

Appeal No.12 of 2010. By that order, the Appellate Court allowed the appeal preferred by the respondent, hereinafter referred to as “defendant” and quashed and set aside the judgment and decree dated 28th October, 2009 passed by the learned Judge, Court Room No.6 of the Court of Small Causes at Mumbai in R.A.E. Suit No.1645/2395 of 2006. The Appellate Court dismissed the suit instituted by the plaintiffs as also dismissed Cross Appeal/Cross Objection No.6 of 2011.

4. In support of this Application, Mr. Kanade submitted that the defendant has filed application Exhibit 28 in the pending appeal under Order-XLI, Rule-27 of the C.P.C for permitting her to adduce additional evidence. By order dated 19th January, 2016, the Appellate Court kept application Exhibit 28 along with the main appeal for final hearing. He invited my attention to the impugned order and in particular paragraph 20. The Appellate Court considered the documents sought to be produced by the defendant by way of additional evidence. He submitted that the Appellate Court committed serious error apparent on the face of the record in considering those documents.

5. A perusal of application Exhibit 28 and in particular paragraphs 5 and 6 shows that the application is preferred under Order-XLI, Rule-27 (aa) of the C.P.C.

6. Mr. Kekane was not in a position to controvert this submission. He submitted that by consent of the parties, impugned order may be set aside. Even otherwise, as noted earlier by order dated 19th January, 2016, the Appellate Court had directed that the application Exhibit 28 will be taken up along with main appeal at the time of final hearing. A perusal of the impugned order does not even remotely indicate that the Appellate Court has decided the application Exhibit 28. In other words, without deciding application Exhibit 28,

the Appellate Court has considered the documents which are sought to be produced by way of additional evidence in paragraph 20. In view thereof, the impugned order cannot be sustained. By consent of the parties, C.R.A is disposed of in the following terms;

- [1] Order dated 25th January, 2017 passed in (2a) Appeal No.12 of 2010 is quashed and set aside.
- [2] 2(a) Appeal No.12 of 2010 is restored to the file of the Appellate Court along with Cross Objection No.6 of 2011 and Application Exhibit 28 of 2015.
- [3] The Appellate Court will first decide application Exhibit 28 and if it allows that application will follow the procedure laid down under Order-XLI, Rule-28. In case, the Appellate Court dismisses the application at Exhibit 28, it will proceed to decide the appeal and cross-objections.
- [4] Pending the hearing of the appeal, the plaintiff shall not take out execution proceedings.
- [5] All contentions of the parties are expressly kept open.

7. Parties agree that they will appear before the Appellate Bench of Court of Small Causes, Mumbai on 3rd May, 2018 and for that purpose, no fresh notice be issued to them. The Appellate Court will give suitable date as per it's convenience and will decide the appeal as also Cross Objection and Exhibit 28 within three months from fixing suitable date of hearing. Rule is made absolute in the aforesaid terms.

[R.G. KETKAR, J.]