THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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C.M.A.No.99 of 2013

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JUDGMENT:

This Civil Miscellaneous Appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure (for short, 'the Code') is directed against the judgment dated 29.10.2012 of the learned I Additional District Judge, Kurnool passed in AS.No.67 of 2011. The learned Additional District Jude while allowing the said appeal and also an interlocutory application in IA.No.321 of 2012 filed under Order XLI Rule 27(1)aa read with Section 151 of the Code had set aside the decree and judgment dated 12.07.2011 of the learned II Additional Junior Civil Judge, Kurnool passed in OS.No.1132 of 2008 and remitted the suit to the trial Court permitting the plaintiff to mark the documents by examining the necessary witnesses and adduce additional evidence, if any, and also permitting the defendants to adduce further evidence, if any, and with a direction to the trial Court to dispose of the suit afresh on priority basis.

2. I have heard the submissions of the learned senior counsel for the appellants/defendants ('the defendants', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The facts that lead to the filing of the present appeal may be stated, in brief, as follows:

The plaintiff brought the suit against the defendants for declaration of title and recovery of possession of the plaint schedule property and for a consequential injunction restraining the defendants and their men from interfering with the plaintiff's peaceful possession and enjoyment of Ac.3.50 cents in Sy.Nos.36 and 102 at Nidzur village more fully described in the schedule annexed to the plaint. The defendants had resisted the suit. At trial, the plaintiff and his supporting witnesses were examined as PWs1 to 4 and exhibits A1 to A9 were marked on the side of the plaintiff. On the side of the defendants, DW1 to 3 were examined and exhibits B1 and B2 were marked. On merits, the trial Court had dismissed the suit. Feeling aggrieved, the sole plaintiff had preferred the first appeal. During the pendency of the first appeal, the plaintiff had filed an interlocutory application in IA.No.321 of 2012 under Order XLI Rule 27(1)(aa) of the Code for receiving additional evidence. The Court below having heard the said application along with the first appeal and having allowed the said application had observed that the right course to be followed for marking these documents through the necessary witnesses is to remit the matter to the trial Court and direct the disposal of the suit afresh by the trial Court after giving opportunities to the plaintiff and the defendant to examine necessary witnesses and adduce additional evidence, if any. Accordingly, the first appeal was allowed and the suit was remitted to the trial Court with the said directions. Hence, the aggrieved defendants are before this Court by way of this CMA.

4. No substantial questions of law are raised in the memorandum of grounds of appeal specifically. The learned senior counsel for the appellants/defendants would contend as follows:

Allowing the appeal and remitting the suit to the trial Court is illegal and unsustainable and, therefore, the Court below ought not to have done so. The Court below had acted illegally by allowing the application under Order XLI Rule 27 and remanding the suit to the trial Court. The Court below acted illegally in receiving the documents on file as additional evidence even though the conditions envisaged under Order XLI Rule 27 are not satisfied. The appeal may be allowed and the order of the Court below be set aside and the first appeal be remitted to the Court below for fresh disposal on merits and in accordance with the procedure established by law.

5. On the other hand, the learned counsel for the plaintiff had supported the judgment and decree of the Court below and had contended as follows:

In view of the observations in the judgments of the trial Court, the plaintiff had filed certified copy of the power of attorney dated 06.06.1991, the copies of adangals issued by Mandal Tahsildar, Kurnool which are related to the plaint schedule property and also the certified copy of registered power of attorney executed by defendants 1 to 4 in favour of the 5th defendant. Having properly considered the request of the plaintiff to receive the additional evidence, the Court below while disposing the application for receiving the additional evidence along with the appeal had rightly allowed the application and had set aside the decree and judgment of the trial Court. Since the application to receive additional evidence is allowed, the Court below was correct in remitting the matter to the trial Court to give an opportunity to both the parties to adduce further evidence, if any, by examining necessary witnesses. Direction in the judgment of the Court below to the trial Court to receive additional evidence of both the sides and then dispose of the suit afresh on merits is justified and caused no prejudice to the defendants. No substantial question of law is involved. The appeal is liable to be dismissed.

