

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4073 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No. 200 of 2016 in R.A.No.4 of 2016 dated 30.06.2017 passed by the Additional Chief Judge, City Small Causes Court at Hyderabad.

Initially, the respondent filed a petition under Section 10(3)(a)(c) of A.P. Buildings Lease Rent & Eviction Control Act, 1960 for eviction. On contest, the eviction petition was ordered and petitioner was directed to vacate and deliver vacant possession of the property. Aggrieved by the said order, the petitioner preferred an appeal under the provisions of A.P. Buildings Lease Rent & Eviction Control Act.

During pendency of the petition, the present petitioner filed an application under Order XLI Rule 27 CPC seeking permission of the Court below to adduce additional evidence by examining K. Raju Chari to prove payment of entire sale consideration to then original owner deceased Police Pentaiah during his life time. As the witnesses to the said transaction were not available during pendency of the eviction petition and it was not evidenced by any documentary proof, to prove the case of the petitioner, the petitioner sought permission of the Court below to adduce additional oral evidence of examination of the witness K. Raju Chari to prove the factum of payment of sale consideration to the original owner deceased Police Pentaiah.

The respondent filed counter in I.A.No.200 of 2016, denying material allegations, while contending that, in the absence of any plea regarding payment of entire sale consideration to the original owner- deceased Police Pentaiah, question of receiving additional evidence at this stage is not permissible under Order XLI Rule 27 CPC and in the absence of any whisper in the counter before the Trial Court regarding the transaction, the petitioner cannot be permitted to adduce additional evidence and prayed for dismissal of the petition.

Upon hearing argument of both the counsel, the Court below dismissed the petition under Order XLI Rule 27 CPC, recording a specific reason that, K. Raju Chari is a set-up witness, as there was no averment in the counter regarding payment of entire consideration to the original owner-deceased Police Pentaiah. Aggrieved by the order passed by the Court below, the present civil revision is filed.

During hearing, learned counsel for the petitioner reiterated the contentions raised in the affidavit, while pointing out the illegality committed by the Court below in dismissing a petition filed under Order 41 Rule 27 CPC to receive additional evidence, though there is sufficient material to substantiate his contention that he raised a plea that he paid entire consideration to the original owner-deceased Police Pentaiah during his lifetime and committed an error.

During hearing, this Court took an objection about maintainability of this petition under Article 227 of the Constitution of India, as a revision lies under Section 22 of A.P. Buildings Lease Rent & Eviction Control Act against the order

passed by the Additional Chief Judge, City Small Causes Court at Hyderabad. But, the learned counsel for the petitioner would draw attention of this Court to the judgment in **Jaleel Khan v. M. Kamalamma**¹, wherein, the division Bench of this Court considered the scope of petition filed under Article 227 of the Constitution of India and distinguished with Section 115 C.P.C and concluded that the petition is maintainable under Article 227 of the Constitution of India. Therefore, the objection raised by this Court is no more *res integra*.

I.A.No.200 of 2016 was filed under Order XLI Rule 27 CPC. Order XLI Rule 27 CPC deals with Production of additional evidence in Appellate Court. Sub-Rule (1) to Order XLI Rule 27 CPC specifies that 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.

In the affidavit filed along with the petition before the Court below, the reason assigned by the petitioner to invoke the

¹ 2001 (5) ALD 610 (DB)

jurisdiction of this Court is that, when the petitioner himself and his relative Srinivas went to Kakinada for attending his colleague's daughter marriage, he came to know about the address of K. Raju Chari and he came to Hyderabad on 24.04.2016 and on information received by the petitioner, he searched and found the address of K. Raju Chari, as he is only the person alive who can speak about the negotiations between late Police Pentaiah and the petitioner.

Basing on the above information, the petitioner contended that, despite exercise of due diligence, he could not produce the witness before the Court, when the decree against him was passed. Order XLI Rule 27(1) (aa) CPC consists of two limbs: The first limb is the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge and the second limb is that, when the party is seeking to adduce additional evidence as they could not produce after the exercise of due diligence, in producing evidence by him at the time when the decree appealed against was passed. But, the entire affidavit is silent about exercise of due diligence, in producing evidence by him before the Lower Court at the time when the decree appealed against was passed. The reason assigned in the affidavit would fall neither in the first limb, nor in the second limb of Order XLI Rule 27(1)(aa) C.P.C. Therefore, it is difficult to accept the contention of the petitioner. However, when a petition is filed under Order XLI Rule 27(1) C.P.C, the Court has to decide such application along with the appeal. If the Court below finds that there is sufficient cause in the application filed under Order XLI Rule 27(1) (a) or (aa) or (b) C.P.C, the Court below can

fall back on Order XLI Rule 28 C.P.C to record evidence. But, the petition filed under Order XLI Rule 27 CPC cannot be decided independently. The petitioner, though insisted the Court to decide the petition independently without hearing the appeal, the Appellate Court ought not to have heard and decided the petition at the demand of the petitioner. Therefore, the order in I.A.No. 200 of 2016 in R.A.No.4 of 2016 dated 30.06.2017 passed by the Additional Chief Judge, City Small Causes Court at Hyderabad, is hereby set-aside, while directing the Appellate Court to hear and decide the application if any filed, along with the main appeal and if, for any reason, the Court below finds that there is sufficient cause, which permits the petitioner to file additional evidence either oral or documentary under Order XLI Rule 27 (1) either under sub-rule (a) or (aa) or (b) C.P.C, the Court may resort to record evidence under Order XLI Rule 28 C.P.C.

With the above observation, the civil revision petition is allowed, by setting-aside the order in I.A.No. 200 of 2016 in R.A.No.4 of 2016 dated 30.06.2017 passed by the Additional Chief Judge, City Small Causes Court at Hyderabad.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:08.02.2018

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