

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11226 OF 2017

(Bilquis Khanum w/o Iqbal Khan and another Vs. Vitthal s/o Kerba
Bhalerao (died), through LR's)

Mr.S.S.Gangakhedkar, Advocate for the petitioners.

Mr.B.G.Deshmukh, Advocate for respondent Nos.1-B, 1-C, 2, 3-A
and 3-B.

Mr.S.L.Bhapkar, Advocate for respondent Nos.1-A, 1-D, 1-F and 3-C.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 22/07/2019

PER COURT :

1. On 12/10/2017, this Court had passed the following order :-

“1 The Petitioners are aggrieved by the impugned order dated 24.08.2017 delivered by the Appeal Court, by which applications Exhibits 33 and 34 invoking Order 41 Rule 27 of the Code of Civil Procedure, have been rejected.

2 The grievance of the Petitioners is that the Appeal Court should have allowed the production of documents and evidence since it is germane to the cause of action.

3 I find that the Petitioners pressed Exhibits 33 and 34 and invoked the jurisdiction of the Appeal Court at a premature stage. The Honourable Supreme Court has settled the law on applications filed under Order 41 Rule 27 of the Code of Civil Procedure in the matters of Malyalam Plantations Limited vs. State of Kerala and another, AIR 2011 SC 559, Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148 and Andisamy Chettiar vs. Subburaj Chettiar, AIR 2016 SC

79. Such applications should have been considered by the Appeal Court while deciding the appeal. However, since the Petitioner pressed the applications, the impugned order has been passed.

4 Issue notice before admission to the Respondents returnable on 28.11.2017.

5 On the condition that the Petitioners shall deposit a total amount of Rs.6000/- (Rupees Six Thousand) before the Appeal Court on or before 31.10.2017, the impugned order dated 24.08.2017 shall stand stayed. Failure to deposit, would enable the Appeal Court to proceed with the final hearing of the appeal.

6 Notwithstanding the above and pendency of this Writ Petition, the Appeal Court would be at liberty to proceed with RCA No.71/2012 for final hearing and would consider Exhibits 33 and 34 along with the appeal in the light of the judgments delivered by the Honourable Supreme Court in the above cited cases.

7 The Petitioners shall supply the copies of the petition paper book for issuance of notices on or before 24.10.2017, failing which this petition shall stand dismissed without reference to the Court on 25.10.2017.”

2. The learned Advocates appearing for respondent Nos.1-B, 1-C, 2-, 3-A, 3-B, 1-A, 1-D, 1-F and 3-C, rely upon the recent view taken by the Hon'ble Apex Court in the matter of Jagdish Prasad Patel (Dead) through LR's and another Vs. Shivnath and others [(2019)6 SCC 82] to support their contention that the application Exhs.33 and 34 do not fall under any of the contingencies as mandated by the

Hon'ble Apex Court in paragraph No.29 of the judgment. The application has therefore been rightly rejected. It is further submitted that one document which the petitioners now desire to produce before the Appellate Court, was refused production by the Trial Court. These petitioners had brought their grievance right upto this Court and the writ petition filed by these petitioners was also rejected. In this backdrop, the petitioners cannot take a chance of producing the same document.

3. Having considered the submissions of the learned Advocates for the respective sides and in view of the Law laid down by the Hon'ble Apex Court in the matters of Malyalam Plantations Limited, Union of India vs. Ibrahim Uddin, Andisamy Chettiar and Jagdish Prasad (supra), Exhs.33 and 34 filed by the petitioners have been prematurely considered by the Appellate Court. Since these petitioners insisted on a hearing, that the Appellate Court took up those applications and has passed an order. It is in this backdrop that I had directed the petitioners to deposit Rs.6,000/- before the Appellate Court.

4. The Hon'ble Apex Court has held in paragraph No.29 in Jagdish Prasad (supra) as under :-

“29. Under Order XLI Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

(I) Where the trial Court had refused to admit the evidence though it ought to have been admitted;

(II) the evidence was not available to the party despite exercise of due diligence; and

(III) the appellate Court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, court can receive additional documents.”

5. In *Malyalam Plantations Limited, Union of India vs. Ibrahim Uddin and Andisamy Chettiar* (supra), the Hon'ble Apex Court has concluded that an application for seeking leave to produce additional evidence under Order 41 Rule 27 of the CPC, has to be dealt with while dealing with the main appeal.

6. In *Jagdish Prasad* (supra), the Hon'ble Apex Court has enunciated the 3 contingencies, in which such an application can be granted. Obviously, to deal with such a situation, the Appellate

Court will have to consider the entire R & P for arriving at a conclusion in the light of the 3 principles as to whether the Trial Court had earlier refused to admit evidence which ought to have been admitted, whether the said evidence was not earlier available and whether the Appellate Court finds it appropriate that the Trial Court would have been able to pronounce the judgment on the basis of such evidence.

7. In view of the above, this petition is partly allowed. The impugned order dated 24/08/2017 is quashed and set aside and Exhs.33 and 34 are listed before the Appellate Court. Since the appeal is more than 7 years old, the Appellate Court shall deal with the said appeal expeditiously and would consider Exhs.33 and 34 alongwith the appeal by considering the Law laid down in *Malyalam Plantations Limited, Union of India vs. Ibrahim Uddin, Andisamy Chettiar and Jagdish Prasad (supra)*.

8. Considering this legal position, the Appellate Court is expected to deal with the appeal finally and while appreciating the record and proceedings of the Trial Court, it would consider Exhs.33 and 34 to assess as to whether the case of these petitioners would fall within the Law laid down by the Hon'ble Apex Court in the above referred 4

cases.

9. It is once again made clear, to avoid misunderstanding, that the impugned order dated 24/08/2017 is being set aside only because these petitioners had pressed Exhs.33 and 34 at a premature stage and the correct law was not cited. Had the Appellate Court been shown the judicial pronouncement in Malyalam Plantations Limited, Union of India vs. Ibrahim Uddin and Andisamy Chettiar (supra), it would have linked Exhs. 33 and 34 with the appeal for final adjudication.

10. In so far as costs are concerned, some of the respondents have not appeared in this proceeding. As such, those respondents, who have caused an appearance through the learned Advocates in this matter, would be at liberty to withdraw the costs in equal proportions, without conditions.

(Ravindra V.Ghuge, J.)