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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1040 OF 2018

WIMCO Limited

..Petitioner.

V/s.

Madhukar Dadau Adangale & Ors.

..Respondents.

Mr.Suresh Bharucha with Shreya Fatterpekar, Hill Boatwalla, Nitat P.Sheth and Ashiwini Sonawane I/b. Nanu Harmasjee & Co. for the petitioner.

Mr.C.R. Benke for respondent Nos.1 to 3.

Mr.V.K. Wasnik for respondent No.4.

CORAM : M.S.SONAK, J.

DATE : MARCH 19, 2019

ORAL JUDGMENT

Heard Suresh Bharucha, learned counsel for the petitioner,
Mr.C.R. Benke, learned counsel for respondent Nos.1 to 3 and Mr. V.K.
Wasnik , learned counsel for respondent No.4

2. Challenge in this petition is to the order dated September 26, 2017 made by learned Appeal Court in Regular Civil Appeal No.191 /2013 refusing to exercise powers under Order 41 Rule 28 of the Code of Civil Procedure ('the CPC' for short) despite having allowed the

petitioner's application under Order 41 Rule 27 of the CPC by order dated March 18, 2015.

3. Mr.Bharucha, learned counsel for the petitioner submits that once the Appeal Court has allowed the petitioner's application to lead additional evidence at the appellate stage by invoking the provisions of Order 41 Rule 27 of the CPC, the subsequent order under Order 41 Rule 28 of the CPC should have been made as a matter of course. He points out that Order 41 Rule 28 of the CPC merely deals with the mood of taking additional evidence which has to be essentially consequential to the main under Order 41 Rule 27 of the CPC.

4. Though the submissions of Mr.Bharucha deserves *prima facie* acceptance nevertheless, it is necessary to note that the order dated March 18, 2015 made by the Appeal Court under Order 41 Rule 27 of the CPC is itself not proper and is liable to be ignored in terms of ruling of the Hon'ble Supreme Court in the case of *Union of India V/s. Ibrahim Uddin and another*¹. In this ruling, the Hon'ble Supreme Court has held that the application under Order 41 Rule 27 of the CPC has to be considered at the time of hearing of the appeal on merits so as to find out whether the document and / or evidence sought to be adduced have any relevance / bearing on the issue involved.

5. The relevant observations are in paragraphs 49 to 52 which

¹ (2012) 8 Supreme Court Cases, 148

read 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 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. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: [Arjan Singh v. Kartar Singh & Ors.](#), AIR 1951 SC 193; and [Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors.](#), AIR 1976 SC 1053).

50. In *Parsotim Thakur & Ors. v. Lal Mohar Thakur*, it was held (LW pp 86-87)

“The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal.

Under R.27, Cl.(1) (b) it is only where the

appellate Court “requires” it (i.e. finds it needful). The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but “when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent”.

....it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the Court adopts this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case...”

(Emphasis added)

(See also: [Indirajit Pratab Sahi v. Amar Singh](#), AIR 1928 P.C. 128)

51.. [In Arjan Singh v. Kartar Singh & Ors.](#) (supra), this Court held (AIR pp 195-96 paras 7-8)

“7.....If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of

improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent.....

8.... The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment”

(Emphasis added)

52.. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential / inexecutable and is liable to be ignored.”

6. As noted above, in paragraph 52, the Hon'ble Supreme Court has held that in case the application for taking additional

evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non application of mind as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential / inexecutable and is liable to be ignored.

7. Since the present petition is only to execute the order dated March 18, 2015 under Order 41 Rule 27 of the CPC. which order admittedly was made much prior to the said appeal was taken up for hearing, the same remains inconsequential / inexecutable and is liable to be ignored.

8. Accordingly, no relief can be granted to the petitioner in the present petition. In exercise of the supervisory jurisdiction under Order 227 of the Constitution of India, it is necessary to declare that the Appeal Court order dated March 18, 2015 is inconsequential, inexecutable and is liable to be ignored. Since the main order dated March 18, 2015 is required to be ignored, it is needless to add that even the impugned order dated September 26, 2017 is required to be ignored, since it is at this stage premature.

9. However, the directions can and are required to be issued to the Appeal Court to take up the petitioner's application under Order 41 Rule 27 of the CPC for consideration at the time of hearing of the appeal on merits so as to find out whether the document and / or

evidence sought to be adduced is any relevance or bearing on the issue involved. This means that the the Appeal Court is required to be directed to follow the ruling of the Hon'ble Supreme Court in *Ibrahim Uddin's (supra)* in the matter and consider the petitioner's application under Order 41 Rule 27 of the CPC.

10. With the aforesaid observations, this petition is disposed of.

11. There shall be no order as to costs.

12. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)