

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6574 OF 2014

Nandkumar Y. Nimbalkar	..	Petitioner
VS.		
Ashish Baliram Tamboli	..	Respondent

Mr. D. J. Dalal h/f. Mr. S. B. Deshmukh for Petitioner.
Mr. S. S. Kanetkar for Respondent.

CORAM : M. S. SONAK, J.
DATE : 16 JULY 2015

P.C. :-

1] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

2] The challenge in this petition is the order dated 10 March 2014, made by the District Judge, Satara, permitting production of original Will at the appeal stage. The impugned order reads thus:

*“Appellant present.
Respondents Advocate present.
Heard Learned Advocate for both sides.
The Original will was not traceable during trial and its is the good ground for production. Hence allowed to produce the same.”*

3] The impugned order came to be made on an application dated 16 July 2012, by which the respondent had applied for leave to produce the original will of late Shankar Ramchandra Tamboli. There is no doubt that the application seeks leave to produce additional evidence at the appeal stage and therefore, is referable to the provisions contained in Order 41 Rule 27 of the CPC.

4] In the context of consideration of applications under Order 41 Rule 27 of the CPC, the Apex Court in the case of *Union of India vs. Ibrahim Uddin & Anr.*¹, has at paragraphs 49, 52 and 53 stated 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 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 Singh - AIR 1951 SC 193 and Natha Singh v. Financial Commr., Taxation - (1976) 3 SCC 28 : AIR 1976 SC 1053.

52. Thus, from the above, it is crystal clear that an 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 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 / in-executable and is liable to be ignored.

53. In the instant case, the application under Order 41 Rule

1 2012 (8) SCC 148

27 CPC was filed on 6-4-1998 and it was allowed on 28-4-1999 though the first appeal was heard and disposed of on 15-10-1999. In view of law referred to hereinabove, the order dated 28-4-1999 is just to be ignored."

5] In view of the aforesaid legal position, there was no question of making the impugned order at stage prior to the hearing of the appeal on merits. That apart, the impugned order hardly contains any reasons.

6] For the aforesaid reasons, the impugned order is set aside. However, the appeal Court is directed to consider the application dated 16 July 2012, as also yet another application dated 21 April 2014 which is also made for seeking leave to produce additional evidence at the stage of hearing of the appeal on merits. In due compliance with the ruling of the Apex Court in the case of *Ibrahim Uddin* (supra).

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

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

(M. S. SONAK, J.)