

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2013

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P.(NPD) . No.2430 of 2012
and
M.P.No.1 of 2012

1. Ravichandran
2. Selvakumar
3. Tamilarasi
4. Alamelu
5. Shanthi

... Petitioners
[Petitioners 2 to 6]

vs

Paramasivam

... Respondent
[Respondent]

Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the order dated 27.02.2012 made in I.A.No.51 of 2011 in A.S.No.173 of 2008 by the Additional District Judge, Fast Track Court, Ariyalur.

For Petitioners : Mr.R.Thiagarajan

For Respondent : Mr.P.Murugan
for
Mr.S.Kamadevan

ORDER

This Revision is preferred against the order of the learned Additional District Judge (Fast Track Court), Ariyalur, dated 27.02.2012 made in I.A.No.51 of 2011 in A.S.No.173 of 2008 on the file of the above said Appellate Judge.

2. One Elanchezhiyan filed the Suit O.S.No.11 of 2004 on the file of the District Munsif, Ariyalur, against the respondent herein for declaration that the suit property belonged to him and for recovery of possession after removal of the construction allegedly made by the respondents herein encroaching upon the suit property. The learned trial Judge, after trial, dismissed the suit by judgment and decree dated 30.06.2005.

3. As against the decree dismissing the suit, the plaintiff, namely Elanchezhiyan, preferred an Appeal in A.S.No.173 of 2008 on the file of the Additional District Judge (Fast Track Court), Ariyalur. During the pendency of the Appeal, Elanchezhiyan died and his legal representatives, who are the revision petitioners herein, got impleaded as appellants 2 to 6. During the pendency of the Appeal, they filed an application in I.A.No.51 of 2011 under Order 41 Rule 27 CPC seeking permission to lead additional evidence. The learned lower Appellate Judge, after hearing, dismissed the application by an order dated 27.02.2012 and aggrieved by the same, the revision petitioners, who are the appellants 2 to 6 in the above said appeal, have knocked at the doors of this Court for redressal by preferring the present revision.

4. Notice before admission was given to the respondent and the respondent is also represented by Counsel. The arguments advanced on both sides are heard. The materials produced in the form of typed set of papers are also perused.

5. The only ground on which the order of the learned Appellate Judge is sought to be challenged is that when a party to the Appeal files an application under Order 41 Rule 27 CPC seeking permission to lead additional evidence, the said application should have been heard along with the Appeal on merits and separate consideration of the application de hors the merits of the main Appeal in which the evidence will be traversed, is against the recognised principle of dealing with an application under Order 41 Rule 27 CPC.

6. The learned counsel for the respondent would contend that though there cannot be any quarrel over the proposition of law relied on by the learned counsel for the revision petitioners, there is nothing to show that the learned lower Appellate Judge did not consider the application along with merits of the Appeal and that hence the challenge made to the order passed by the learned lower Appellate Judge dismissing the application filed under Order 41 Rule 27 CPC is bound to fail. It is his further contention that the scope of requirement is to hear the application along with the Appeal on merits and such a requirement cannot be stretched further to contend that the order in such application should be either incorporated in the judgment in the Appeal or passed simultaneously while pronouncing the judgment in the Appeal.

7. This Court paid its anxious consideration to the above said submission made on both sides.

8. Of course, it is true that the preponderance of authorities in this regard which is spelt out in the judgment of the learned single Judge of this Court in S.Santhana Selvaraj ..vs.. Jaffar Khan and two others reported in 1998 (III) CTC 138 and also in the judgment of a Division Bench of this Court in M.Ayyaswami and another ..vs.. S.P.Ganesan and another reported in 1994-2-L.W.376 point out that an application filed under Order 41 Rule 27 CPC should not be heard separately and it should be heard along with the appeal on merits. The scope of such a requirement cannot be extended by holding that the order passed in such an application should be either incorporated in the judgment itself or should be made simultaneously while pronouncing judgment in the appeal. The above said judgments of the single Judge of this Court in S.Santhana Selvaraj ..vs.. Jaffar Khan and two others reported in 1998 (III) CTC 138 is based on the observation made by the Division Bench cited second above. In the judgment of the Division Bench of this Court, reference had been made to some of the pronouncements of the Privy Counsel and also the judgment of the Hon'ble Supreme Court in "Arjun Singh ..vs.. Kartar Singh" reported in AIR 1951 SC 193 and a decision of the Supreme Court in "K.Venkataramaiah ..vs.. Seetharama Reddy" reported in AIR 1963 SC 1526. A close study of the judgments referred to above and a proper consideration of the provisions dealing with the recording of additional evidence will show that though an application under Order 41 Rule 27 CPC is to be heard along with the appeal on merits, it shall not be necessary and it shall not be desirable in certain contingencies to incorporate the order in the judgment or pronounce the order simultaneously while the judgment in the appeal is pronounced.

