

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION 1772 OF 2022

1. Natha s/o. Anand Paithane,
aged 61 yrs, Occ. Agriculturist,
2. Shamrao s/o. Anand Paithane,
aged 56 yrs, Occ. Agriculturist,
3. Dattu s/o. Natha Paithane,
aged 41 yrs, Occ. Agriculturist,
4. Dashrath s/o. Natha Paithane,
aged 44 yrs, Occ. Agriculturist,
5. Pandharinath s/o. Natha paithane,
aged 42 yrs, Occ. Agriculturist,
6. Rahul s/o. Natha Paithane,
aged 31 yrs, Occ. Agriculturist,
7. Samadhan s/o. Shamrao paithane,
aged 26 yrs, Occ. Agriculturist,
8. Dwarkabai w/o. Natha Paithane,
aged 45 yrs, Occ. Agriculturist,
9. Kamlabai w/o. Shamrao Paithane,
aged 51yrs, Occ. Agriculturist,
10. Indu Pandharinath Paithane,
aged 36 yrs, Occ. Agriculturist,
11. Subhash s/o. Shamrao Paithane,
aged 25 yrs, Occ. Agriculturist,
12. Shobha s/o. Dashrath Paithane,
aged 45 yrs, occ. Agriculturist,
13. Mayawati Dattu Paithane,
aged 37 yrs, occ. Agriculturist,

14. Mandabai w/o. Samadhan Paithane,
aged 24 yrs, Occ. Agriculturist,

All r/o. Dhotra (Nandai),
Tahsil Deulgaon Raja, District Buldana **PETITIONERS**

VERSUS

1. Amol s/o. Arun Mundhe,
Through his Gai father, Arun
Eknath Mundhe, aged 44 yrs,
Occ. Agriculturist, r/o. Dhotra(Nandai),
Tahsil Deulgaon Raja,
District Buldana
2. Indirabai w/o. Rama @ Chinda Paithane
aged 65 yrs, Occ. Agriculturist,
r/o. Dhotra (Nandai),
Tahsil Deulgaon Raja, District Buldana
3. Eknath s/o. Sitaram Mundhe,
aged 70 yrs, Occ. Agriculturist,
r/o. Dhotra (Nandai)
Tahsil Deulgaon Raja, District Buldana **RESPONDENTS**

Mr. M.P. Kariya, counsel for the petitioners.

CORAM : **ROHIT B. DEO, J.**
DATED : **13th APRIL, 2022**

ORAL JUDGMENT :

The petitioners are assailing the order dated 11.2.2022, rendered by District Judge – 1, Buldhana, in Regular Civil Appeal 124/2012, whereby application (Exhibit 106) purportedly preferred by the petitioners under Order XLI Rule 27 of the Code of Civil Procedure (“Code”, for short), for production of additional evidence in appeal, is rejected.

2. The petitioners are the original defendants in Regular Civil Suit 236/2003, which was instituted by respondent 1 herein, seeking possession of the suit property which is agricultural land, admeasuring 3.24 H.R., situated at village Dhotra (Nandai), Tahsil Deulgaon Raja, District Buldana.

3. The case of the plaintiff was that defendant 1 Mrs. Indirabai Rama @ Chindhaji Pathane was the owner of the suit property and she alienated the suit property for legal necessity vide registered sale-deed dated 30.12.2002, in favour of the plaintiff and since then, the plaintiff is the owner and in possession. The plaintiff then alleged that the defendants forcibly dispossessed the plaintiff from the suit property on 5.5.2013.

4. It appears that the defendant 1 Mrs. Indirabai Paithane admitted the claim of the plaintiff. However, the defendants 3 to 16 resisted the claim of the plaintiff. The defence was that the suit property was received by the uncle of the defendants 3 and 4 from the Government, on rent and during his lifetime, the said uncle executed Will bequeathing the suit property in favour of his wife and nephews, who are defendants 3 and 4. It is further the claim that the said uncle also executed a memorandum of partition in accordance with which

half the land fell to the share of Mrs. Indirabai only for the purpose of maintenance and that Mrs. Indirabai did not have right to alienate the property. It was broadly on such averments that the contesting defendants claimed that the sale-deed executed by Mrs. Indirabai did not transfer title in favour of the plaintiff.

