

CNR No. GASG010011842022

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**IN THE COURT OF DISTRICT JUDGE-2, SOUTH
GOA, MARGAO.**

(Before: Dr. Pooja C. Kavlekar District Judge-2, South Goa,
Margao)

Regular Civil Appeal No. 68/2022.

1. Leticia Piedade Cunha e Mascarenhas,
w/o late Alexandre Miquel Philomeno
Firmino Mascarenhas, in age 75.
2. Bevinda Mascarenhas,
w/o late David Camilo Mascarenhas,
of age 54.
3. Macrina Mascarenhas,
of age 17,
d/o late David Camilo Mascarenhas.
4. Mevina Mascarenhas,
of age 16,

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d/o late David Camilo Mascarenhas.

5. Pramila Adelaide Mascarenhas,
d/o late Alexandre Miquel Philomeno
Firmino Mascarenhas, age 52,
and her husband.
6. Ricky Fernandes,
of age 54.
7. Oscar Pio Mascarenhas,
s/o late Alexandre Miquel Philomeno
Firmino Mascarenhas, of age 57.
8. Humberto Lourdes Mascarenhas,
s/o late Alexandre Miquel Philomeno
Firmino Mascarenhas, in age 50 and his wife.
9. Sandra Mascarenhas,
of age 45, all r/o H.No.12,
Sarvodem, Margao, Goa. ... Appellants.

Vs.

Joana Juliana Pinto alias
Joana Juliana Pinto e Mascarenhas,
d/o late Joaquim Inacio Pinto
83 years of age, r/o Sao Paulo,
Brazil, represented by her duly
constituted attorney Savio Jorge
Barreto alias Savio George
Barreto, s/o Tony Barreto,
51 years of age, r/o B/2,
Wellworth Residency,
Borda, Margao, Goa. ... Respondent.

Appellants represented by learned Advocate Shri C. Coutinho.

Respondent represented by learned Advocate A. Ramani.

ORDER

(Delivered on this the 27th day of the month of February, of the year, 2024)

1. This order shall dispose of an application for production of documents filed by the appellants.

2. The case of the appellants is that they sought to produce a matríz certificate bearing No.493 pertaining to the suit property Mugalem. The boundaries shown in the matríz certificate of 493 and that of land Registration 21036 match on all fours. The Court was pleased to reject the document holding that it is not relevant to decide the matter in controversy. The finding of the Court that the matríz certificate does not mention the Land Registration document is perverse as normally the matríz certificate does not contain the land registration document. The said

matriz certificate was required to prove the matter in controversy. As the only issue before the Court was whether the land registration 6299 and 21036 pertain to the same property and the claim of the plaintiffs was that both are covered by matriz 669.

3. The said document is relevant for deciding the matter in controversy. Fundamentally the Trial Court has come to the wrong conclusion that 6299 and 21036 pertain to same matriz holding 669. Such a wrong finding has come on record due to the Trial Court rejecting to take on record matriz certificate 493 sought to be produced by exhibit 81. The matriz certificate clinches the defence and tears into the judgment of the Trial Court. It is just proper and imperative that the said document that is matriz certificate no.493 sought to be produced be taken on record. It is therefore prayed that the plaintiffs be permitted to rely upon and produced in evidence the said matriz document 493.

4. The respondent has filed a reply. It is their case in view of the judgment in the case of **Union of India Vs. Ibrahim Uddin 2012 (8) SCC 148**, the application for production of documents have to be considered alongwith main appeal. It is therefore prayed that application may be dismissed and may be considered at the time of final hearing of the appeal on merits.

5. Before going into the merits of the case I shall address the objection raised by the respondent to decide the application for production of document prior to hearing the final arguments in appeal.

6. Learned Counsel for the appellants has relied upon the judgment in the case of **Union of India Vs. Ibrahim Uddin and another (2012) 8 Supreme Court Cases 148**. In this case it was held that “ *The general principle is that the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in*

appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate Court to take additional evidence in exceptional circumstances. The appellate Court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist.”

7. Ld. Counsel for the appellants has invited the attention of the Court to Order 41 Rule 27 of CPC which reads as under:

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.

8. Ld. Counsel has therefore contended that when new evidence is sought to be produced which was never produced before the Trial Court, the Court need not proceed to hear the appeal and the Court considers the utility of the additional documents sought to be produced. The Court need not waste its time in hearing the appeal.

9. Per contra, Ld. Counsel for the respondent has drawn a distinction between the word 'produce' and 'admitted' used under Order 41 Rule 27 of CPC. It is his contention that in the instant case no application was previously made for allowing the documents sought to be produced herein. These documents are being produced for the first time before the First Appellate Court. Therefore, ratio of Union of India (supra) should be held applicable to the present case and application should be heard alongwith main appeal.

