

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABA

WRIT PETITION NO. 11564 of 2016

Ramkrishna Devidas Jadhav,
age 53 years occupation agriculture and business
R/o Bembli Taluka and Dist. Osmanabad
at present Narayangaon Tal. and Dist. Pune. **...PETITIONER**

VERSUS

1. Rajkumar S/o Gajendra Kakade,
age 43 years occupation agriculture
R/o opposite Jijamata Udyan, Mahadeo Galli,
Osmanabad Tal. and Dist. Osmanabad.
2. Surendra S/o Gajendra Kakade,
age 38 years occupation and R/o as above. **...RESPONDENTS**

Mr E.S. Murge, Advocate for petitioner
Mr M.S. Kulkarni, Advocate for respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 10th October, 2017

ORAL ORDER :

In appeal, the respondents proposed to produce additional evidence under Order XLI Rule 27 of the Civil Procedure Code in the form of document dated December 4, 2009 cancelling earlier agreement of sale of the same date. In the said application, original plaintiff/petitioner herein admitted existence of such cancellation deed.

2. Based on such document, the Appellate Court allowed application under Order 41 Rule 27 of C.P.C., and forwarded the matter to the Trial Court for recording evidence on the said issue. Both the orders are questioned in this petition.

3. Shri Bedre, learned Counsel for the petitioner/original plaintiff, would strenuously urge that the order impugned is not sustainable in view of the fact that in the matter of **Union of India Vs. Ibrahim Uddin & Anr.**, reported in **2012(8) S.C.C. 148**, the Apex Court has held provisions of Order XLI Rule 27 as mandatory. According to him, unless foundation is laid before the Trial Court for the issue, which is raised before the Appellate Court or for such convincing reason which was beyond the control of the party, who is invoking such provision, the Court can take recourse of Order XLI Rule 27 of C.P.C., which is not the case here. He would rely upon observations made in paragraphs No. 25 to 28 of the said Judgment. In addition, he would urge that the said provisions are not meant for coming out with altogether new case at the whims and fancy of the aggrieved party.

4. Per contra, Shri Kulkarni, learned Counsel for the respondents, would urge that provisions are invoked having regard to the fact that the agreement based, on which the suit was decreed, was

cancelled and said cancellation deed is not disputed in reply to the application filed under Order XLI Rule 27 of C.P.C.. He would urge that the said fact was also within the knowledge of the petitioner/plaintiff, however, he suppressed it from the Court.

5. Considered rival submissions. In paragraph No. 29 of the Judgment of the Apex Court in the matter of **Union of India Vs. Ibrahim Uddin & Anr.**, cited supra, the Apex Court had an occasion to lay down certain eventualities, which cannot be covered under provisions of Order XLI Rule 27, however, in paragraphs No. 25 to 28 has proceeded to observe that relief under Order XLI Rule 27 is a discretionary relief.

6. In the case at hand, what could be inferred from the record is, existence of cancellation of agreement dated 4th December 2009 is not disputed by the petitioner/original plaintiff, in reply to the application moved by respondents/defendants under Order XLI Rule 27 of C.P.C..

7. Apart from above, under Order XLI Rule 27 of C.P.C., the Trial Court was alive to the fact that there exists the discretion in it, however, same is required to be exercised cautiously. Discretion, in my opinion, exercised by the Trial Court is with more caution and circumspection, particularly, when petitioner has admitted existence of

cancellation of the agreement of sale.

8. Apart from above, the interest of the petitioner can be safeguarded by directing the respondents to pay costs of Rs. 10,000/- (Rs. Ten thousand only), to be deposited before the Trial Court, before whom the evidence is to be recorded, to which the petitioner will be entitled to.

9. In view of above, I hardly see any reason, to call for interference in extra ordinary jurisdiction. Petition, as such, stands dismissed.

10. It is made clear that this Court has not expressed any opinion on the merits of the deed of cancellation and said document will be subject to scrutiny in accordance with the provisions of the Evidence Act. It is expected that the Trial Court to decide the issue forwarded to it pursuant to Order XLI Rule 27 of C.P.C. expeditiously, and in any case, within a period of three months from the date of appearance of the parties.

(NITIN W. SAMBRE, J.)

pjm