

(2018) 12 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No. 3962 Of 2017

Manohar Ramchandra Deshpande (Dead) Thr. Lrs. Smt.
Latika M. Deshpande And Others

APPELLANT

Vs

Pralhadrao R. Despande (Dead) Thr. Lrs. Smt. Nirmala Wd/O
Pralhadrao Despande And Others

RESPONDENT

Date of Decision : 10-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 1, Order 41 Rule 27, Order 41 Rule 27(1)(a), Order 41 Rule 27(1)(aa), Order 41 Rule 27(1)(b), Section 115

Citation : (2018) 12 BOM CK 0036

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : S.D. Dewani, Akshay Sudame

Final Decision : Partly Allowed

Judgement

1. Rule. Rule made returnable forthwith. The writ petition is heard finally with the consent of the learned counsel for the parties.
2. The petitioners herein have raised a question as to whether the Court below was justified in rejecting their application for permission to file additional documents when their application seeking permission to raise additional grounds of challenge in the appeal relying upon the very same documents had been allowed.
3. The petitioners herein are legal heirs of original defendant No.1 in a suit bearing Regular Civil Suit No.133 of 2005 filed by the predecessor of respondent No.1-A to 1-E and others, seeking a decree of partition and possession. The parties are related to each other and it was claimed by the respondents (original plaintiffs) that the property at Field Survey No.16/1, Mouza Nalwadi, Taluka and District Wardha was part of ancestral property of which they were seeking partition and possession. The said suit was decreed by judgment and order dated 12/04/2012 passed by the Court of Joint Civil Judge, Junior Division, Wardha.

The predecessor of the petitioners herein filed Regular Civil Appeal No.278 of 2012 before the Court of District Judge, Wardha challenging the said judgment and decree. During the pendency of the aforesaid appeal, the petitioners, who had been brought on record as appellants before the District Court, filed an application for grant of permission to raise additional grounds in their memo of appeal and an application under Order XLI Rule 27 of the Civil Procedure Code (CPC) for permission to file documents. The additional grounds sought to be raised by the petitioners pertained to true valuation of the suit property and also pertained to a registered partition deed dated 28/09/1994, to which the petitioners as well as the respondents (through their predecessor) were parties, so as to demonstrate that the suit property was not ancestral property and that the decree passed by the Court below was unsustainable. The additional documents sought to be brought on record were a valuation certificate pertaining to the suit property and the aforesaid registered partition deed dated 28/09/1994 bearing registration No.2624 of 1994. The respondents opposed both the applications filed on behalf of the petitioners.

4. By order dated 06/04/2017 the District Court allowed the application of the petitioners for raising additional grounds at Exhibit- 53. But, by the impugned order of the same day, dated 06/04/2017, the District Court rejected the application filed by the petitioners under Order XLI Rule 27 of the CPC for permission to file the registered partition deed and the valuation report on record. The petitioners herein have challenged the said order by filing the present writ petition.

5. Mr. Shyam Dewani, learned counsel appearing for the petitioners, has submitted that the District Court committed a grave error in rejecting the application filed by the petitioners for placing on record additional documents under Order XLI Rule 27 of the CPC, particularly when the said Court on the very same day had allowed the application of the petitioners to raise additional grounds in the memo of appeal. It was submitted that when the additional grounds permitted to be raised in the memo of appeal pertained to and they were relatable to the additional documents sought to be brought on record, there was no reason why the application filed on behalf of the petitioners to place additional documents on record could have been rejected. It was submitted that the petitioners had sufficiently explained the reasons why the said documents could not be placed on record earlier and that those documents went to the root of the matter and they were necessary for the Court to pass a just and proper judgment in the case. The learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in the case of *Union of India v. K.V.Lakshman and others*, reported in (2016) 13 SCC 124, *Shyam Gopal Bindal and other v. Land Acquisition Officer and another*, reported in (2010) 2 SCC 316 and judgments of this Court in the case of *Suman wd/o Kanhaiyyalal Jain and others v. Krantibala w/o Vasant Kondalkar*, reported in 2008 (4) Mh.L.J. 447 and *Resources International v. John Fillipe Costa and others*, reported in 2016 (5) Mh.L.J. 339.

