



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 10510 OF 2022

1. Ahmedpasha s/o Meerasab Tamboli,
Age: 69 years, Occu: Business.
2. Moinpasha s/o Meerasab Tamboli,
Age: 59 years, Occu: Business,
Both R/o Azad Chowk, Latur,
Tq. & Dist. Latur

.....PETITIONERS
(Orig. Plaintiffs)

VERSUS

Smt. Parwatibai w/o Jagannath Verma,
Age: 81 years, Occu: Household,
R/o. C.T.S. No.6667, Azad Chowk,
Latur, Tq. & Dist. Latur.

.....RESPONDENT
(Orig. Defendant)

Mr. M. D. Shinde, Advocate for the Petitioners
Ms. Anjali Dube (Bajpai), Advocate for Respondent no.1

CORAM : ROHIT W. JOSHI, J.

DATED : 23RD JULY, 2025

ORAL JUDGMENT :-

- . Rule. Rule made returnable forthwith.
2. Heard finally with consent of parties.
3. The petitioners in the present petition are the original plaintiffs and respondents in Regular Civil Appeal No.78 of

2014, which arises out of judgment and decree dated 21.03.2014, passed by the learned 5th Joint Civil Judge, Junior Division, Latur in Regular Civil Suit No.12 of 2009.

4. The learned Trial Court has passed a decree for perpetual injunction restraining the defendant (respondent in present petition) from demolishing and damaging a wall running in north-south direction between two lands bearing CTS No.6667 and 6668. There is a boundary dispute between the parties and both the parties claim ownership on the wall . Both the parties claim that the wall is situated within their land. As stated above, the original defendant has filed appeal challenging the decree passed by the learned Trial Court. In this appeal, the defendant/appellant filed two applications at Exhibit 24 and 26. Exhibit 24 is filed for permission to produce documents pertaining to measurement report dated 03.07.2012 on record. This measurement dated 03.07.2012 was done with respect to property owned by the plaintiff pursuant to application made by the plaintiff. The application at Exhibit 26 is an application seeking permission to lead additional evidence, wherein it is prayed that cadastral

Surveyor from the office of TILR, Latur be summoned so as to examine him as a witness. Initially, vide order dated 18.09.2021, passed below Exhibit 26, the learned Appellate Court called upon the plaintiff either to admit or to deny the documents produced on record alongwith application at Exhibit 24. The learned Appellate Court had already permitted production of documents vide order dated 08.02.2021. Since, the plaintiff refrained from either admitting or denying the document, application for Exhibit 26 was taken up for hearing.

5. The learned Appellate Court has allowed the application vide order dated 03.03.2022. It is observed that despite opportunity being given, the appellant had chosen to remain silent with respect to the documents produced on record and he did not admit or deny the said documents. The learned Appellate Court has further observed that the documents which were sought to be produced on record, were pertaining to a measurement of the property owned by the plaintiff on an application made by the plaintiff himself. This measurement record was not produced on record by the plaintiff. In that

view of the matter, the learned Appellate Court has allowed the application.

6. Mr. Manoj Shinde, the learned Advocate for the petitioner contends that it is well settled that application under order 41, Rule 27 is required to be heard and decided alongwith appeal. The learned Advocate contends that the Court cannot arrive at satisfaction with respect to relevance of the evidence unless the Court hears the appeals on merits. The learned Advocate further contends that the measurement case of which documents are produced on record only pertains to correction of clerical error in the record and is, therefore, not relevant for adjudication of the controversy which forms subject matter of the appeal. The learned Advocate for the petitioner has placed reliance on judgments of the Hon'ble Supreme Court in the matters of *Malyalam Plantations Limited Vs. State of Kerala and Another*, reported in (2010) 13 SCC 487 and *A. Andisamy Chettiar Vs. A. Subburaj Chettiar*, reported in (2015) 17 SCC 713.

