

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO.12 OF 2011
WITH
CROSS OBJECTION NO.2 of 2012**

Shri Shrikrishna Vasudev Patil,
major in age, married, resident
of CT-2-F Radha Building,
Shantinagar Ward, Ponda, Goa.

....Appellant

V/s

1. Shri Baburao Vasudev Patil,
major in age, married.
2. Smt. Sudha Baburao Patil,
major in age,

Both r/o House No.197,
Velkas Vaddo, Savoi-Verem,
Ponda, Goa.

.... Respondents

Shri S.D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for
the Appellant.

Shri J. A. Lobo, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

**Reserved on : 6th JUNE, 2018
Pronounced on: 11th JUNE, 2018**

JUDGMENT :

This appeal challenges the judgment and decree dated 27/12/2010 passed by the District Judge-2, North Goa, Panaji pursuant to which the learned District Judge partly allowed the appeal filed by the respondents against the judgment and decree dated 30/01/2010 passed by the Civil Judge Junior Division, Ponda

and remanded the matter to the Trial Court for deciding the matter afresh after taking the documents on record. Since the appeal challenges the judgment and decree of remand in terms of Order XLIII Rule 1(u) CPC, the substantial question of law would be required to be formulated treating this Appeal From Order on par with a Second Appeal in terms of Section 100 CPC. Heard Shri S.D. Lotlikar, learned Senior Counsel on behalf of the appellant who submitted that the substantial question of law which would arise for determination is whether the first appellate Court was justified in allowing the application under Order XLI Rule 27 CPC for the reasons recorded by it and remanding the file to the Trial Court after quashing and setting aside the judgment of the Trial Court decreeing his suit in the appellant's favour.

2. It was the contention of Shri Lotlikar, learned Senior Counsel that pursuant to the Deed of Settlement dated 24/08/1991, the plot 'C' was allotted to the appellant, plot 'B' to the respondent and plot 'A' was allotted to their third brother. The respondents had taken a plea in their written statement filed in defence that the plan annexed to the Deed of Settlement was altered and modified by the appellant herein. The parties had led evidence before the Trial Court and despite due opportunity, no case was brought forth by the respondents to show that the plan was altered or modified

and accordingly the Trial Court on the basis of the issues framed for determination decreed the suit in the appellant's favour. The respondents preferred an appeal before the District Court which by the impugned judgment allowed the respondents to produce the certified copy of the Deed of Settlement on record by allowing their application under Order XLI Rule 27 CPC and quashed and set aside the decree in their favour. He adverted to the judgment of the first appellate Court and submitted that the learned District Judge had gone contrary to the predicates of Order XLI Rule 27 CPC while permitting the production of the document and quashing and setting aside the judgment and decree in the appellant's favour. He placed reliance in **A. Andisamy Chettiar V/s. A. Subburaj Chettiar [AIR 2016 SC 79]** in support of his case and submitted that no reasons whatsoever were assigned by the learned appellate Court that any of the conditions were fulfilled as contemplated by Order XLI Rule 27 CPC while permitting the production of the document. The appellate Court had correctly decided the matter and yet in his wisdom while allowing the documents had quashed and set aside the judgment and decree of the Trial Court which judgment had to be set aside and the decree passed by the Trial Court had to be confirmed.

3. Shri J.A. Lobo, learned Advocate for the respondents

submitted at the outset that the appellate Court was conscious of its powers under Order XLI Rule 27 CPC which otherwise were unfettered and had properly exercised the powers while passing the impugned judgment and decree. He adverted to the judgment of the Trial Court and the application moved on behalf of the respondents under Order XLI Rule 27 CPC and submitted that no error was committed by the first appellate Court while allowing the production of the document and setting aside the judgment and decree of the Trial Court. He distinguished the judgment in **A. Andisamy Chettiar** (supra) and otherwise placed reliance in **Union of India V/s. K.V. Lakshman & Ors. [2016 (13) SCC 124]** and in **J. Balaji Singh V/s. Diwakar Cole & Ors. [AIR 2017 SC 2402]** apart from adverting to the application under Order XLI Rule 27 CPC to substantiate his case. There was no reason for interference with the impugned judgment and therefore the appeal had to be dismissed. i would consider their submissions in the light of the judgment relied upon, the predicates of Order XLI Rule 27 CPC, their contentions and the judgment of the Court below and the first appellate Court i.e. the impugned judgment and decide the appeal appropriately.

