

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10978 OF 2013

Shri. Chandrakant Bhimrao Salave and Ors. .. Petitioners
Versus
Raju Tukaram Katarnavare .. Respondent

Mr. Chetan Dambre I/b M.P. Panchakshari for petitioners.
Mr. P.N. Joshi for respondent.

CORAM : K.K. TATED, J.

DATE : 28 FEBRUARY 2019.

P.C:-

. Heard learned Counsel for parties.

2. By this writ petition under Article 227 of the Constitution of India, petitioner/original defendant is challenging the order dated 13.08.2013 passed by the learned District Judge, Niphad, Nashik below Exhibit-22 in Civil Appeal No.17 of 2007 allowing respondent/original plaintiff's application under Order 41 Rule 27 of Civil Procedure Code, 1908 to produce and marked the exhibit certain documents.

3. In the present proceedings, respondent/original plaintiff has filed Special Civil Suit No.70 of 2002 before the Civil Judge, Senior Division, Niphad, Nashik for specific performance of contract in respect of suit property. In that suit, the learned Civil Judge, Senior Division, Niphad Nashik passed Judgment and Decree dated 31.07.2007 holding that plaintiff to be entitled to recover the earnest money of Rs.25,000/- together with interest at the rate of 9% per annum from the date of contract of the sale

i.e. 23.05.2000 till realization of the entire amount.

4. Being aggrieved by the said Judgment and Decree, the respondent/original plaintiff preferred Civil Appeal No.17 of 2007 before the Appellate Court. In Appellate Court, the respondent/original plaintiff has filed application dated 15.03.2012 below Exhibit-22 under Order 41 Rule 27 of Civil Procedure Code, 1908 for taking on record certain documents and for marking them as Exhibit. The respondent/original plaintiff filed their application below Exhibit-22 and stated that though some of the receipts were duly filed along with the list of documents at Exhibit-12 before trial Court, it remain to be exhibited those receipts. Therefore, the respondent/original plaintiff filed application under Order 41 Rule 27 of Civil Procedure Code, 1908.

5. Considering the fact that though the receipts were produced by the plaintiff on record along with Exhibit-12 list of documents before trial Court, the Appellate Court permitted to produce those documents on record and marked them as exhibit. Being aggrieved by the said order, the petitioner/original defendant has filed present writ petition.

6. The learned Counsel appearing on behalf of petitioner/original defendant submits that the impugned order dated 13.08.2013 passed by the learned District Judge-2, Niphad, Nashik below Exhibit-22 in Civil Appeal No.17 of 2007 is bad in law. He submits that though the appeal was filed in 2007, the respondent/original plaintiff filed application under Order 41 Rule 27 of Civil Procedure Code, 1908 on 15.03.2012 i.e. more

than 5 years from the date of filing of the appeal. He submits that even the delay for filing the said application was not explained by the plaintiff in its application. He further submits that trial Court has not considered the principles as laid down under Order 41 Rule 27 of Civil Procedure Code, 1908 at the time of allowing the parties to place on record certain documents and marked as exhibit. He submits that the appellate Court failed to consider the fact that respondent has not lead any evidence of those receipts for marking them as exhibit. He further submits that though the receipts were in possession of the respondent, they failed and neglected to make appropriate application in the trial Court itself for marking them as exhibit. Therefore, on the ground of delay the Court below ought to have rejected respondent's application under Order 41 Rule 27 of the Civil Procedure Code, 1908. In support of this contention, he relies on the judgment of the Apex Court in the matter of **N. Kamalam (dead) and Another Vs. Ayyaswamy and Another**¹, he relies on paragraph 19 which reads thus :

“19. Incidentally, the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in *The Municipal Corporation of Greater Bombay v. Lala Pancham and others* (AIR 1965 SC 1008) has been candid enough to record that the requirement of the high Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In paragraph 9 of the judgment, this Court observed:

1 AIR 2001 SCC 2802

“.....This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports in a large measure the plaintiffs contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under cl. (b) of sub-r.(1) of r.27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision.

