

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.4.2017

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

C.R.P.(NPD) No.360 of 2013

G.Venkatachalam

.. Petitioner

Vs.

1 A.P.kuppuraj
S.Sundaram (died)
2 S.Palaniammal
3 Selvi
4 S.Krishnaveni
5 S.Poongodi
6 S.Bhanu

.. Respondents

This Civil revision is filed under Article 227 of Constitution of India against the order, dated 04.07.2012, made in I.A.No.273 of 2012 in A.S.No.68 of 2011 on the file of the I Additional Sub Court, Erode.

For Petitioner : Mr.N.Manokaran
For Respondents : No appearance

ORDER

This revision is at the instance of the first respondent/first defendant in A.S.No.68 of 2011 as against allowing I.A.No.273 of

2012 filed under Order 41 Rule 27 C.P.C. by the Ist Additional Sub Judge, Erode.

2 The plaintiff is the owner of the property comprised in survey No.407/2 and 406 situate in Kolathupalayam in Erode District. On the north and western side, the property of 1st defendant, on the south, the property of 2nd defendant situate. North of first defendant's land, there is Amaravathipudur-Arambapalayam road.

3 According to the plaintiff, from the said road, he could reach his property through A, B, C, D, E, F cartrack proceeding from the road running through 1st defendant's land in S.No.406 and also 2nd defendant's land. The 2nd defendant also has to follow the same route to reach his land and beneath the cartrack pipeline of the plaintiff also proceeds.

4 Plaintiff instituted the suit in O.S.No.80 of 2008 pleading that the plaintiff is entitled to use the said cartrack in the 1st defendant's property to reach his property comprised in R.S.No.407/2 and he has acquired such easementary right. He has also sought for

declaration as to the same and consequential injunction as against the first defendant.

5 The first defendant denied the existence of the said cartrack and the pipeline was permitted to be put up by him on an understanding that as and when demanded the plaintiff will remove it. Plaintiff has no right of easement over his property.

6 Since the second defendant has passed away, his legal representatives/defendants 3 to 7 have been impleaded. Through 4th defendant they have filed written statement supporting the case of the plaintiff.

7 The trial Court framed the issues and tried the suit. Appreciating the oral and documentary evidence let in and the Advocate/Commissioner's report and the plan concluded that the plaintiff has alternative pathway and he has not established his case and thus, dismissed the suit.

8 Aggrieved, plaintiff has directed the Appeal Suit in A.S.No.68 of 2011.

9 Pending appeal, the appellant/plaintiff has filed I.A.No.273/2012 under Order 41 Rule 27 C.P.C. to receive a

settlement deed, dated 1.3.1963 executed by one Ramasamy Gounder in favour of his wife Ammaniammal as additional document to establish his case of cart-track.

10 In support of his said reception petition, the appellant has filed affidavit the material portion of which runs as under:

"1) I am the petitioner herein and Appellant in the appeal. I have filed the suit under Appeal for declaration of my easementary right to enjoy the suit property as a cart-track and for permanent Injunction against the 1st respondent. The learned District Munsif, Kodumudi was pleased to dismiss the suit on among other grounds for want of evidence to speak about the enjoyment of the suit property as a cart-track.

2) I submit that my father owned an extent of 1.95 Ac. in old S.F.No.187 and 185A in an extent of 3.90 Ac. within specific boundaries as his ancestral property. On 20/11/1946, my father had purchased the remaining half share of 3.90 Ac.

3) I further submit that while my father enjoyed the extent of 3.90 Ac. during the year 1946, the adjoining owners on the North and the West were Ramasamy gounder and Sriranga gounder, sons of Kandianna gounder. The above said Ka.Ramasamy gounder had dealt

with his share in O.S.F.No.187 & 185A as early as 1963 by conveying his share of property to his wife Ammani ammal by way of Gift Settlement Deed dated 01/03/1963.

4) Thus it could be seen that my father and forefather had taken their carts through the fields in O.S.F.Nos.187 and 185A which as R.S.No.406 is situated to the South of the Amaravathipudur-Aavarnampalayam East West road. The document dated 01/03/1963 discloses “மாழில் தட பாத்தியம்” and as such relevant to examine the suit claim.

