(2014) 3 ALLMR 497 : (2014) 5 BomCR 231 : (2014) 2 MhLj 884

Bombay High Court (Nagpur Bench)

Case No: L.P.A. Nos. 458 of 2012 and 242 of 2013 in W.P. No. 2808 of 2012

Hasanate Taheriyyah Fidayyiah		APPELLANT
	Vs	
Mahesh		RESPONDENT

Date of Decision: Jan. 18, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, Order 41 Rule 27, Order 41 Rule 27(1)(a), Order 41 Rule 27(1)(b), Order 41 Rule 33
- Maharashtra Rent Control Act, 1999 - Section 15, 16(1)(g), 16(1)(n)

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Hon'ble Judges: B.R. Gavai, J; A.S. Chandurkar, J

Bench: Division Bench

Advocate: Rohan Chhabra in L.P.A. No. 458 of 2012 in W.P. No. 2808 of 2012, S.V. Sirpurkar in L P. A. No. 242 of 2013 in W. P. No. 2808 of 2012, Advocate for the Appellant; S.V. Sirpurkar, A.A. Naik amicus curiae in L.P.A. No. 458 of 2012 in W.P. No. 2808 of 2012 and Rohan Chhabra, Advocate for the Respondent

Judgement

B.R. Gavai, J.
Heard. Admit. By consent of the parties, the appeals are taken up for hearing finally.

2. Both these appeals take exception to the Judgment and order passed by the learned Single Judge of this Court in Writ Petition No. 2808 of 2012 on 15th October, 2012. These appeals are having chequered history.

3. In the present matters, the parties are referred by their nomenclature in original suit. The plaintiff has filed a Suit for ejectment, possession and mesne profits. It is the contention of the plaintiff that the defendant was not using the suit premises and as such the plaintiff was entitled for a decree of ejectment and possession of the suit premises u/s 16(1)(n) of the Maharashtra Rent Control Act, 1999 (hereinafter referred to as the "said

Act")- The plaintiff had also sought possession u/s 16(1)(g) on the ground of bona fide need. It was further contended by the plaintiff that the defendant/tenant was in arrears of rent and as such also liable to be evicted in view of the provisions of section 15 of the said Act. The learned trial Judge, vide Judgment dated 25th April, 2008, though gave a finding that the plaintiff was entitled for possession u/s 16(1)(n) and 16(1)(g) of the Maharashtra Rent Control Order, dismissed the suit on the ground that the trustees of the Trust were not joined as parties and that there was no evidence to show that the trustee through whom the plaintiff had filed the suit, was a Managing Trustee of the Trust. Being aggrieved by the Judgment of the learned trial Court, the plaintiff filed an appeal before the learned District Judge. During pendency of the Appeal, the plaintiff filed an Application under Order 41, Rule 27 of the CPC for permission to file original power of attorney authorizing the Managing trustee of the Trust to file the suit on behalf of the Trust. The learned District Judge, while allowing the application of the plaintiff under Order 41, Rule 27 of the CPC at the stage of the Judgment, concurred with the findings of the learned trial Court regarding non-user of the premises and bona fide requirements, and as such reversed the Judgment of the learned trial Court and decreed the suit vide Judgment and decree dated 3rd February, 2011. The tenant filed Writ Petition No. 2008 of 2011 before this Court challenging the findings of the learned Appellate Court. The learned Single Judge of this Court on 3rd May, 2011 passed the following order partly allowing the writ petition of the tenant:

7. Hence, for the reasons aforesaid, the writ petition is partly allowed. The impugned order passed by the first Appellate Court on 3-2-2011 is quashed and set aside. The matter is remanded to the first Appellate Court for deciding the application filed by the respondent under Order 41, Rule 27 of the CPC afresh on merits and then decide the appeal filed by the respondent, on merits and in accordance with law. Since the matter is an old one, the first Appellate Court is expected to decide the appeal as early as possible and positively within a period of 8 months from the date of this Judgment.