Further in *Smt. Pramod Kumari Bhatia v. Om Parkash Bhatia and Others* (AIR 1980 SC 446) this Court also in more or less in an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April, 1983 but the application for permission to adduce additional evidence came to be made only in August, 1993. Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time: In our view, a plain reading of Order 41 Rule 27 would depict that the rejection of the claim for production of additional evidence after a period of

10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. The learned Trial Judge while dealing with the matter has, as a matter of fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the will and in our view contextually, the justice of the situation does not warrant any interference. The attempt, the High Court ascribed it, to be a stage managed affair in order somehow to defeat the claim of the respondents - and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court can not be found fault with for rejecting the prayer of the appellant for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs being the appellant herein.”

7. The learned Counsel for the petitioner submits that the Appellate Court erred in coming to the conclusion that, the application filed by the respondent under Order 41 Rule 27 of the Code of Civil Procedure, 1908 is required to be decided separately. He submits that once the application is filed under Order 41 Rule 27 of Civil Procedure Code, 1908 for production of certain documents, same is required to be heard at the time of final hearing. In support of this contention, he relies on the judgment of the Apex Court in the matter of **Union of India Vs. Ibrahim Uddin and Another**². He relies on paragraph Nos. 49 and 52 of the said judgment which reads thus :-

“49. An application under Order XLI 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

2 (2012) 8 SCC 148

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. and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors.

52. Thus, from the above, it is crystal clear that an 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 the 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. “

On the basis of these authorities, the learned Counsel appearing on behalf of petitioner submits that the impugned order is required to be set aside with cost.

8. On the other hand, the learned Counsel for respondent/original plaintiff vehemently opposed the present writ petition. He submits that the Court below after considering the law of Apex Court and the facts of the present matter rightly decided their application under Order 41 Rule 27 of Civil Procedure Code, 1908 and permitted them to exhibit those documents in Appeal. Therefore, there is no question of entertaining the present writ petition.

9. The learned counsel for the respondent submits that under Order 41 Rule 27 of Civil Procedure Code, if documents already placed on record in the trial Court and same were not marked as exhibit, then the plaintiff can make appropriate application at the appellate stage under Order 41 Rule 27 of Civil Procedure Code, 1908 for marking those documents as exhibit. He submits that in the present proceedings, the Appellate Court specifically recorded in paragraph 5 of the impugned order that all those documents were placed on record by the plaintiff along with Exhibit-12 i.e. list of documents filed by the plaintiff. Therefore, there is no question of setting aside the said impugned order passed by the Court below. Hence, writ petition to be dismissed with cost.

10. I heard both sides at length. It is to be noted that in the case in hand, the respondent/original plaintiff placed all those receipts along with Exhibit-12 i.e. list of documents filed by them in the trial Court. Those documents were not marked by the trial Court. Hence, the respondent/original plaintiff filed application below Exhibit-22. Bare reading of the Order 41 Rule 27 of Civil Procedure Code, 1908 shows that in such circumstances party can

make appropriate application for exhibiting documents at appellate stage also.

11. It is to be noted that the authority cited by the petitioner in the matter of **Union of India Vs. Ibrahim Uddin and Another (Supra)** is not applicable in the facts and circumstances of the present case. In that authority, the Apex Court held that the application under Order 41 Rule 27 is required to be decided at the time of final hearing of the Appeal. But in the case in hand those documents are showing already on record at Exhibit-12.

12. In similar way, the authority cited by the learned Counsel for the petitioner in the matter of **N. Kamalam (dead) and Another (Supra)** is also not applicable in the facts and circumstances of the present case. Because, as soon as the respondent/original plaintiff learned that though they filed those documents along with list of documents at Exhibit-12 before the trial Court and same were not marked as exhibit, immediately they filed the present application below Exhibit-22. Therefore, there is no question of delay in filing application. Considering these facts and as those documents were already on record in the trial Court along with Exhibit-12 i.e. list of documents, I am of the opinion that petitioner has not made out any case to interfere in a well reasoned order passed by the Court below.

13. Hence, writ petition stands rejected.

14. No order as to costs.

(K.K. TATED, J.)