4. There was no particular dispute that distinct plots were allotted to the parties namely plot 'C' to the appellant, plot 'B' to

the respondent no.1 and plot 'A' to their third brother pursuant to the Deed of Settlement dated 24/08/1991 alongwith the plan annexed thereto depicting the scheme of allotment of plots. It was admitted by the respondents that the plots were allotted pursuant to the Deed of Settlement of 1991 although a case was carved by the respondents in defence that the plaintiff had made alterations and modifications in the plan annexed to the Deed after its execution. However, a cursory perusal of the application under Order XLI Rule 27 CPC would indicate unlike the plea in defence that it was only after the filing of the appeal and during the course of consultation with the advocate at the time of filing the appeal that the respondents realised that the plan produced by the appellant herein with the Deed of Settlement at Exhibit 30 was not the same plan annexed to the Sale Deed and there was manipulation of the plan. He had accordingly applied for a copy of the Deed of Settlement at Exhibit 30 and the same was issued to him and in the course of conference with his advocate and comparing the certified copy with the plan produced by the respondents it was found that the appellant herein had changed the plan of the original Deed and which was not realised by the advocate appearing for the respondents in the Trial Court. This plea taken in the course of production of document in appeal runs contrary to the statement made in the written statement as early

as February, 2004 where the appellant had taken a concrete and specific plea that the appellant had made alterations and modifications in the plan annexed to the Deed after its execution. There is no escape for the respondents from this position contrary to the submission of Shri Lobo, learned Advocate for the respondents.

5. The learned Trial Judge had caste the burden on the appellant to prove his ownership to the suit property, allotment of the plot 'C' in terms of Deed of Settlement in his favour, the acts of trespass by the respondents herein, which were all answered in the affirmative and also cast the burden on the respondents to prove alterations and modifications in the plan annexed to the Deed of Settlement after its execution. In that context, the learned Trial Judge had examined the Deed of Settlement dated 24/08/1991 alongwith the plan, Exhibit 30. The learned Trial Judge had clearly observed in the judgment that despite an assertion that there was manipulation and changes in the plan by the appellant herein, there was no challenge to the Deed at his instance. The Trial Judge for that matter had taken note of the fact that no alternate plan was produced by the respondents to show what was actually agreed upon and further noted that the Deed of Settlement was a document registered in the office of the Sub-Registrar and that it

was incumbent on the respondents to prove that there were alterations made by the appellant in the said plan which was duly registered in the office of the Sub-Registrar. The learned Trial Judge had found that the respondents had neither examined the lawyer who had drawn the Deed of Settlement nor examined his other brother who was a party to the Deed of Settlement to support his case and ultimately found that an adverse inference was required to be drawn against the respondents and held that he had not discharged the burden of proving that the plan was manipulated or altered by the appellant after its execution and finally decreed the suit.

6. The learned first appellate Court formulated points for determination on hearing the learned advocates for the parties, the first of such point being whether the application under Order XLI Rule 27 CPC was required to be allowed and the appellants before him i.e. the respondents herein were permitted to produce the certified copy of the Deed of Settlement, whether the Trial Judge had committed an error in passing the impugned judgment and consequentially whether records were required to be remanded to the Trial Court to permit the respondents to produce the said document. Coming to the point of production of documents, the learned first appellate Court clearly came to a finding that the

respondents ought to have brought some cogent evidence on record to show that the appellant had carried out some changes to the plan which was annexed to the Deed of Settlement, observed that he had not produced any documentary evidence on record and considering the application of the respondents under Order XLI Rule 27 CPC observed that this document ought to have been produced before the Trial Court during the pendency of the proceedings before it. The learned Judge contrary to the predicates of Order XLI Rule 27 CPC observed that producing and relying on the documents was a technical aspect which was required to be known by the advocates appearing for the parties and that the error committed by the advocates should not be the bane of the respondents and in that view of the matter allowed the application for production of document.

