

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8466 OF 2014

Shaikh Ismail Mohammed	..	Petitioner
vs.		
Shree Tirthankar Company	..	Respondents

Mr. Apollo Maghe for Petitioner.
Mr. Sameer Bhalekar for Respondents.

CORAM : M. S. SONAK, J.
DATE : 24 AUGUST 2015

P.C. :-

1] This petition challenges order dated 5 March 2014, by which the Appeal Court has declined the petitioner leave to amend the memo of appeal and to produce on record conveyance deed dated 10 February 2012 and rectification deed dated 3 July 2012.

2] Although, the petitioner had styled his application one to amend the memo of appeal and to produce documents on the appeal stage, in sum and substance, the petitioner's application was one under Order XLI Rule 27 of the CPC, by which the petitioner desires to produce additional evidence on record. The learned counsel for the petitioner states that the petitioner, will file, within a period of two weeks from today a formal application under XLI Rule 27 of the CPC and furnish a copy of the same to the learned counsel appearing for the respondents.

3] The Hon'ble Apex Court in the case of *Union of India vs. Ibrahim Uddin & Anr.*¹ at paragraph 49 has held that an application under XLI Rule 27 of the CPC is to be considered at the time of hearing of the appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced if any relevance, bearing on the issues involved. The observations in paragraph 49 read 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 out 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 to be adduced. Such occasion would arise only 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 vs. Kartar Singh - AIR 1951 SC 193 and Natha Singh v. Financial Commr., Taxation - (1976) 3 SCC 28.”

1 (2012) 8 SCC 148

4] Accordingly, if the petitioner makes a formal application under Order XLI Rule 27 of CPC within a period of two weeks from today, then the Appeal Court, to consider the same in accordance with law and on its own merits at the time of hearing of the appeal on merits. In deciding such application under Order XLI Rule 27 of CPC, the Appeal Court need not be influenced by the observations made in the impugned order dated 5 March 2014. This is because, the Hon'ble Apex Court has held that consideration of an application under Order XLI Rule 27 of CPC has to be at the time of hearing of the appeal on merits and not at some stage prior thereto. No doubt, in this case, some confusion has ensued on account of the petitioner, styling his application as one to amend the memo of appeal and to produce documents on record. However, in substance, since even the said application was one under Order XLI Rule 27 of CPC, the Appeal Court is directed to consider the formal application which the petitioner shall make within a period of two weeks from today.

5] With the aforesaid observations, this petition is disposed of. It is made clear that this Court has not examined the matter on its own merits and therefore, all contentions of all parties in this regard are left open for decision by the Appeal Court.

6] Further, considering that the appeal is of the year 2009, and the same has been delayed to some extent, on account of applications taken out by the petitioner, the Appeal Court is requested to dispose of the Appeal as expeditiously as possible and in any case within a period of six months from today.

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

(M. S. SONAK, J.)

Chandka