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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 3047 OF 2022

KALAVATI KASHINATH DALI AND ANR

....PETITIONERS

V/s.

SHARADCHANDRA NARAYAN ABHYANKAR

.....RESPONDENTS

Smt. Shakuntala A. Mudbidri Advocate for the Petitioners

Mr. Anant Vadgaonkar Advocate for Respondent

CORAM : NITIN W. SAMBRE, J.

DATE: APRIL 4, 2022.

P.C.:

- 1) Heard.
- 2) Petitioner-Defendant nos. 1A to 1C suffered a Decree for eviction after Respondent landlord established his bonafides in R.C.S. No. 63/1995 vide Judgment and Decree dated 09/12/2019.
- 3) Petitioners feeling aggrieved preferred Appeal being R.C.A. No. 26/2020 in which under provisions of under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (Hereinafter referred to as 'CPC' for the sake of brevity) Application Exh. 15 was taken out for permission to

produce documents. Such Application is rejected vide impugned order dated 23/02/2021. As such, this Petition.

4) Contentions are, Suit was initiated against Shankar who was real brother of Kashinath. Petitioners claimed to be legal heirs of Kashinath. It was the defence of present Petitioners that Shankar was unmarried and as such, Shankar and father/husband of the Petitioners resided together jointly. After death of Shankar, Kashinath inherited tenancy. In the aforesaid background, it is claimed that counterclaim seeking declaration that they are tenant in the Suit property is dismissed. In Appeal, Petitioners claimed to have come across certain important documents which according to them substantiates their claim of being tenant in the Suit property. It is claimed that though such documents were in existence, however, they are discovered only during the pendency of the Appeal and same has prompted the Petitioners to take out Application referred above. By drawing support from the Judgment of the Apex Court in the matter of **Wadi V/s. Amilal**¹ so also in the matter of this Court between **Abdul Aziz Abdul Rafique Kadri V/s. Mohammad Yusuf**

¹ LAWS(SC) 2002 7 10

Shaikh² it is claimed that Court below has committed an error as order impugned is contrary to provisions of Order XLI Rule 27 of CPC. According to him, failure to observe due diligence on the part of the Petitioners ought not to have considered to their detriment while exercising powers under Order XLI Rule 27 of CPC as the relevant date of tracing documents is relevant.

5) While countering aforesaid submissions, counsel for Respondent-would urge that litigation is pending since last more than 30 years. After first attempt on the part of Respondent-Plaintiff was unsuccessful and part of the possession was surrendered by deceased Shankar, present second Suit was initiated. According to him, since the very requirement under Order XLI Rule 27 (1) of CPC is not satisfied, the Court below was justified in rejecting the prayer.

6) Considered rival submissions.

7) Provisions under Order XLI Rule 27 particularly clause (a) & (aa) of CPC permits the party to produce documentary evidence at an Appellate stage provided they satisfy test of due diligence. If the claim put forth by the Petitioners before the Trial Court for permission to

² LAWS (BOM) 2010 250

produce additional evidence is appreciated, what can be noticed is, documents which were sought to be produced were very much in existence i.e. from 19/01/1987 till 28/01/2021 what is claimed is, same were traced recently.

8) The aforesaid documents were not produced by the Petitioners when the Suit claim was decided though they had enough opportunity to defend the Suit. It appears that the only reason so as to satisfy due diligence as could be noticed in the Application for production of documents is, after detailed search, the aforesaid documents were noticed, which takes this Court to draw inference that same was in the custody of Petitioner-Defendants, they were not diligent in tracing the same.

9) The aforesaid reasons furnished in support of invoking provisions of Order XLI Rule 27 of CPC, has no qualification in the very language employed in said provision. Fact remains that documents were in possession of the Petitioners at the time when Suit was decided, however, have not produced the same and sought production at the time of deciding the Appeal.

10) Court is also required to be sensitive to the fact that earlier

attempt on the part of the Petitioners to get themselves impleaded in the Suit was rejected upto this Court, however, an opportunity was given to the Petitioners to establish their claim as a tenant. It is not in dispute that Petitioners were given due opportunity to establish their claim as is apparent from Application Exh. 15 and the Judgment of Eviction passed. In the aforesaid background, Judgment relied on by the Petitioners in the matters of **Wadi V/s. Amilal and Abdul Aziz Abdul Rafique Kadri V/s. Mohammad Yusuf Shaikh** will be of hardly any assistance or significance.

11) In the aforesaid background, I hardly notice any illegality in the order impugned which warrants interference. Petition as such fails, stands dismissed.

[NITIN W. SAMBRE, J.]