7. Order XLI Rule 27 CPC allows for the production of additional evidence in the appellate Court and reads thus:

(1) The parties to an appeal **shall not be** entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not

within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

In other words, it was incumbent on the respondents to show that his case fell within clause (a) or clause (aa) or that the said document was required by the appellate Court to enable it to pronounce the judgment.

8. The learned first appellate Court threw caution to the winds and on a specious plea that the parties should not suffer the mistake committed by their advocate allowed the production of the document in appeal which was contrary to the requirements thereof. Moreover, it is not as if the learned first appellate Court had not proceeded to decide the matter or come to a finding that it required the said document for enabling it to pronounce the judgment as to permit its production in appeal. Rather, the learned first appellate Court had clearly recorded that the judgment and decree passed by the Trial Court was after considering the entire evidence on record and that the respondents had failed to prove

that the appellant had committed any fraud or manipulation in the document. The learned Judge for that matter was equally seized of the fact that the respondents could have filed the suit to declare the Deed of Settlement as null and void or even raise a counter claim to that effect. The learned Judge proceeded to record a finding that the Trial Judge had not committed any error in passing the impugned judgment and order but having allowed the respondents to produce the document i.e. the Deed of Settlement with the plan on record in his wisdom held that the respondents' evidence had to be reopened permitting them to produce the Deed of Settlement alongwith the plan and in that view of the matter passed the order of remand and consequentially reversed the judgment and decree of the Trial Court in the appellant's favour.

9. In **A.A. Chettiar** (supra), the Apex Court was seized with the question whether the High Court was justified in dismissing the application for production of additional documents which were allowed by the first appellate Court. The Apex Court considered the scope of Order XLI Rule 27 CPC which carved out the three exceptional circumstances in which additional evidence could be adduced before the appellate Court and on considering the host of judgments held in the factual matrix that the order of the High Court could not be upheld when appeal was pending before the

lower appellate Court. However, to do complete justice between the parties, it was just and proper to direct the first appellate Court to decide the application for additional documents afresh on principles on which such an application could be allowed or rejected. It held that the parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27.

10. In **A.A. Chettiar** (supra) and in the brief facts, the appellant filed the suit for permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment which was originally owned by one Pillai. He had transferred the property in 1963 by executing a Sale Deed in favour of Lakshmiammal who further transferred it to Gurusamy Naicker by Deed dated 26/12/1968. The plaintiff's father purchased the property from Gurusamy Naicker and constructed his house. His father had executed the Will dated 13/12/1990 in favour of the plaintiff and after his death the plaintiff was in exclusive possession of the property and that the defendant had no right over the same. The defendant Subburaj Chettiar who is the son of Ayyappan Chettiar contested the suit and disputed the Will executed in favour of the plaintiff. He alleged that the plaintiff had filed the suit for

permanent injunction only to evade the partition of the property and that, apart from the two sons there were three daughters from his father and the suit was bad for non-joinder of necessary parties being the legal heirs of the pre-deceased daughters.

11. In **A.A. Chettiar** (supra), the plaintiff examined himself and attesting witness to the Will apart from producing nine documents. The defendant examined himself and produced three documents. The Trial Court on hearing the parties held against the plaintiff that he had failed to prove that Chettiar had executed the Will in his favour and dismissed the suit giving rise to an appeal before the first appellate Court. During the pendency of the appeal, he moved an application for directing a scientific investigation to find out whether the signature of his father on the Will was genuine by comparing with the admitted signatures by a competent handwriting expert and to file a report which was allowed by the first appellate Court. This order came to be challenged by the defendant before the High Court which allowed the same giving rise to the impugned order before the Apex Court when this issue came up for consideration. No doubt the Apex Court had relied in **Union of India V/s. Ibrahim Uddin & Anr. [(2012) 8 SCC 148]**, where it was held at para 49 thus:

“49. An application under Order 41 Rule 27 CPC is

to be considered at the time of hearing of appeal on merits so as to find out 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.....”

