

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.1048 OF 2019**

1. Mrs. Maria Felicidade Amaltina
Mascarenhas, aged 79 years,
occupation, retired from service,
wife of the Shri Antonio Gregorio
Baltazar Jesus Rodrigues (s.d),
residing at House No.392, 4th Ward,
Colva, Salcete, Goa.
2. Dr. Bernard Felinov Rodrigues,
aged 57 years, service,
son of Shri Antonio Gregorio
Baltazar Jesus Rodrigues (s.d),
3. Mrs. Tecla Camila Diniz,
aged 53 years, housewife,
wife of (2) above, both
(2) and (3) resident of
House No.14, Aquem Baixo,
Margao, Goa.
4. Mr. John Herminov Rodrigues,
aged 54 years, son of Shri Antonio
Gregorio Baltazar Jesus Rodrigues
(s.d), and having his residence at
House No.392, 4th Ward,
Colva, Salcete, Goa.
5. Mr. Anthony Brenov Rodrigues,

aged 42 years, advocate by
profession, son of Shri Antonio
Gregorio Baltazar Jesus Rodrigues
(s.d),

6. Mrs. Beulah Syible Deborah Cota,
aged 38 years, advocate by profession,
wife of (5) above and both (5) and (6)
resident of House No.392, 4th Ward,
Colva, Salcete, Goa. Petitioners.

V/s.

1. Shri Joao Francisco Serrao
alias John Francisco Serrao,
aged 71 years, married,
businessman and his wife;
2. Smt. Julieta Silva e Serrao,
aged 64 years, housewife,
both residing at House No.192,
3rd Ward, Colva, Salcete, Goa. Respondents

Mr. Zeller De Souza, Advocate for the petitioners.

Mr. Ashwin D. Bhobe, Advocate for the respondents no.1 and 2.

Coram : M. S. SONAK, J.

Date : 17th February, 2021.

Oral Judgment:

Heard Zeller De Souza, the learned Counsel for the

petitioners. Mr. A.D. Bhobe, the learned Counsel for the respondents no.1 and 2.

2. Rule.

3. Rule is made returnable forthwith at the request of the learned Counsel for the parties.

4. The short question which arises for determination in this petition is not whether the petitioners application under Order 41 Rule 27 of C.P.C. ought to have been allowed or not but the question is the stage at which the said application should have been taken up for consideration.

5. In **Union of India Vs. Ibrahim Uddin and another (2012) 8 Supreme Court Cases 148**, the Hon'ble Supreme Court has made the following observations at paras 49 to 53.

49. An application under Order 41 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 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 Section 107, Civil Procedure Code, as elucidated by Order 41 Rule 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 Rule 27, clause (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 supply

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 Rule 27(2) to record its reasons for so doing and under Rule 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)

(See also Indrajit Pratap Sahi v. Amar Singh.)

51. In Arjan Singh v. Kartar Singh this Court held: (AIR pp. 195-96, paras 7-8)

“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 its judgment.”

(emphasis added)

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, the 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 41 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.

6. From the aforesaid, it is clear that such applications are to be taken up for consideration alongwith the final hearing of the appeal. In this case, it appears that the petitioners' application was taken up for consideration independently and not at the stage of the final hearing of the appeal.

7. On the aforesaid, short ground and without advertng to the merits, the impugned Order dated 7th August, 2018 is set aside. The petitioners' application under Order 41 Rule 27 is restored to the file of the Appellate Court and the Appellate Court to take up and to dispose of such application in accordance with law and on its own merits by following the aforesaid observations made by the Hon'ble Supreme Court in the case of **Ibrahim Uddin and another** (supra).

8. It is made clear that this Court has not adverted to the merits of the rival contentions and therefore, it will not be for the Appellate Court to advert to the rival contentions on its own merits and in accordance with law.

9. The Rule in this petition is made absolute in the aforesaid terms.

10. There shall be no order as to costs.

11. All concerned parties to act on the authenticated copy of this Order.

M. S. SONAK, J.

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