

VRJ

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

WRIT PETITION NO.14026 OF 2022

Ashok Vishwasrao Chavan

Since Deceased Through Legal Heirs

... Petitioners

V/s.

Jayant Shivpal Banchode

... Respondent

VAIBHAV
RAMESH
JADHAV
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VAIBHAV RAMESH
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Mr. Yogesh Patil for the petitioners.

Mr. Drupad S. Patil for the respondent

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 4, 2023

PC.:

1. This is a petition under Article 227 of the Constitution of India challenging order dated 31st January 2020 passed by the District Judge-7, Kolhapur in Regular Civil Appeal No.187 of 2017 rejecting the applications under Order 41 Rule 27 of the Civil Procedure Code, 1908.

2. The respondent filed Special Civil Suit No. 138 of 2013 seeking specific performance of agreement to sell dated 18th February 2011. The Trial Court, by judgment and decree dated 2nd September 2015, decreed the suit directing the defendants to get approval of the cooperative housing society where the suit property is situated. On failure of the defendants, the plaintiff was permitted to apply before the housing society.

3. The defendants being aggrieved by the said decree filed

Regular Civil Appeal No.187 of 2017. During the course of final arguments, the defendants (appellants) filed three applications under Order 41 Rule 27 of the Civil Procedure Code, 1908, seeking permission to produce on record the documents to indicate that only Ex-servicemen are entitled to become member of the housing society and, therefore, the plaintiff is not entitled to get any relief.

4. The appellate Court, by the impugned order, rejected the applications on the ground that by-laws of the society was within the knowledge of the defendants. There was no due diligence on the part of the appellants. Considering nature of the decree, the documents sought by the appellants are not necessary to pronounce judgment.

5. Learned advocate for the petitioner submitted that the father of the appellants was looking after the proceedings of the suit. The documents sought to be produced on record were not within the knowledge of the appellants. The documents are necessary for effectual adjudication of the appeal.

6. It is well settled that the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908, needs to be adjudicated by the appellate Court during the course of final arguments on the appeal. From the impugned order, it is clear that the impugned order is passed after conclusion of arguments of the appellants. Therefore, the stage for decision on the applications under Order 41 Rule 27 of the Civil Procedure Code, 1908, was not improper.

7. Learned advocate for the petitioner submitted that the Judge who decided the applications was thereafter transferred and,

hence, therefore arguments are necessary. Therefore, re-adjudication on the applications under Order 41 Rule 27 of the Civil Procedure Code, 1908, is required. In my opinion, the said submission cannot be accepted. The requirement as held by the Apex Court in the case of **Union of India vs. Ibham Uddin and Another** reported in (2012) 8 SCC 148 is that the appellate Court shall decide application under Order 41 Rule 27 during the course of final arguments. Once the stage for decision on an application under Order 41 Rule 27 was right, the valid adjudication on an application under Order 41 Rule 27 cannot be re-done.

8. Therefore, the submission of the petitioners that such application needs to be decided afresh by the appellate Court cannot be accepted.

9. Learned advocate for the petitioners then submitted that due to ill-health of the father of the appellants and the lack of knowledge of the appellants, they could not file the application earlier. Reading of the application makes it clear that none of the ingredients of Clause (1)(aa) or (b) of Rule 27 of Order 41 are made out. The expression “due diligence” under Order 41 Rule 27 of the Civil Procedure Code, 1908, needs to be pleaded in the application and satisfaction needs to be recorded by the appellate Court. The explanation furnished by the appellants cannot be termed as due diligence. Therefore, in my opinion, there is no error of jurisdiction in an order passed by the appellate Court.

10. Hence, the writ petition is dismissed. No costs.

(AMIT BORKAR, J.)