

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

932 WRIT PETITION NO. 8126 OF 2017

SHAIKH SALEEM SHAIKH HAMID PINJARI
VERSUS
BHAGWAN KHANDU CHAUDHARI

...
Advocate for Petitioner : Mr. D. M. Mane h/f Mr. D. M. Pingale
Advocate for Respondent : M. G. Kochar

...
CORAM: V. K. JADHAV, J.
DATED: 27th February, 2018.

PER COURT :-

1. Heard finally with consent at admission stage.

2. Both the counsel appearing for the respective parties agreed that the lower appellate court may postpone the consideration of application Exh.21 till hearing of the appeal and should take up the same at the time of hearing of the appeal on merits, so as to find out whether the evidence sought to be adduced is relevant and bearing on the issues involved. Even, it is also open for the other side i.e. respondent to argue that the petitioner / original defendant has not led any evidence in the trial court and the production of the additional evidence cannot be allowed to fill up the lacuna or fill in the gap. It is for the lower appellate court to decide the controversy at the time of final hearing of the appeal, on merits.

3. In the peculiar facts and circumstances of the present case, the suit for recovery of possession has been instituted by one tenant and not by the landlord. It is also part of the record that present petitioner has raised a plea that he is one of the tenant of the suit property. However, the trial court has observed that the petitioner has failed to substantiate the same by adducing oral and documentary evidence to that effect. It is also a part of record that the petitioner has tried to examine the landlord to substantiate his contentions. The lower appellate court has to consider the overall aspects of the case and decide the application Exh.21 at the time of final hearing of the appeal on merits. Hence, the following order.

ORDER

1. Writ petition is hereby partly allowed. No costs.
2. The impugned order dated 09.12.2016 passed below Exh.21 in Regular Civil Appeal No. 21 of 2012 by learned Ad-hoc District Judge-1, Shahada, District Nandurbar is hereby quashed and set aside.
3. The lower appellate court shall decide application Exh.21 at the time of final hearing of the appeal, on merits.
4. Lower appellate court shall take a note that the pending appeal is required to be decided on its own merits and learned Judge shall not get prejudiced due to the

aforesaid observations while deciding the appeal on merits.

5. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

vsm