

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

SECOND APPEAL NO.323 OF 2015

JUDGMENT:-

This Second Appeal is taken up for hearing on the admission of the appeal.

2. The learned counsel for the appellant raised a very serious issue and pointed out that application, filed under Order XLI Rule 27 CPC, is allowed without notice to him. The learned counsel points out that the applications to receive additional documents were filed viz., I.A.Nos.1591 and 1592 of 2011. Both applications were dismissed for default. Thereafter, these two applications were sought to be restored by filing I.A.Nos.1090 and 1091 of 2012. It is the contention of the learned counsel for the appellant that these two applications for restoration were taken up for hearing without notice being served on the present appellant. He points out that in the stay application the party has on oath stated that these interlocutory applications along with process that is paid by the respondents is still lying in the Registry of the court. In this manner, he points out that the applications were allowed and Exs.A-9 to A-17 were marked in the appeal. The learned counsel also points out by relying on these documents, the first appellate court reversed the decree

that was passed by the lower court. Further, the learned counsel relies upon a judgment of the Hon'ble Supreme Court of India in reported *Uttaradi Mutt vs. Raghavendra Swamy Mutt*(¹) wherein the Apex Court discussed the provisions of Order XLI Rule 27 CPC and the method in which an additional evidence is to be taken. Therefore, the learned counsel submits that this is a fit case in which the matter should be admitted and decided or in an alternative it should be remanded to the lower court.

3. On the other hand, the learned counsel for the respondent argues that these documents are not at all relevant or necessary for the finding. The learned counsel made an attempt to point out that these documents are not really material and that the lower court did not actually rely upon them in arriving at the ultimate finding while reversing the judgment of the lower court. Therefore, the learned counsel submits that this was not at all a case where the appeal should be admitted or in the alternative be remanded.

4. This court, after hearing both the learned counsel, notices that the respondent did not raise any objection to the contention raised by the learned counsel for the appellant that the applications that were filed for

¹ 2018(6) ALD 102(SC)

restoration of the two applications were not even served on the learned counsel. His further averment that the process that was paid is still lying in the court and the process was not even ordered let alone delivered to the appellant is not contradicted in any manner. Even the finding of the first appellate court in the impugned judgment is to the effect that these documents are necessary to come to a conclusion and directly the court has marked Exs.A-9 to A-17.

5. The lower court has totally overlooked the provisions of Order XLI Rule 27 to 29 CPC. As per these provisions and as per the settled law on the subject, an application under Order XLI Rule 27 CPC can only be allowed when the conditions therein are satisfied. The court has not at all recorded a finding as to whether the conditions stipulated in Order XLI Rule 27 CPC for receiving the evidence in the appeal are satisfied or not. As per the settled law, additional evidence is not a matter of right. Unless and until the conditions under Order XLI Rule 27 CPC are satisfied, the evidence cannot be received in an appeal. In addition, even for taking the additional evidence, the provisions of Order XLI Rule 28 and 29 CPC mandate a procedure that is to be followed. The appellate court may either take such evidence directly or it can direct the court from whose decree the appeal is preferred, or any other subordinate

court to take such evidence and then send it to the appellate court. Under Order XLI Rule 29 CPC when additional evidence is directed or allowed to be taken, the appellate court shall have specify the points on which the evidence is to be confined and record on its proceedings the points so specified. In the case on hand, the entire procedure was overlooked by the first appellate court. It did not pass a reasoned order why the documents have to be received as mandated under Order XLI Rule 27 CPC. The procedure stipulated thereafter was also totally overlooked. The settled law that an application filed under Order XLI Rule 27 CPC should be heard and disposed when the appeal is finally heard is also not followed.

6. Therefore, in the opinion of this court, the entire procedure adopted by the first appellate court is totally opposed to law. Hence, the matter is remanded to the first appellate court with a direction to give an opportunity to the present appellant to file his counters in the applications filed for receiving an additional evidence, {I.A.Nos.1591 and 1592 of 2011}. If the court comes to a conclusion that these two applications are to be allowed, then the other steps as per Order XLI Rule 28 and 29 CPC should be followed.

With these directions, the Second Appeal is allowed and the matter is remitted back to the first appellate court with a direction to dispose of the applications, as stated above, within a period of two months from the date of receipt of a copy of this order. No costs. Miscellaneous Petitions pending, if any, shall stand closed in consequence.

20-12-2018
TSNR

D.V.S.S.SOMAYAJULU,J