5) I submit that I could not with due diligence could get to know the details and the evidentiary value of the document now sought to be produced. Only on obtaining the registration copy of the above document, I was impressed with the importance and value of the document.

6) Unless the document now produced is received as additional evidence, I will be put to great loss and hardship. The above document is in a way anterior document which clothes the 1st respondent with ownership in R.S.No.406 of Kolathupalayam village.

11 The first respondent/first defendant opposing the said application filed counter, the material portion of which runs as under:

"6) The allegations in para 5 of the petitioners affidavit is denied as false. It is false to say with due diligence could get to know the details and the evidentiary value of the document sought to be produced. It is denied that he would be put to great loss and hardship if the same is not received in additional evidence.

7) This respondent submits that the present application under Order 41 Rule 27 of C.P.C. is not sustainable in law. The reasons to receive additional evidence in appellate Court is for limited purpose alone. If the lower court refused to receive the document in question at the time of trial or due diligence was made but such evidence was not within his knowledge and due diligence only obtain the evidence or the appellate Courts requires any document to be produced or any witness to be examined to give a proper judgment. But the affidavit is vague and there is no necessity for the appellate court to receive the documents filed along with the petitioner as there was sufficient reasons given which has been enumerated under Order 41 Rule 27 of C.P.C. only to drag on the proceedings alone, the present petition has been filed."

12 The learned Appellate Judge after hearing both sides, passed detailed order allowing the petition on condition to pay a cost

of Rs.500/- to the first respondent. The cost was paid.

13 Aggrieved, as stated at the outset, the first defendant has directed this revision.

14 The learned counsel for the revision petitioner/first defendant would contend that as per Order 41 Rule 27 C.P.C., the petitioner has to show a proper reason as to why he had not filed such a document before the trial Court.

15 The learned counsel for the revision petitioner also contended that through Order 41, Rule 27 C.P.C. a lacuna or gap in the evidence of plaintiff cannot be filled up.

16 The learned counsel for the revision petitioner also contended that the appellate Court has not followed the settled principles in allowing the reception petition in the appeal.

17 The learned counsel for the revision petitioner further contended that the Court must consider whether it is necessary only when the appeal is heard. Thus, the reception petition shall be heard along with the appeal. However, without doing so, the appellate court has heard and disposed of the said petition even without hearing the main appeal.

18 The learned counsel for the revision petitioner also contended that while allowing the petition, the appellate Court considered the merit of the appeal itself.

19 In this connection, the learned counsel for the revision petitioner would cite **Union of India vs. Ibrahim Uddin and another (2012)8 SCC 148**).

20 In spite of opportunity given to the respondent/plaintiff, there was no representation for the respondent.

21 I have anxiously considered the submissions of the learned counsel for the revision petitioner, the impugned order, the materials on record and the decision cited.

22 In the trial Court, there is provision for receiving additional evidence, may be oral or documentary by either party. Similarly, in appeal under Order 41, Rule 27 C.P.C. both the appellant and also the respondent can bring in such additional evidence.

23 Now, let us notice hereunder the said Order 41 Rule 27 C.P.C. which runs 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—

(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) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

[Emphasis supplied by the Court]

24 In **Union of India vs. Ibrahim Uddin and another (2012)8 SCC 148**) the Hon'ble Supreme Court laid down the principles to be followed in a petition filed under Order 41 Rule 27 C.P.C. It is profitable to notice hereunder the following observations in the judgment of the Hon'ble Apex Court:

"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 v. Mohd. Iqbal and Mohd. Ali and Co. (1978) 2 SCC 493 : 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.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this

provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and

without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: *State of Orissa v. Dhaniram Luhar*, AIR 2004 SC 1794; *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi*, AIR 2008 SC 2026; *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.*, AIR 2010 SC 1285; and *Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors.*, (2010) 13 SCC 336).

45. In *City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc.*, AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

"28... We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence. A similar view has been reiterated by this Court in *Basayya I. Mathad v. Rudrayya S.Mathad* (2008)3

SCC 120).