4. As directed by the learned Single Judge, the learned Appellate Court on 23rd November, 2011 allowed the application filed by the plaintiff for adducing additional evidence. The learned District Judge thereafter heard the regular appeal on merits as per the directions issued by the learned Single Judge and allowed the appeal vide Judgment and order dated 10-1-2012 thereby reversing the Judgment and order passed by the learned trial Judge and decreeing the suit. Being aggrieved thereby the tenant filed the Writ Petition No. 2808 of 2012. The learned Single Judge vide impugned Judgment dated 15th October, 2012 held that the learned Appellate Court had erred in upholding the findings of the trial Court without discussing the evidence regarding bona fide requirements and non-user of the premises. The learned Single Judge found that as a final fact finding Court it was the duty of the learned Appellate Court to consider and appreciate the relevant evidence tendered by the parties on the issue of bona fide need and non-user of the premises. The learned Single Judge, however, was of the view that the Judgment of the learned Appellate Court insofar as the maintainability of the suit

requires no interference inasmuch as by power of attorney the plaintiff had proved that he was entitled to file the suit. Being aggrieved thereby, both the landlord and tenant have approached this Court. The Letters Patent Appeal No. 458/12 is filed by the plaintiff landlord and Letters Patent Appeal No. 242/13 has been filed by the defendant tenant.

5. Shri Rohan Chhabra, learned counsel appearing on behalf of the plaintiff submits that the learned Single Judge has grossly erred in remanding the matter to the learned Appellate Court for considering the evidence on the issue of bona fide requirements and non-user of the premises. The learned counsel submits that the tenant had not challenged the findings of the learned trial Judge on the issues of bona fide requirements and non-user of the premises and as such they attained finality. The learned counsel, therefore, submits that in view of the non-challenge of the findings in that regard by the tenant, it was not at all necessary for the learned Appellate Court to reappreciate the evidence on those issues inasmuch as the same had attained finality. The learned counsel, therefore, submits that the Judgment passed by the learned Single Judge deserves to be set aside and the petition deserves to be dismissed in totality upholding the findings of the learned Appellate Court.

6. Per contra, Shri S. V. Sirpurkar, learned counsel appearing for tenant submits that the learned Appellate Court had grossly erred in deciding the application under Order 41, Rule 27 of the CPC first and thereafter deciding the appeal on merits.

7. The learned counsel placed relying on the Judgment of the Apex Court in the case of Union of India (UOI) Vs. Ibrahim Uddin and Another, submits that the application could be considered only at the stage of pronouncing the Judgment and as such the jurisdiction exercised by the learned Appellate Court in deciding the application first and thereafter deciding the appeal, was contrary to law. The learned counsel, therefore, submits that the learned Single Judge has grossly erred in upholding the findings regarding the maintainability of the suit inasmuch as it had decided the application for adding additional evidence first and thereafter deciding the appeal.

8. In view of the important question involved in the present matter, we had requested to Mr. Akshay Naik, learned counsel to appear as amicus curiae, which request was graciously accepted by Mr. Akshay Naik and he has rendered valuable assistance to us.

9. The learned amicus curiae relying on the Judgment of the Himachal Pradesh High Court in the case of Himanshu Vs. Bishan Dutt and Others, , submits that if an application is filed under Clause l(a)(aa) of Rule 27, Order 41 of the Code of Civil Procedure, it has to be decided at the stage prior to the decision of the appeal. The learned counsel further submits that if the additional evidence is to be permitted in view of clause 1(b) of Rule 27, then same has to be decided while deciding the appeal on merits. The learned counsel further submits that if a party does not file an appeal or cross objection challenging the findings which are given by the trial Court against it, then it is not necessary for the Appellate Court to appreciate the evidence in respect of those findings are considered.

10. The learned amicus curiae relied upon the following Judgments:

i) Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, , ii) Padmadevi Shankarrao Jadhav and Others Vs. Kabalsing Garmilsing Sardarji and Others, , iii) Laxman Tatyaba Kankate and Another Vs. Smt. Taramati Harishchandra Dhatrak, .

11. Undisputedly, the order which is passed by the learned Appellate Court allowing adducing of additional evidence is referable to the clause (b) of subsection (1) of Rule 27 of Order 41. The Apex Court in the case of Union of India v. Ibrahim (supra) has observed thus:

49. An application under Order 41, Rule 27, CPC is to be considered at the time of hearing of appeal on merits so as to find put whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the Court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court (Vide Arjan Singh v. Kartar Singh and Natha Singh v. Financial Commr., Taxation.).

49. In Parsotim Thakur v. Lal Mohar Thakur it was held: (LW pp. 86-87)

.....The provisions of section 107, Civil Procedure Code, as elucidated by Order 41, Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal.

.....Under Rule 27, clause (1)(b), it is only where the Appellate Court "requires" it (i.e. finds it needful).....The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.

.....It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified...the power so conferred upon the Court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main

issue in the case.

(emphasis added).

51. In Arjan Singh v. Kartar Singh this Court held: (AIR pp 195-96, paras 7-8).

7.... If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent...

8.....The order allowing the appellant to call the additional evidence is dated 17-8-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment.

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.

12. 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.