6. Now the law is well settled that an appeal under Order XLI Rule 1(u) from an order of remand under Order XLI Rule 23A is maintainable. However, such appeal under Order 43 Rule 1(u) can only be heard on the grounds on which a second appeal may be heard under Section 100 of the Code. In **Narayanan v. Kumaran** the Supreme Court held that an appeal under Order 43 Rule 1(u) of the Code should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints under sub-section 100 of the Code continue to be attached to an appeal under Order 43 rule 1(u). In view of the said legal position, it is now to be examined as to whether any substantial question of law though not raised is involved in this CMA. The only substantial question of law from the memorandum of grounds and the contentions raised before this Court appears to be is this – 'The Court below had allowed the application filed by the plaintiff to receive additional evidence though no grounds were made out and the ingredients of provision of Order 41 Rule 27 of the Code are not attracted to the case on hand and that, therefore, the Court below had acted illegally in allowing the said application'.

7. In this backdrop, it is necessary to first refer to Order 41 Rule 27 of the Code, which reads as under:

> **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 –**
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> **(a) the Court, from whose decree the appeal is preferred, has refused to admit evidence which ought to have been admitted; or**
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> **(aa) the party seeking to produce additional evidence, established 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) Wherever additional evidence or document to be produced by an Appellate court, the Court shall record the reason for its admission.

8. The suit of the plaintiff is one for declaration of title and recovery of possession. The case of the plaintiff is this: 'The father of the plaintiff by name late Chinna Lal Mohammed and the father of the defendants 1 to 4 namely late Pedda Lal Mohammad are the sons of Kattekalla Hussain Saheb. The said two brothers had jointly purchased land in Sy.No.36 in an extent of Ac.6.20 cents and also the land in Sy.No.102 in an extent of Ac.0.80 cents i.e., total Ac.7.00 cents at Nidzur village from one Seshi Reddy for a consideration of Rs.1,000/- by virtue of a registered sale deed dated 24.09.1956. The two brothers having obtained possession had enjoyed the said properties. In an oral partition in the year 1957 between the said two brothers, the above said land fell to the share of Chinna Lal Mohammad, the father of the plaintiff, and after such partition, he had exclusively enjoyed the property being in possession of the same. Chinna Lal Mohammad had got two sons – Alla Bakash and Hussain Basha (plaintiff herein). Alla Bakash separated and partitioned the properties with Chinna Lal Mohammad in the year 1984 and he had got lands in Sy.Nos.102 and 36 to an extent of Ac.3.50 cents towards his share in the said partition whereas the plaintiff and his father continued to live jointly. On 24.06.1991, the plaintiff and his father had partitioned their property under registered partition deed. As per the registered partition deed dated 24.06.1991, the plaintiff had got the land in Sy.Nos.102 and 36 to an extent of Ac.3.50 cents; and, from the said date of partition, the plaintiff has become the absolute owner, possessor and enjoyer of his share of property. On 18.01.1994 the plaintiff had purchased the land in Sy.No.102 and 36 from late Chinna Lal Mohammad/father of the plaintiff, who is a GPA holder of the brother of the plaintiff by way of registered sale deed for a consideration of

Rs.17,500/-. From the date of the said purchase, the plaintiff has got good title, possession and enjoyment of the entire land in Sy.No.102 in an extent of Ac.7.00 cents. The plaintiff had obtained pattadar pass book and title deed book from the Mandal Revenue Officer, Kurnool for the said land and also other properties. While so, the defendants 1 to 4, who have no right, title, interest and possession over the plaint schedule property, had entered into an agreement of sale-cum-general power of attorney with the 5th defendant on 07.08.2008 and also tried to interfere with the possession of the plaintiff over the plaint schedule property on 02.11.2008 and further proclaimed while leaving the place on that date that they would come again with men and trespass into the property. Hence, the plaintiff brought the suit.'

9. On the other hand, the case of the defendants is this: 'The material allegations in the plaint are false. The father of the plaintiff and the father of the defendants 1 to 4 purchased the written statement 'A' schedule property under a registered sale deed dated 24.09.1956 and had obtained possession of the same. The father of the defendants being elder was looking after agricultural operations of the family and the father of the plaintiff who is younger was looking after the family affairs. The father of the plaintiff pre deceased Pedda Lal Ahmed having died on 16.06.2001. During the life time of Chinna Lal Saheb and Pedda Lal Saheb, the revenue officials issued pattadar pass book and title deed book in respect of Sy.No.36 to an extent of Ac.6.00 cents in the year 1996 to the knowledge of one and all. While so, the father of the defendants died on 01.06.2005 leaving behind the defendants. The written statement 'A' schedule property is being jointly enjoyed by the father of the plaintiff and the father of the defendants and they were having a half share each in the said property. The plaintiff and his brother got Ac.3.50 cents in Sy.No.36 and 102 and the defendants 1 to 4 got the written statement 'B' schedule property and they were enjoying their respective shares. There was an oral partition of properties covered under registered sale deed dated 24.09.1956 between Chinna Lal Ahmed and Pedda Lal Ahmed in the year 1957 as averred in the plaint is false. Neither the defendants 1 to 4 nor their father-Pedda Lal Ahmed are parties to the alleged sale deed dated 18.01.1994 or the alleged partition deed dated 24.06.1991 or the partition rectification deed dated 20.10.1997. The documents are manipulated. The defendants 1 to 4 have title and possession over the written statement 'B' schedule property. They have sold the same to the 5th defendant under a registered agreement of sale-cum-General Power of Attorney. Hence the suit may be dismissed.'

