly dismissed. Rule discharged. No order as to costs."

10. I do not find in application Exh.32 that the appellant has set

out specific circumstances and reasons which would convince the Court that despite due diligence, the appellant was prevented in filing Exh.32.

11. In the matter of Tejibai (supra), this Court has concluded in paragraph No.14 as under :-

“14. Before considering the merits of the case I would also like to deal with the application No.8740 of 2007 filed under Order XLI Rule 27 of Code of Civil Procedure. No doubt it appears that, before this Court an application was filed when it was first appeal (First Appellate No.197 of 1983) and the civil application was C.A.No.587 of 1994, yet it can be seen that even the present application Civil Application No.8740 of 2007 should be within the parameters of Order XLI Rule 27 of Code of Civil Procedure. A specific issue was framed before the trial Court that, "Does defendant No.1 prove that by Will dated 10-12-1978 deceased Walibai widow of Bhoja Natha made bequest of the suit properties in her favour ?". It can be seen from the Judgment of the learned trial Court and record of the matter that, the learned advocate representing 15 SA 390-2005 defendant No.1 passed a purshis at Exhibit 70 stating that, defendant No.1 does not want to lead evidence on the point of Will. Therefore, even observation was made by the learned trial Court that, though the learned advocate representing the defendant No.1 has not specifically stated in Exhibit 70, but the purshis indicates that and it was orally addressed by the

learned advocate that, defendant No.1 does not want to claim her title on the basis of Will. If such purshis was specifically passed and thereafter defendant No.1 did not adduce any evidence, then may be in first appeal or now in second appeal the application under Order XLI Rule 27 cannot be considered at all. The scope of Order XLI Rule 27 is different. Rule 27 of Order XLI provides for, additional evidence to be adduced or received by the appellate Court if the appellant specifies the Court that, after the exercise of due diligence, such evidence was not within his knowledge or could not be produced when the trial Court decided the suit against him. Here the case is totally different. In spite of knowledge of framing of specific issue, of which burden was on her; defendant No. 1 filed purshis at Ex.70 stating that she does not want to lead any evidence. This act on the part of defendant No. 1 amounts to giving up of claim by her on that point. Original will was in the possession of original defendant No.1, still when she did not adduce any evidence, with knowledge; then she or her heirs cannot seek any relief by laying hand on Order XLI 16 SA 390-2005 Rule 27 of Code of Civil Procedure. Therefore, the said application No.8740 of 2007 deserves to be rejected.”

12. In view of the above, I do not find that the impugned order could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore dismissed.

13. It goes without saying that the Appellate Court would consider the appeal in the light of the grounds raised by the appellant and the record and proceedings available before it.

(Ravindra V.Ghuge, J.)