7. As against this, the learned Advocate Ms. Anjali Dube supports the impugned order. Her contention is that since

documents pertaining to measurement of suit property have been suppressed by the plaintiff, it was necessary to allow the application for production of additional evidence even at the appellate stage. She contends that it is bounden duty of every litigant to come to the Court with clean hands by making full and complete disclosure of all the evidence that is in custody relating to controversy involved in the matter. The learned Advocate further contends that since, the measurement is carried out on an application made by the plaintiff, the plaintiff cannot raise any grievance about any prejudice being caused to him.

8. As regards the submission of learned Counsel for the petitioner that the application should have been taken up for hearing at the stage of final hearing of the appeal, the learned Advocate has placed reliance on judgment of the Hon'ble Supreme Court in the matter of *K. R. Mohan Reddy Vs. M/s. Net Work Inc. Rep. Tr. M.D.*, reported in *2007 AIR SCW 7597* and a Division Bench judgment of this Court in the matter of *Hasanate Taheriyyah Fidayyiah & Anr. Vs. Mahesh Kishor Saran & Anr.*, reported in *2014 (2) Mh.L.J. 884*.

9. In the matter of ***Malyalam Plantations Limited Vs. State of Kerala and Another***, the Hon'ble Supreme Court has held that at the appellate stage whenever additional evidence is sought to be brought on record, the Court should not call upon the other side to admit or deny the evidence and that additional evidence cannot be permitted to be led in order to fill up lacuna. So far as judgment in the matter of ***A. Andisamy Chettiar Vs. A. Subburaj Chettiar*** is concerned, the said judgment deals with power of Appellate Court to permit additional evidence under Order 47, Rule 27.

10. As against this, judgment in the matter of ***K. R. Mohan Reddy Vs. M/s. Net Work Inc. Rep. Tr. M.D.*** takes into consideration distinction between clauses (aa) and (b) of Order 47, Rule 27. It is held that in the event, a party applies for additional evidence under Clause (aa) and establishes before the Court that the evidence was not within his knowledge and could not be produced before the Trial Court despite due diligence, permission can be granted for leading additional evidence at the appellate stage before the stage of final hearing. It is with respect to Clause (b), the Hon'ble

Supreme Court has held that when dealing with an application under the said clause, the Appellate Court is bound to consider the entire evidence on record and come at a satisfaction with respect to relevance of evidence by taking into consideration the entire material on record which can be done only at the stage of final hearing. The Division Bench judgment of this Court in the matter of ***Hasanate Taheriyah Fidayyiah & Anr. Vs. Mahesh Kishor Saran & Anr.***, also lays down the same ratio. Rather in paragraph 15 of the judgment, the Division Bench has categorically expressed that when an application is made either under Clause (a) or (aa), it will be prudent that the same is decided at a stage earlier than the stage of final hearing.

11. In the present case, the evidence that is sought to be brought on record pertaining to measurement case of the land of the plaintiff, which was carried out on an application made by the plaintiff. It is not the case of the plaintiff that the defendant was noticed in the said measurement case. Since there is a boundary dispute between the parties, the area of respective lands will have some relevance. In that view of the

matter, it was for the plaintiff to produce the said documents on record and then to furnish clarification, if any, with respect to the same. The plaintiff has however chosen not to file documents at all.

12. Having regard to the aforesaid, I am of the considered opinion, the application falls within the parameters of Clause (aa) of order 41, Rule 27. No fault can be found with the learned First Appellate Court in deciding the application before hearing of the appeal in view of law laid down in ***K. R. Mohan Reddy*** and ***Hasanate Taheriyyah Fidayyiah***.

13. The learned Advocate for the petitioner/plaintiff is right in a submission that the learned Appellate Court and not to have called the plaintiff either to admit or to deny the document. However, perusal of the order will demonstrate that the learned First Appellate Court has not decided the application only on the ground that the plaintiff did not either admit or deny the document. The learned Appellate Court has recorded that measurement of land of the plaintiff on the application by the plaintiff will have bearing on the controversy involved in the matter.

14. Having regard to the aforesaid reasons recorded by the learned Appellate Court, in the considered opinion of this Court, no case for interference is made out. The Writ Petition is therefore rejected.

15. Civil Application, if any stands, disposed of.

(ROHIT W. JOSHI, J.)