

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4748 OF 2017

Yogesh S. Gunjal

.. Petitioner

vs.

Major Alfred Celestine
Rebeloo (since deceased
through Legal Heir) and ors.

.. Respondents

Mr. Tejesh Dande i/b Tejesh Dande and Associates for the
Petitioner.

Ms Jyoti Bajpayee for Respondent No.1-Plaintiff.

CORAM : M. S. SONAK, J.

DATE : 12 APRIL 2019.

ORAL JUDGMENT :

1] Heard Mr. Tejesh Dande, learned counsel for the
petitioner and Ms Jyothi Bajpayee, learned counsel for
respondent Nos.1 (original plaintiff).

2] Learned counsel for the petitioner has quite correctly
submits that presence of respondent Nos.2 and 3 is not
necessary for adjudicating the challenge in the present
petition. Even otherwise from the order which is proposed to
be made, the presence of respondent Nos.2 and 3, who are
original defendants in the suit along with the petitioner are
really not necessary.

3] Therefore, Rule. Rule is made returnable forthwith with the consent of learned counsel for the parties.

4] The challenge in this petition is to the order dated 29th August 2016 by which learned Appeal Judge has rejected the petitioner's application adducing additional evidence in terms of Order 41 Rule 27 of the CPC. Learned Appeal Judge disposed of the petitioner's application under Order 41 Rule 27 of CPC before the appeal could be taken up for final disposal and not at the time when the appeal was taken up for final disposal.

5] The Hon'ble Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another – (2012) 8 SCC 148*** has made the following observations regards the stage at which application under Order 41 Rule 27 of the CPC is required to be considered. The observations in paragraphs 49 and 52 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 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. 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 Commr., Taxation., AIR 1976 SC 1053).

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] In view of the aforesaid, the impugned order is set aside. Learned Appeal Court is directed to reconsider the

petitioner's application under Order 41 Rule 27 of the CPC consistent with the aforesaid observation of the Hon'ble Supreme Court, at the time the appeal is taken up for final hearing.

7] It is made clear that this Court has not adverted to the merits of the rival contentions and therefore, all contentions of all parties are kept open to be decided by the Appeal Court.

8] Rule is made absolute to the aforesaid terms. There shall be no order as to costs.

9] All concerned to act upon an authenticated copy of this order.

(M. S. SONAK, J.)