13. The Division Bench of Himachal Pradesh High Court in the case of Himanshu (supra) has laid a fine distinction between the powers to be exercised under clauses (a) and (aa) of Sub-rule (1) of Rule 27 of Order 41 and clause (b) of the said sub-rule. It will be appropriate to refer to paras 9 and 10 of the said Judgment, which are as under:

9. The judgments in cases of State of Rajasthan v. T. N. Sahani; Aryan Singh v. Kartar Singh and others and Parsotim Thakur and others v. Lal Mohar Thakur and others, make it abundantly clear that all these cases related to the exercise of jurisdiction by the appeal Court under clause (b) and none of these cases related to the exercise of jurisdiction by the appeal Court under clause (a) or under clause (aa). Undoubtedly, a bare reading of the three clauses in Rule 27 of Order XLI clearly suggests to us that insofar as clause (a) and clause (aa) are concerned, the initiative has to come from the party seeking to lead additional evidence either because the party feels that despite efforts by it the trial Court had refused to admit the evidence which ought to have been admitted [refer to clause (a)] or despite exercise of due diligence, the evidence not being in the knowledge of the party in the trial Court, it could not produce the same during the trial. Insofar as the situations relatable to clauses (a) and (aa) are concerned, in our considered opinion, application for production of additional evidence can be filed by the party at any stage of the appeal, even before the stage of final hearing of the appeal. In coming to this view, we have in our minds cogent reasons. The main reason is that the party knows that either with respect to the situation under clause (a) or with respect to a situation under clause (aa), the trial Court erred in not allowing the additional evidence and unless the additional evidence is produced the party''s case cannot be properly put across. There is no reason for such a party to wait for the final hearing of the appeal because that would be a sheer wastage of time and the party would be well advised in such a situation to file an application for leading the additional evidence at the initial, rather earliest stage of the appeal itself. There can also be situations where the party understands its case very well and finds that unless the additional evidence is brought on the record the appeal cannot be effectively adjudicated upon. There can be numerous other reasons why a party would genuinely feel convinced about the imperative need of leading additional evidence at the very initial stage of the appeal because the party would be genuinely convinced that unless additional evidence was produced, the appeal by itself, based on the record of the trial Court would be imperfect or incomplete causing prejudice to the interests of the party.

10. In contradistinction to clauses (a) and (aa), as far as clause (b) is concerned, its ambit and scope is quite distinct because the expression "to enable it to pronounce the judgment" occurring in clause (b) clearly suggests that only when the Appellate Court has started hearing of the appeal and in the course of the hearing of the appeal feels that it requires any additional document to be produced or any additional witness to be examined, it may call for additional evidence. Their might be actually situations and cases where even though the appeal 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 interests of justice something which remained obscure should be filled up so that it can pronounce the judgment in a more satisfactory manner. The requirement has to be of the Court and the requirement is always to enable the Court to pronounce the judgment for any substantial cause. In either case the requirement has to be of the Court. This is the plain meaning and clear interpretation of clause (b) and based on such interpretation,

in our considered view, 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 when on examining the evidence as it stands some inherent lacuna or defect became apparent to the Appeal Court. There might be situations where the Appeal Court in the process of examining the evidence while hearing the appeal finds that some omission needs to be supplied and in such a situation it can ask for additional evidence to supply such an omission with a view to enabling it to pronounce the judgment.

14. 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 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.

15. Insofar as the other issues are concerned, it will be relevant to refer to Rule 22 of Order 41 which reads thus:

22. Upon hearing respondent may object to decree as if he had preferred separate appeal. -- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection) to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(Explanation-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree insofar as it is based on that finding; notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the sit, the decree, is wholly or in part, in favour of that respondent.)

(2) Form of objection and provisions applicable thereto--Such cross-objection shall be in the form of a memorandum, and the provisions of rule) so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(4) Where, in any case in which respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

Perusal of the said rule clearly reveals that the respondent, though may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross objection to the decree. However, proviso requires that he can do so only if he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow. Undisputedly, the defendant tenant has not done so.

16. In this respect, it will be appropriate to refer to the following observations of the Hon"ble Apex Court in the case of Laxman Tatyaba Kankate (supra), which are as under:

24. It is a settled principle of law that before the first Appellate Court, the party may be able to support the decree but cannot challenge the findings without filing the cross-objections. As it appears from the record, the present appellants have neither filed

cross-objections nor their appeal challenging the findings recorded by the learned trial Court. In fact, the entire conduct of the present appellants shows that they have not only failed to prove their claim before the Courts of competent jurisdiction but have even not raised proper pleas in their pleadings.