10. At trial, plaintiff had only filed exhibits A1 to A9, the details of which are as follows: - 'Exhibit A1 is the registered sale deed dated 24.09.1956 executed by Seshi Reddy in favour of Peddalal Ahammad and Chinnalal Ahammad. Exhibit A2 is the registered partition deed dated 24.06.1991. Exhibit A3 is the registered sale deed dated 18.01.1994 executed in favour of the plaintiff by GPA Allabakash on behalf of Chinnalal Ahammad. Exhibits A4 and A5 are the pattadar pass book and title deed book. Exhibit A6 is the adangal issued by the Village Revenue Officer. Exhibit A7 is the certified copy of Adangal issued by the Mandal Revenue Officer. Exhibit A8 is the certified copy of 1B register. And, exhibit A9 is the certified copy of Register of Records.' In view of the observations in the judgment of the trial Court while dismissing the suit, the plaintiff having preferred the first appeal had filed the application to receive the additional evidence. The details of the documents sought to be produced/adduced as additional evidence are as follows:

> '(1) Certified copy of registered power of attorney executed by Chinna Lal Mohammad in favour of his elder son Allah Bakash, dated 06.06.1991.
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> (2) Certified copy of Adangal extracts for the faslies 1419, 1418, 1415, 1413, 1412, 1409 for Sy.No.36.
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> (3) Certified copy of adangal extracts for Sy.No.102 for the faslies 1419, 1418, 1415, 1413, 1412 & 1409.
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> (4) Particulars furnished by the Tahsildar, Kurnool in respect of patta pass book and title deed.
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> (5) Pattadar 135 in the name of Pedda Lal Miah, S/o.Hussain Saheb.
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> (6) Valuation Certificate issued by the Sub-Registrar, Kurnool.
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> (7) Regd. Power of attorney combined with agreement of sale dated 07.08.2008.

The reasons assigned by the plaintiff for not filing these documents earlier before the trial Court may be summed up as under: - ‘One document is the Registered power of attorney coupled with agreement of sale dated 07.08.2008. The original of that document is now filed as document no.7. Earlier only Photostat copy was filed and hence it was not marked. The advocate for the plaintiff did not properly advise him about the importance of documents like the adangal extracts, which show the possession and enjoyment of the plaintiff ever since 1994 in respect of the land purchased in the year 1956. Therefore, he is now advised to file the certified copies of adangal extracts for the faslies 1419, 1418, 1415, 1413, 1412 & 1409 for Sy.No.36 and adangal extracts for faslies 1419, 1418, 1415, 1413, 1412 & 1409 for Sy.No.102. The Tahsildar furnished particulars in respect of patta pass book and title deed book, which lay bare that exhibits B1 and B2 never existed and they are fake and manipulated documents. The said original document issued by the Tahsildar is filed as document no.4. Document no.1 now filed is copy of registered power of attorney executed by Chinnalal Mohammad in favour of his elder son Alla bakash dated 06.06.1991. All these documents are essential for arriving at a just decision in the matter.’ The Court below had permitted the appellant/plaintiff to mark the above documents as additional evidence while remitting the suit to the trial Court after setting aside the decree and judgment of the trial Court. As already noted, the learned senior counsel for the defendants would submit that no case is made out for receiving additional evidence. The relevant provision of law is already extracted supra. According to the plaintiff notwithstanding the exercise of due diligence the additional evidence which the plaintiff now seeks to produce was not within his knowledge and could not, after the exercise of due diligence be produced by him, at the time when the decree assailed against was passed as he was not properly advised by his counsel about the importance of the documents. The learned senior counsel for the defendants placed reliance on the following decisions: (1) **Surjit Singh and others v. Gurwant Kaur and others**. In this decision, the appellate Court’s power under Order 41 Rule 27(1)(b) is dealt with and it is stated that such power is circumscribed by the limitations specified in the language of the Rule. (2) **Union of India v. Ibrahimuddin and another** wherein the Supreme Court held as follows:

> **“36. 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 XLI 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. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

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.