10. I shall first go into the facts of the case of Union of India (supra). In this case the suit filed was dismissed. In appeal the plaintiffs filed an application under Order 41 Rule 27 of CPC for adducing additional evidence. This application was allowed by the First Appellate Court and the first appeal stood allowed by the First Appellate Court by its judgment and decree dated 15.10.1999. Aggrieved by the order of the First Appellate Court the appellant

preferred the second appeal before the Hon'ble High Court which was dismissed and this judgment has been challenged before the Hon'ble Supreme Court. Therefore, this is a case where the documents at the first instance were produced before the First Appellate Court. In this context the Hon'ble Supreme Court discussed the stage for consideration of such application under Order 41 Rule 27 of CPC and held at para 85.7 of the SCC Journal that the *first appellate Court committed a grave error in deciding the application under Order 41 Rule 27 CPC much prior to the hearing of the appeal. Thus, the order allowing the said application is liable to be ignored as the same had been passed in gross violation of the statutory requirement.*

11. In the instant case as well it is the contention of the appellants that they have a document which will show discrepancy between the matrix number and land registration number claimed by the plaintiffs and the said document is relevant to decide the real issue in

controversy. Without going into the merits of the case the Court cannot conclude whether the said document is relevant to decide the real issue in controversy. Hence, by applying the ratio of Union of India (supra) this Court will have to take up the application for production of document simultaneously alongwith the main appeal.

12. Ld. Counsel for the appellants has relied upon the judgment in the case of **Hasante Taheriyyah Fidayyiah Vs. Shri Mahesh s/o Kishor Saran, 2014 (3) ALL MR 497**, wherein it was held that “*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 therefore, the application filed under Order 41 Rule 27 (1) (a) (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 stag of pronouncement of the judgment. The 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”.

13. At the outset it is noted that this is a judgment of the Hon'ble Bombay High Court. Principle laid down by the Hon'ble Supreme Court will precede. That apart, in this case a suit was filed by the plaintiff which suit was dismissed. The plaintiff filed an appeal. The plaintiff also filed an application under Order 41 Rule 27 CPC for permission to file original power of attorney. The Id.

District Judge allowed the application for additional documents and concurred with the findings of the learned Trial Court on non user of premises. However, reversed the finding on bonafide requirement. The respondent filed a Writ Petition before the Hon'ble High Court. The Hon'ble Single Judge of the Hon'ble High Court allowed the Writ Petition and the judgment passed by the First Appellate Court was quashed and set aside and the application for production of documents and the matter was remanded back with the direction to decide the application for production of documents filed under order 41 Rule 27 of CPC afresh on merits and then decide the appeal filed by the respondent in accordance with law as directed by the Ld. Single judge. The First Appellate Court allowed the application for production of additional evidence. Thereafter Ld. District Judge heard the regular appeal on merits and allowed the appeal by judgment and order dated 10.1.2012 thereby reversing the judgment and order passed

by the learned Trial Judge and decreed the suit. Being aggrieved thereby the tenant filed Writ Petition No.2808/2012. By order dated 15.10.2012 the Hon'ble High Court (Single Judge) held that Ld. Appellate Court had heard in upholding the findings of the Trial Court. In so far as maintainability of the suit is concerned the Hon'ble High Court (Single Judge) maintained the finding of the First Appellate Court and that in view of power of attorney which was subsequently produced before the Appellate Court. The suit filed by the plaintiff is maintainable. Being aggrieved by this order both the landlord and the tenant filed a Letters Patent Appeal. It was argued before the Hon'ble Bombay High Court that in view of the judgment of Union of India (supra) application can be considered only finally alongwith the main appeal, Ld. Court therefore has grossly erred in deciding application for production of documents first and has erred

in upholding the findings regarding maintainability of the suit.

14. After hearing the arguments the Hon'ble High Court held at paras 13, 21 and 22 that *"It can thus clearly be seen that the Apex Court , after considering the legal position, has held 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. It has been further held that 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/in executable and is liable to be ignored.

The findings of the learned Appellate Court and the learned Single judge in respect of maintainability of the suit on accepting the additional evidence as produced by the plaintiff are set aside. The matter is remanded back to the learned Appellate Court for considering the question regarding permissibility of the additional evidence at the stage of the pronouncement of the judgment.

Since the matter is already heard on merits and on two occasions, the learned Appellate Court is directed to decide the appeal on merits alongwith the question as to whether the additional evidence which has been permitted earlier on two occasions is necessary for pronouncement of the judgment or for any substantial cause at the stage of pronouncement of the judgment. Same shall be done within a period of two months from today”.

15. This judgment , therefore in fact has maintained the principle laid down in the case of Union of India (supra) and remanded the matter to the Trial Court in considering the question permissibility of additional evidence at the stage of pronouncement of the judgment. The case of **Hasante** (supra) therefore does not support the case of the appellants. Hence no case is made out to decide the application for production of documents prior to hearing of the appeal on merits. Hence, I pass the following:

O R D E R

Application for production of documents shall be taken up alongwith the main appeal.

Pronounced in the Open Court.

Margao,Dated:27.02.2024.

(Pooja C. Kavlekar)
District Judge-2,
South Goa, Margao.

Sg/-