

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.07.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (NPD)No.1519 of 2014

and

MP No.1 of 2014

Ammasi

... Petitioner

versus

1. Easwari

2. Annammal

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 31.01.2014 passed in I.A. No.21 of 2012 in A.S. No.8 of 2011 on the file of Subordinate Court, Sankari, against the judgment and decree dated 18.11.2010 passed in O.S. No.164 of 2002 on the file of District Munsif Court, Sankari.

For Petitioner

: Mr.P. Jagadeesan

For Respondent

: Ms.P.T. Ramadevi for R1

No appearance for R2

ORDER

The instant Civil Revision Petition has been filed challenging the order dated 31.01.2014 passed by the Subordinate Court, Sankari in I.A. No.21 of 2012 in A.S. No.8 of 2011.

2. The petitioner is the first defendant in the suit O.S. No.164 of 2002 filed by the first respondent. The suit was filed for permanent injunction restraining the petitioner / first respondent from interfering in the pathway mentioned in the suit schedule. The petitioner has also filed a separate suit O.S.No.232 of 2001 against the first respondent claiming rights over the same pathway and permanent injunction was also sought for in that suit also. Both the suits were tried simultaneously and both the suits were decreed in favour of the respective plaintiffs by a separate judgment and decree. Aggrieved by the judgment and decree, dated 18.11.2010 passed in O.S. No.164 of 2002, the petitioner, who is the first defendant in that suit, filed an appeal before the Subordinate Court, Sankari in A.S. No.8 of 2011. During the pendency of the appeal, I.A. No.21 of 2012 in A.S. No.8 of 2011 was filed by the petitioner / 1st defendant under Order XLI Rule 27 CPC to receive the additional documents at the appellate stage viz. Exhibits A1 and A2 marked in the suit filed by him, before the District Munsif Court, Sankari in O.S. No.232 of 2001. According to the petitioner Exs.A1 and A2 were marked as Exhibits in O.S. No.232 of 2001 filed by him against the first respondent. According to him, even though under the impugned judgment and decree dated 18.11.2010 passed in O.S. No.164 of 2002, the Trial Court had taken judicial

notice of Exs.A1 and A2 marked in O.S. No.164 of 2002 has erroneously observed that the said documents were not marked as Exhibits in O.S. No.164 of 2002 filed by the first respondent. According to him, the non marking of the documents viz. Exs. A1 and A2 marked as Exhibits in O.S.No.232 of 2001 is neither wilful nor wanton but only due to the reasons stated above. It has also been averred in the petition that the marking of the documents will no way change the nature and character of the suit, since, the said Exhibits were already marked in O.S. No.232 of 2001 filed by the petitioner against the first respondent.

3. A counter affidavit was also filed by the first respondent in I.A. No.21 of 2011, wherein, the first respondent has extracted the provisions of Order XLI Rule 27 CPC and submitted that the petitioner has not stated in his affidavit anywhere that the lower Court has refused to receive the documents sought to be marked as Exhibits by the petitioner. Hence, according to her, the application filed under Order XLI Rule 27 is not maintainable. Further she has stated that only to drag on the proceedings, the application has been filed by the petitioner.

4. By order dated 31.01.2014, the Court below dismissed I.A. No.21 of 2012 in A.S. No.8 of 2011 filed by the petitioner under Order XLI Rule 27. Aggrieved by the dismissal, the instant Civil Revision Petition has been filed under Article 227 of the Constitution of India.

5. Heard Mr.P. Jagadeesan, learned counsel for the petitioner and Ms.P.T. Ramadevi, learned counsel for the first respondent. Despite service of notice on the second respondent and the name of the second respondent having been printed in the cause list today, no one has entered appearance on the side of the second respondent.

6. This Court has perused and examined the judgment and decree passed in both the suits O.S.No.164 of 2002 filed by the first respondent as well as O.S. No.232 of 2001 filed by the petitioner. Both the parties have sought for permanent injunction, in their respective suits. Both of them are claiming rights over the same pathway. It is an admitted fact that both the suits were tried simultaneously. In the earlier suit filed by the petitioner in O.S. No.232 of 2001, the subject documents viz., Exs.A1 and A2 were marked as Exhibits on the side of the petitioner. The said Exhibits

were also duly considered in the judgment and decree dated 18.11.2010 passed in favour of the first respondent against the petitioner.

Order XLI Rule 27CPC reads as follows :

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.

