IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**INTERIM APPLICATION NO. 12642 OF 2024.**
**IN**
**FIRST APPEAL NO. 31 OF 2017.**

Smt. Bhanumati Mulraj Kabali & Ors. ...Appellants/Applicants.
***Versus***
Kalpana Prakash Kabali & Ors. ...Respondents.



*Adv. Pradeep Thorat i/b A. M. Saraogi for the Appellants.*
*Adv. Janhavi Joshi and Rakesh Pathak for Respondent Nos. 1 & 2.*
*Adv. Ridhi Shah i/b M/s. Shah and Furia Associates for Respondent Nos. 6 to 8.*
*Adv. A. R. Patil, AGP for the State.*

**Coram : Sharmila U. Deshmukh, J.**

**Date : October 17, 2024.**

**ORDER :**

**1.** The First Appeal is preferred at the instance of the original Plaintiff who is aggrieved by the dismissal of S.C. Suit No 713 of 2012 vide judgment dated 27th October, 2016. The present Interim Application has been preferred under Order 41 Rule 27 (1)(aa) of the Code of Civil Procedure, 1908 (CPC) for permission to produce and/or lead additional evidence in respect of the documents mentioned at Exhibit-A to E to the Interim Application.

**2.** The Appeal was taken up for final hearing alongwith the present Interim Application. The facts of the case that S. C. Suit No. 713 of 2012, was filed by the Plaintiff *inter alia* seeking order of permanent injunction restraining the Defendant Nos. 1 and 2 from interfering in the management of the affairs of the building "Chandra Bhuvan" and for reliefs in respect of Room No. 2 situated on the ground floor of the building Chandra Bhuvan.

**3.** Briefly put, the core issue involved in the suit for purpose of grant of the reliefs sought by the Plaintiff was whether the suit property i.e. Chandra Bhuvan building was the property of the Defendant No 2 Trust or the property of the Plaintiffs by virtue of being the executors of Will dated 19th April, 2008 of one Mulraj Kabali, who is stated to be the owner of the said building. The case of the Plaintiffs was that Defendant No. 2-Trust came into existence by virtue of Scheme approved by the High Court in the year 1925 and later on modified in 1965 pursuant to the decree dated 19th February 1965, whereby the suit property was released from the claim of the Defendant No. 2-Trust and therefore the Defendant Nos. 1 and 2 have no ownership rights over the suit property.

**4.** The parties went to the trial and the Trial Court settled about six issues including an issue as to the Plaintiffs right to manage the suit building and as to the proof that suit property originally belongs to the Trust. Vide the impugned Judgment dated 27th October 2016, the Trial Court answered the issue of ownership of the suit property in favour of the Trust and negated the right of Plaintiffs to manage the suit building.

**5.** The Trial Court noted the following admitted facts:

**(a)** The Defendant No 2 Trust came in existence by virtue of Scheme approved by High Court in the year 1925 and at the time of creation of trust, the suit property was vested with Defendant No 2 Trust by Bai Tulsabai.

**(b)** Trustees filed Suit No 74 of 1952 and introduced the Scheme and the High Court permitted to prepare the scheme and get it approved from the Competent Court. The draft of the Scheme was filed in the High Court for its approval. Accordingly decree was passed in the said suit dated 19th February, 1965.

**(c)** Suit No 3216 of 1998 has been filed by deceased Mulraj Kabali in capacity of trustee of Defendant No 2 against tenants of the suit property where he pleaded that the suit property is of Defendant No 2 Trust.

**6.** The Trial Court noted that the Plaintiff had admitted in the cross examination that she does not have any document to show whether Mulraj Kabali claimed the suit property as a owner during his life time. She has also admitted that the Charity Commissioner's register is showing that the suit building belongs to the Trust. The Trial Court held that the Plaintiffs have claimed their ownership in the suit property by virtue of decree passed in Suit No. 74 of 1952 dated 19th February 1965, which was a conditional decree. The Trial Court held in paragraph No. 28 and 29 as under:

