

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.01.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.R.P. (NPD).No.4041 of 2014

and

M.P.No.1 of 2014

- 1.Rajagopal
- 2.Rajavel (Minor)
- 3.Rajalatchumy (Minor)

...

Petitioners

(Minor petitioners 2 & 3 are
Rep.by their father the first
petitioner as their natural
guardian)

Vs.

- 1.Sinouvassane
- 2.Gurunathan
- 3.Vijayalatchumy
- 4.Mangayarkarasi
- 5.Yougalatchumy

...

Respondents

सत्यमेव जयते

Prayer :- The Civil Revision Petition has been filed under Article 227 of the Constitution of India against the fair and final order dated 05.08.2013 made in I.A.No.45 of 2013 in A.S.No.3 of 2012 on the file of the Principal Sub Judge, Pondicherry.

For Petitioners

: Mr.M.Sudharsan

For Respondent No.1

: Mr.S.Vadivel

ORDER

The instant revision has been filed challenging the order dated 05.08.2013 passed in I.A.No.45 of 2013 in A.S.No.3 of 2012 by the Principal Sub Judge, Pondicherry.

Brief facts leading to the filing of the revision:

2.The petitioners are the 5th to 7th defendants in the suit O.S.No.302 of 2006 filed by the first respondent for partition. The suit was decreed in favour of the first respondent by the Principal District Munsif Court at Pondicherry. Aggrieved over by the dismissal of the suit, the petitioners have preferred an appeal before the Principal Sub Judge, Pondicherry in A.S.No.3 of 2012. During the pendency of the appeal, the petitioners filed I.A.No.45 of 2013 in A.S.No.3 of 2012 under Order 41 Rule 27 r/w 151 CPC to receive the petition mentioned documents as additional evidence. The documents included the photo copy of the plaint filed in O.S.No.872 of 2005, Original French sale deed dated 30.10.1950, Original Translation Deed dated 30.10.1950, Original Registered Will dated 07.12.1993, Original Registered Will dated 23.06.1999, Family Ration Card dated 15.07.2005, Original Patta dated 01.07.1998, Water Tax Receipt dated 07.01.2004, Water Tax Receipt dated 31.01.2005 and Voter Identity Card dated 24.06.2002. According to the petitioners, the documents mentioned in the petition could not be produced earlier, since the suit filed by them in O.S.No.872 of 2005 against the first respondent

was decreed in their favour only on 06.01.2011 and therefore, they could file a copy application only after the decree of the suit and get certified copy of the said documents.

3.A counter was also filed by the first respondent in I.A.No.45 of 2013 filed by the petitioners in A.S.No.3 of 2012 stating that the petitioners ought to have filed all the documents along with their written statement and if there was any delay only with the leave of the Court that too only in the suit O.S.No.302 of 2006, the documents ought to have been produced by the petitioners and not in the appeal. Further, all the documents mentioned in the Order 41 Rule 27 application were very much available even at the time of the pendency of the suit and therefore, they cannot be produced in the appellate stage.

4.By order dated 05.08.2013 in I.A.No.45 of 2013 in A.S.No.3 of 2012, the Principal Sub Judge, Pondicherry, dismissed the said application. Aggrieved by the dismissal of I.A.No.45 of 2013 in A.S.No.3 of 2012, the petitioners, who are the 5th to 7th defendants in the suit O.S.No.302 of 2006 and the appellants in A.S.No.3 of 2012, have preferred this revision.

5.Heard Mr.M.Sudharsan, learned counsel appearing for the petitioners and Mr.S.Vadivel, learned counsel appearing for the first

respondent. Despite service of notice on the remaining respondents, no one has entered appearance on their side.

6.Order 41 Rule 27 CPC 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.The suit filed by the first respondent against the petitioners in O.S.No.302 of 2006 before the Principal District Munsif Court at Pondicherry is a partition suit. The first respondent claimed 1/3 share in the suit schedule property. Admittedly, even according to the first respondent, as per the plaint averments made in O.S.No.302 of 2006, the petitioners are having a share in the suit schedule property, but the petitioners claim exclusive ownership of the property based on the registered Will and other documents. Therefore, the petitioners have also filed a suit O.S.No.872 of 2005 against the first respondent for

permanent injunction restraining the first respondent from interfering with their peaceful possession and enjoyment of the suit schedule property and the petitioners have also filed their written statement in O.S.No.302 of 2006 and pleaded that there are registered Wills dated 07.12.1993 and 23.06.1999 and patta for the suit schedule property also stand in the name of the petitioners. Paragraph Nos. 7 and 8 of the written statement filed by the petitioners are extracted hereunder:

