

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8566 OF 2014

Bebabai W/o Nago Marathe,
Age: 83 years, Occu: Labour,
R/o Balaji Road, Dharangaon,
Tq. Erandol, Dist. Jalgaon.

...PETITIONER
(Original Plaintiff)

versus

1. Adhar Dongar Marathe,
Age : 61, occu. Agril. Service,
2. Magan Adhar Marathe,
Age: 35 years, Occu.: Service,
3. Dinesh Adhar Marathe,
Age: 31 years, Occu. Service,

All R/o Mumbai, Ghatkopar,
at present R/o Balaji Road,
Dharangaon, Tq. Erandol,
Dist. Jalgaon.

...RESPONDENTS
(Original Defendants)

.....
Mr. P.P. Dhorde, Advocate for Petitioner
Mr. U.S. Malate, Advocate for respondents
.....

CORAM : SUNIL P. DESHMUKH, J.

DATED : 13th JULY, 2015

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard the learned counsel for parties finally with consent.
2. Petitioner - original plaintiff is before this court, purportedly aggrieved by order dated 28-07-2014 on Exhibit-41 in Regular Civil Appeal No. 157 of 2014 pending before Principal District Judge, Jalgaon

whereunder his request for leading additional evidence, has been turned down. Application Exhibit - 41 had been moved pursuant to Order XLI, Rule 27 of the Code of Civil Procedure seeking permission to lead additional evidence

3. Learned advocates for either side have vehemently pressed into service certain citations. Learned advocate for petitioner relies on the judgment reported in *2013 AIR SCW 2752 (1) (Union of India Vs. Ibrahim Uddin and another)*. Learned advocate appearing for respondents fairly referred to a decision reported in *2014(4) LJSoft 32 (Hasanate Taheriyyah Fiddyaih through its Trustee Shri Zohairbhai S/o Late Sheikh Abdul Hussain Vs. Mahesh Kishor Saran)*, wherein it has been considered that-

“ (a) Application for taking additional evidence on record at an appellate stage even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order of pronounce the judgment or for any other substantial cause. It has been further held that in case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete-non application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/in-executable and is liable to be ignored.

(c) However, in view of the judgment of the Apex Court in the case of Union of India (Supra) we will have to hold that exercise of the jurisdiction by the learned appellate Court in first deciding the application under Order 41, Rule 27(1) (b) and subsequently deciding the appeal on merits was contrary to the settled principle of law. As such the findings of the learned appellate Court as well as the learned Single Judge in that regard would not be sustainable. ”

4. Perusal of impugned order shows that the application has been viewed from another angle that the proceedings in appeal had been overstretched on delay condonation and even thereafter. The trial court further appears to have considered in paragraphs No. 3 and 5 of the impugned order thus : -

“ 3. Since the matter was quite old, appellant was directed to file private paper-book, which has been filed. Apart from the aforesaid contentions, it is contended by the appellant that she had obtained certain documents, which would be vital for the decision of the appeal and since the appellant is aged 83 years and the documents could not be obtained prior thereto, the same be permitted to be placed on record.

5. The matter was fixed today for arguments on the present application at the request of the learned counsel for the appellant. However, even today nobody appeared i.e. the learned counsel for the appellant or the appellant. The averments in the application as regards leading additional evidence are concerned, are quite vague in nature since no particulars have been given by the appellant as to why despite due diligence these documents could not be procured at the time of the trial and whether any efforts were taken in that regard. There is also no material placed on record to show as to how and when the said documents were applied and obtained. ”

5. Looking at that, the law is clearly settled on this point, the situation can be taken care of by awarding reasonable costs to other side.

6. In view of aforesaid, for the reasons which have weighed with the Apex Court as well as division bench of this court in the cited cases, I deem it appropriate to set aside the impugned order.

7. Accordingly, order dated 28-07-2014 on Exhibit-41 in Regular Civil Appeal No. 157 of 2014 pending before Principal District Judge, Jalgaon, stands set aside subject to payment of costs of Rs. 5000/- to be paid by the petitioner-original plaintiff to the respondents - original defendants. Application Exhibit - 41 be considered along with hearing of the appeal. The amount of costs to be deposited in the appellate court within a period of four weeks from the date receipt of writ of this order, for onward payment to the respondents in appeal.

8. Looking at the duration for which the appeal is pending, the appellate court shall dispose of the same, as expeditiously as possible, preferably within a period of six months, from the date of receipt of writ of this order.

9. Writ petition, as such, stands allowed in aforesaid terms. Rule is made absolute accordingly.

Sd/-
(**SUNIL P. DESHMUKH, J.**)

MTK