



C.R.P.(MD)No.932 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 09.02.2024

PRONOUNCED ON:22.03.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.932 of 2019

and

C.M.P.(MD)No.5330 of 2019

1.Stella Mary
2.Sahaya Mary
3.Jeyapaul
4.Jansi
5.Jeyaseelan

: Petitioners/Petitioners/Appellants

Vs.

1.Iruthaya Mary
2.Innasimuthu
3.Arockiasamy
4.Philominal
5.Gnanasoundari
6.Amali
7.Arul Jeganathan
8.Lily
9.Kulandai Theresu
10.Gnanaprakasi
11.Mariyaselvam @ Jeyaseeli
12.Somamoorthi
13.Ganesan
14.Pandi(died)
(memo in USR No.30732 dated 09.09.2023
is recorded to the effect that R.14 died, issueless, vide
order dated 04.01.2024)

: Respondents/Respondents/Respondents



C.R.P.(MD)No.932 of 2019

PRAYER:- Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order passed in I.A.NO.1 of 2019 in A.S.No.35 of 2011, dated 24.04.2019, pending on the file of the Subordinate Judge, Devakottai.

For Petitioners : Mr.K.Samidurai

For Respondents : Mr.J.Anand Kumar
for R.1

: Mr.S.Ravi

for R.2 to R.6

: No Appearance for R.7 to R.10

: R.11 – died memo filed

ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.1 of 2019 in A.S.No.35 of 2011, dated 24.04.2019, on the file of the Subordinate Court, Devakottai dismissing the petition filed under Order 41 Rule 27 C.P.C.,

2. The revision petitioners are the appellants and the defendants 1 to 5. The first respondent/plaintiff has filed the suit against the revision petitioners and the other respondents for partition and allotment of 1/6th



C.R.P.(MD)No.932 of 2019

share to the plaintiff. The learned Judge, after full trial, has passed a preliminary decree dated 16.08.2010 as prayed for. Aggrieved by the said judgment and decree, the defendants 1 to 5 have preferred an appeal in A.S.No.35 of 2011, on the file of the Subordinate Court, Devakottai. The appellate Judge, considering the materials available on record and on hearing the arguments of both sides, has passed the judgment dated 01.07.2011, setting aside the judgment and decree passed by the trial Court and remitted the case back to the trial Court and thereby permitted the appellants/defendants 1 to 5 to send the disputed Ex.B.2 Will to the expert for comparing the signatures of the executant Kasparammal @ Sebastiammal and get an opinion and also permitted the appellants to examine the attestos of the Wil and for the plaintiff to cross-examine them. Aggrieved by the order of remand, the plaintiff has filed an appeal before this Court in C.M.A.No.1592 of 2011. A learned Judge of this Court, vide judgment dated 02.11.2018 allowed the appeal by setting aside the judgment of the first appellate Court and remitted the appeal back to the said Court for deciding the appeal on merits and in accordance with law within a period of three months from the date of receipt of a copy of that order.



C.R.P.(MD)No.932 of 2019

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3. When the appeal was restored to file, the appellants/defendants 1 to 5 have filed the above application under Order 47 Rule 27 C.P.C., seeking permission to examine the two attestors of Ex.B.2 Will. The respondent/plaintiff has filed a counter statement raising serious objections. The learned appellate Judge, after enquiry has passed the impugned order dated 24.04.2019 dismissing the said petition. Challenging the order of dismissal, the appellants/defendants 1 to 5 have preferred the present Civil Revision Petition.

4. It is not in dispute that the first respondent / plaintiff and Thainese @ Selvaraj – husband of the first defendant and the father of the defendants 2 to 4 are brother and sister and that the suit property was owned by their mother Sebastiammal @ Kasparammal. The plaintiff, by alleging that his mother died intestate, has filed the above suit claiming 1/6th share. The main defence of the defendants 1 to 5 is that Sebastiammal @ Kasparammal has executed a Will in favour of her son Thainese @ Selvaraj on 11.01.1993.



