

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

**SECOND APPEAL NO.508 OF 2019
WITH CA/10646/2019 IN SA/508/2019**

LOTAN KASHIRAM BAVISKAR AND OTHERS
VERSUS
PREMCHAND @ ANIL SOMA SONAWANE

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Advocate for Appellants : Mr. Rane Girish S.
Advocate for Respondent : Mr. Patil Atmaram J.

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CORAM : MANGESH S. PATIL, J.

DATE : 28.01.2022

PER COURT :

Heard both the sides. The appeal is admitted on the following substantial question of law which arises for determination of this Court :

Whether the appellate court could have decided the appeal even without recording any finding on the Application (Exhibit-17) filed by the appellant herein purportedly under Order XLI Rule 27 of the Civil Procedure Code, more so when in Writ Petition No.10747/2015, by the order dated 10.10.2018 this Court had quashed and set aside the order passed on the application (Exhibit-17) and had restored it for reconsideration by the appellate court in the light of the decision of the Supreme Court in the case of **Union of India Vs. Ibrahim Uddin and Anr.; 2013 AIR SCW 2752 (1) ?**

2. The respondent is the original plaintiff who prayed for specific performance of an agreement to sell the suit property. The stand of the

appellant who are the original defendants was to the effect that it was a money lending transaction and the sale deed was executed only by way of a security. Since the suit was decreed they preferred appeal. By moving application (Exhibit-17) they sought to produce documents *prima facie* to demonstrate that the respondent was in the habit of entering into such transactions and was in fact a money lender.

3. The application (Exhibit-17) was initially allowed by the appellate court but only partly and only certified copy of judgment in RCS No.32/2005 was allowed to be produced. The appellant had challenged that order before this Court in Writ Petition No.10747/2015 and by referring to the decision in the case of **Ibrahim Uddin** (supra) the Court had allowed the Writ Petition in following words :

- “4. However, looking at decision of Supreme Court referred to above, the order cannot be sustained, as such, the same is set aside. While considering the application for additional evidence, the court may give regard to that respondents herein do not have particular objection to production or evidence of documents as allowed under impugned order.
5. Needless to refer that application Exhibit – 17 gets restored for reconsideration, in accordance with observations of Supreme Court.
6. Regular Civil Appeal No.58 of 2012, be expedited.”

4. In spite of such state of affairs, apparently the appellate court has by the judgment and order under challenge merely referred to the judgment in Regular Civil Suit No.32/2005 and did not decide the application (Exhibit-17) as was expected by the order in the Writ Petition.

5. Needless to state that what is worth of the documents sought to

be produced cannot be embarked upon at this juncture. The fact remains that the appellate court was duty bound to decide that application (Exhibit-17) and then depending upon the result it should have decided the appeal. It has clearly abdicated its duty.

6. In the circumstances, there is no alternative but to quash and set aside the order of the appellate court and remand the matter for a fresh decision not only in the appeal but also on the application (Exhibit-17).

7. I, therefore, answer the aforementioned question in the negative.

8. The Second Appeal is partly allowed. The judgment and order under challenge is quashed and set aside. The matter is remanded back to the first appellate court which shall now decide the appeal afresh along with on the application (Exhibit-17).

9. The Appeal shall stand expedited and the appellate court shall make every endeavour to hear and decide it as early as possible and in any event within a period of four months.

10. Parties to appear before the appellate court on 07.02.2022 and there shall be no need to issue any notice to them.

11. R & P be sent back immediately.

12. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)