9. In this regard this Court in "Jayamoorthy and others ..vs.. Palani and others" reported in "(2013) 7 MLJ 471" has observed as follows:-

"13. In addition, as rightly contended by the learned counsel for the appellants, though an application under Order XLI Rule 27 is to be heard along with the appeal, an order dismissing the application can be incorporated in the judgment itself, when the appellate Court decides to dismiss the application. The procedure to be followed in case the appellate court decides to allow such applications shall be different. In such cases, the appellate court has to follow the procedure for taking evidence in the appellate stage. Order XLI Rule 28 deals with the same. The same reads as follows:-

"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."

14. There shall be only one circumstance under which the appellate court can mark the documents and proceed with the pronouncement of judgment i.e., in case the parties do not raise objection and they do give their consent for marking the documents produced as additional evidence. In such an event, there shall be no necessity to postpone the further hearing of the appeal and the appellate court can record the same in the order passed in the application under Order 41 Rule 27 and mark those documents by consent as additional evidence, hear further arguments in the appeal in the light of such additional evidence and then proceed with the pronouncement of the judgment in the appeal."

In the above judgment, it has been clarified that in case the Appellate Court, after hearing the appeal on merits and the application for adducing additional evidence, comes to the conclusion that the application is liable to be dismissed, the proper course to be adopted by the Appellate Court is to pass an order dismissing the application and at the same time, pronounce a judgment in the appeal on merits. This can be done in another way by incorporating the order of dismissal of the application in the judgment itself and passing a common order and judgment in the application and the appeal. But when the Court comes to the conclusion that the application filed under Order 41 Rule 27 CPC is to be allowed, the above said procedure cannot be followed and it shall not be desirable, because once the Court comes to the conclusion that the application for adducing additional evidence is to be allowed, then the Court has to follow the procedure contemplated under Rule 28 CPC for the recording of additional evidence. Without recording additional evidence after allowing the application for adducing additional evidence, pronouncement of judgment in the Appellate Court shall not be possible. There can be only one contingency in which the order allowing the application can be passed and the judgment can be pronounced on the same day. The same is possible when the additional evidence sought to be adduced is only a documentary evidence and the opposite party does not dispute the genuineness and admissibility of the evidence and on the other hand, gives consent for marking that document and proceeding with the disposal of the appeal on merits, taking into consideration the additional evidence also. The Court can conveniently mark the evidence by consent and proceed with the pronouncement of the judgment on the same day on which, the application under Order 41 Rule 27 CPC is allowed. This Court hopes that the above said observation regarding the manner in which the application under Order 41 Rule 27 CPC is to be dealt with

and under what circumstances the order in such an application can be incorporated in the judgment in the appeal or passed simultaneously while pronouncing the judgment and in what cases the order should be passed separately and the appeal should be postponed for further hearing, will make it amply clear the proposition of law in this regard.

10. Applying the test to the case on hand, this Court is of the view that though the learned lower Appellate Judge could have heard the appeal on merits and thereafter passed an order in the application filed under Order 41 Rule 27 CPC dismissing the said application, there is nothing in the order to indicate that such a consideration of the appeal on merit was made. Nothing prevented the trial Court from incorporating the order of dismissal of the application in the judgment itself or from pronouncing a judgment of the appeal on merits, immediately on pronouncing the order which will indicate that the appeal was heard on merits along with the application and after such hearing the lower Appellate Court decided to dismiss the application. As the Court has not chosen to do it in either way, namely incorporating the order in the judgment or pronouncing judgment simultaneously with the passing of the order, this Court has to infer that the learned lower Appellate Judge had not followed the dictum enunciated in the judgments referred to above. Hence this Court is inclined to accept the contention of the learned counsel for the revision petitioner and set aside the order passed by the learned lower Appellate Judge on 27.02.2012 made in I.A.No.51 of 2011 in A.S.No.173 of 2008 dismissing the said Interlocutory Application. This Court is of the view that after setting aside the said order, the said application should be remitted back to the lower Appellate Judge to deal with the same afresh in accordance with the law indicated supra and dispose of the same.

11. In the result, the Civil Revision Petition is allowed. The order passed by the learned Additional District Judge, Fast Track Court, Ariyalur, on 27.02.2012, in I.A.No.51 of 2011 in A.S.No.173 of 2008 dismissing the said Interlocutory Application, is set aside and the said application is remitted back to the lower Appellate Judge to deal with the same afresh in accordance with the law indicated supra and dispose of the same. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

mra

To

1. The Additional District Judge,
Fast Track Court, now redesignated as
The Additional District Judge, Ariyalur.

1 CC To Mr.S.Kamadevan, Advocate SR NO.66406

1 CC To Mr.R.Thiagarajan, Advocate SR NO.66126

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C.R.P. (NPD). No.2430 of 2012



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