

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11155 OF 2016

Ramesh B. Salunke and ors. .. Petitioners

vs.

Smt. Pramila J. Salunke and ors. .. Respondents

Mr. Ashok B. Tajane for the Petitioners.

CORAM : M. S. SONAK, J.

DATE : 23 APRIL 2019.

ORAL JUDGMENT. :-

1] Heard Mr. Tajane, learned counsel for the petitioners. He states that all the respondents are duly served and even the affidavit of service is filed.

2] This Court on 15th October 2018 made the following order:

“1. Issue notice before admission, returnable on 3rd December, 2018. Hamdast is permitted. In addition to the Court notice, the petitioner is permitted to serve the respondent by private notice i.e. by registered A.D. / courier / hand delivery and shall file affidavit of service before the next date. It should be made clear in the said notice that subject to time constraint, the Court will make an endeavor to dispose of the said writ petition finally at the admission stage.”

3] Accordingly, Rule. Rule is made returnable forthwith.

4] The challenge in this petition is to the order dated 2nd March 2016 by which the learned Appeal Court has dismissed the petitioners' application at Exhibit-34 for production of additional evidence at the appeal stage by resorting to the provisions of Order 41 Rule 27 of the CPC.

5] According to me, the impugned order is required to be set side without going into the merits, in view of the decision of the Hon'ble Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another – (2012) 8 SCC 148***. In this case, the Hon'ble Supreme Court has held that the proper stage for consideration of application under Order 41 Rule 27 of CPC is when the matter is taken up for final hearing and not earlier.

6] The relevant observations, in the aforesaid regard in the case of *Ibrahim Uddin (supra)*, at paragraphs 49 and 52 read as follows:

“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.”

7] Accordingly, the impugned order dated 2nd March 2016 is hereby set aside. The petitioners' application at Exhibit-34, is restored to the file of the Appeal Court. The application is to be considered at the stage of final disposal of appeal, in terms of ruling of the Hon'ble Supreme Court in *Ibrahim Uddin (supra)*. All contentions of all parties on merits or otherwise of the application at Exhibit-34 are specifically kept open. Such application should be decided without being influenced by any observations in the impugned order dated 2nd March 2016, which, in any case, is now set aside.

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

9] The stay on the proceedings granted earlier is hereby vacated.

10] Parties to appear before the Appeal Court on 30th April 2019 at 11.00 a.m.. In case, the respondents do not appear on this date, the Appeal Court to give them notice, since they have not appeared in this Court.

11] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)