On the other hand, the learned counsel for the respondents placed reliance on the following decisions: (1) **Subash Gupta and others v. V. Narasimha Reddy**. The facts of the case show that certified copy of judgment and decree relating to same subject property was sought to be filed as additional evidence and the same was received by the appellate Court subject to proof, relevancy and admissibility and, therefore, this Court held that the petitioner/plaintiffs, can very well put forth their objections, if any, thereto at any time during hearing of appeal and, therefore, no exception can be taken to the order passed by the appellate Court allowing the application; Accordingly, the revision petition was dismissed by this Court. (2) **K. Venkataramaiah v. A. Seetharama Reddy and others** wherein the Supreme Court held that omission to record reasons does not vitiate admission of additional evidence. A reading of the decision shows that when additional evidence was taken with the assent of both sides or without objection at the time it was taken, it is not open to a party to complain of it later on.

11. In the case on hand, the Court below had recorded a finding that the documents are necessary for disposal of the appeal. The Court below had expressed a definite opinion that it is really necessary to accept the documents as additional evidence to enable the Court to pronounce the judgment. The suit is one for declaration of title in respect of immovable property of considerable value. Some documents are registered documents and some documents are extracts of public documents like adangals. From the facts and circumstances of the case, it appears that the acceptance of the public documents as additional evidence is necessary for a just decision in the matter and, therefore, permitting the plaintiff to adduce additional evidence and the defendant also to adduce further evidence, if any, would sub-serve the cause of justice and helps in avoiding miscarriage of justice. The evidence sought to be adduced may throw some light on the controversy and may be helpful in giving a quietus to the dispute between the parties, who are closely related. Therefore, the Court of first appeal is justified, in the well considered view of this Court, in allowing the plaintiff to adduce additional evidence. Be it noted that in the case on hand, only the petition to receive additional evidence was allowed by the Court below and the documents are taken on file subject to proof, admissibility and relevancy. The documents are yet to be exhibited and proved. For the purpose of proving the documents and exhibiting the documents, the Court below had remitted the suit to the trial Court and also at the same time permitted the defendants to adduce further evidence, if any, on their side after the completion of adduction of additional evidence on the side of the plaintiff. The Court below was of the view that in the peculiar facts of the case, permission should be accorded for adduction of additional evidence for the reason that some of the documents being produced as additional evidence are being produced for the purpose of proving that some of the documents already marked in ‘B’ series are fake and not genuine documents. Be that as it may, when the first appellate Court permits a party to the first appeal to adduce additional evidence, the appellate Court need not remand the suit to the trial Court in view of the provision of Order 41 Rule 28 which reads as under:

> **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.**

A reading of the above provision of law shows that 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. For the purpose of mere recording additional evidence the suit need not be remitted to the trial Court. Therefore, in the well considered view of this Court, it is just and fair to direct the appellate Court itself to take the additional evidence of both the sides, if any, as per the procedure established by law. Having regard to the reasons, this Court finds that the order allowing the interlocutory application and permitting the appellant/plaintiff to adduce additional evidence by examining necessary witnesses and also permitting the defendants to adduce additional evidence, if any, can be sustained, however, the order setting aside the decree and judgment of the trial Court and remitting the suit to the trial Court needs to be set aside having regard to the facts and the legal position obtaining.

12. In the result, the Civil Miscellaneous Appeal is partly allowed confirming the decretal order/judgment of the Court below insofar as it permitted the plaintiff to adduce additional evidence and also the defendant to adduce further evidence, if any; but, the impugned decretal order/judgment is set aside insofar as remitting the suit to the trial Court after setting aside the decree and judgment of the trial Court. Accordingly, the first appellate Court is directed to readmit the first appeal on its file with the same number and take additional evidence (both oral and documentary) on the side of the plaintiff and the further additional evidence (both oral and documentary), if any, on the side of the defendants in accordance with the procedure established by law and then decide the appeal afresh taking into consideration the entire evidence brought on record. It is made clear that both the sides are permitted to recall any material witness for the purpose of adduction of additional evidence. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

14th October, 2015

Vjl