> *"28. The Plaintiffs have claimed their ownership over the suit property by virtue of the decree passed in Suit No.74 of 1952 dated 19 February, 1965. The decree was conditional one. As per the said decree plaintiffs and defendants were directed for preparation of the scheme and approval of the said scheme meeting of the party for settlement of the said scheme before the Charity Commissioner. No doubt, the amount of Rs.27,000/- have been paid to the Trust by then plaintiffs and therefore the property had to be released from the schedule of Charity Commissioner and defendant No.2. However, it was not happened. There is no proof that after the decree passed in Suit No.74 of 1952 dated 19th February, 1965, the plaintiffs and then trustees of the trust moved any proceeding before Charity Commissioner to approve the scheme and release the suit property from index of the Trust. It seems, the decree has not been executed by then trustees and plaintiffs in respect of release of the suit property. No doubt, because of the said decree rights have been determined in respect of the suit property in favour of then plaintiffs. But neither suit property has been deleted from the schedule of the Charity Commissioner nor trustees executed transfer deed of the suit property in favour of then plaintiffs. Why it is not done, it is the fact within the knowledge of then trustees and plaintiffs. However, in my view, the property was of Bai Tulsabai who has created the Trust and thrown her property with the Trust. Then plaintiff Mr. Purushottam was son-in-law of Bai Tulsabai. As per original scheme of Bai Tulsabai of the Trust there was no clause to transfer the suit property in favour of anybody. The permanent arrangement has been made about the suit property. The*

*trust was family trust. The trustees are required to be appointed by survivorship. In these circumstances then plaintiffs must have felt that it is not proper to transfer the property in their names and keep away the object of the Trust and intention of the settler and therefore, in my view, then plaintiffs and trustees have not transferred the title of the property in favour of Purushottam and Mulraj Kabali.*

*29. Plaintiffs are the only executors of Mulraj Kabali. The plaintiff No.1 is wife of Mulraj and She has no legal right to claim on the property on which her predecessor Mr. Mulraj never claimed any legal right. Mulraj filed the suit No.3216 of 1998 in respect of some premises of the suit property. Wherein deceased Muiraj deposed and verified on oath that, the sult property was of defendant No.2 Trust. It seems, during life time of Mulraj or his father Purushottam though there was decree but they have not acted upon the said decree and not claimed their ownership over the suit property. The suit property remained with defendant No.2 Trust and therefore the suit property has not been deleted from the schedule of the Charity Commissioner. In these circumstances the evidence of plaintiffs that deceased Mulraj Kabali was owner of suit property is not believable and trustworthy."*

**7.** The Trial Court though accepted that there was a decree dated 19th February 1965 passed by the High Court in Suit No 74 of 1952 and amount of Rs 27,000/ had been paid to the Trust by then Plaintiffs and therefore the property had to be released from the Trust, the Trial Court held that neither the suit property has been deleted from the schedule of Charity Commissioner nor trustees executed transfer deed of the suit property in favour of then Plaintiffs.

The Trial Court therefore held that the suit property remained with Defendant No 2 Trust and was not deleted from the Schedule of the Charity Commissioner.

**8.** Mr. Thorat, Learned Counsel for the Appellants has taken this Court through the proceedings and pointing out the said findings of the Trial Court, would submit that that Trial Court has negated the ownership issue against the Plaintiff by reason of the suit property not being deleted from the schedule of Charity Commissioner and the property remaining with the Trust. He would submit that during the pendency of the present Appeal, the Defendants filed the audited accounts of the Defendant No. 2-Trust before the office of the Charity Commissioner for the period of 1991 to 2021 on 23rd March, 2022. Drawing attention to the audited accounts filed by the Defendant No 2 Trust, he submits that the suit property is not shown as an asset of the Trust. He would further submit that pursuant to the decree dated 19th February 1965, the Assistant Charity Commissioner carried out correction in Schedule-I of the PTR of the Respondent No. 2-Trust to implement the scheme framed on 25th July 1968, pursuant to the decree passed on 18th November 1952. He submits that the correction in Schedule-I of the PTR shows that the properties of the Trust consist of sum of Rs. 27,000/- the amount which was paid for the purpose of release of the subject property from the Trust. He would submit that the audited balance sheet as well as the correction in Schedule-I of the PTR would indicate the execution of the decree dated 19th January, 1965 and that the Defendant No 2 did not claim the suit property as the property of the Trust. He submits that the documents not being in existence during the trial of the suit could not be produced before the Trial Court and therefore the ingredients of Order XLI Rule 27(1)(aa) of CPC are satisfied and the Plaintiffs be permitted to lead additional evidence. He submits that the Civil Court has dismissed the suit on the ground that the Plaintiffs have not been able to establish their ownership of the suit property based on the decree passed in Suit No. 74 of 1952 dated 19th February 1965, as there was no execution of the said decree. He submits that the documents on record that is the Schedule-I to the PTR would indicate that the decree had been executed and therefore the same is relevant and has bearing on the case. In support he relies upon the following decision.

