

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 12353 OF 2024****M/s. Inderlok Infra-Agro Pvt. Ltd.****....Petitioner****V/s.****Subhash Shamrao Majar****....Respondent****WITH****WRIT PETITION NO. 12387 OF 2024****M/s. Inderlok Infra-Agro Pvt. Ltd.****....Petitioner****V/s.****Sangita Chandrashekar Major****....Respondent**

Ms. Priti S. Shah, for the Petitioner.**Ms. Vaijayanti R. Kalekar, for the Respondent.**

CORAM : SANDEEP V. MARNE, J.**Date : 4 SEPTEMBER 2024.****P.C. :**

1) By these Petitions, Petitioners assail orders dated 2 August 2024 passed by the Appellate Bench of Small Causes Court disposing of Application at Exhibit-60 taken out by the Respondents / Defendants, in which a prayer was made that the application filed by Petitioners / Plaintiffs at Exhibit-51 for leading additional evidence under provisions of Order 41 Rule 27 of the Code of Civil Procedure, 1908 be tagged along with the Appeal and be considered at the time of final hearing of the Appeal. It appears that though the order passed by the learned Appellate Bench is not happily worded, the Court has allowed

the said application filed by Respondents / Defendants at Exhibit – 60 directing that the Application at Exhibit – 51 for production of additional evidence would be considered at the time of final hearing of the Appeal.

2) What has caused anxiety in the mind of Petitioner / Plaintiff is use of the words ‘after final hearing of the Appeal’ and ‘at the stage of pronouncement of Judgment’. Furthermore, the order lacks clarity as to which exact application is disposed of by the Appellate Bench. The learned counsel appearing for the Petitioner believes that what is disposed of is application at Exhibit–51. However, since the order dated 2 August 2024 is passed on Application at Exhibit–60, what is necessarily disposed of is Application at Exhibit–60 and not the Application at Exhibit – 51. A better clarity in this regard on the part of the Appellate Bench would have prevented filing of these Petitions.

3) Coming to the correctness of the view taken by the learned Appellate Bench in the impugned order dated 2 August 2024 about consideration of Application at Exhibit – 51 after final hearing of the Appeal and at the stage of pronouncement of Judgment, the Petitioner carries an apprehension that the additional evidence sought to be produced by it would altogether be ignored since the Appellate Bench would first hear the Appeal and would consider the Application at Exhibit–51 only at the stage of pronouncement of the Judgment. Once again, the use of peculiar language by the learned Appellate Bench has created the confusion in the mind of the Petitioner, which in my view is misplaced.

4) The law with regard to the stage at which additional evidence can be considered by the Appellate Court is by now well-settled. The learned counsel for the Petitioner has contended that if the Application for production of additional evidence is made under provisions of Rule 27(1)(a) or (aa) such application has to be necessarily decided before the Appeal is taken up for hearing. In support, she has relied upon Judgment of Division Bench of this Court in **Hasanate Taheriyah Fidayyah Vs. Mahesh s/o Kishor Saran**¹. However, after careful consideration of the findings recorded by the Division Bench and what Ms. Shah seeks to contend does not appear to be the ratio expounded therein. In paragraph No.15 of the Judgment, the Division Bench has held as under :-

15. The Division Bench has held that if an application is filed under clause (a) or (aa), the same has to be decided at any stage of the appeal even before the stage of the final hearing of the appeal and it would be prudent if such an application is decided at earlier stage. However, the Division Bench held that the powers under clause (b) is to be exercised where even though the Appellate Court finds that it would be able to pronounce the judgment on the basis of the record of the trial Court as it was, it might still consider that in the interest of justice something which remained obscure should be filled up, so that it can pronounce the judgment in a more satisfactory manner. It has further been held that the requirement has to be of the Court and the requirement is always to enable the Court to pronounce the judgment or for any substantial cause. It has been further held that the legitimate occasion for the exercise of this jurisdiction is not any stage prior to the hearing of the appeal but the stage of the final hearing of the appeal. We are in respectful agreement with the view taken by the Division Bench of Himachal Pradesh High Court. The requirement under clause (a) or (aa) for leading additional evidence is that of a party where for the reasons in clause (a) or (aa) could not file evidence at the stage of the trial. However, requirement under clause (b) is that of the Court where it finds that additional evidence is required for the purpose of enabling it to pronounce the Judgment or for any other substantial cause. We, therefore, find that the

