

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

WRIT PETITION NO.8453 OF 2017

SURENDRA SOMNATH PANDE
VERSUS
KRUSHNA BHIMRAO WAGH AND OTHERS

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Advocate for the Petitioner : Shri Deepak Chaudhari h/f Shri Shah J.R..
Advocate for Respondent 2 : Shri Natu Sharad V..

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**CORAM: RAVINDRA V. GHUGE, J.
DATE :- 04th December, 2018**

Per Court:

1 Despite the service of court notice, Respondent Nos.1 and 3
have not caused an appearance.

2 After this matter was heard on 18.09.2017, this Court had
passed the following order :-

- "1. *The petitioner/original plaintiff is aggrieved by the order dated 17/06/2017 by which the Appeal Court has rejected application Exh.25 filed by the petitioner seeking leave to adduce additional oral evidence under Order 41 Rules 27 and 28 in the backdrop of the Appeal Court having allowed the production of documents by order dated 16/12/2016.*
2. *Learned Advocate for the petitioner has strenuously submitted that once an Appellate Court permits the appellant to file certain documents on record, the said documents will have to be proved by leading oral evidence notwithstanding that the appeal is yet to be decided. He submits that since production of documents was earlier allowed, the appellant will have to lead evidence to prove the said documents.*
3. *Mr.Natu, learned Advocate for respondent No.2 submits that the case of the petitioner/appellant is squarely covered by the Apex Court in the matter of*

Malyalam Plantations Ltd., Vs. State of Kerala and another [AIR 2011 SC 559] and Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148] = [2013 AIR SCW 2572]. He further points out that the documents produced by the appellant under the order dated 16/12/2016, are certified copies of the following documents :-

[a] Evidence of Krishna Bhimrao Wagh dated 11/10/2013.

[b] Evidence of Bhimrao Sukhlal Kunkari (Wagh) dated 11/10/2013.

[c] Complaint of Krishna Bhimrao Wagh (filed with a police station)

[d] Statement of Bhimrao Sukhlal Wagh before the police.

[e] Judgment dated 05/03/2014 in STC No.1046/2007.

4. *I find from application Exh.11 filed earlier by the appellant that he had prayed for producing the public documents and exhibiting them. It was not prayed in Exhibit 11 that the appellant desires to lead oral evidence. In this backdrop, order dated 16/12/2016 was passed and upon being convinced that the documents are public documents, the Appeal Court permitted the appellant to produce these documents.*
5. *By the impugned order, the Appeal Court has rejected application Exh.25 filed by the petitioner/appellant seeking leave to adduce oral evidence.*
6. *I find from Order 41 Rule 27(1)(b) that an Appellate Court may permit the production of a document and may also permit a witness to be examined to enable it to pronounce judgment. The Hon'ble Apex Court has considered the issue of an application under Order 41 Rule 27 for leading additional evidence in a pending appeal in the following matters :-*

[a] Malyalam Plantations Ltd., Vs. State of Kerala and another [AIR 2011 SC 559]

[b] Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148] = [2013 AIR SCW 2572]

[c] Andisamy Shettiar Vs. A.Subburaj Chettiar [AIR 2016 SC 79]

7. *Considering the law settled by the Hon'ble Apex Court and keeping in view the interest of the petitioner/appellant, I find that application Exh.25 should not have been pressed by the appellant as the documents produced are certified copies of court proceedings and two documents pertain to statements recorded in the police station. As the appellant pressed for a hearing, the Appellate Court has rejected Exh.25. In my view, Exhibit 25 deserves to be considered by the Appellate Court alongwith the pending appeal.*
8. *Considering the above, issue notice to the respondents, returnable on 11/10/2017. Mr.Natu, learned Advocate waives service for respondent No.2.*
9. *Until the returnable date, the impugned order dated 17/06/2017 shall stand stayed.*
10. *Besides Court notice, the petitioner may serve respondent Nos.1 and 3 before the Appellate Court by placing a copy of this order on record and also by private service through Speed Post AD and submit a service affidavit and a copy of the tracking report.*
11. *The Appellate Court would therefore adjourn Civil Appeal No.60/2012 beyond the returnable date in this matter."*

3 It is now submitted by the learned Advocate for the Petitioner that as the documents have been allowed to be produced, the Petitioner/Appellant be allowed to lead evidence under Order 41 Rules 27 and 28 of the Code of Civil Procedure.

4 In my view, considering the judgments delivered by the Honourable Supreme Court referred to in paragraph 6 of the earlier order, it makes things clear that any request to lead additional evidence under Order 41 Rules 27 and 28 will have to be considered by the Appellate

Court while deciding the main appeal.

5 The learned Advocate for Respondent No.2 submits that irrelevant documents have been filed, which originate from the criminal proceedings and they have no nexus with the pending appeal and have been filed only to delay the matter.

6 I find that the apprehension of Respondent No.2 can be fully taken care of since he would be at liberty to address the mind of the Appellate Court in view of Order 41 Rules 27 and 28. All his contentions that the documents are irrelevant or have no nexus with the cause of action, would be considered by the Appellate Court while deciding the main appeal.

7 In view of the above, this Writ Petition is partly allowed. The impugned order dated 17.06.2017 passed by the Appellate Court stands set aside so as to restore the application Exhibit 25 filed by the Petitioner to be heard along with the main appeal in view of the judgments of the Honourable Supreme Court.

8 Needless to state, the Appellate Court would consider the contention of Respondent No.2 that the said documents are not necessary, have no significance and are not required for the adjudication of the appeal on its merits.