C.R.P.(MD)No.932 of 2019

WEB COPY

5. The case of the revision petitioners in the affidavit filed in support of the petition filed under Order 41 Rule 27 C.P.C., before the appellate Court is that since the attestors of Ex.B.2 – Will were out of station at that time, time was sought for in the trial Court, but the same was rejected, that their Counsel, who was appearing before the trial Court, has also stated that the examination of D.W.2 – scribe is sufficient to prove the Will and on that basis, the evidence of their side was closed, that the trial Court has decreed the suit on the sole ground that the defendants have not examined any of the two attestors in Ex.B.2 -Will, that the appellate Court, accepting the request of the defendants 1 to 5, remanded the suit to the trial Court to take additional evidence, that when the C.M.A., was pending before the High Court, the learned Counsel appearing for the plaintiff has conceded the request of the defendants 1 to 5 that an opportunity should be given for them to examine the attestors before the appellate Court itself and stated no objection for remand, that the very purpose and intention of conceding for remand by their Counsel at High Court was on understanding that the additional witnesses would be examined before the appellate Court, otherwise there was no chance for conceding the remand, that non-examination of the



C.R.P.(MD)No.932 of 2019

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attestors is not wantonly done, but due to the reasons stated, that they have obtained legal advice that the examination of atleast one attesor is necessary and since their case rests upon Ex.B.2-Will, they have to prove the same by examining the attestors, that the petitioners will be put to much hardship, loss and injury, if they are not permitted to examine the attestors and that therefore, it has become just and necessary to permit the appellants to examine the attestos of Ex.B.2 – Will.

6. The defence of the respondent/plaintiff is that the C.M.A., was allowed as the remand was not in accordance with law, that there was no understanding that the appellants should be given an opportunity to examine the attestors before the first appellate Court, that the learned Counsel for the appellants have not conceded for remand, that their Counsel have only submitted that they won't have any objection for allowing the appeal, if time limit is fixed for the early disposal of the appeal before the Subordinate Court, that the only reason stated for non-examining the attestors before the trial Court is that the witnesses were out of station and their request for adjournment was rejected by the trial Court is absolutely false and incorrect, that they have not taken any steps to summon the attestors before the trial Court and that the above petition



C.R.P.(MD)No.932 of 2019

has been filed only to prevent the aged plaintiff from realising the fruits of the decree and that therefore, the petition is liable to be dismissed.

7. The learned appellate Judge, by observing that though sufficient opportunity was given to the appellants for examination of the attestors before the trial Court, they have voluntarily closed their evidence and the above petition only came to be filed to fill up the lacuna in the judgment of the trial Court, dismissed the petition.

8. Before proceeding further, it is necessary to refer Orde 41 Rule 27 C.P.C., hereiunder for better appreciation:

“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



C.R.P.(MD)No.932 of 2019

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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) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.”

9. Recently, I had an occasion to consider the scope of Order 41 Rule 27 C.P.C., in the case of **Sevaraj Vs. V.K.Parasuram (died) and others** reported in **2023-4-L.W., 887** and the relevant passages are extracted hereunder:

“17. Under Rule 27 of Order XLI C.P.C., production of additional evidence where oral or documentary is permitted only under three circumstances which are;

*-Where (i) the trial Court had refused to admit the evidence, though it ought to have been admitted;
(ii) the evidence was not available to the party, despite exercise of due diligence and (iii) the*



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C.R.P.(MD)No.932 of 2019

appellate Court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature.

18. It is settled law that additional evidence in appellate Court cannot be produced by a party as of right and that the essentials of Order 41 Rule 27 C.P.C., have to be satisfied. It is pertinent to note that the said provision cannot be used to patch up the weak points in the case and fill up the omission in the Court of appeal.

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*21. No doubt, Hon'ble Supreme Court in catena of decisions, has settled the legal position that when an application for reception of additional evidence under Order 41 Rule 27 C.P.C., is filed in an Appeal, the Appellate Court has to consider the application along with the appeal and deprecated the practice of considering the application for reception of additional evidence separately. No doubt, the Hon'ble Division Bench of this Court has referred to the judgment of Hon'ble Supreme Court in **Arjun Singh Vs. Kartar Singh** reported in **AIR 1951 SC 193**, wherein our Apex Court after referring to the decision of the Privy Council, has held that without examination of the evidence on record and without a decision is reached that the*



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C.R.P.(MD)No.932 of 2019

evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment, the appellate Court would not be justified in admitting additional evidence under Order 41 Rule 27 C.P.C.

