

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

22 WRIT PETITION NO. 15345 OF 2017

MARUTI MOHAN KADAM AND OTHERS
VERSUS
LAXMIBAI UTTAMRAO KADAM AND OTHERS

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Advocate for Petitioners : Mr. S. S. Thombre
Advocate for Respondent No. 1 : Mr. Ravindra V. Gore

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CORAM : V. K. JADHAV, J.
DATED : 12th FEBRUARY, 2018

PER COURT:-

1. Heard finally by consent at admission stage.
2. The learned counsel for the petitioners-original defendants submits that the respondent-plaintiff has instituted a Suit for a decree of perpetual injunction in respect of the Suit property, wherein the petitioners have raised a specific defence that the transaction was not an out and out sale and in fact, it was a money lending transaction and the sale deed came to be executed as a security of loan. The learned Judge of the trial Court has decreed the Suit and being aggrieved by the same, the petitioners-defendants have preferred an Appeal bearing Regular

Civil Appeal No. 85 of 2012 before the District Court, Vaijapur. During pendency of the Appeal, the petitioners filed an Application Exhibit 48 under Order XLI Rule 27 Sub-Rule (1) Clause (aa) of the Code of Civil Procedure for seeking permission to produce additional evidence. The respondent-original plaintiff has strongly resisted the said Application and the trial Court has rejected the said Application Exhibit 48 by the impugned order dated 2nd February, 2017.

3. The learned counsel submits that if such an Application for taking additional evidence on record is filed at the appellate stage during the pendency of the Appeal, the same is to be heard at the time of final hearing of the Appeal. However, in the instant case, the learned Ad-hoc District Judge, Vaijapur has rejected the said Application Exhibit 48 with observations touching to the merits of the Appeal.

4. The learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the decision in the case of *Union of India vs Ibrahim Uddin & Anr.*, reported in *2012 (8) SCC 148*.

5. Learned counsel for the respondent-original plaintiff submits that the civil Suit instituted by the respondent-plaintiff is of the year 2006, wherein the decree simpliciter for perpetual injunction is sought. The learned Judge of the trial Court has decreed the said Suit with specific observations and also by recording a finding that the respondent-plaintiff is in possession of the Suit property. In the year 2015, the petitioners-defendants have initiated proceedings under the provisions of the Maharashtra Money-Lending (Regulation) Act, 2014 and on the basis of the findings recorded by the authority under the provisions of the aforesaid Act, now seeking permission from the First Appellate Court for production of additional evidence. The learned counsel submits that the petitioners can very well exhaust the remedies available under that Act and those are the independent remedies. In the instant case, the First Appellate Court has, therefore, rightly rejected the Application Exhibit 48 which has been filed almost six years after the Suit is decreed by the trial Court.

6. The learned counsel for the respondent placed reliance on the decision in the case of *N. Kamalam vs Ayyasamy*, reported

in **2001 (7) SCC 503** to substantiate his contentions.

7. In the case of *Union of India vs Ibrahim Uddin & Anr.* (supra) relied upon by the learned counsel for the petitioner, in para 41 of the judgment, the Hon'ble Supreme Court has made the following observations:

“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 28.04.1999 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.”

8. In the instant case, the First Appellate Court has decided the Application Exhibit 48 before hearing finally both the sides on the Appeal itself. It further appears from the impugned order

that by rejecting the Application Exhibit 48, the First Appellate Court has almost touched the merits of the Appeal. The same is impermissible. In case, the Application for taking additional evidence on record has been considered and allowed prior to the hearing of the Appeal, then, the order being a product of total and complete non-application of mind as to whether the evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential and inexecutable, as observed by the Supreme Court in para 41 of the above cited case.

9. In the case of *N. Kamalam vs Ayyasamy* (supra) relied upon by the learned counsel for the respondent-plaintiff, though the facts are identical, however, the Supreme Court upheld the order passed by the High Court mainly on the ground that the three limbs of Rule 27 do not stand attracted.

10. In the instant cast, admittedly, at the time of deciding the Suit on merits, the documents sought to be produced before the First Appellate Court were not in existence. It is for the First Appellate Court to find out as to whether those documents are

relevant for the just disposal of the Appeal at the time of final hearing of the Appeal. Hence, the following order:

ORDER

- I. The Writ Petition is hereby partly allowed. No costs.
- II. The impugned order dated 2nd February, 2017 passed below Exhibit 48 by the learned Ad-hoc District Judge, Vaijapur is hereby quashed and set aside with the following direction:
 - (a) The First Appellate Court shall consider the Application Exhibit 48 at the time of final hearing of the Appeal on its own merits.
- III. All points kept open.
- IV. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

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