**9.** *Per contra,* Ms. Joshi, learned Counsel appearing for the Respondent Nos 1 and 2 would submit that the provisions of Order XLI Rule 27 does not grant any liberty to the parties to produce additional evidence as a matter of right and it is necessary to make out a case for invoking Order XLI Rule 27. She would submit that the provisions of Order XLI Rule 27, enable the Appellate Court to take additional evidence, in exceptional circumstances only if the conditions laid down in the Rule are found to exist which is not so in the present case. She would further submit that the books of accounts maintained by the Trust is record of its income and expenses and has nothing to do with the assets owned by the Trust. She would further submit that the correction in Schedule I of PTR to implement the orders are not illustrative of any divesting of the suit property. She would further submit that the deceased Mulraj Kabali till his demise in the year 2010, retained all the documents in his sole custody and only upon the demise of the said Mulraj Kabali the Respondents No 1 and 2 gained control over the affairs and management of the Trust. She would further submit that it was on the advise of the auditors that the subject property being sub-judice was kept outside the purview of the account statement, continuing the practice of maintaining the accounts as done by the deceased Trustee. She submits that as the income of the Trust was less than Rs. 25,000/- the yearly audit was not mandatory requirement. She would submit that what is necessary to be considered is whether the documents on record show the divesting of the property from the Respondent No. 2-Trust. She submits that the Plaintiffs had failed to prove before the Trial Court that the Trust had been divested of the subject property as there non execution of the decree of the year 1965. She submits that neither the corrections in Schedule-I of the PTR nor the filing of the audited balance sheets of the Trust would assist the case of the Applicants to show their ownership of the subject property. She would further submit that it was the specific case of the Respondents in the written statement that the deceased Mulraj Kabali in the various proceedings has affirmed that the subject building is owned by the Trust. She would submit that even if the balance sheet and the corrections in the PTR are accepted by the Respondents as there is no divesting of the subject property the additional evidence will not assist the case of the Plaintiffs. She submits that the documents which are sought to be produced by way of an additional evidence have no relevance and no bearing in the present case. In support, she relies upon the following decision.

**10.** I have carefully considered the submissions and perused the records.

**11.** Before proceeding further it would be apposite to have a look at the law on receiving additional evidence which is set out under Order XLI Rule 27 of CPC and reads 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."*

**12.** The provision makes it clear that upon satisfaction of clauses (a), (aa) or (b) of Sub Rule 1, the production of additional evidence can be permitted, if the Appellate Court is of the view that the additional documents which have been produced are necessary for adjudication of the dispute. The Code also provides the mode of taking the additional evidence under Order XLI Rule 28 of CPC which reads thus:

"*28. Mode of taking additional evidence— Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.*"

**13.** In the instant case the audited balance sheet and the corrections in the Public Trust Register has been effected during the pendency of the Appeal and were not in existence during the Trial. Thus the Plaintiff could not have produced the same during the Trial. In support of their case, the Plaintiffs produced the certified copy of the Plaint of Suit No. 74 of 1952, the copy of the hand written decree dated 18th November 1952 passed in Suit No. 74 of 1952 and the certified copy of the scheme framed by the Hon'ble High Court on 19th February 1965, in respect of the Defendant No. 2-Trust. The Plaintiffs also produced the certified copy of the letter dated 20th July 1965, of the Charity Commissioner which was forwarded to then Trustees of the Defendant No. 2-Trust confirming the fact of payment of sum of Rs.27,000/-.

**14.** Although the said documents were produced on record, the Trial Court has answered the issue about the right of the Plaintiffs to manage the suit property in the negative for the reason that though the decree was passed in the year 1965 and the amount of Rs.27,000/- was paid the property was not released from the Schedule of the Charity Commissioner and the Defendant No. 2-Trust. There is no scope for debate about the satisfaction of ingredients of clause (aa) of Sub Rule (1) of Rule 27 of Order XLI as the audited balance sheets as well as the correction in Schedule-I of the PTR came into existence during the pendency of the present Appeal.

**15.** The issue in present case is about the rival claims of ownership of subject property. *Prima facie,* the audited balance sheet filed by the Defendant No 2 Trust with the Charity Commissioner and the corrections in Schedule I of PTR by the Charity Commissioner thereby putting into effect the Scheme sanctioned by the High Court on 19th January, 1965 has direct bearing on the subject matter of the suit considering that the subject property is claimed to be property of Trust. The statutory provisions enjoin upon the Trust to file returns with the Charity Commissioner's Office and any change effected is required to be entered in PTR Schedule-I. The entries made in the Schedule-I carry evidentiary value. It needs to be noted that by order dated 19th February 1965, the High Court had confirmed the Scheme approved under the decree passed on 18th November 1952, in Suit No. 74 of 1952. The scheme which was approved by High Court shows that the property of the Trust consists of sum of Rs. 27,000/-. In fact the decree of 19th February 1965, sanctioned the scheme for the Trust by noting that the property of the Trust consist of sum of Rs. 27,000/- and the Trial Court on the basis that there was no execution of the scheme has answered the issue against the Plaintiff. The correction in the Schedule-I of the PTR which has been done by the Charity Commissioner on 23rd August 2024 is pursuant to the scheme framed by the Court which is the foundational fact for the relief sought by the

Plaintiffs. The documents sought to be produced, if proved, would have material impact on the subject matter and are required to be considered for complete and effectual adjudication of the dispute. I do not find force in submission of Ms. Joshi that the documents have no bearing on the subject matter of dispute. The documents will have to be proved in accordance with law and in the manner as provided under Order XLI Rule 28 of CPC.