17. It will also be appropriate to refer the following observations of the Division Bench of this Court in the case of Smt. Padmadevi Shankarrao Jadhav (supra), which are as under:

7. So far as the question as to whether the opponents can challenge the finding qua negligence of the opponent No. 1 Kabalsing is concerned, in our view, it is not open to the opponents to challenge the said finding in the absence of filing of an independent appeal or a cross-objection. It is not disputed that in an appeal filed under the provisions of the Motor Vehicles Act, it is open to the opposite party to file cross-objections, since the provisions of Order 41, Rule 22 will aptly apply to such an appeal. This position is not disputed even by Shri Trivedi and in our opinion, rightly. As held by the various High Courts, including K. Chandrashekara Naik and Another Vs. Narayana and Another, , U.P. State Road Transport Corporation Vs. Smt. Janki Devi and Others, , National Insurance Co. Vs. Diwaliben, , Srisailam Devastanam Vs. Bhavani Pramilamma and Others, , Srisailam Devastanam v. Bhavani Pramilamma, the provisions of the CPC will be applicable to an appeal filed u/s 110D of the Motor Vehicles Act. As a necessary corollary of this, cross-objections could be filed in such an appeal. In our view, this position is placed beyond doubt by the amendment to the provisions of Order 41, Rule 22 of the Code of Civil Procedure. The Explanation to Order 41, Rule 22 clearly provides that a respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree insofar as it is based on that finding notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent. In the present case, admittedly the ultimate award for compensation passed by the Tribunal is based on the finding on the issue of negligence. Unless it was held that the truck driver was negligent in driving the truck and the accident took place because of his negligence, the award for compensation against the opponents cannot follow. Even if it is held that it was the case of contributory negligence on the part of the truck driver as well as the deceased, men also unless a finding in that behalf is recorded, an award for compensation cannot be passed in favour of the claimants. Therefore, the finding on the question or issue of negligence is not only germane, hut is the foundation for awarding compensation. Hence, a cross-objection could have been filed by the opponents challenging the said award based on the said finding. This has not been admittedly done. Therefore, in our view, unless a cross-objection is filed, it will not be open to the opponents to challenge the finding in that behalf. We are fortified in this view by the latest decision of the Supreme Court in Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, . Precisely a similar question fell for the consideration of the Supreme Court in the context of the provisions of Order 41, Rule

22 and Order 41, Rule 33 of the Code of Civil Procedure. After making a reference to its earlier decisions in Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others, and Giasi Ram and Others Vs. Ramjilal and Others, , this is what the Supreme Court has observed in paras 12,13 and 14 of the judgment.

12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to reopen decrees which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from.

13. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of the other laws viz. The Law of Limitation or the Law of Court-fees etc..

14. In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar, there was no justification for the Commissioner to have interfered with that finding in favour of the appellants. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under Order 41, Rule 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation.

In our view, these observations aptly apply to the present case also. This Court cannot exercise power under O. 41, R. 33 by losing sight of the other provisions of the Code, or the provisions of other laws viz. The Law of limitation, the Law of Court-fees etc.. In the present case. Shri Trivedi practically wants that not only the appeal should be dismissed but the claim made by the claimants should be dismissed in toto which means that we should pass an order to the prejudice of the claimants though the opponents have not filed any appeal or cross-objections and the Award passed by the Tribunal has become final, so far as the opponents are concerned. In our view, the wide powers conferred upon this Court under O. 41. R 33 cannot be exercised to achieve such a design. This is not legally permissible, nor is it equitable.

18. In that view, we also find that the learned Single Judge has erred in remanding the matter to the learned Appellate Court for considering the evidence afresh on the issues of bona fide requirements and non-user of the premises. The defendant/tenant not having

assailed the findings on the issue of bona fide requirements and non-user of the premises by either filing appeal or at least by cross-objection, could not be heard to say for the first time in writ jurisdiction that the Appellate Court had erred in not considering the evidence in that regard. We, therefore, find that said finding is also not sustainable in law.

19. In that view of the matter, both the Letters Patent Appeals are allowed. The impugned orders are quashed and set aside. The order passed by the learned Single Judge in remanding the matter for deciding for considering the issue on the bona fide requirements and non-user of the premises is set aside. It is held that said finding on fact as recorded by the learned trial Court has attained finality inasmuch as the tenant has not challenged the same.

20. 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 along with 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.

In the facts and circumstances of the case, no order as to costs.

The Court express gratefulness of Shri Akshay Naik, the learned counsel who has as usual ably assisted the Court.