"7.The defendants 5 to 7 humbly submit that the plaintiff filed the suit by suppressed all the material facts and filed the suit before this Hon'ble Court. The defendants 5 to 7 submit that the suit schedule mention property is originally owned by Kamatchiammal W/o.Varatharau @ Balakrishna counder and daughter of Appavu counder by virtue of registered notorial sale deed dated 30.10.1950 purchased from Ellammal W/o.Arunachall counder. Before her death, she executed a registered will dated 7.12.1993 in favour of her daughter Rajathi since Rajathi was a heart patient. Kamatchiammal died on 14.12.1993. From the birth till her death of Rajathi she was enjoyed the property. She got two minor children that is defendant No.6 and 7 and her husband that is the 5th defendant also a sick man. So the said

Rajathi executed a will on 23.06.1999 in favour of her minor son defendant No.6 and 7 by appointing 5th defendant as their guardian. On 21.12.2002 the said Rajathi was died leaving behind the defendants 5 to 7 are her legal heirs. Till date, the defendants 5 to 7 are in possession of the suit property and enjoying the property by virtue of the registered will executed by Rajathi.

8.The defendants 5 to 7 humbly submit that to disturb the peaceful possession and enjoyment of the suit property the plaintiff and the defendants 1 to 4 and their henchmen threatened the poor and innocent defendants No.5 and tried to evict them from the suit property by force. So the 5th defendant filed a suit O.S.No.872 of 2005 before the II A.D.M. At Pondicherry for permanent injunction against the plaintiff and the 2nd defendant, subsequently the 5th defendant filed a petition for interim injunction against them. After perusal of the petition, counter and all the documents and also heard the arguments of the counsels and granted temporary injunction against the plaintiff and the 2nd defendant till the disposal of the suit O.S.No.872 of 2005 by the Hon'ble II A.D.M. Pondicherry. The

suit is pending for trial. In the meanwhile this plaintiff filed this suit before this Hon'ble Court without any documents or rights over the property. So as per the registered will dated 23.06.1999 executed by Rajathi in favour of defendants 5 to 7 they are the rightful owner of the suit property. The plaintiff and the defendants 1 to 4 are not at all liable to ask for partition in the suit property."

8.As seen from Order 41 Rule 27(b) CPC, if 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.

9.In the instant case, the suit filed by the first respondent is a partition suit and even according to the first respondent, the petitioners are entitled for a share in the suit schedule property. The petitioners have also pleaded in their written statement that there is a registered Will executed in their favour and by virtue of the same, they claim absolute ownership of the suit schedule property, which is disputed by the first respondent. Even though the documents mentioned in the petition filed by the petitioners under Order 41 Rule 27 CPC were very much available during the pendency of the suit O.S.No.302 of 2006, the reasons given by

the petitioners for not producing the same before the trial Court are sufficient and bonafide reasons. Since the said documents were marked as exhibits in the suit filed by the petitioners in O.S.No.872 of 2005 against the first respondent for permanent injunction, the same could be produced only after the disposal of the said suit on 06.01.2011. In order to effectively adjudicate the dispute between the parties, the documents mentioned in the application filed under Order 41 Rule 27 CPC are very much essential. Further, the petitioners have also pleaded in the written statement the existence of those documents. That being the case, the lower Appellate Court ought to have allowed the application filed by the petitioners under Order 41 Rule 27 CPC, but the lower Appellate Court, without appreciating the necessity for the petitioners to produce those documents to prove their case, has erroneously dismissed the application filed by the petitioners in I.A.No.45 of 2013 in A.S.No.3 of 2012 only on the ground that there is no bonafides on the part of the petitioners. This Court is of the considered view that the order passed by the lower Appellate Court in I.A.No.45 of 2013 in A.S.No.3 of 2012 is erroneous and has to be set aside for the aforementioned reasons.

In the result, the order dated 05.08.2013 passed by the Principal Sub Judge, Pondicherry in I.A.No.45 of 2013 in A.S.No.3 of 2012 is hereby set aside and the Civil Revision Petition is allowed. Consequently, connected miscellaneous petition is closed. However, this Court directs

the lower Appellate Court to dispose of the appeal A.S.No.3 of 2012 within a period of 3 months from the date of receipt of a copy of this order. Due to the sheer negligence and delay on the part of the petitioners to file an application for production of additional documents before the trial Court in O.S.No.302 of 2006, this Court also directs the petitioners to pay cost of Rs.5,000/- to the first respondent within a period of 4 weeks from the date of receipt of a copy of this order. However, the documents sought to be marked as exhibits by the petitioners will have to be tested by the lower Appellate Court subject to proof and relevancy.

Index : Yes / No
Internet : Yes / No
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04.01.2019

To
The Principal Sub Judge, Pondicherry.

सत्यमेव जयते

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ABDUL QUDDHOSE,J.

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