

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10166 OF 2019

Machindranath Muktaji Gaikwad

...Petitioner.

Versus

Kanifnath Muktaji Gaikwad & Ors.

..Respondents.

Mr. Uday B. Nighot for the petitioner.

Coram : Sharmila U. Deshmukh, J.

Date : July 6, 2023.

P. C. :

1. Heard.
2. The challenge in the petition is to the order dated 21st June 2019 rejecting the petitioner's application filed under Order-41 Rule 27 of the Code of Civil Procedure, 1908 [for short "CPC"] for production of additional evidence in the appellate court.
3. Mr. Nighot, learned counsel for the petitioner has invited the attention of this court to Issue No.2 framed by the trial court casting a burden on the plaintiff-petitioner to prove that the sale deed executed by defendant no.1 in favour of defendant no.6 is a false and bogus sale deed. He would submit that the burden was

wrongly cast on the plaintiff and has been answered in the negative for the reason that the sale deed was not produced. He would further submit that for the effective adjudication of appeal, the production of additional evidence is necessary. He would further point out that the defendants had not appeared before the trial court and as such no prejudice will be caused to them if the production of additional evidence is allowed.

4. Considered the submissions.

5. It would be necessary to reproduce the provisions of Order-41 Rule-27 of CPC, which read thus :

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

6. A plain reading of above provisions indicates that if the appellate court requires such evidence to be produced to enable it to pronounce the judgment in that event, the parties will be entitled to produce the additional evidence. The Apex Court in the case of ***Union of India v. Ibrahim Uddin & Anr. [(2012) 8 SCC 148]*** has held that the application for production of additional evidence is to be considered at the time of hearing of appeal to find out whether the evidence sought to be adduced is relevant for the appellate court for the purpose of pronouncement of judgment. It was also held that the court should not permit patching of the weaknesses in the evidence of unsuccessful party. The position is different if the appellate court requires the additional evidence to do justice.

7. In the present case, the application came to be filed under Order-41 Rule-27 of CPC which has been decided by the appellate court on the basis of averments made in the application and without taking into consideration the decision of the Apex Court in ***Union of India v. Ibrahim Uddin (supra)***.

8. Considering the decision of Apex Court in ***Union of India v. Ibrahim Uddin (supra)***, in my opinion, it would be in the interest of justice if the impugned order dated 21st June 2019 is quashed and set aside and the application preferred under Order-41 Rule-27 is remanded back to the appellate court to be considered at the time of hearing of appeal in the light of above.

9. The writ petition stands disposed of in the above terms.

[Sharmila U. Deshmukh, J.]