

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 666 OF 2020**

Chandradev Dakshini Singh

...Petitioner/
Orig. Plaintiffs

V/s.

Smt. Sulochana Tukaram Kochare
and Ors....Respondents
(Resp.no.1 to 4-
Orig Defendants)

* * *

Mr. Vikas Singh, Advocate for the petitioner.

Ms. Mansi Bane, AGP for State-respondent no.5.

CORAM : SANDEEP K. SHINDE, J.Closed for orders on : 9th June, 2021.Pronounced on : 11th June, 2021.**P.C. :**

1. This petition challenges the order dated 26th November, 2019 passed by the Appellate Bench of Small

Causes at Mumbai (Bandra) in Appeal No.17/2015 in R.A.E. & R. Suit No. 540/1999.

2. Petitioner's suit for eviction and recovery of possession of the suit premises under the Rent Act was dismissed by the learned trial Court in January, 2015. He preferred substantive Appeal before the Appellate Bench. Pending Appeal, the petitioner moved an application under Order 41 Rule 27 of the Civil Procedure Code ("CPC" for short), seeking permission to produce additional documentary evidence in the form of the extract of voter's list. In para-3 of the application, petitioner pleaded that pending appeal, he got to know about extract of electoral roll, which shows, defendants no.1 and 2 were occupying the suit premises with family members. The application was rejected vide order dated 11th November 2019, on the ground that appellant did not file any document alongwith an application. Whereafter

petitioner moved an application below Exhibit-12, contending that order dated 11th November, 2019 was passed without hearing him and therefore requested to recall the order, restore the application and decide the same on merits. This application below Exhibit-12 was heard by the Appellate Bench and rejected it vide order dated 26th November, 2019. The Appellate Bench, declined to recall the order dated 11th November, 2019 also on the ground that petitioner had not filed copies of additional documentary evidence alongwith an application made under Order 41 Rule 27. Aggrieved petitioner, thus filed this petition under Article 227 of the Constitution of India.

3. At the outset, it may be stated that, Section 107(d) of the Code of Civil Procedure, is an exception to the Rule which enables the Appellate Court to take additional evidence or to require such evidence to be

taken on the fulfillment of conditions laid down under Rule 27 of Order 41; however, the Court is not bound under the circumstances mentioned in the Rule to permit additional evidence and parties are not entitled to it as of right, and the matter is entirely in the discretion of the Court as held in the case of **Mahavir Singh & Ors. V/s. Naresh Chandra and Ors., AIR (2001) SC**

134. In the case in hand, neither the petitioner nor the learned Appellate Bench examined the provisions of Clause (aa) of Rule 27, which reads as under :

“27. Production of additional evidence in Appellate Court-

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed,]”

4. The petitioner in his application did not plead that, upon the exercise of due diligence, the voters list/extract was not within his knowledge nor he could, after the exercise of due diligence, produce it at the time when the decree, appealed against, was passed. The averments in para-3 are vague and uncertain and possibly do not meet the requirements of Clause (aa) of Rule 27 Order 41 of the CPC. Insofar as the impugned orders i.e. orders dated 11th November, 2019 and 26th November, 2019 are concerned, the Appellate Court equally failed to consider the provisions of Rule 27 of Order 41 of the CPC and in particular Clause (aa). The only ground on which the Appellate Bench declined to entertain the application was that, the petitioner did not produce the copies of the additional documentary evidence alongwith the application. In my view, the Appellate Bench ought to have examined the applicant's request, in view of the provisions of Clause (aa) of the

Rule-27. That to say, petitioner did not annex/produce electoral role, was not a valid ground to reject the application. It thus, amounts to failing to exercise the jurisdiction. Be that as it may, the manner in which the application was moved equally shows, the petitioner had approached the Appellate Court in a most casual manner without reference to provisions of Rule 27. In the circumstances and in view of the facts of the case, the petitioner is granted liberty to file another application in accordance with law seeking permission to produce the additional documentary evidence and if such an application is made, the Appellate Court shall hear the same alongwith the hearing of Appeal No.17/2015 subject to cost of Rs.10,000/- which the appellant shall pay to the respondents. As a result, the order dated 11th November, 2019 passed below Exhibit-12 and order dated 26th November, 2019 passed below Exhibit-14 in Appeal No.17/2015 in R.A.E. & R Suit No.540/1999 by the

Appellate Bench, Court of Small Causes at Mumbai are set aside.

5. The petition is allowed and disposed of in the aforesaid terms.

(SANDEEP K. SHINDE, J.)