

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

WRIT PETITION NO.5843 OF 2017

Abdul Gani s/o Abdul Raheman

-vs-

Abdul Shakur s/o Abdul Raheman (dead) Thr. LR Ashiabi w/o Abdul Shankur and ors.

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

Court's or Judge's Orders.

Shri M. R. Johrapurkar, Advocate for petitioner.
Shri Nitin Vyavahare, Advocate for respondent Nos.1 to
6 and 8 to 15.

CORAM : A.S.CHANDURKAR, J.

DATE : September 30, 2019

Rule. Heard finally considering the short issue involved.

The appellant before the first appellate Court who is the present petitioner is aggrieved by the order passed below Exhibit-14 thereby rejecting the application filed under provisions of Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short, the Code).

2. Shri M. R. Johrapurkar, learned counsel for the petitioner by relying upon the decision in *Union of India vs. Ibrahim Uddin and anr. 2013 AIR (SC) 2752* submits that this application under Order XLI Rule 27 of the Code could not have been decided before considering the appeal on merits. He therefore submits that the impugned order has been passed by wrongly exercising jurisdiction in that regard.

3. Shri N. Vyavahare, learned counsel for the respondent Nos.1 to 6 and 8 to 15 submits that the appeal filed by the petitioner

itself is not maintainable. According to him since the suit has been filed under Section 6 of the Specific Relief Act, 1963, no appeal challenging the decree passed therein was maintainable. He therefore submits that the application has been rightly rejected by the appellate Court.

4. Heard the learned counsel. In the light of the law as laid down in *Union of India* (supra) it was not open for the appellate Court to have initially considered the application under Order XLI Rule 27 of the Code. That application was required to be considered along with the appeal as filed. On that count the impugned order is not sustainable. As regards objection to the maintainability of the appeal, till date the respondents have not raised any such objection to the maintainability of the appeal before the appellate Court. Needless to state if such objection is so raised, the appellate Court would consider the same on its own merits.

5. Accordingly the order passed below Exhibit-14 on 17/12/2016 is set aside. That application shall be considered along with the appeal in the light of law referred to herein above. All contentions of the parties are kept open.

The Writ Petition is allowed in aforesaid terms. No costs.

JUDGE