

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5388 OF 2021

1. Putalabai w/o Ramrao Ladde,
Age : 80 years, Occu. Household & Agri.
2. Shrimant s/o Ramrao Ladade,
Age : 55 years, Occu. Agri.
3. Balaji s/o Ramrao Ladade,
Age : 45 years, Occu. Agri.
4. Sunil s/o Ramrao Ladade,
Age : 42 years, Occu. Agri.

All r/o Phulari Galli, Udgir,
Tq. Udgir, District Latur

PETITIONERS
(Orig. Respondent
Nos.1 to 5 in R.C.A.)

VERSUS

1. Siddammabai w/o Harishchandra
Kamanna, Age : 40 years, Occu. Agri.
R/o Kapade Galli, Udgir, Dist. Latur
2. Harishchandra s/o Dattu Kamanna,
Age : 42 years, Occu. Agri.,
R/o Kapade Galli, Udgir,
Tq. Udgir, District Latur
3. Anita w/o Baburao Shetkar,
Age : 50 years, Occu. Agri.
R/o Kapade Galli, Udgir,
Tq. Udgir, District Latur
4. Gunwant Trimbak Ladade
Since deceased, through L.Rs.
- 4-1. Kasturabai w/o Gunwantrao Ladade,
Age : Major, Occu. Household,
R/o Phulari Galli, Udgir,
Tq. Udgir, District Latur

- 4-B. Shivkumar s/o Gunwantrao Ladade,
Age : Major, Occu. Gri.,
R/o Phulari Galli, Udgir,
Tq. Udgir, District Latur
- 4-C. Jagdevi @ Roopa w/o Chandrakant Mangne,
Age : Major, Occu. Household,
R/o Mehkar, Tq. Bhalki,
District Bidar (Kar.)
- 4-D. Mahdevi w/o Nagnath Biradar (Patil),
Age : Major, Occu. Household,
R/o Malewadi, Tq. Udgir,
District Latur
- 4-E. Sridevi w/o Rajkumar Hadole,
Age : Major, Occu. Household,
R/o Devarjan, Tq. Udgir,
District Latur
- 4-F. Rekha w/o Rajkumar Sidheshware,
Age : Major, Occu. Household,
R/o Dawanhipparga, Tq. Deoni,
District Latur
5. Nazir Mohammad Khan s/o Munwar Khan,
Age : 38 years, Occu. Agri.
R/o Udgir, Tq. Udgir, District Latur
6. Baswantrao s/o Malikarjun Dhumale,
Age : 60 years, Occu. Agri.,
R/o Kapale Galli, Udgir,
Tq. Udgir, District Latur
7. Ratikant s/o Ramrao Ladade,
Age : 53 years, Occu. Agri. & Service,
R/o Phulari Galli, Udgir,
Tq. Udgir, District Latur

RESPONDENTS

.....
Mr. G.R. Syed, Advocate for the petitioners
Dr. Swapnil D. Tawshikar, Advocate for respondent Nos.1, 2, 3 and 6
.....

CORAM : MANGESH S. PATIL, J.

DATE : 25.11.2021

ORAL JUDGMENT :

Heard.

2. Rule. The Rule is made returnable forthwith. Learned Advocate Dr. Tawshikar waives service for contesting respondent Nos.1 to 3 and 6. At the request of the parties, the matter is heard finally at the stage of admission.

3. The petitioners, who are the original plaintiffs defending an appeal filed by the contesting respondents, are aggrieved by the order passed by the appellate court on their application (Exh-40) seeking to produce a certified copy of a decree passed in Regular Civil Suit No.144/1969 under Order XLI Rule 27 of the Code of Civil Procedure.

4. Mr. Syed, learned Advocate for the petitioners submits that the application though was insisted for by the petitioners could have been taken up for hearing alongwith hearing of the appeal, the learned Judge has proceeded to even examine the worth of the facts to be established by production of certified copy of the decree. The approach is incorrect. It deprives the petitioners of putting up necessary evidence before the appellate court. Also a pleading regarding existence of such previous litigation and passing of the decree was made in the plaint thereby putting the respondents to notice about existence of such a decree. It is a suit for

declaration of ownership and injunction. The respondents would get an opportunity to demonstrate as to how the contents of the decree would not inure to the benefit of the petitioners. The impugned order being illegal be quashed and set aside.

