

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5/12/2019

C O R A M:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

C.M.A. No.2400 of 2011

and

M.P. No.1 of 2011

A.Rehman Sheriff

..Appellant/1st Respondent

Vs.

1.A.Noorjahan

2.A.Regan Basha

...Respondents/Appellant

Prayer: Civil Miscellaneous Appeal filed under Order XLIII Rule 1 of the Civil Procedure Code, to set aside the judgment and decree dated 6.7.2011 made in A.S. No.73 of 2010 on the file of Sub Court, Erode in reversing and remanding the judgment and decree dated 27.4.2011 made in O.S. No.461 of 2009 on the file of Principal District Munsif, Erode.

Appellant : Ms.R.Shasee
for Mr.R.Marudhachalamurthy

Respondent : Mr.C.E. Pratap for R1
R2-No Appearance

JUDGMENT

The present Civil Miscellaneous Appeal has been filed challenging the judgment and decree dated 6.7.2011 made in A.S. No.73 of 2010 on the file of Sub Court, Erode, reversing and remanding the judgment and decree dated 27.4.2011 made in O.S. No.461 of 2009 on the file of Principal District Munsif, Erode.

2. There is a dispute between the brothers and sister, who are parties to the suit O.S. No.461 of 2009, with regard to pathway of 3" x 59". The court below came to the conclusion that there is no hindrance to the pathway and both the plaintiff and the defendants, are entitled to have a common enjoyment to the pathway, which is common to both the parties.

3. The issue in the present civil miscellaneous appeal is on a limited question as to whether the lower appellate court is empowered to invoke Order XLI Rule 27 CPC to reopen the evidence already concluded, based on which a finding has been rendered

between the parties. According to the learned counsel for the appellant herein, the lower appellate court is empowered to deal with the production of additional evidence, both verbal and documentary, but not permitted to reopen the evidence already taken, based on which a finding has been rendered.

4. It is further stated that the brother of the respondents herein was not residing in the property in question and it has been given on rent, which fact has been admitted by the brother of the respondents herein. The lower appellate court has permitted the respondents herein to reopen the evidence for the purpose of proving the fact that the appellant herein was not staying in Railway quarters and that he was residing in the property in question and that there is no hindrance to anyone caused by the respondents herein. The respondents herein would submit that the appellant herein was not residing in the quarters, but was residing in the property, which was subject matter of the suit where the common pathway issue has arisen and that there were no tenants. In order to establish that fact, the lower appellate court has permitted the parties to reopen and lead evidence insofar as that aspect is concerned. Order XLI Rule 27 CPC does not bar the appellate court in enabling the evidence that has been let in before the lower court to be reopened and it is not necessary that there should be an additional evidence alone to be considered by the appellate court. As a limited scope for which the matter has been permitted to be reopened, the order of the lower appellate court cannot be said to be illegal.

5. Heard both sides and perused the materials available on record.

6. The issue devolves upon Order XLI Rule 27 of CPC, which is extracted below:

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.

7. It is not in dispute that the plaintiff and the defendants are sister and brothers and that there is a pathway dispute. With regard to 3' x 59' that there is a common pathway, has attained finality and that there is no hindrance. The contention of the petitioner herein that Order XLI Rule 27 CPC has got to be confined only to the additional evidence of the appellate court, cannot be accepted. The purpose of Order XLI Rule 27(b) would be defeated and that the appellate court is empowered in case it requires any document to be produced or any witness to be examined, to enable it to pronounce a judgement, can, allow such evidence to be let in. The question of restricting only to additional evidence in appellate court cannot be accepted. Hence the contention of the petitioner herein cannot be accepted. However as the issue has got to be dealt with both factually as well as legally, when there is an admitted evidence by the appellant herein that he was residing in Railway quarters, there is no need for the appellate court to reopen the evidence, as already there is an evidence before the court. Though the powers are there with the appellate court, to reopen any evidence, call for and accept any evidence, when there is an evidence which has been admitted by the parties, in order to prove the same, there is no need for another opportunity to be given to the party concerned. Hence to that extent the finding of the lower appellate court is not justified.

8. Civil Miscellaneous Appeal is disposed of accordingly. However, there shall be no order as to costs. Consequently, M.P. No.1 of 2011 is closed.

s/d-

Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

Asr

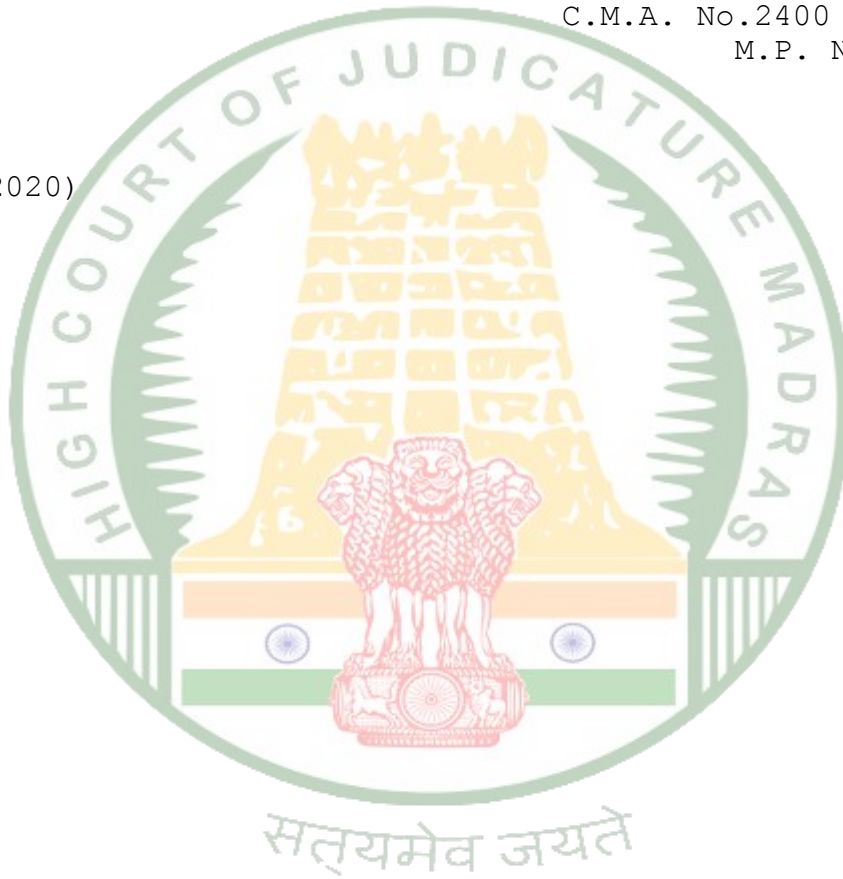
To

- 1) The Subordinate Judge, Erode
- 2) The Principal District Munsif, Erode

+1 CC to Mr.C.E. Pratap , Advocate sr 101839.
+1 CC to Mr.M. Guruprasad, Advocate sr 102055.

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M.P. No.1 of 2011

VGII(CO)
SP(12/03/2020)



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