

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY

C.R.P.(NPD).No.1612 of 2016
and C.M.P.No.8752 of 2016

1.V.Karunanidhi

2.V.Kala

3.V.Kannagi

4.V.Palani

... Petitioners

Vs.

1.V.Manoharan

2.V.Sundaram

... Respondents

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the order dated 28.03.2016 passed in C.M.P.No.66 of 2015 in A.S.No.350 of 2014 on the file of the XIX Additional Judge, City Civil Court, Chennai.

For Petitioners : Mr.K.Bijai Sundar

For Respondents : Mr.K.Justin Selvakumar

ORDER

Challenging the fair and final order passed in C.M.P.No.66 of 2015 in A.S.No.350 of 2014 on the file of the XIX Additional Judge, City Civil Court, Chennai, the defendants in O.S.No.2737 of 2011 on the file of the 1st

Assistant Judge, City Civil Court, Chennai have filed the above Civil Revision Petition.

2.The respondents/plaintiffs filed the suit in O.S.No.2737 of 2011 for partition. The defendants filed their written statement and contested the suit. At the time of trial, the defendants also marked 12 documents viz., Exs.B1 to B12. At the time of cross examination of P.W.1, however, the defendants chose not to examine any witnesses on their side.

3.According to the learned counsel for the petitioners, when the suit was reserved for judgment, the defendants took out an application to re-open the case for examination of D.Ws. However, the said application was rejected by the trial Court on the ground that the suit was reserved for judgment and the trial Court is about to pronounce the judgment. Thereafter, the trial Court passed a preliminary decree for partition, against which the defendants preferred an appeal in A.S.No.350 of 2014 on the file of the XIX Additional Judge, City Civil Court, Chennai.

4.Thereafter, in the year 2015, the defendants, who are the appellants in A.S.No.350 of 2014, took out an application in C.M.P.No.66 of 2015 under Section 94 E of the Civil Procedure Code read with Section 151

of the Civil Procedure Code to permit the defendants to adduce evidence. In the affidavit filed in support of the petition, the defendants have stated that though the defendants have marked 12 documents viz., Exs.B1 to B12, the trial Court had erroneously held that no documentary evidence on the side of the defendants was produced to substantiate the counter claim filed by them. Since this finding given by the trial Court and the judgment and decree of the trial Court is under challenge in A.S.No.350 of 2014, that can be canvassed by the defendants before the Lower Appellate Court. The defendants have also stated that from the A-Diary maintained in the trial Court, it was noticed that the suit was never posted on 11.12.2013 at all for final hearing as indicated in the impugned judgment and contrary to the A-Diary, it could be seen from the notes maintained by the Court that the date of hearing was fixed on 11.12.2013 and as there was no representation on behalf of both the plaintiffs and defendants, the suit was further adjourned. The said finding of the trial Court can also be canvassed by the defendants before the Lower Appellate Court in the First Appeal.

5. When the application filed by the defendants before the trial Court to re-open the evidence of the defendants was rejected, the defendants filed the present application to permit them to adduce evidence before the Lower Appellate Court, after a lapse of one year from the date of filing of

the Appeal. The Appeal was numbered in the year 2014 and the present application under Section 94 E and Section 151 of the Civil Procedure Code was numbered in the year 2015. The Lower Appellate Court, while dismissing the application, rightly took note of the fact that the defendants have quoted a wrong provision of law in the petition. No doubt, the application cannot be rejected solely on the ground that the petitioners/defendants have quoted wrong provision of law. However, the application under Section 94 E cannot be maintained to adduce evidence before the Lower Appellate Court when specific provision is available under the Civil Procedure Code to adduce additional evidence. Instead of invoking the said provision, the defendants, for the reasons best known to them, have invoked Section 94 E of the Civil Procedure Code.

6.The Lower Appellate Court also took note of the fact that the present application was filed by the defendants when the Appeal was posted for arguments. The defendants having filed a counter claim, the burden of proof to prove the counter claim is on the defendants. Having chosen not to examine any witness on their side before the trial Court and having filed the application before the trial Court when the suit was reserved for judgment and having filed the present application before the Lower Appellate Court when the Appeal was posted for arguments, the

conduct of the defendants would establish that they are not interested in prosecuting the Appeal in a right manner. Since the defendants have not utilized the opportunities given to them to adduce oral evidence, they cannot be given another opportunity, after a lapse of more than five years. The Lower Appellate Court has rightly dismissed the application.

7. In these circumstances, I do not find any error or irregularity in the order passed by the Lower Appellate Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed.

8. Mr. K. Bijai Sundar, learned counsel appearing for the petitioners submitted that liberty may be given to the petitioners to file an application under Order 41 Rule 27 of the Civil Procedure Code before the Lower Appellate Court.

9. Since no liberty is required for filing an application under Order 41 Rule 27 of the Civil Procedure Code, it is open to the petitioners to file appropriate application before the Lower Appellate Court and if such an application is being filed by the petitioners, the Lower Appellate Court is directed to dispose of the same on merits and in accordance with law. No

costs. Consequently, the connected miscellaneous petition is closed.

Index : No
Internet : Yes
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08.06.2016

To

1.The XIX Additional Judge,
City Civil Court,
Chennai.

2.The 1st Assistant Judge,
City Civil Court,
Chennai.

M.DURAIWAMY,J.
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