5. Learned Advocate Mr. Syed would further cite the decision of this court in the case of *Sayyad Iqbal Sayyad Ismail Ustad Vs. Audumbar Ranganath Kotalwar died L.Rs.; Writ Petition No.9549 of 2017*, decided on **06.10.2017** and submits that the course adopted in this decision of directing the appellate court to decide the application alongwith the appeal be followed.

6. Per contra, Dr. Tawshikar, learned Advocate for the contesting respondents submits that the application suffers from the delay and laches. Though the decree was passed way back in the year 1969 and the suit was also filed in the year 1997, the certified copy of the decree is sought to be produced for the first time before the first appellate court. The stand being taken by the petitioners in the plaint is inconsistent with the finding in the decree. The application does not demonstrate the grounds to be made out under Order XLI Rule 27 of the Code of Civil Procedure and the petition be dismissed. In case the petition is to be allowed, the petitioners may be made to pay some costs. In support of his submission, he would cite following decisions of the Supreme Court:

- (i) ***Roop Chand Vs. Gopi Chand Thelia;***
Civil Appeal No.855 of 1978 and C.M.P No.906 of 1979,
decided on ***29.03.1989***
- (ii) ***Lekhraj Bansal Vs. State of Rajasthan and Ors.;***
Civil Appeal Nos.2848-2849 of 2014 (Arising out of Special
Leave Petition (Civil) Nos.14329-14330 of 2008), decided
on ***25.02.2014***

7. True it is that Order XLI Rule 27 of the Code of Civil Procedure lays down the specific circumstances under which leave can be granted at the appellate stage to produce a document or lead additional evidence. Even the decisions of the Supreme Court in the cases of ***Roop Chand*** and ***Lekhraj*** (supra) can safely be relied upon in this respect.

8. It is also true that inspite of having made averments in the plaint about existence of such a decree, no attempt was made to produce it at some earlier point of time. But then the very fact that reference to existence of such a decree was made in the plaint clearly demonstrates that the petitioners were not intending to hide anything. For whatever reasons, they did not produce the copy of the decree. Again, the fact that such an averment was already there in the plaint also demonstrates that the petitioners had also put the respondents to notice regarding existence of such a decree. Consequently, prima facie even it cannot be said that the respondents are being taken by surprise by such belated production of the certified copy of the decree.

9. Again, whether the stand that is being taken by the petitioners

in the plaint is compatible with the facts to be established by producing the certified copy of the decree is like prejudging the issue. When the appeal was ripe for hearing, the effect and worth of the document could have been conveniently considered and decided while deciding the appeal, the course which is held to be appropriate course to be followed by the appellate court, as laid down in the cases of *Malayalam Plantations Ltd. Vs. Stte of Kerala; (2010)3 SCC 487, Union of India Vs. Ibrahim Uddin and another; (2012)8 SCC 1481* and *A. Andisamy Chettiar Vs. A. Subhuraj Chettiar; AIR 2016 SC 79*.

10. True it is that even a request for taking up and deciding the application (Exh-40) alongwith the appeal could have been made by the petitioners. Whatever may be the reason, the approach of the learned Judge of the appellate court in proceeding to decide it without following the appropriate course, is not legal and proper.

11. Strictly speaking the application (Exh-40) may be devoid of the specific grounds as are required to be pleaded under Order XLI Rule 27 of the Code of Civil Procedure. But then unless and until a serious prejudice is likely to be caused to a party by such belated production, it would not be appropriate to refuse production even of certified copy of a public document of which knowledge is to both the sides.

12. The decisions in the case of *Roop Chand* and *Lekhraj* (supra) would clearly demonstrate that certain documents were sought to be

produced at the second appellate stage and no attempt was ever made to produce those at the first appellate stage. Therefore, strictly speaking the analogy cannot be pressed into service for the decision of this writ petition.

13. Considering all the aforementioned facts and circumstances, in my considered view, it would be appropriate to allow the writ petition by calling upon the first appellate court to decide the application (Exh-40) alongwith the appeal itself, subject to, however, by imposing certain costs on the petitioners.

14. The Writ Petition is allowed. The impugned order is quashed and set aside. The learned Judge of the first appellate court shall decide the application (Exh-40) alongwith the main appeal without being influenced by his earlier observations as also the observations of this court in this judgement. The petitioners shall deposit costs of Rs.3000/- in the first appellate court, which the contesting respondent shall be entitled to withdraw.

15. The Rule is made absolute in above terms.

[MANGESH S. PATIL]
JUDGE