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application filed under Order 41, Rule 27(1)(a) or (aa) could be decided at the stage prior to the hearing of the appeal. However, when the Court finds that such an evidence is necessary for pronouncing the judgment or for any other substantial cause, the same has to be done at the stage of pronouncement of the Judgment. No doubt that the learned counsel for the tenant is justified in saying that the learned Single Judge vide order dated 3rd May, 2011 itself had directed that the application for leading additional evidence is to be decided first and thereafter decide the appeal on merits. However, it appears that the learned Single Judge did not find the benefits of going through the Judgment of the Apex Court in the case of Union of India v. Ibrahim (supra) inasmuch as the said Judgment has been delivered on 17th July, 2012 whereas the order was passed by the learned Single Judge in the first round on 3-5-2011. However, in view of the Judgment of the Apex Court in the case of Union of India (supra) we will have to hold that exercise of the jurisdiction by the learned Appellate Court in first deciding the application under Order 41, Rule 27 (1)(b) and subsequently deciding the appeal on merits was contrary to the settled principle of law. As such the findings of the learned Appellate Court as well as the learned Single Judge in that regard would not be sustainable.

5) Therefore, while application for production of additional evidence under Order XLI Rule 27(1)(a) or (aa) can be decided at the stage prior to hearing of the Appeal, when the Court finds that such an evidence is necessary for pronouncing the Judgment or for any other substantial cause, consideration and decision of such application can also be done at the stage of pronouncement of the Judgment. Therefore, it cannot be stated that an application filed under Rule 27(1)(a) or (aa) must necessarily be decided at the stage prior to taking up the Appeal for decision. It all depends upon facts and circumstances of each case. After going through the application, if the Court finds that it is more appropriate to decide the application once the Appeal is taken up for hearing, the Court enjoys necessary liberty in that regard. This exactly what appears to have been done by the Appellate Bench in the present case. The Appellate

Bench would open up the Appeal for hearing and during the course of hearing of the Appeal, if the Appellate Bench is convinced that the additional evidence sought to be produced by the Petitioner is required to be taken into consideration, it will pass necessary order in that regard. If marking of the two additional documents in evidence requires leading of oral evidence, the Court will also take necessary call in that regard. In fact, Ms. Kalekar the learned counsel appearing for Respondent has invited my attention to the order dated 13 July 2022 passed by this Court in Civil Writ Petition Nos. 6116 and 6117 of 2022 in which this Court, while allowing the prayer for inspection of the suit premises, has clarified in paragraph 12 of the order as under:-

Material collected in the form of expertise report or such other documentary evidence whether can be used and accepted during pendency of the Suit or Appeal will be an independent issue. Same can be independently considered by the concerned Court on its own merit in accordance with law at an appropriate stage of the proceedings. However, just because inspection is asked during pendency of the Suit or during pendency of the Appeal does not ipso facto attract an embargo on the right of the Petitioner-landlord to seek remedy under Section 28 of the Act.

6) Writ Petitions are accordingly disposed of, by clarifying that the Application at Exhibit-51 shall be considered and decided by the Appellate Bench during the course of hearing of the Appeal. If the Appellate Bench considers that leading of oral evidence is necessary for taking additional documentary evidence on record, it shall pass an order in accordance with law. This clarification shall however not be construed to mean as this Court has permitted the Petitioner to lead oral evidence.

The Appellate Bench shall also be mindful of the clarification issued by this Court in paragraph No.12 of the order dated 13 July 2022.

7) With the above clarifications, the Writ Petitions are disposed of.

[SANDEEP V. MARNE, J.]

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