6. Per contra, Mr. Akshay Sudame, learned counsel appearing for the contesting respondents, submitted that the order passed by the District Court rejecting the application of the petitioners to place on record additional documents was justified because the stringent conditions provided in Order XLI Rule 27 of the CPC were not satisfied by the petitioners in the present case. It was submitted that the rule was that parties to an appeal shall not be entitled to produce additional evidence/documents and that an exception was carved out in Rule 27 of Order XLI of the CPC. It was submitted that the petitioners had failed to demonstrate that they could not produce the said documents before the Trial Court despite exercising due diligence, particularly when the documents were within their knowledge and that as per the law laid down by the Hon'ble Supreme Court, mistake of counsel or any such reason would not amount to a substantial cause for the Appellate Court to permit filing additional documents on record. It was further submitted that the said documents were not shown by the petitioners to be necessary for rendering judgment by the Appellate Court and that therefore, the writ petition deserved to be dismissed. It was further submitted by the learned counsel that merely because application for raising additional grounds in memo of appeal was allowed by the District Court, it did not mean that the petitioners were entitled for their application under Order XLI Rule 27 of the CPC to be allowed because permission to raise additional grounds in the memo of appeal did not result in suitable amendment of pleadings. It was submitted that if only the petitioners were permitted to amend their original pleadings that they would have consequential right of their application under Order XLI Rule 27 of the CPC to be allowed. The learned counsel placed reliance on judgments of the Hon'ble Supreme Court in the case of K. Venkatramaiah v. A. Seetarama Reddy and others, reported in AIR 1963 SC 1526, Mahavir Singh and others v. Naresh Chandra and another, reported in (2001) 1 SCC 309 and Union of India v. Ibrahim Uddin and another, reported in (2012) 8 SCC 148.

9. In order to examine as to whether the District Court in the present case has committed an error in passing the impugned order, it would be necessary to refer to the relevant provision i.e. Order XLI Rule 27 of the CPC and the judgments relied upon by the rival parties. Order XLI Rule 27 of the CPC reads as follows.

"O.XLI R.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."

10. In the present case, the only limited portion of the said provision in which the petitioners can seek permission to produce additional documents is clause (b) of sub-rule (1) of Rule 27 of Order XLI of the CPC. This is because the case of the petitioners cannot fit into clauses (a) and (aa) of the aforesaid sub-rule, which pertains to a situation where the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted and the party seeking to produce additional evidence despite exercise of due diligence could not have produced such additional documents. In the present case, admittedly the petitioners and their predecessor were aware of the aforesaid registered partition deed dated 28/09/1994 because they were parties to it and it was not as if the said document was sought to be produced before the Trial Court and they were prohibited from doing so. The other additional document i.e. the valuation report sought to be produced by the petitioners also would not be covered under the said clauses (a) and (aa) of sub-rule (1). Therefore, the only manner in which the petitioners could successfully produce the said two additional documents before the District Court was to demonstrate that the District Court required the said documents to enable it to pronounce judgment for any other substantial cause.

11. Before examining the question as to whether the petitioners satisfied the said requirement, it would be proper to deal with the other submission raised on behalf of the petitioners i.e. when the District Court had permitted the petitioners to raise additional grounds in the memo of appeal, why could permission not be granted for placing on record the aforesaid additional documents. In this regard, the learned counsel for the respondents has submitted that raising additional grounds in the memo of appeal did not amount to amendment of pleadings and that the petitioners were required to suitably amend their pleadings so as to claim production of the said additional documents. There can be no doubt about the fact that the grounds of appeal as per Order XLI Rule 1 of the CPC are clearly distinguishable from pleadings in the original Court under Order VI Rule 1 of the CPC. To that extent the learned counsel appearing for the respondents is correct in contending that the petitioners were not justified in claiming permission to produce additional documents on record as a matter of right, upon being granted permission by the District Court for raising additional grounds in their memo of appeal. But, a perusal of the written statement filed on behalf of the predecessor of the petitioners before the Trial Court shows that pleadings with regard to valuation of the suit and the property not being liable to be partitioned, were already taken in the written statement. Therefore, no specific amendment of the pleadings was required in the present case.

12. Now coming to the question as to whether the petitioners had been able to make out a case under Order XLI Rule 27(1)(b) of the CPC, it will have to be examined as to the reasons stated by the petitioners in their application before the District Court under the said provision and the nature of additional documents sought to be brought on record. In their application, the petitioners have stated that documents could not be brought on record before the Trial Court because of mistake of their counsel and that they were necessary to be brought on record to expose the falsehood of the case of the respondents and for proper adjudication of the matter on merits. As noted above, since the petitioners were very much aware of the existence of the registered partition deed that they sought to place on record by way of additional documents, their case would certainly not be covered under Order XLI Rule 27(1)(a) and (aa) of the CPC.

13. Under Order XLI Rule 27(1)(b) of the CPC, the petitioners were required to demonstrate that the additional documents which they were seeking to produce on record were required by the District Court to enable it to pronounce judgment or for any other substantial cause.

The words "for any other substantial cause" have been examined by the Hon'ble Supreme Court in the case of Union of India v. Ibrahim Uddin and another (supra) and it has been laid down as follows :-

"40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment."

14. The said position of law makes it clear that the petitioners in the present case cannot claim that the mistake of their lawyer could be said to be a substantial cause for their failure to produce the said documents before the Trial Court or as a justification for producing them before the District Court.

