

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 197 OF 2020

Vamneshwar Saunsthan,
A religious institution governed by
Regulamento das Mazanias
(Devasthan Regulations) having its office
at Dhavli, Ponda, Goa
represented by its duly constituted attorney
Gajanan Vasant Sinai Talaulikar
61 years of age,
tax consultant, residing at house no. 224,
near Mahalaxmi temple, Talaulim,
Ponda, Goa.

..... Petitioner

V e r s u s

1. Gajanan Babuso Sattarker,
major of age,
2. Sham Rama Sattarker,
major of age,
3. Sharada Gajanan Sattarker,
major of age, wife of Respondent no.1, and
4. Shanti Sham Sattarker,
major of age, wife of Respondent no.2,

All residing at Dhavli, Ponda, Goa.

..... Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Mr. Ashwin Ramani, Advocate
for the Petitioner.

Mr. A. D. Bhobe, Advocate for the Respondents.

Coram :- M. S. SONAK, J.

Date : 22nd June, 2021

ORAL JUDGMENT

1. Heard Mr. Sudin Usgaonkar, learned Senior Advocate for the Petitioner and Mr. A. D. Bhobe, learned Counsel for the Respondents.
2. Rule. Rule is made returnable forthwith at the request and with the consent of learned Counsel for the parties. Learned Counsel for the Respondents waives notice.
3. The challenge in this Petition is to the orders dated 18.10.2019 by which the First Appellate Court has dismissed the Petitioner's application under Order 41 Rule 27 of the Civil Procedure Code (CPC) for seeking leave to produce additional evidence at the appellate stage and application under Order 6 Rule 17 of the CPC seeking leave to amend the plaint so that there is no allegation that the evidence which the Petitioner now seeks to produce is not backed by the pleadings in the plaint.

4. Mr. Usgaonkar, learned Senior Advocate, relied upon the decision of the Hon'ble Supreme Court in *Union Of India vs Ibrahim Uddin & Anr* reported in *2012 (8) SCC 148*, to submit that both the applications should have been taken up only at the stage of final hearing of the appeal and not before. He submits that since this has not been done, the impugned orders are liable to be set aside with directions to the First Appellate Court to take up both the applications along with the final hearing of the appeal itself as was held by the Hon'ble Apex Court in *Ibrahim Uddin* (supra).

5. Mr. A. D. Bhobe, the learned Counsel for the Respondents, submits that the applications were in fact taken up at the stage of final hearing itself. He submits that in any case, the principle in *Ibrahim Uddin* (supra) does not apply to consideration of applications seeking leave to amend the plaint at the appellate stage. He submits that this is an attempt on the part of the Petitioner to simply delay the matter and in the absence of any jurisdictional error, this Petition is required to be dismissed.

6. The roznama has been produced on record by the Petitioners. The roznama does not indicate that the two applications were taken up at the stage of the final hearing of the appeal. True, ***Ibrahim Uddin*** (supra) is concerned, *inter alia*, that the stage at which an application under Order 41 Rule 27 of CPC is to be considered and does not delay with the issue of an application seeking leave to amend the plaint at the appellate stage. However, since it is submitted that both the applications seeking leave to amend the plaint and the application seeking leave to produce additional evidence at the first appellate stage are interconnected and have direct nexus with one another, according to me, it is only appropriate that in the peculiar facts of this case, both the applications are taken up for consideration along with the final hearing of the appeal itself.

7. In ***Ibrahim Uddin*** (supra), this is what the Hon'ble Supreme Court has observed at paragraphs 49, 50, 51, 52 and 53 :

“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 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 and Natha singh v. financial Commr. Taxation).

50. *In Parsotim Thakur v. Lal Mohar Thakur, it was held : (LW pp. 86-87)*

“The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under R.27, Cl.(1) (b) it is only where the appellate Court “requires”

it (i.e. finds it needful). The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but “when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent”, it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the Court adopts this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case...”
(Emphasis added)

51. In *Arjan Singh v. Kartar Singh* this Court held :

“7.....If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be

ignored and the case decided as if it was non-existent.....

8.....The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment” (Emphasis added)

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.

53. In the instant case, the application under Order XLI Rule 27 CPC was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999. In view of law referred to hereinabove, the order dated 28.4.1999 is just to be ignored.”

8. Applying the aforesaid principles to the peculiar facts of the present case, the impugned orders are hereby set aside not by adverting to their merits but merely because of the stage at which both the applications came to be considered by the First Appellate Court.

9. Now, the First Appellate Court is directed to consider the applications under Order 6 Rule 17 and Order 41 Rule 27 of the CPC at the time of final hearing of the appeal at the 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. This will be an approach consistent with which has been laid down by the Hon'ble Supreme Court in the case of ***Ibrahim Uddin*** (supra).

10. The Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

11. All concerned to appear before the First Appellate Court on 08.07.2021 and file an authenticated copy of this order so that the First Appellate Court can proceed accordingly.

12. The First Appellate Court to dispose of the appeal and the pending applications as expeditiously as possible and, in any case, within three months from the date the parties file authenticated copy of this order.

13. All parties including in particular the Petitioner herein to co-operate with the First Appellate Court for the expeditious disposal of the appeal and the pending applications by not seeking any unnecessary adjournments in the matter.

14. All concerned to act on the basis of an authenticated copy of this order.

M. S. SONAK, J.