

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5722 OF 2015

Shri Vithal Bhikaji Sawant.] ... Petitioner

Versus

Shri Darmaji Tukaram Malgaonkar.] ... Respondent

Mr. C. N. Chavan a/w Mr. Manoj Mane for Petitioner.

CORAM :- M. S. SONAK, J.
DATE :- AUGUST 07, 2015

P. C. :-

1. Rule. Rule is made returnable forthwith as on 24/07/2015, it was made clear that this matter will be disposed of finally at the stage of admission.

2. The learned Counsel for Petitioner states that service is complete and necessary Affidavit of service is also filed.

3. By the impugned order, the Appellate Bench of the Small Causes Court has rejected the Petitioner's application under Order 41 Rule 27 of the CPC. The learned Counsel for Petitioner points out that the main appeal is yet to be taken up for final hearing. In these

circumstances, there was no question of dismissing the application under Order 41 Rule 27 of the CPC.

4. The Hon'ble Apex Court, in the case of ***Union of India Versus Ibrahim Uddin and Another***¹, has held that an application under Order 41 Rule 27 CPC is to be considered at the time of hearing of the appeal on merits so as to find out whether the document and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. In para nos.49 and 52, the Hon'ble Apex Court has observed thus :-

“49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought

¹ (2012) 8 Supreme Court Cases 148

to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh² and Natha Singh and Ors. v. The Financial Commr., Taxation³.)

52. *Thus, from the above, it is crystal clear that 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 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 to pronounce the judgment or for any other substantial cause. 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/inexecutable and is liable to be ignored.”*

5. In the light of aforesaid legal position, the application under Order 41 Rule 27 of the CPC should have been taken up for

² AIR 1951 SC 193

³ (1976) 3 SCC 28 : AIR 1976 SC 1053

consideration by the Appeal Court at the stage of final hearing of the appeal. On this short ground and not on merits, the impugned order dated 13/03/2015 is set aside.

6. The Appeal Court is requested to take up for further consideration the Petitioner's application under Order 41 Rule 27 of the CPC in accordance with law and the aforesaid ruling of the Apex Court at the stage of final hearing of the appeal.

7. It is made clear that this Court has not examined the merits of the matter and therefore it will be open to the Appeal Court to to decide both, the appeal as well as the application under Order 41 Rule 27 of the CPC, on its own merits and in accordance with law.

8. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

9. All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)