15. At the same time, the Hon'ble Supreme Court has also held in the case of Union of India v. K.V.Laxman and others (supra) as follows:-

"36. Order 41 Rule 27 of the Code is a provision which enables the party to file additional evidence at the first and second appellate stage. If the party to appeal is able to satisfy the appellate court that there is justifiable reason for not filing such evidence at the trial stage and that the additional evidence is relevant and material for deciding the rights of the parties which are the subject-matter of the

lis, the court should allow the party to file such additional evidence. After all, the court has to do substantial justice to the parties. Merely because the court allowed one party to file additional evidence in appeal would not by itself mean that the court has also decided the entire case in its favour and accepted such evidence. Indeed once the additional evidence is allowed to be taken on record, the appellate court is under obligation to give opportunity to the other side to file additional evidence by way of rebuttal."

15. Even in the judgments relied upon by the learned counsel for the respondents i.e. Union of India v. Ibrahim Uddin and another (supra) and K.Venkataramiah v. A. Seetharama Reddy and others (supra) the Hon'ble Supreme Court has emphasized that the matter under Order XLI Rule 27 of the CPC is entirely within the discretion of the Court, although such discretion is to be used sparingly and it is circumscribed by the limitation specified in the Rule itself. At the same time, it has been held by the Hon'ble Supreme Court in the said judgments that if the Appellate Court finds that the document sought to be produced is necessary and it is required for enabling the Court to pronounce judgment, such a document could certainly be allowed to be produced before the Appellate Court. The judgments of this Court relied upon by the learned counsel for the petitioners, in the case of Suman v. Krantibala (supra) and Resources International v. John (supra) also emphasize on the necessity to allow production of such additional documents that are necessary for pronouncing judgment and if they are not allowed to be produced, the eventual order passed by the Court would be leading to injustice or could be rendered a nullity.

16. Therefore, the District Court i.e. the Appellate Court in the present case was required to examine as to whether the documents sought to be brought on record by the petitioners, particularly the registered partition deed dated 28/09/1994, was required to be brought on record to pronounce judgment in the matter.

17. In this context the judgment of the Hon'ble Supreme Court in the case of Mahavir Singh and others v. Naresh Chandra (supra) becomes relevant, wherein it has been held as follows.

"5. The expression "to enable it to pronounce judgment" has been subject of several decisions including Syed Abdul Khader v. Rami Reddy wherein it was held that when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence (See: Municipal Corporation of Greater Bombay v. Lala Pancham). But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule. The words "or for any other substantial cause" must be read with the word "requires", which is set out at the

commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in *Kesowji Issur v. G.I.P. Railway*. It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, have interfered with such an order, particularly when the whole appeal is not before the court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order 41, Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC. In this regard, we may notice the decision of this Court in *Gurdev Singh vs. Mehnga Ram* in which the scope of exercise of power under Section 115 CPC on an order passed in an application filed under Order 41, Rule 27 CPC was considered. When this decision was cited before the High Court, the same was brushed aside by stating that the principle stated therein is not applicable to the facts of this case. We do not think so. The High Court ought not to have interfered with such an order."

18. Thus, it becomes clear that the enquiry as to whether a particular document is required for enabling pronouncement of judgment is within the domain of the Appellate Court. The Appellate Court is necessarily required to enter into such an enquiry because the entire appeal is pending for consideration before it and it has to form an opinion regarding the same while deciding the application under Order XLI Rule 27 of the CPC. As per the said position of law enunciated by the Hon'ble Supreme Court in the case of *Mahavir Singh and others v. Naresh Chandra* (supra), it is only the Appellate Court, which can conduct such an enquiry and when a decision in that regard is taken by the Appellate Court, it would not be appropriate for the High Court to interfere in the same as the entire appeal at that stage is not before the High Court.

19. In these circumstances, it becomes necessary to examine as to the nature of enquiry conducted by the District Court in the present case while rejecting the application of the petitioners by impugned order dated 06/04/2017. The reasons given by the District Court while passing the impugned order are as follows.

"9. Coming to the facts of the present case. By filing an application, appellant sought to produce valuation report and it is the contention of appellant that the suit was not properly valued. The said valuation report which is issued by Assistant Sub-Registrar, Wardha, is of the month of October, 2016. The original suit is of the year 2005. If the defendants have any objection in respect of valuation of suit property, then they ought to have raised it before the trial Court at appropriate stage. After lapse of near about 10 years, definitely valuation of

the property is increased. Therefore, I am of the view that such document cannot be allowed to be produced as per the provisions of Order 41, Rule 27 of the Code of Civil Procedure. Moreover, no explanation is given as to why such objection was not raised before trial Court.

