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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10166 OF 2012

1. Ramkisan s/o Haribhau Mogal PETITIONERS
Age - 39 years, Occ - Agri & Service
R/o House No. 12, Pranav Apartment,
Dashmesh Nagar, Jay Nagar,
Osmanpura, Aurangabad

2. Ramanand s/o Haribhau Mogal,
Age - 34 years, Occ - Agriculture
R/o Abegaon, Taluka - Majalgaon
District - Beed

VERSUS

1. Achutrao s/o Appasaheb Shejul RESPONDENTS
Age - 68 years, Occ - Agriculture
R/o Abegaon, Taluka - Majalgaon
District - Beed

2. Mohan s/o Haribhau Mogal
Age - 43 years, Occ - Agriculture
R/o Kundi, Taluka - Sailu
District - Parbhani

3. Sharda w/o Pralhad Ugle
Age - 28 years, Occ - Household
R/o Chinchgawhan, Taluka - Majalgaon
District - Beed

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Mr. Fulchand R. Tandale, Advocate for the petitioners
Mr. B. S. Kudale, Advocate for respondent No.1

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 29th AUGUST, 2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the appearing parties.

2. This petition takes exception to order dated 22nd October, 2012 on Exhibit-22 in Regular Civil Appeal No. 30 of 2011 whereunder request of present petitioners - appellants to permit them to lead additional evidence by submitting some documents on record, has been rejected.

3. Learned advocates for the respective parties are not at logger heads that the impugned decision is rendered on merits of the application, yet, learned advocate for the petitioners submits that while the matter was being addressed to, decision rendered by the Supreme Court in the case of "*Union of India V/s Ibrahim Uddin and Another*" reported in 2013 AIR (SCW) 2750 : 2012 (8) SCC 148 had not been before the court.

4. Learned advocate for the petitioners adverts to head note "B" thereof and paragraphs No. 38 and 41. Paragraphs No. 38 and 41 from aforesaid judgment are reproduced hereinbelow for ready reference, reading, thus-

“ 38. *An application under Order XLI, Rule 27 CPC 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 & Ors., AIR 1951 SC 193; and Natha Singh & Ors. V. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

41. *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 / inexecutable and is liable to be ignored.*

In the instant case, the application under Order XLI, Rule 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. Looking at the background in which decision has been rendered by the Supreme Court and specially the reasons which went into making of the observations, it appears to be expedient in the present matter, such an opportunity be allowed to the petitioners to have hearing afresh of application Exhibit-22.

6. Learned advocate for respondent No. 1 submits that this would tantamount to a second inning being allowed over the same subject matter and would prejudice defence of respondent No. 1 resisting the application.

7. Apprehension being expressed by learned advocate for respondent No. 1 that this order may prejudice his defence appears to be based on friable ground as setting aside impugned order in present matter for the purpose and for the reasons as referred to in the decision of the Supreme Court would not wipe out and destroy defence and resistance to the application as has been considered.

8. It would be open for respondent No. 1 to take up all the contentions as were taken resisting the application while hearing application Exhibit-22.

9. As such, for the reasons contained in the decision of the

Supreme Court, impugned order dated 22nd October, 2012 on Exhibit-22 in Regular Civil Appeal No. 30 of 2011 passed by District Judge-1, Majalgaon is set aside. Application Exhibit-22 is restored to its position, to be considered afresh along with appeal, as referred to by the Supreme Court in the reported judgment, on its own merits and without prejudice to the contentions of rival parties. This order would not be an impediment for the parties concerned to re-address themselves on application Exhibit-22. All points are kept open.

10. Writ petition as such, stands allowed. Rule is made absolute in aforesaid terms.

[SUNIL P. DESHMUKH, J.]