

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

WRIT PETITION NO.12214 OF 2018

BANUBI SYED MIR AND OTHERS
VERSUS
SYED IBRAHIM MOHD AND ANOTHER

...

Advocate for the Petitioners : Shri Kazi S.S.
Advocate for Respondent 1 : Shri Shaikh Mujtaba Gulam Mustafa.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 24th April, 2019

Per Court:

1 On 31.10.2018, while issuing notice, the following order was
passed :-

- "1 *The petitioners / original defendants 1 to 3, who are respondents in RCA No.78 of 2013 are aggrieved by the impugned order dated 12.9.2018, by which, the appellate Court has entertained an application Exhibit 32 under Order XLI Rule 27 of the CPC and permitted the appellant to lead additional evidence.*
- 2 *It is apparent that the litigating sides have not assisted the appellate Court by citing the correct law. The Honourable Apex Court has settled the law in the judgments delivered in **Malyalam Plantation Ltd. Vs. State of Kerala [AIR 2011 SC 559]** , **Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148]** and **A. Andisamy Chettiar Vs. A. Suburaj Chettiar [AIR 2016 SC 79]**, whereby it is concluded that an application under Order XLI Rule 27 of the CPC shall be considered along with the appeal at the final*

stage.

- 3 *Issue notice to the respondent No.1 alone, who is the original plaintiff, returnable on 11.12.2018. In the meanwhile, the impugned order dated 12.9.2018 shall stand stayed. Since RCA No.78 of 2013 is pending final hearing for five years, the appellate Court is permitted to proceed to decide the appeal finally and would consider application Exhibit 32 filed by the appellant along with the said appeal, expeditiously.*
- 4 *Copy of the paper book for issuance of notice shall be supplied and all objections shall be removed on/or before 13.11.2018, failing which this application shall stand vacated without reference to the Court on 14.11.2018."*

2 I have heard the learned Advocates for the respective sides at length. The law laid down by the Honourable Supreme Court in the above referred judgments calls for no debate. The application Exhibit 32, in view of the judgments delivered by the Honourable Supreme Court, will have to be considered under Order XLI Rule 27 of the Code of Civil Procedure along with the main appeal. While deciding the appeal, if the Appellate Court is convinced that the measurement of the suit properties and the examination of the court commissioner is necessary, it may remit the matter to the Trial Court for recording of such evidence and after evidence is recorded, it may be submitted to the Appellate Court. In the alternative, any other order as may be permissible in law could be passed by the Appellate Court.

3 In view of the above, this Writ Petition is partly allowed. The

impugned order dated 12.09.2018 is quashed and set aside and the application Exhibit 32 is remitted to the Appellate Court in the pending Regular Civil Appeal No.78/2013. In view of the law laid down by the Honourable Supreme Court in the above referred judgments, the Appellate Court would consider the application Exhibit 32 along with the main appeal and pass an appropriate order as it may find necessary in the interest of justice.

kps

(RAVINDRA V. GHUGE, J.)