10. The second document which sought to be produced is partition deed. If the suit filed is perused, it is for partition, possession, mesne profits and incidental reliefs. It appears that except the present appellant, other defendants did not contest the suit. On the contrary, defendant nos.2 and 3 by filing their written statement at Ex-22 and defendant nos.4 and 5 by filing their written statement at Ex-26, admitted the entire claim and other defendants though duly served remained absent. Therefore, the present appellant is the only contesting defendant.

11. Production of additional evidence at appellate stage can be allowed if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or 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 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.

12. The document sought to be produced, as stated above, is a partition deed, which is a registered document dt. 28.09.1994. The present appellant is party no.2 in the said partition deed. Therefore, execution of said partition deed in the year 1994 is well within the knowledge of the appellant. The suit which was filed is for partition. In spite of that, nowhere defendant explained as to why said document is not filed on record though appellant who was defendant no.1 in the suit and the only contesting defendant has filed the same before the lower Court. No case under the provisions of Order 41, Rule 27 of the Code of Civil Procedure is made out for production of additional evidence i.e. partition deed. It appears that the appeal is of 2012. Appellant on one or the other pretext is trying to prolong the matter though some of the parties to the appeal are senior citizens. It appears that learned counsel for the respondents has also filed an application for expediting the hearing of the appeal on the ground that the parties are senior citizens in the month of September, 2015. Though copy was received by learned advocate for the appellants on the same day, no say is filed on that application. Therefore, it appears that this is also one of the attempts on the part of appellant to prolong the hearing of the appeal. Thus, there is no merit in the application and it needs to be rejected. Hence, I pass the following order."

20. A perusal of the above quoted reasoning of the District Court shows that the entire emphasis of the said Court, while rejecting the application of the petitioners under Order XLI Rule 27 of the CPC, has been on the lack of reasons put forth by the petitioners for failing to produce the said documents before the

Trial Court. In fact, while considering the registered partition deed dated 28/09/1994, sought to be brought on record by the petitioners, the District Court has only emphasized that the petitioners failed to explain as to why the said document was not brought on record earlier, despite the fact that it was well within the knowledge of the petitioners. Thereafter, the District Court has held that since the appeal was of the year 2012 and the petitioners were seeking to delay the decision in the appeal on one pretext or the other, despite the fact that some of the parties were senior citizens, the permission for bringing on record the said documents could not be granted. A perusal of the impugned order, therefore, shows that the District Court has failed to enter into the enquiry as required under Order XLI Rule 27(1)(b) of the CPC to examine as to whether the documents sought to be brought on record by the petitioners are required for pronouncing judgment. Since the entire appeal and evidence was and is before the District Court for consideration, such an enquiry and a finding thereon is necessary before deciding as to whether the petitioners could be granted permission to place the said additional documents on record. The petitioners have claimed that the said additional documents go to the very root of the matter and that they are absolutely necessary for pronouncing judgment. Therefore, it was all the more necessary for the District Court to have conducted the said enquiry and pronounced upon the same, while disposing of the application preferred by the petitioners under Order XLI Rule 27 of the CPC. But, it has failed to do so.

21. As laid down by the Hon'ble Supreme Court in the case of Mahavir Singh v. Naresh Chandra (supra), since the entire appeal and evidence is not before this Court, as the present writ petition concerns dismissal of only the application filed by the petitioners under Order XLI Rule 27 of the CPC, this Court cannot go into the question as to whether the said documents are required by the Appellate Court (District Court) for pronouncing judgment. It would be for the said Court to decide the same. In the light of the above, it becomes evident that while the impugned order passed by the District Court is not sustainable and it deserves to be set aside, this Court is required to relegate the parties to the District Court for a decision afresh on the application for producing additional documents filed by the petitioners under Order XLI Rule 27 of the CPC, by examining whether the said documents sought to be produced by the petitioners are required by it to enable it to pronounce judgment.

22. In the light of the above, the writ petition is partly allowed in the following terms.

(i) The impugned order dated 06/04/2017 passed by the Court of Principal District Judge, Wardha in Regular Civil Appeal No.278 of 2012 below Exhibit-54 is quashed and set aside.

(ii) The Court of the Principal District Judge, Wardha is directed to take up the said application at Exhibit-54 filed by the petitioners for consideration afresh by examining the question as to whether the petitioners have been able to satisfy

the requirement under Order XLI Rule 27 (1) (b) of the CPC in seeking production of additional documents.

(iii) The Court of Principal District Judge, Wardha shall decide the application expeditiously, by taking into consideration the law laid down by the Hon'ble Supreme Court and this Court in various pronouncements pertaining to the question of requirement of the Appellate Court for additional documents / evidence to enable it to pronounce judgment.

(iv) Needless to say that this Court is not expressing any opinion on the merits of such enquiry contemplated under Order XLI Rule 27 (1) (b) of the CPC, as it is within the domain of the District Court, which is seized of the entire appeal and evidence.

23. Rule is made absolute in the above terms. No order as to costs.