However, it does not run contrary to the mandatory predicates of Order XLI Rule 27 CPC and therefore it does not lie for Shri Lobo, learned Advocate for the respondents to canvass that this judgment in **A. Chettiar** (supra) relying in **Ibrahim** (supra) supports his case and justifies the impugned order of the first appellate Court.

12. In **K.V. Lakshman** (supra), another two Judge Bench of the Hon'ble Apex Court held that the High Court committed an error when it rejected the application filed by the appellant Union of India under Order XLI Rule 27 of CPC to adduce additional evidence

in the factual matrix and after considering the fact that the appellant Union of India had averred in the application as to why they could not file the additional evidence earlier, the delay on their part, the application being supported by an affidavit and remaining un rebutted, the application containing necessary averments as to why the additional evidence was necessary to decide the real controversy involved in the appeal and being in the nature of public documents ought to have been taken on record and lastly as the appellant being the Union of India was entitled to legitimately claim more indulgence in such procedural matters due to their peculiar set up and way of working. It however does not laid down any proposition of law that the application under Order XLI Rule 27 CPC shall be permitted to be produced on any ground whatsoever which is not within the predicates of Order XLI Rule 27 CPC.

13. **Shri J. Balaji Singh** (supra), filed a suit before the Senior Civil Judge, Kadapa against the declaration of his title over the suit property and also sought permanent injunction to restrain them from interfering in his possession over the suit property. The respondents in their written statement denied his claim over the suit property and thereafter the issues were framed on facts and law on the basis of the pleadings and the evidence was adduced in support of their respective cases. The Trial Court dismissed the

appellant's suit who preferred an appeal before the additional District Judge, Kadapa. He filed an application under Order XLI Rule 27 CPC and sought permission to file additional evidence in support of his case which according to him was material and necessary for the disposal of the suit and the same could not be even filed due to its non-availability. The first appellate Court allowed the application and proceeded to decide the appeal on merits, set aside the judgment of the Trial Court and remanded the case to it for deciding afresh on merits uninfluenced by any of the observations made in the judgment giving rise to an appeal under Order XLI Rule 1(u) of the code. The learned Single Judge allowed the appeal, set aside the judgment of the first appellate Court and dismissed the suit by restoring the judgment of the appellate Court giving rise to the appeal by special leave.

14. In **J. Balaji** (supra), the question which arose for consideration in the appeal was whether the High Court was justified in allowing the defendants' appeal and in restoring the judgment/decreed of the Trial Court which had dismissed the suit. The questions which arose before the High Court was whether the first appellate Court was justified in setting aside the judgment/decreed of the Trial Court and if so whether it was justified in remanding the case to the Trial Court for fresh trial of the suit in

accordance with law. Another question which also fell for consideration was whether the first appellate Court was justified in allowing the application filed by the appellant hereinunder Order XLI Rule 27 CPC to adduce additional evidence in appeal. In the facts at large, the Apex Court held that once the first appellate Court allowed the application under Order XLI Rule 27 CPC and took on record additional evidence, it rightly set aside the judgment/decreed of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which in turn enabled the Trial Court to decide the civil suit afresh on merits. This judgment with respect did not deal with the requirements of Order XLI Rule 27 CPC except for the observations of the Hon'ble Apex Court that the first appellate Court was justified in allowing the production of documents. Besides, the first appellate Court had found that the additional evidence sought to be produced was material and necessary for a proper adjudication of the suit and that there were justifiable reasons why the same could not be produced during the trial. This judgment too with respect does not buttress the case of Shri Lobo, learned Advocate for the respondents that the first appellate Court was justified in allowing the production of documents by recourse to Order XLI Rule 27 CPC. Hence, considering the judgments relied upon and the facts at large, the learned first appellate Court was totally in error and not

justified in permitting the production of document by recourse to Order XLI Rule 27 CPC and interfering with the judgment passed by the Trial Court. In view thereof i pass the following :

O R D E R

The Appeal From Order is allowed and the impugned judgment and order is quashed and set aside. The Cross Objection accordingly stands dismissed.

NUTAN D. SARDESSAI, J.

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