IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7093 OF 2016

M/s. Jyoti Studio And Photo Stores
and Anr. ...Petitioners
Versus
Shri. Sudhir Naginlal Shah
and Anr. ...Respondents

....
Mr.Raj Patel i/b. Mohan P. Patel, Advocate for the Petitioners.
Mr. Prabhakar K. Shetty, Advocate for the Respondents.
....

CORAM : R. G. KETKAR, J.

DATE : 20th July, 2016

P.C.

1. Not on board. At the request of Mr.Patel taken up for admission.

2. Heard Mr. Raj Patel, learned Counsel for the petitioners and Mr. Prabhakar Shetty, learned Counsel for the respondents, at length.

3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the judgment and order dated 16.1.2016 passed

by the Appellate Bench of the Small Causes Court at Bombay below Exhibit-15 in Appeal No.207/2010. By that order, the Appellate Court dismissed the application made by the defendants under Order 41 Rule 27 of Code of Civil Procedure (for short, 'C.P.C.') seeking production of additional evidence/documents.

4. In support of this Petition, Mr. Patel submitted that the defendants have filed affidavit of documents of Mr.Rajesh Shantilal Panchal, defendant No.2 for self and as Constituted Attorney of first defendant, on 12.12.2006. Along with that affidavit, the schedule containing list of documents was appended. Clause-4 thereof reads thus :

> "4 Income tax records of Defendant 1"

5. Mr. Patel invited my attention to the application Exhibit-15 made by the defendants and in particular paragraphs-4 to 8 thereof. In paragraph-4, the reference is made to the affidavit of documents dated 12.12.2006 and the schedule appended thereto. It is contended that defendant No.1 is assessed to income tax and the income-tax returns are filed under PAN No.AACFJ7662B allotted to the firm of defendant

No.1. Similarly the partners of defendant No.1 have also filed their individual income tax returns.

6. In paragraph-5 it is asserted that the income tax returns of defendant No.1 and its partners were earlier being filed through the firm of tax practitioner by name M/s. Thakkar & Gadhia and the income tax file of defendant No.1 and its partner was lying with said tax practitioners and none of them were possessing the income tax returns or its copies.

7. In paragraph-6 it is asserted that at the time of filing of his affidavit of examination in chief, he had visited the office of said tax practitioner and asked for income tax record so as to enable him to produce the same in Court. At that time he was informed that said file was misplaced and not traceable. He requested said tax practitioners to trace out the same so that he could produce the same in the trial Court. Inspite of his several visits to the office of said tax practitioners, he was given the same answers that the file was not traceable and therefore he could not produce the income tax returns of defendant No.1 and its partners before the trial Court. In view of the lapse on the part of the tax practitioners, their services were discontinued

with immediate effect and they were requested not to do any further work and since Assessment Year 2010-11, said work is being handled by another income tax consultant and accountant since the year 2010-11.

8. In paragraph-8 it is asserted that the documents, namely, income tax returns were not available and could not be produced in the trial Court despite exercising due diligence by him at the time of filing of affidavit of examination in chief and at the time when the decree was passed by the trial Court. The defendants therefore prayed for permission to produce the additional documents/income tax returns of defendant No.1 and its partners from Assessment Year 2004-05 to 2009-10.

9. Mr. Patel submitted that as laid-down by the Apex Court in the case of ***Union of India v. Ibrahim Uddin and Anr., 2012(8) SCC 148***, the Appellate Court could have decided the application under Order 41 Rule 27 of C.P.C. along with the main appeal. In other words, the Appellate Court ought to have decided the application under Order 41 Rule 27 of C.P.C. along with the main appeal. He therefore submitted that the impugned order may be set aside thereby directing the Appellate

Court to decide the application along with the main appeal. He further submitted that for the reasons stated in the application, the defendants could not produce the documents during the course of trial. The copies of income tax returns have been specifically referred to and relied upon in the affidavit of documents. As the documents were not available with the defendants during the course of trial those could not be produced. These documents establish the defendants' case and go to the root of the matter. He, therefore, submitted that the impugned order deserves to be set aside.

10. On the other hand, Mr. Shetty supported the impugned order and submitted that no case is made out for production of additional evidence.

11. Mr. Patel submitted that the application under Order XLI Rule 27 of C.P.C. has to be decided along with the main appeal. He relied upon paragraphs-49 and 52 of ***Union of India v. Ibrahim Uddin (supra).*** Paragraphs-49 and 52 read thus:

> "**49.** An application under Order 41 Rule 27 of Civil Procedure 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 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 and Ors. AIR 1951 SC 193; and Natha Singh and Ors. v. The Financial Commissioner, Taxation: AIR 1976 SC 1053).

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, 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.”

12. In the present case, the defendants have contended that notwithstanding exercise of due diligence they could not produce the documents when the order under appeal was made. In other words, the defendants have come with the case that the case falls under Rule 27(1)(aa) of Order 41 of C.P.C..

13. Perusal of paragraphs-49 and 52 of ***Union of India v. Ibrahim Uddin (supra)***, extracted hereinabove, does not indicate that the application under Order XLI Rule 27(1)(aa) of C.P.C. has to be decided only along with the main appeal. In fact in the event of the Appellate Court allowing production of additional evidence, it has to follow the procedure under Order 41 Rule 28 which reads thus :

> “ ***ORDER XLI***
>
> APPEALS FROM ORIGINAL DECREES
>
> **28. Mode of taking additional evidence.--** Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court. take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.”

14. Now even if the application made by a party under Order 41 Rule 27(aa) of C.P.C. is to be heard only with the main appeal, in the event of the Court allowing such application, the Court will have to follow the procedure laid down under Order 41 Rule 28 of C.P.C. This will necessarily delay hearing of the appeal. As against this when the application made under Order 41 Rule 27(aa) of C.P.C. is allowed pending the hearing of main appeal, in that event, after following the procedure under Order 41 Rule 28 of C.P.C., the evidence led by the parties would be available in the appellate Court while deciding the main appeal. It is where the ground under Order 41 Rule 27(b) is made out, namely, the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause, the application is to be decided along with the main appeal. As in the instant case, the application is made under Order 41 Rule 27(aa) of C.P.C., I do not find any merit in the submission of Mr. Patel that said application is required to be decided along with the main appeal.

15. As far as the merits of the case are concerned, in case of ***Union of India v. Ibrahim Uddin (supra)***, the Apex Court has exhaustively dealt with provisions of Order 41, Rule 27 of C.P.C. in paragraphs 36 to 49. In paragraph 36, the Apex Court observed that the general principle is that the appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. Order 41, Rule 27 of C.P.C. enables the appellate Court to take additional evidence in exceptional circumstances. The appellate Court may permit additional evidence only and only if the conditions laid down in the Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court and is to be used sparingly. In paragraph 39, it was observed that when a party had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot be allowed to produce it in appeal. The inadvertence of the party of realizing the importance of document does not constitute a substantial cause. The mere fact that certain evidence is

important, is not in itself a sufficient ground for admitting that evidence in appeal.

16. Applying the tests laid down in the above decision and after considering the reasons in the application, I do not find that any case is made out for production of additional evidence. Petition fails and the same is dismissed

17. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)