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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9507 OF 2022

Bhagawan Kallappa Awate ... Petitioner
V/s.
Mangal Pravin Dhale ... Respondent

Mr. Prasad P. Kulkarni for the Petitioner.

CORAM : S. M. MODAK, J.

DATED : 20TH SEPTEMBER 2022.

P.C:-

1. Heard learned Advocate for the Petitioner/Original Defendant.
2. The correctness of order dated 9th February 2022 passed by the First Appellate Court below Exhibit-42 is challenged by this Writ Petition. As per said application, present Petitioner has made the following two requests :
 - (a) To direct the Plaintiff to examine certain witnesses;
 - (b) To permit the Defendant to examine certain witnesses
3. The First Appellate Court has rejected that application. It was filed as per the provisions of Order 41 Rule 27 of the Code of Civil Procedure.
4. I have perused copy of the application at Exhibit-42 filed in the First Appellate Court. The request for additional evidence was predominantly made for reason that inspite of framing of additional

issues, the trial Court has not granted an opportunity to the parties including the Defendant to adduce the evidence.

5. The First Appellate Court while rejecting that request has referred the Application at Exhibit-98 filed by the Plaintiff before the trial Court. Copy of that application is not filed along with this Writ Petition. In para 2 of the impugned order it is observed that “interesting in learned the trial Court’s order dated 4th September 2018 passed on Exhibit-98 is also conspicuous on record”.

6. It is further observed that “it is material to note that the trial Court has discussed the contentions made by the Appellant/Original Defendant”. The First Appellate Court mean to say that additional issues were framed after hearing the Defendants.

7. If this reasoning are perused, it seems that they are not clear. A copy of the additional issues is filed at page 25. Three additional issues were framed on 4/09/2018. It pertains to a) bonafide requirement, b) hardship and c) non payment of municipal taxes by the Defendant. The trial Court has incorporated these additional issues in the judgment on page 30 as Issue Nos.6 to 8. All have been answered in favour of the Plaintiff. If these are factual aspects, the First Appellate Court ought to have dealt with the grievance that after framing additional issues, parties were not given an opportunity to lead evidence. First Appellate Court only said “trial court has heard the parties”, But hearing the parties is one aspect & giving an opportunity to give evidence is another aspect.

8. It is true that an application under the provision of Order 41 Rule

27 of the Code of Civil Procedure has to be decided on the basis of guidelines given in Order 41 Rule 27. It consists of various contingencies. It includes evidence not accepted by the trial Court, evidence not found inspite of due diligence and when evidence is required for proper determination of dispute. The request has to be decided on touchstone of either of these contingencies.

9. So the contingency raised before the First Appellate Court is that after framing of additional issues, the parties, more specifically the Defendant was not permitted by the trial court to adduce evidence. The First Appellate Court in fact could have dealt with it in better way by mentioning in the order what has happened after additional issues were framed till the time judgment is pronounced. The Appellate Court was having record of the trial Court. So after perusing the record, the Application could have been decided in better way. So the order cannot be sustained in the eyes of law.

10. The First Appellate Court can decide the application afresh by going through the record of the trial Court and by giving appropriate reasons. The Appellate Court to consider Order 41 Rule 27 and various contingencies laid down therein. There is reliance placed on the judgment in case of *Union of India vs. Ibrahim Uddin and Another* reported in **(2012) 8 SCC 148** and more specifically para 52. There is grievance that the First Appellate Court out to have decided Application along with Appeal and not earlier and the First Appellate Court committed wrong in deciding Exhibit-42 prior to deciding the Appeal.

11. Once the matter is remanded it may not be appropriate for this

Court to give any comment about its applicability. The Appellant is at liberty to place reliance on the said judgment and the First Appellate Court may express its opinion on applicability depending upon the facts of this case.

12. On perusal of the impugned order, in my opinion the impugned order is not well reasoned order, however, this Court feels to remand the matter. This Court has not felt it necessary to issue notice to the Respondents. It has not caused any prejudice to the Respondents. It is for the Respondent to certainly argue their case before the First Appellate Court. Hence the following order is passed :

ORDER

- (a) The order dated 9th February 2022 passed below Exhibit-42 is set aside.
- (b) The First Appellate Court is directed to decide Exhibit-42 afresh after hearing both sides on the contingencies of Order 41 Rule 27 of the Code of Civil Procedure.
- (c) The Appellant is at liberty to place reliance upon the judgment *Union of India vs. Ibrahim Uddin and Another* (supra).
- (d) The Appellate Court to take a decision when to decide Exh. 42 i.e. to say alongwith appeal or earlier to appeal.

13. Writ Petition is disposed of accordingly. No costs.

(S. M. MODAK, J.)