

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3712 OF 2014
WITH
WRIT PETITION NO. 6475 OF 2014

MURGAPPA CHANNPPA HOLKUNDE (DIED) THR. LRS.
VERSUS
BASAPPA VEERPAKSHAPPA HOLKUNDE AND OTHERS

...
Advocate for Petitioners : Ms. Mhase Madhaveshwari S.
Advocate for Respondents : Mr. Jain Vishwajit R. (Kamboj)
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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 06, 2017
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PER COURT :-

1. In the first petition, the petitioners / plaintiffs decree holders have putforth prayer clause 13(B) which reads as under:-

“ (B) By Writ of certiorari or any other writ in the nature of certiorari quash and set aside the order dated 18.3.2014 below Exh.42 in Regular Civil Appeal No.86 of 2012, passed by District Judge-1, Nilanga and for that purpose issue necessary orders.”

2. In the second petition, the petitioners / original judgment debtors have putforth prayer clause 17(C), which reads as under:-

“(C) Issue writ of certiorari or any other appropriate writ or direction and be pleased to quash and set aside the R.D.No. 45/2013 filed by present respondent before the Ld. Civil Judge, Senior Division, Nilanga.”

3. In the first petition, by order dated 28.4.2014, this Court has stayed Regular Civil Appeal No.86 of 2012, by way of interim relief. In the second petition, by order dated 18.7.2014, this Court has stayed Regular Darkhast No.45 of 2013.

4. I have considered the strenuous submissions of the learned Advocates for the respective sides. The petitioners in the first petition are the respondents in the second petition and vice-a-versa.

5. The original plaintiffs, who are decree holders, were respondents in RCA No. 86 of 2012, after remand from this Court (Old No. 133 of 1982). An application Exhibit 42 was filed the plaintiffs invoking Order XLI Rule 27(AA) of the Code of Civil Procedure (“CPC”) on 13.3.2014, praying for permission to adduce additional evidence. By the impugned order, dated 18.3.2014, the said application was rejected.

6. Issue raised is as to, at what stage should an application seeking permission to lead additional evidence under Order XLI Rule 27 of the CPC should be considered. The said issue is no longer *res-integra* in the light of the judgment of the Honourable Apex Court in the matter of Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148]. In paragraphs 49 to 52, the Apex Court has reiterated the law laid down earlier in catena of judgments and which read as under:-

*“49. An application under Order XLI Rule 27 Code 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, Punjab and Ors.* : AIR 1976 SC 1053).

50. In *Parsotim Thakur and Ors. v. Lal Mohar Thakur and Ors.* : AIR 1931 PC 143, it was held:

The provisions of Section 107 as elucidated by Order 41, R. 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under Rule 27, Cl. (1) (b) it is only where the appellate Court "requires" it (i.e. finds it needful). ...The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent", it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the

points so specified. **The power so conferred upon the Court by the Code ought to be very sparingly exercised** and one requirement at least of any new evidence to be adduced should be that it should have a **direct and important bearing on a main issue in the case.**

(Emphasis added)

(See also: *Indirajit Pratab Sahi v. Amar Singh*)

51. In *Arjan Singh v. Kartar Singh and Ors.* (supra), this Court held:

... If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, **it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent...** The order allowing the Appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment

(Emphasis added)

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. In the instant case, the application under Order XLI Rule 27 Code of Civil Procedure 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.”

7. Learned counsel for the judgment debtors vehemently submits that the principle of due diligence is critical in this matter and the judgment debtors can indicate from the record that due diligence is not visible in the conduct of the decree holder and hence, the application Exhibit 42 deserves to be rejected. He, therefore, submits that the appeal Court has rightly rejected Exhibit 42 by the impugned order.

8. I do not find that the stage at which Exhibit 42 is rejected

and as is canvassed by the judgment debtors, would be in tune with the law laid down by the Honourable Apex Court in the case of Ibrahim Uddin (supra). All the contentions of the judgment debtors would be open to be canvassed after the Appeal Court considers Exhibit 42 along with the appeal as is the law crystallized by the Honourable Apex Court. It would, therefore, be premature to go into the merits of the rival contentions of the litigating sides at this stage, as it would amount to disrespecting the law laid down by the Honourable Apex Court.

9. Considering the above, the first petition filed by the decree holder is allowed in terms of prayer clause (B) reproduced above. Application Exhibit 42 stands restored to the file of the appeal Court in RCA No. 86 of 2012.

10. There is no dispute in so far as the second petition is concerned that the decree holders have instituted Regular Darkhast No. 45 of 2013, before the executing Court. The judgment debtors are praying for the quashing of the execution proceedings. I do not find that such a prayer can be entertained by this Court and more so when the Regular Civil Appeal filed by the judgment debtor challenging the decree, which is the foundation of the execution proceedings, is pending before the

Appeal Court. If the appeal Court quashes the decree, the execution proceedings would naturally come to an end. It would be a different situation, if the appeal Court sustains the decree.

11. Learned counsel for the decree holders, on instructions, makes a fair statement that RD No.45 of 2013 would not be pressed till the Regular Civil Appeal filed by the judgment debtors is decided by the appeal Court, provided the pending appeal is decided on/or before 30.11.2017.

12. Considering the above, the second petition filed by the judgment debtors is disposed off.

13. Consequentially, Exhibit 42 having been restored to the file of the Appeal Court, will be considered by the Appeal Court along with the pending RCA No.86 of 2012. I am directing the Appeal Court to decide the said appeal as expeditiously as possible and in any case on/or before 30.11.2017, since the said appeal was actually instituted in 1982 and was earlier bearing No. 133 of 1982.

14. However, in the event, the Appeal Court fails to decide the said appeal on/or before 30.11.2017, the statement of the decree

holders of keeping the execution proceedings in abeyance, shall lose its efficacy and the said statement shall not be continued after 30.11.2017. This goes without saying that the litigating sides would be precluded from seeking adjournments on trivial and unreasonable grounds and the Appeal Court would be at liberty to impose costs, if such adjournments are sought.

15. Learned counsel Shri Jain submits that Rs.1,000/- have already been deposited in the Library on 30.9.2014 and he would produce the copy of the receipt on record in the second petition.

(RAVINDRA V. GHUGE, J.)

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akl/d