5. The trial Judge held that the plaintiff proved the possession of the suit property prior to 5.6.2003 and further proved that the defendants 3 to 16 dispossessed him on 5.6.2003. The case of the defendants 3 and 4 of acquiring title was rejected. While the trial Court held that Mrs. Indirabai did have the right to alienate the property, the sale-deed was not held invalid. The plaintiff was held entitled to possession of the suit property. The judgment and decree in Regular Civil Suit is challenged in Regular Civil Appeal 124/2012. The application under Order XLI Rule 27 is preferred on 9.10.2017. In paragraph 2, what is alleged is that during the pendency of the suit, the defendants were not aware about the existence of certain documents such as the judgment in Regular Civil Suit 63/2005 decided on 30.10.2009. The next averment is that the defendants wish to place on record registered Will-deed of Mr. Rama @ Chindha, consolidation chart, 7/12 extract, judgment and decree in Regular Civil Suit 63/2005, mutation entry, written statement in Regular Civil Suit 114/2011 filed by the Tahsildar, copy of the plaint in Regular Civil Suit 114/2014 filed

by Rama @ Chindha, certified copy of record of right and of Miscellaneous Application 2/2010. A general and vague averment is made that all the documents are necessary to help the Court to arrive at the right conclusion.

6. The provisions of Order XLI Rule 27 read thus:

27. Production of additional evidence in Appellate Court – (1)The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate court, the Court shall record the reason for its admission.

Amendments : Objects and Reasons. - *Clause 90 – sub-clause (xv) – Rule 27 is being amended to provide that additional evidence may be received by the Appellate Court if the appellant satisfies the Court that, after the exercise of due diligence, such*

evidence was not within his knowledge or could not be produced when the appeal was decided against him.

[Statement of Objects and Reasons (Bill) – Gazette of India, Ext., dt. 8.4.1974, Pt.II, S.2, p.338-339]

7. Clause (a) of sub rule 1 of Rule 27 is clearly not attracted since it is not the case of the defendants that the trial Court refused to admit the evidence on record. Clause (b) is also not attracted at this stage. The only clause which is attracted given the recitals in the application under Order XLI, Rule 27 is clause (aa), sub rule (1). The said clause obligates that the person seeking to produce additional evidence must plead and establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed.

In my considered view, there is absolutely no attempt made in the application preferred under clause (aa) of Order XLI, Rule 27(1) to establish that despite the exercise of due diligence, the documentary evidence could not have been produced in the trial Court. In this view of the matter, the rejection of the application by the learned trial Judge is unexceptionable.

8. The learned counsel for the defendants Mr. M.P. Kariya is relying on the decision of the Supreme Court in ***Union of India vs. Ibrahim Uddin and another***, (2012)8 SCC 148, and particularly, on the observations in paragraph 49, which read thus:

“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 & Ors.](#), AIR 1951 SC 193; and [Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors.](#), AIR 1976 SC 1053).”

In my considered view, the observations of the Supreme Court cannot be read or understood as precluding the appellate Court from rejecting an application which is preferred invoking clause (aa) of Order XLI, Rule 27(1), if on the face of the averments, no attempt is made to establish due diligence.

The factual matrix which fell for consideration in the decision supra was that the application under Order XLI Rule 27 of the Code was

as a fact, allowed before the final hearing, which constrained the Supreme Court to observe that there was no application of mind as to whether such evidence is required to be taken on record to pronounce the judgment or not. The facts in the decision cited, and the consideration, clearly turns on the provisions of clause (b) of Order XLI, Rule 27(1). Clause (b) serves a salutary purpose. The provision ensures that in the search of the truth, the appellate Court shall not be fettered or constrained by evidence which ought to be on record, and which alone, shall enable the appellate Court to pronounce the judgment. Clause (b) does not create any right in favour of a litigant. The discretion is absolutely and exclusively that of the Court, and therefore, it is enunciated that such discretion shall be exercised only at the stage of final hearing since at that stage, the appellate Court shall be in a position to decide whether judgment can or cannot be pronounced on the basis of evidence which is available on record. In my considered view, it would be stretching the observations of the Supreme Court too far if the same are understood as laying down an absolute proposition that where the litigant is invoking clause (a) and the application ex facie discloses no averment that despite exercise of due negligence, the evidence could not be produced on record of the trial Court, the consideration must be necessarily postponed.

9. Having said so, I must clarify that the rejection of the

application by the order impugned shall not come in the way of the appellate Court to consider the prayer for production of evidence, if at the stage of final hearing, the appellate Court comes to the conclusion that judgment cannot be pronounced on the basis of evidence on record. Nothing observed herein shall be understood or construed to lay down, that the rejection of the application which invokes clause (aa) on the ground that there is no due diligence pleaded much less proved, shall come in the way of the appellate Court in exercising the discretion under clause (b), which needless to observe, shall be exercised only at the stage of the final hearing of the appeal as is mandated by the articulation of the Supreme Court. It is further clarified that it shall be open to the defendants to prefer an appropriate application at the stage of final hearing invoking the provisions of clause (b) of Order XLI, Rule 27(1) of the Code.

10. Subject to the aforesaid observations, I see no error to interfere with the order impugned.

11. The petition is disposed of.

JUDGE

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Digitally Signed By:BELKHEDE
RAVINDRA SURESHRAO
P.A. to the Hon'ble Judge
Signing Date:22.04.2022 10:14