

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

11 WRIT PETITION NO.5159 OF 2018

**SAYED LADDU SAYYED GANI AND OTHERS
VERSUS
GORI BEGUM RAHIMKHA PATHAN AND OTHERS**

...
Advocate for Petitioners : Mr. Mukul Kulkarni h/f. Mr. R.R. Sancheti
Advocate for Respondent Nos.1 to 5 & 7 : Mr. Shaikh Ashpak Taher
Advocate for Respondent Nos.1, 3 to 5 : Mr. S.P. Katneshwarkar
Advocate for Respondent Nos.1, 3 to 5 : Mr. Athrva Makrand Pathak
...

CORAM : SANDEEP V. MARNE, J.

DATE : 09-11-2022

PER COURT :

. By the present petition, the petitioners have challenged order dated 15.01.2018 passed by the Ad-hoc District Judge-2, Jalna thereby rejecting the petitioners application filed under Order-41, Rule-27 of the Code of Civil Procedure for permission to lead additional evidence in appeal.

2. Mr. Kulkarni, the learned counsel appearing for the petitioners raises a preliminary objection to the impugned order on the ground that the application for production of additional evidence could not have been decided by the District Judge before taking up the appeal for hearing. In this regard, he relies upon the decision of the Apex Court in **Union of India vs. Ibrahim Uddin & Anr**, 2012 (0)

BCI 168. Mr. Kulkarni further invites my attention to the pleadings of the plaintiffs in the plaint which make specific reference to the sale-deed which was sought to be brought on record as an additional evidence. Referring to those pleadings, Mr. Kulkarni would question the finding of the District Judge about there being no whisper of sale-deed in the written-statement filed by the petitioners in the suit. Mr. Kulkarni also invites my attention to the findings recorded by the trial court while deciding the suit whereby the sale-deed has been referred and conclusions thereof have been drawn. Mr. Kulkarni would therefore submit that the application of the petitioners for production of additional evidence ought to have been allowed by the District Judge.

3. Per contra, Mr. Pathak, the learned counsel appearing for respondent nos.1, 3 to 5 opposes the petition. He would submit that the sale-deed which was sought to be brought on record by way of additional evidence is shown to have been executed in the year 2004 and was sought to be brought on record for the first time in the year 2017. He would further submit that the suit was decreed on 27.02.2014 and even while filing the appeal memo the petitioners failed to produce the said sale-deed along with the appeal memo. He would further submit that the application for production of additional

evidence was filed only at the stage where the appeal was to be heard finally. Referring to the contentions raised in the application to seek production of additional evidence, Mr. Pathak would submit that the vague contentions were raised in that application without specifying the exact date or period when the sale-deed was allegedly found by the petitioners. He would further submit that the petitioners failed to refer to the said sale-deed in their written-statement. Mr. Pathak would also make alternate submission that the application for production of additional evidence be directed to be decided while deciding the appeal itself. He would also alternatively submit that hearing of the appeal be expedited.

4. Having heard the learned counsel for the parties, I find considerable force in the objections raised by Mr. Kulkarni that the application for production of additional evidence filed under Order 41, Rule-27 of the Code of Civil Procedure ought not to have been decided by the District Judge before taking up the appeal for hearing. In this regard, reliance of Mr. Kulkarni on the judgment of the Apex Court in **Ibrahim Uddin & Anr** (*supra*) appears to be apposite. In para - 41 of the judgment, the Apex Court has held as under:

‘41. 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.

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.'

5. Considering the ratio of the judgment in **Ibrahim Uddin & Anr** (*surpa*) it is clear that the application for production of additional evidence ought to have been considered by the District

Judge only at the time of hearing of the appeal.

6. Even though I have extensively heard both the counsels on the merits of the impugned order passed by the District Judge, considering the ratio of the judgment in **Ibrahim Uddin & Anr** (*supra*), I deem it appropriate to set aside the order dated 15.01.2018 and restore the application at Exh.23 filed by the petitioners on the file of the District Judge to be taken up and decided while hearing the appeal finally. Accordingly, I proceed to pass the following order.

ORDER

- (i) Order dated 15.01.2018 passed by the Ad-hoc District Judge-2, Jalna on application below Exh.23 is set aside.
- (ii) The application filed by the petitioners at Exh.23 is restored. The issue of consideration of additional evidence sought to be produced by the petitioners in support of their appeal be considered and decided by the District Judge while deciding the appeal finally.
- (iii) Considering the fact that the present petition is pending since the year 2018 and there has been stay to the proceedings before the District Judge, the District Judge is requested to expedite the hearing of the appeal and to decide it as expeditiously as possible, preferably within a period of six months from today.

(iv) Writ Petition is accordingly disposed of.

(SANDEEP V. MARNE, J.)

GGP