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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6143 OF 2021

1. Smt. Hilda wd/o Peter Goveas
deleted since deceased)
 2. Oscar s/o. Peter Goveas
 3. Trevor s/o. Peter Goveas
 4. Pramila d/o. Peter Goveas
- ...Petitioners.

V/s.

1. Surgeon Commodore Patrick
L.K. De Sylva
(since deceased through
Lrs.
1.(a) Patricia P. D'Silva
1.(b) Rohit P. D'Silva
1.(c) Nikhil P. D'Silva
 2. Ivor s/o. Peter Goveas
 3. Sharmila d/o. Peter Goveas
- ...Respondents.

Mr. Nitin Mulye for the Petitioners.

Ms Eventa A. Gonsalves and Mr. R.L. Gonsalves for the
Respondents.

CORAM : N.R. BORKAR, J.
DATE : 08.03.2022.

P.C. :

1. This petition takes an exception to the order dated
28.02.2020 passed by the Appellate Bench of Court of Small
Causes at Mumbai (Bandra Bench) below Exhibit-24 in Appeal No.
67 of 2011.

2. The respondent No.1/landlord had filed the Suit for eviction and possession of suit premises viz. 1st floor ad-measuring about 678 sq. ft. of House No.57, 33rd Road Old Khar, Mumbai -400 052 against the petitioners/tenants. The trial court decreed the said Suit. Against the said decree, the petitioners filed the appeal before the Appellate Bench of Small Causes Court at Mumbai (for short "Appellate Court"). During the pendency of appeal, in view of certain subsequent developments, the petitioners filed an application under Order 41 Rule 27 of the Code of Civil Procedure seeking permission to adduce additional evidence. The learned Appellate Court rejected the said application by the order impugned.

3. I have heard the learned counsel appearing for the petitioners and the learned counsel appearing for the contesting respondents.

4. The learned counsel for the petitioners submits that the Appellate Court ought not to have rejected the application at the threshold and it ought to have been decided at the stage of final hearing of the appeal. In support of submission, the learned

counsel for the petitioners has relied upon the judgment of this Court in the case of ***Rajkumar C. Shah vs. Gunmala C. Shah and ors.***¹. It is submitted that the impugned order thus needs to be quashed and set aside.

5. On the other hand, learned counsel for the contesting respondents, submits that till date the petitioners have filed multiple applications under Order 41 Rule 27 of CPC. It is further submitted that in addition to application under Order 41 Rule 27, the petitioners have also filed multiple applications seeking permission to amend the written statement and one such application is still pending. It is submitted that the motive of the petitioners to move such applications is to prolong the hearing of the appeal. It is further submitted that the Appellate Court after considering all the facts and circumstances of the case, by reason order rejected the application (Exhibit-24). It is submitted that no interference is therefore, called for in the order impugned.

6] This Court in the case of ***Rajkumar vs. Gunmala (supra)*** , has held :

¹ 2020 (2) Mh.L.J. 74

"12. A perusal of the order passed by the first Appellate Court on 4th November, 2016, on the application filed by the defendant No.2 under Order 41, Rule 27 indicates that the said application is rejected on the ground that the defendant No.2 had not exercised due diligence and had not satisfied the conditions prescribed under Order 41, Rule 27 of the Code of Civil Procedure. The fact remains that the Appellate Court rejected the said application at the threshold and not while hearing the appeal filed by the defendant No. 2 finally. The Supreme Court in case of Union of India vs. Ibrahim Uddin and another (supra) has considered this issue and has held that the application filed under Order 41, Rule 27 has to be decided at the stage of final hearing of the appeal and at that stage, if the Appellate Court comes to the conclusion that the case under Order 41, Rule 27 of Code of Civil Procedure was made out, the appeal Court permit the appellant to produce the additional evidence documents. In my view, the order passed by the Appellate Court on 4th November, 2016 rejecting the application filed by the defendant No.2 under Order 41, Rule 27 at the threshold is contrary to the principles of law laid down by the Supreme Court in case of Union of India vs. Ibrahim Uddin and another (supra) and thus deserves to be set aside."

7] In view of above legal position, I have no option except to quash and set aside the impugned order. In the result, the following order is passed.

ORDER

A] Writ Petition is partly allowed.

B] The order dated 28.02.2020 passed by the Appellate Bench of Court of Small Causes at Mumbai (Bandra Bench)

below Exhibit-24 in Appeal No. 67 of 2011 is quashed and set aside and the application at Exhibit-24 is restored on the file of Appellate Court for deciding it afresh at the stage of final hearing of the appeal.

C] As the appeal is of the year 2011 and the decree is on the ground of *bona fide* need, the Appellate Court shall endeavour to decide the appeal and the interlocutory applications, if any, as early as possible and in any case within a period of six months from the date of receipt of copy of this order.

D] Writ Petition is disposed of in the above terms.

[N.R.BORKAR, J.]