

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.6833 OF 2014

Shivganga Netaji Pinjarkar

-vs-

Sanjay Pralhadrao Kelkar

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri M. P. Karia, Advocate for petitioner.

Shri M. M. Sudame, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.

DATE : JULY 10, 2015

Rule. Heard finally with consent of learned counsel for the parties.

Challenge in the present writ petition is to the order passed below Exhibit-24 by the Appellate Court rejecting the application moved by the present petitioner under provisions of Order-41 Rule-27 of the Code of Civil Procedure.

The petitioner is the original defendant who has filed appeal challenging the decree passed by the trial Court for specific performance. During pendency of the appeal, an application under provisions of Order-41 Rule-27 of the Code was filed seeking permission to file and rely upon copies of orders passed in other proceedings. The trial Court by the impugned order rejected the application on the ground that said orders were in existence when the appeal was filed.

Shri M. P. Karia, learned counsel for the petitioner submitted that the Appellate Court ought to have allowed the application without relying upon any technicalities as regards availability of said documents. He submitted that said

documents were necessary for proper adjudication of the appeal. He placed reliance on judgment of the Division Bench reported in *Abdul Aziz Abdul Rafique Kadri Vs. Mohammad Yusuf Shaikh Hussain 2010(3) ALL MR 61*.

Per contra, Shri M.M. Sudame, learned counsel for the respondent opposed the petition and submitted that as the orders sought to be produced were already in existence when the appeal was filed, the trial Court was justified in rejecting the application. He however fairly submitted that in terms of the law laid down by the Supreme Court in *Union of India Vs. Ibrahim Uddin & Anr. (2012) 8 Supreme Court Cases 148*, the application below Exhibit-24 should have been considered along with the appeal. He however states that the impugned order has not been challenged on this ground.

The law in relation to provisions of Order-41 Rule-27 of the Code and the stage when such application should be considered is now settled in view of the decision of the Supreme Court in *Union of India* (supra). It has been held that an application under provisions of Order-41 Rule-27 should be considered along with appeal itself and not prior thereto. In view of this settled position and in view of the fact that application below Exhibit-24 has been considered before the appeal itself was taken up for hearing, the impugned order cannot be sustained. Though such ground has not been specifically raised in the writ petition, the fact that the impugned order is contrary to the law as laid down

is a fact that cannot be ignored. Hence following order is passed :

- i) The order dated 08/09/2014 passed below Exhibit-24 in R.C.A. No.310 of 2012 is set aside.
- ii) Application below Exhibit-24 shall be considered along with R.C.A. No.310 of 2012.
- iii) It is made clear that this Court has not examined the correctness of reasons assigned by the appellate Court while rejecting said application. The same shall be considered afresh and in accordance with law.
- iv) Rule is made absolute in aforesaid terms with no order as to costs.

JUDGE