

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13448 OF 2016

Loknete Rajarambapu Patil Hospital

...Petitioner.

Versus

Oriental Insurance Company Ltd. & Ors.

..Respondents.

Dr. Uday P. Warunjikar for the petitioner.

Mr. Rushabh Vidyarthi , Mr. A.S. Vidyarthi, Ms. Ishita Bhole, Mr. shasvat Vidyarthi and Mr. Parth Parikh i/b Mr. Asim Vidyarthi for respondent No.1.

Coram : Sharmila U. Deshmukh, J.

Date : July 25, 2023.

P. C. :

1. The challenge in the petition is to the order dated 29th September 2016 passed by the appellate court in RCA number 27 of 2013 allowing the appellant's application filed under Order 41 Rule 27 of CPC.

2. Regular civil suit No. 194 of 2007 came to be filed by the petitioner-plaintiff challenging the cancellation of the mediclaim insurance policy by the respondent insurance company and for a declaration that the insurance policy remains effective till the period of its expiration. The suit came to be decreed by the judgment and

order dated 13th December 2012 as against which RCA No.27 of 2013 came to be filed. On 21st August 2015 application came to be moved by the respondent appellant under order 41 rule 27 for production of additional evidence. It was contended in the said application that one of the grounds of defence in the suit and in the appeal is that the respondent-plaintiff had not filed the complete document of the mediclaim insurance policy and that the plaintiff had submitted only agreement part of the policy. It was further contended that during the pendency of complaint at Alibag consumer Court, the insurance company while scrutinising the documents realised that the plaintiff respondent had submitted the mediclaim policy in the consumer complaint and as such got the certified copy of the documents submitted by the plaintiff in the matter in consumer court. It is this certified copy of the document which the appellant sought to produce. The prayer in the application is that to decide the matter correctly on merits the said document be allowed to be produced on record. Objections were raised to the said application by the plaintiff by its reply dated 27th August 2015. By the impugned order dated 29th September 2016 the application has been allowed and the appellant has been allowed to produce the document.

3. Heard Dr. Warunjikar, learned counsel appearing for the petitioner and Mr. Vidyarthi, learned counsel appearing for the respondent.

4. Learned counsel appearing for the petitioner submits that the said document was produced by the appellant along with the list below exhibit 18. He would further contend that it was therefore incumbent on the defendant to get the document proved during the cross-examination by putting necessary questions as regards the said policy which was not done in the present case. He would further submit that the appellant is now trying to produce the document at the appellate stage which is for the purpose of filling up the lacuna which cannot be permitted.

5. *Per contra*, learned counsel appearing for the respondent submits that the document was already on record and what the appellant seeks to produce is the document to show that the complete mediclaim policy was produced before the consumer court and the same was for the purpose of showing the conduct of plaintiff and is necessary to decide the dispute between the parties.

6. Considered the submissions.

7. Before going into the merits of the case it would be beneficial to refer to the decision of the apex court in the case of ***Union Of India Versus Ibrahim Uddin [(2012) 8 SCC 148]***. The apex court in that case dealt with the stage at which an application under order 41 rule 27 can be considered. The apex court held in paragraph 49 as under :

"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)."

8. Considering the law laid down by the apex Court, the true test for permitting the additional evidence at the appellate stage is whether the appellate court is able to pronounce the judgment on the material before it without taking into consideration the additional

evidence sought to be produced. The apex Court has held that 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.

9. In the present case, this court is informed that the matter was kept for final hearing at which stage the application came to be filed. However, considering the decision of the apex court it is necessary for the appeal to be heard on merits for the appellate court to come to a conclusion that for the purpose of pronouncing the judgment or for any other substantial cause the evidence sought to be produced is required to be produced. This discretion is required to be exercised by the appellate court at the time of hearing of the appeal on merits. It has not been demonstrated to this court that the hearing of appeal has started and it is merely pointed out that the stage is for arguments on the appeal. In that view of the matter the application in question has to be decided upon the appellate court examining the evidence, for the Court to come to a conclusion that the said evidence is necessary for the appellate court to pronounce the judgment or for any other substantial cause.

10. In view of the above in my opinion the impugned order

dated 29th September 2016 is hereby quashed and set aside and the application filed by the appellant under order 41 rule 27 of CPC is restored to the file to be considered by the appellant Court at the time of hearing of appeal.

11. Considering that the appeal is of the year 2013 the appellate court is requested to expedite the hearing of appeal and in any event to decide the same within a period of 3 months from today. Learned counsel appearing for the respective parties assure this court that full cooperation will be extended to the appellate court to ensure the expeditious disposal of appeal.

[Sharmila U. Deshmukh, J.]