22. The learned Senior Counsel for the respondents would submit that the above observations of the Hon'ble Supreme Court would only mean that the Court has to consider the evidence already available on record for deciding the appeal and if any other evidence is required for the Court to pronounce the judgment, then only the concerned Appellate Court can hear the petition for reception of additional evidence and decide whether the additional evidence sought to be received are required for pronouncing the judgment. If such an interpretation is given to the said observation, the Appellate Court without conducting any enquiry in the application for the reception of additional evidence and without even knowing the reason for filing the petition for reception of additional evidence, has to reject the same, if the Court comes to a decision that the evidence already available is sufficient enough to decide the appeal.

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C.R.P.(MD)No.932 of 2019

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26. It is settled law that the application filed under Order 41 Rule 27 C.P.C., should be heard along with the appeal, but that does not mean that the judgment in the appeal and the order in the application filed under Order 41 Rule 27 C.P.c., should be pronounced simultaneously. The hearing of the appeal along with the application for reception of additional evidence is mandatory, but not the disposal. In case, if the appellate Court comes to a decision that the addicional evidence sought to be received is to be allowed, then the next question that arises is as to whether the appellate Court itself shall record the evidence or the trial Court or any other Court should be directed to record the evidence and transmit the same. But if the appellate Court comes to a decision that the application for reception of additional evidence is liable to be rejected, then there is no bar or prohibition for the appellate Court to pronounce the judgment in the appeal along with the dismissal order of the petition filed under Order 41 Rule 27 C.P.C., and in that case, the appellate Court has to pass a common judgment and order. But in case, if the appellate Court comes to a decision that the additional evidence sought to be received is to be allowed, then the appellate Court by re-opening the appeal has to pass orders only in the application. In case of the appellate Court allowing the application filed under Order 41 Rule 27 C.P.C., if the respondent in the petition for reception of additional evidence stated no objections for



C.R.P.(MD)No.932 of 2019

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marking the documents or if the Court comes to a decision that there is no issue with regard to the admissibility of the document and the objections raised by the other side are formal, the appellate Court by itself can mark the documents and proceed to pronounce the judgment. If the respondent raises serious objections for marking the documents and there exists an issue with regard to the very admissibility of the document itself, then the appellate Court has to call the applicant to adduce further evidence either before the appellate Court or before any other Court as directed by the appellate Court and in that case, the other side is entitled to produce the rebuttal evidence in accordance with the provisions of the Evidence Act.”

10. Considering the settled legal position, the course adopted by the learned appellate Judge in deciding the application under Order 41 Rule 27 C.P.C., separately cannot be appreciated. The learned appellate Judge should have taken the appeal along with the above petition for reception of additional evidence and in case if the Court is of the view that the additional evidence is not necessary or cannot be received, has to pronounce the judgment in the appeal by dismissing the petition under Order 41 Rule 27 C.P.C., but on the other hand, if the Court is of the



C.R.P.(MD)No.932 of 2019

WEB COPY

view that the additional evidence is necessary, then the Court has to adopt any of the course referred in the above judgment. The appellate Court, by considering the contentions of both sides and taking note of the notes papers of the trial Court, has given its findings, for dismissing the prayer for reception of additional evidence. This Court is of the view that there is every chance or possibility for taking the order of the appellate Court that the Court has indirectly shown its mind to accept the findings of the trial Court and in order to avoid such a situation, the appeal has to be heard along with the petition for reception of additional evidence. Hence, this Court concludes that the impugned order dismissing the petition cannot be sustained legally and as such, the same is liable to be set aside and is set aside accordingly.

11. In the result, the Civil Revision Petition is allowed, by setting aside the order passed in I.A.No.1 of 2019 in A.S.No.35 of 2011, dated 24.04.2019. Consequently, the connected Miscellaneous Petition is closed. There shall be no order as to costs. The appellate Court is directed to restore the above petition for reception of additional evidence filed under Order 41 Rule 27 C.P.C., to its file and to hear the appeal



C.R.P.(MD)No.932 of 2019

along with the above petition and to proceed the same in accordance with the settled legal position above referred.

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22.03.2024

NCC : Yes : No
Index : Yes : No
Internet : Yes : No

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To

1.The Subordinate Court, Devakottai.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.R.P.(MD)No.932 of 2019

K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

C.R.P.(MD)No.932 of 2019

22.03.2024