**16.** In ***Union of India vs Ibrahim Uddin***[1] the facts of the case were that at the appellate stage, the unsuccessful Plaintiff filed an application under Order 41 Rule 27 of CPC for adducing additional evidence i.e. Will of his maternal grandfather pertaining to the suit property. The application was allowed by the Appellate Court vide order dated 28th April, 1999 which allowed the Appeal by judgment dated 15th October, 1999. One of the contentions raised before the Apex Court was that the first Appellate Court had no occasion to decide the application under Order XLI Rule 27 of CPC prior to the hearing of the Appeal itself and taking of Will on record does not mean that either the Will or its contents stood proved. The Apex Court considered the provisions of Order 41 Rule 27 of CPC and summed up its observations in paragraph 47 and 48 as under:

***"47.*** *Where the additional evidence sought to be adduced*

1 (2012) 8 SCC 148

> *removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.*
>
> ***48.*** *To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."*

**17.** In the same decision, the Apex Court considered the stage of consideration of the applications under Order XLI Rule 27 and has held in paragraph 52 as under:

> ***"52.*** *Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to*

> *pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."*

**18.** To my mind, upon the reading of the decision of the Apex Court, the law laid down by the Apex Court is that additional evidence can be permitted at the appellate stage in exceptional circumstances and only where the ingredients of Order XLI Rule 27 stands satisfied i.e. where the trial court has refused to admit evidence which ought to be admitted, evidence now sought to be produced was not available to the party despite exercise of due diligence and appellate court requires the additional evidence so as to enable it to pronounce judgment for any other other substantial cause of like nature. The application is to be considered at the time of final hearing of the appeal when the entire evidence is open for appreciation and the Appellate Court comes to a conclusion that additional evidence is required to be taken on record. The principle laid down is that the application cannot be considered in isolation of the entire evidence which is already produced on record as what assumes significance is requirement of additional evidence for full and effective adjudication of the case.

**19.** In ***Uttaradi Mutt vs. Raghavendra Swamy Mutt***[2] the Apex

2 (2018) 10 SCC 484

Court has held that the documents cannot be straight away executed and the Respondents will have to not only prove the existence, authenticity and genuineness of the document but also the contents thereof as may be required by law.

**20.** Having regard to the discussion above, in my view, the audited balance sheets and the extract of the corrections in the PTR are relevant and have direct relevance to the subject matter and are necessary to be considered for full and effective adjudication of the dispute in the present case where the core issue for determination is the ownership of the suit property, whether vests in the Trust or the Plaintiffs. The audited balance sheets and PTR extract *prima facie* have material bearing on the subject matter.

**21.** Resultantly, the Interim application will have to be allowed. Rule 28 of Order XLI provides for mode of taking additional evidence providing for the points to which the evidence is to be confined. Hence the following order is passed:

***ORDER:***

**(a)** The Interim Application stands allowed.

**(b)** The additional evidence will have to be recorded on the following points:

**(i)** Whether the Audited Balance Sheets have been submitted by the Defendant No. 2-Trust to the Office of

Charity Commissioner ?

**(ii)** Whether the Audited Balance Sheets of the Defendant No 2 Trust to be submitted to the Charity Commissioner's Office under the Maharashtra Public Trusts Act, 1950 is statutorily required to include the immovable assets of the Trust.

**(iii)** Whether the Office of Charity Commissioner has carried out corrections in Schedule-I of PTR as regards Defendant No. 2-Trust.

**(iv)** Whether the Office of Charity Commissioner has settled the Scheme approved by the High Court by its decree dated 19th January, 1965 by carrying out corrections to Schedule-I of the PTR.

**(v)** Whether the corrections carried out in Schedule I of PTR by the office of Charity Commissioner in the year 2024 has the effect of divesting the Defendant No. 2 of the suit property ?

**(c)** Adv. Mr. Satchit Bhogle is appointed as a Court Commissioner and is requested to complete the recording of the evidence on the points stated above within a period of three months from the date of communication of this order. After completion of evidence, the record be transferred to this Court along with the copy of the report.

**(d)** It is made clear that both the parties are at liberty to lead additional evidence.

**(e)** The fees of the Court Commissioner to be borne equally by both the parties.

**[Sharmila U. Deshmukh, J.]**