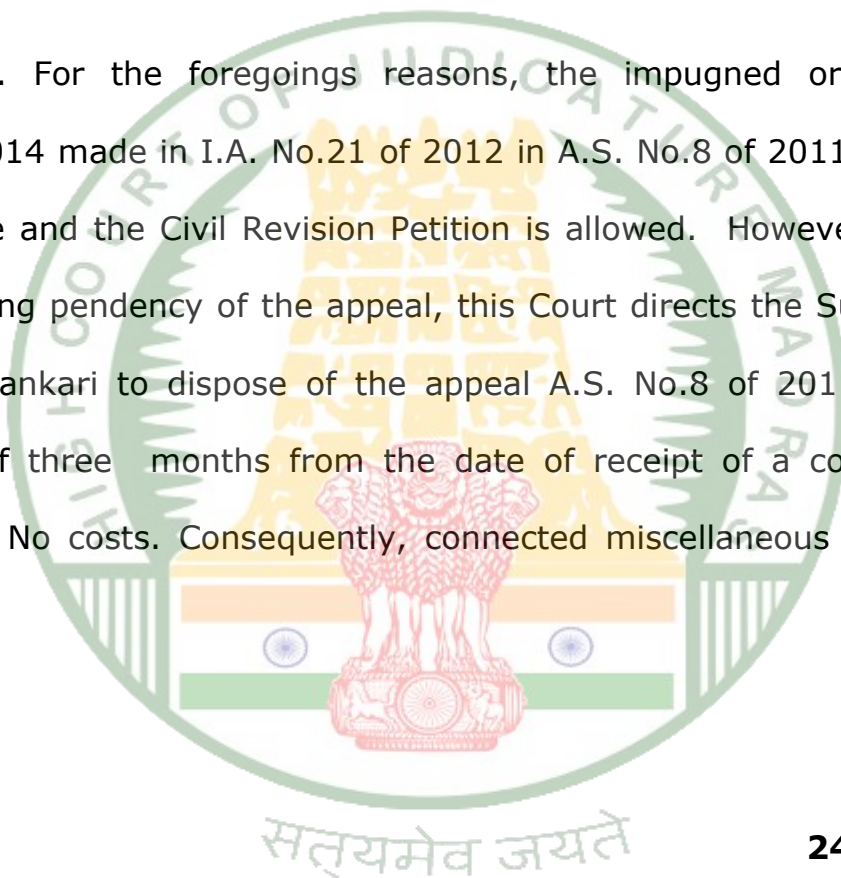
7. As seen from Order XLI Rule 27 CPC, the appellate Court can also require any document to be produced under Order XLI Rule 27 (b) CPC. Further under Order XLI Rule 27(aa), if the petitioner establishes

that notwithstanding the exercise of due diligence, it 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, production of additional evidence in the appellate stage is permissible.

8. In the instant case, admittedly Exs. A1 and A2 were marked as exhibits in the suit O.S. No.232 of 2001 filed by the petitioner against the first respondent and it is also an admitted fact that both suits O.S. No.232 of 2001 and O.S. No.161 of 2004 were tried simultaneously. The impugned judgment and decree dated 18.11.2010 passed in O.S. No.164 of 2002 has also relied upon Exs. A1 and A2 marked by the petitioner in his suit O.S. No.232 of 2001. The petitioner has also made an averment in the affidavit filed in support of Order XLI Rule 27 CPC that he was under the impression that the lower Court would have taken judicial notice in respect of the documents marked in O.S. No.232 of 2001 as both the suits O.S. No.232 of 2001 and O.S. No.164 of 2002 were tried simultaneously. This being the case, it can be inferred that there is no negligence on the part of the petitioner for not having marked the documents as Exhibits in O.S. No.164 of 2002.

9. This Court finds force in the submissions made by the learned counsel for the petitioner that the Appellate Court ought to have entertained, the application filed by the petitioner under Order XLI, Rule 27 CPC.

10. For the foregoing reasons, the impugned order dated 31.01.2014 made in I.A. No.21 of 2012 in A.S. No.8 of 2011 is hereby set aside and the Civil Revision Petition is allowed. However, in view of the long pendency of the appeal, this Court directs the Subordinate Court, Sankari to dispose of the appeal A.S. No.8 of 2011 within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.



24.07.2019

Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
vsi2

To

1. The Subordinate Court, Sankari,
2. The District Munsif Court, Sankari.

ABDUL QUDDHOSE, J.

vsi2



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