

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.831 OF 2018

Sandip Wamanrao Kilnake, Warora, Chandrapur

-vs-

Hari Lakhuji Meshram, Madheli, Warora, Chandrapur

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri M. P. Khajanchi, Advocate with Shri A. S. Dhore,
Advocate for petitioner.

Shri P. K. Mishra, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.

DATE : June 11, 2019

In view of notice for final disposal issued earlier the learned counsel for the parties have been heard at length.

The petitioner is the appellant before the appellate Court in an appeal filed under Section 96 of the Code of Civil Procedure, 1908 (for short, the Code). During pendency of the appeal the petitioner filed an application below Exhibit-17 praying for grant of permission to file various documents as per the list at Exhibit-25. In that list there was a reference to about 41 documents. The appellate Court allowed that application by observing that the documents sought to be placed on record could be helpful for the just decision of the appeal. Thereafter the petitioner filed an application below Exhibit-20 under provisions of Order XLI Rule

27 of the Code. Permission was sought to lead additional evidence. The appellate Court by the impugned order partly allowed that application and permitted the appellant to rely upon the 7/12 extracts and not the documents at Serial Nos.1 to 4 in the list at Exhibit-25. Being aggrieved by that part of order refusing to rely upon the documents at Serial Nos.1 to 4, the said order has been challenged.

3. Shri M. P. Khajanchi, learned counsel for the petitioner submitted that the appellate Court having permitted production of the documents after observing that the same could be relevant for just decision of the appeal, it ought to have allowed the petitioner to lead additional evidence with regard to all those documents. By failing to allow the application in its entirety and by ignoring the provisions of Order XLI Rule 28 of the Code the appellate Court committed an error. The same has caused prejudice to the rights of the petitioner.

4. Shri P. K. Mishra, learned counsel for the respondent supported the impugned order. According to him the documents sought to be relied upon related to the period after the judgment of the trial Court and therefore the petitioner should not be

permitted to rely upon same with a view to fill the lacuna. The 7/12 extracts were permitted to be taken into consideration as they were public documents and it was rightly observed by the appellate Court that the other documents could not be permitted to be duly proved. He further submitted that the legal position in this regard was rightly considered by the appellate Court while passing the impugned order. The same therefore did not deserve to be interfered with.

5. Heard the learned counsel for the parties. It is seen that initially the petitioner had moved an application below Exhibit-17 seeking permission to place on record various documents. The appellate court by observing that said documents could be useful in just decision of the appeal allowed the same. About 41 documents were permitted to be placed on record. The order passed by the appellate court below Exhibit-17 recording its satisfaction that the documents filed would be helpful to the Court for arriving at a just decision in the appeal is not under challenge by the respondent. Having permitted the appellant to produce the documents which according to the Court would have assisted it in adjudication of the appeal, the appellate Court thereafter was required to follow the course prescribed by provisions of Order XLI

Rule 28 of the Code.

It is in that context that the application below Exhibit-20 came to be moved. At this stage reference to the provisions of Order XLI Rule 28 of the Code would also be necessary. As per the said provisions where additional evidence is allowed to be produced, the same can be permitted to be taken either by the appellate Court or the appellate Court can direct the trial Court to take such evidence. As in the impugned order it has been specifically observed that the application seeking permission to file documents had been allowed, consequentially the only option was to consider those documents for just decision of the case. In the light of the fact that the 7/12 extracts were permitted to be taken into consideration being public documents, the appellate Court ought to have followed the course as prescribed under provisions of Order XLI Rule 28 of the Code with regard to the other documents. This would include an opportunity of rebuttal evidence to the respondent. The weightage to be given to those documents would be a matter to be considered by the appellate Court while deciding the appeal. At this stage it is not necessary to comment on that aspect of the matter. The appellate Court therefore having permitted filing of the documents as per the order passed below Exhibit-17 on the ground that same appeared to be

helpful for just decision of the appeal ought to have thereafter followed the course as prescribed by Order XLI Rule 28 of the Code. By failing to do so the appellate Court has committed an error.

6. Hence for aforesaid reasons the order dated 31/10/2017 passed below Exhibit-20 to the extent reliance on documents at Serial Nos.1 to 4 in the list at Exhibit-25 had not been permitted is set aside. The appellate court shall follow the course as prescribed by provisions of Order XLI Rule 28 of the Code in respect of those documents. It is clarified that the appellate Court shall consider the evidentiary value of those documents when the appeal is taken up for hearing. Any observations made in this order shall not cause prejudice to the case of the respondent. By expediting the hearing of the appeal, the writ petition is allowed in aforesaid terms. No costs.

JUDGE