46. A Constitution Bench of this Court in K. Venkataramiah (A.I.R.1963 SC 1526), while dealing with the same issue held: It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence.. The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory

provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find 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 & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

[Emphasis supplied by me]

50. In Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors., AIR 1931 PC 143, it was held:

The provisions of S.107 as elucidated by O.41, R.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 R.27, Cl.(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 apply 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 R.27(2) to record its reasons for

so doing, and under R.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) (See also: Indirajit Pratab Sahi v. Amar Singh, AIR 1928 P.C. 128)."

[Emphasis supplied by me]

25 Thus, the Appellate Court must come to a conclusion that the documents sought to be adduced as additional evidence will enable the Court to pronounce judgment. These documents will be useful to resolve the controversy in issue. The documents are needed for taking a decision in the appeal. Of course, the petitioner has to explain to the Court, what prevented the appellant from filing the said document in the trial Court. But if the Appellate court feels that these documents are necessary, such objection will become technical objection.

26 But whether these documents are required to decide the issue involved in the appeal could be known only when the main appeal is heard only when the evidence already on record is read.

27 In this connection, in **Union of India vs. Ibrahim Uddin and another (2012)8 SCC 148**), the Hon'ble Supreme Court has held as under:

"52. Thus, from the above, it is crystal clear that 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 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, 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."

28 Keeping the above principles in our mind, let us approach the case at our hand.

29 The crux of the plaint averments is the existence of a cartrack in the property of the first defendant through which the plaintiff is alleged to have access to his property comprised in

S.No.407/2, situate in a Kolathupalayam in Kodumudy in Erode District. In the impugned order, the learned first Additional Sub Judge, Erode has completely went into the merit of the appeal itself. The Appellate Court went beyond the scope of Order 41 Rule 27 C.P.C.

30 An aspect to be noted is that the Appellate Court has heard and disposed of the petition filed under Order 41, Rule 27 C.P.C. independently, separately. It should hear only along with main appeal. Then only the Court could read the evidence, record of the case and decide whether the new documents are necessary to take a decision in the appeal. The procedure adopted by the Appellate court is as against the principles governing Order 41, Rule 27 C.P.C., the ratio laid down by the Hon'ble Supreme Court in **Union of India vs. Ibrahim Uddin and another** (supra).

31 In view of the foregoing, ordered as under:

(i) This revision succeeds;

(ii) The order and decretal order passed by the learned I Additional Sub Judge, Erode in I.A.No.273 of 2012 in A.S.No.68 of 2011 are set aside.

(iii) I.A.No.273 of 2012 is remanded back to the said Appellate Court.

(iv) The said Court will hear the said I.A.No.273 of 2012 along with A.S.No.68 of 2011 following the guidance and the principles laid down in Order 41, Rule 27 C.P.C. and the Hon'ble Apex Court decision in **Union of India vs. Ibrahim Uddin and another ((2012)8 SCC 148)**.

(v) This Appeal suit of the year 2012, shall be disposed of by the said Judge within two months from the date of receipt of a copy of this order.

(vi) As soon as the appeal is disposed of, the said Court shall submit the completion report to the Registrar (Judicial) of this Court.

(vii) In the circumstances, there is no order as to costs.

32 Accordingly, this revision is disposed of.

21.4.2017

Speaking/Non Speaking order

Index : Yes / No

Internet : Yes / No

vaan

DR.P.DEVADASS, J.,

vaan

Note: Registry is directed to place this judgment before My Lord, the Hon'ble Chief Justice, for orders to circulate the same to the Judicial Officers functioning in the State of Tamil Nadu and in the Union Territory of Puducherry as it contains some guidance on certain aspect of Civil Procedure.

To

- 1 The Principal District Judge, Erode
- 2 I Additional Sub Judge, Erode
- 3 The District Munsif, Kodumudy

Copies to

- 1 The Registrar (Judicial)
- 2 The Assistant Registrar (A.S.)
High Court, Madras.

Copy to

The Director,
Tamil Nadu State Judicial Academy,
Greenways Road,
R.A. Puram,
Chennai -28.

C.R.P.(NPD) No.360 of 2013

Dated: 21.4.2017