A. Andisamy Chettiar vs A. Subburaj Chettiar on 8 December, 2015

Equivalent citations: AIR 2016 SUPREME COURT 79, 2015 (17) SCC 713, AIR 2016 SC (CIVIL) 596, (2015) 2 ORISSA LR 747, (2016) 1 KER LJ 311, (2015) 8 MAD LJ 855, (2016) 1 MAD LW 936, (2016) 2 ANDHLD 19, (2016) 157 ALLINDCAS 123 (SC), (2016) 1 RECCIVR 677, (2016) 1 ICC 444, (2016) 1 CIVILCOURTC 731, (2016) 1 PAT LJR 394, (2016) 130 REVDEC 709, (2016) 1 RAJ LW 740, (2016) 2 PUN LR 406, (2016) 1 JLJR 256, (2015) 4 CURCC 420, (2016) 1 CLR 201 (SC), (2015) 13 SCALE 378, (2016) 1 ALL RENTCAS 7, (2016) 1 ALL WC 661, (2016) 2 CIVLJ 888, (2016) 4 CAL HN 99, (2016) 1 BOM CR 792

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Bench: Prafulla C. Pant, Dipak Misra

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 14055 OF 2015
(Arising out of S.L.P. (C) No. 7798 of 2015)

Andisamy Chettiar … Appellant

Versus

Subburaj Chettiar …Respondent

J U D G M E N T

Prafulla C. Pant, J.

This appeal is directed against order dated 07.11.2014, passed by the High Court of Judicature at Madras, Bench Madurai, in Civil Revision Petition (PD) (MD) No. 1787 of 2008 whereby the revision was allowed, and order dated 12.03.2008 passed by Subordinate Judge, Virudhunagar, on I.A. No. 3 of 2008 (in A.S. No. 55 of 2007), is set aside.

We have heard learned counsel for the parties and perused the papers on record.

Succinctly stated, facts of this case are that the appellant/plaintiff instituted Original Suit No. 92 of 2003 before District Munsif, Virudhunagar, for permanent injunction restraining the defendant from interfering in his peaceful possession and enjoyment of the property in suit. It is pleaded in the plaint that originally the property in dispute was owned by one Gopalsamy Pillai. On 21.08.1963 Gopalsamy Pillai transferred the property by executing a sale deed in favour of one Lakshmiammal. Lakshmiammal further transferred the property to Gurusamy Naicker through deed dated 26.12.1968. Plaintiff's father Ayyappan Chettiar purchased the property from Gurusamy Naicker, and constructed his house. It is further pleaded that Ayyappan Chettiar executed Will dated 13.12.1990 in favour of the plaintiff, and after death of his father in 1997, the plaintiff is in exclusive possession of the property. Alleging that the defendant has no right over the disputed property, relief of permanent injunction against him is sought in the suit. Plaintiff Andisamy Chettiar and defendant Subburaj Chettiar are sons of Ayyappan Chettiar.

The defendant filed his written statement and contested the suit. It is not disputed in the written statement that Ayyappan Chettiar, who purchased the property from Gurusamy Naicker, died on 12.10.1997. However, it is disputed that Ayyappan Chettiar executed Will dated 13.12.1990, relied by the plaintiff. It is alleged by the defendant that the plaintiff has filed suit for permanent injunction only to evade partition of the property. It is also pleaded by the defendant that apart from two sons, Ayyappan Chettiar had three daughters, namely, Lakshmi, Avudaithai and Andal. Lakshmi and Andal died intestate leaving legal heirs, as such, suit is bad for non-joinder of remaining daughter of Ayyappan Chettiar and legal heirs of pre-deceased daughters.

On the basis of pleadings of the parties following issues were framed by the trial court: -

> Whether Ayyappan Chettiar executed a Will in favour of the plaintiff in respect of the property in suit?
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> Whether the plaintiff is entitled to the relief of permanent injunction?
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> To what other relief, if any, the plaintiff is entitled?
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> The plaintiff got examined himself as PW-1 Andisamy Chettiar and he also got examined PW-2 Selvarajan, stated to be attesting witness of the Will. Nine documents (including Will Ex.A-4) were filed by the plaintiff. On behalf of the defendant, he got himself examined as DW-1 Subburaj Chettiar, and filed three documents. The trial court, after hearing the parties, decided issue No. 1 against the plaintiff holding that the plaintiff failed to prove that Ayyappan Chettiar executed the Will relied on by him. On the basis of finding on issue No. 1, issue Nos. 2 and 3 are also decided in favour of the defendant, and the suit was dismissed vide judgment and order dated 05.02.2007.
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> Aggrieved by the decree passed by the trial court, the plaintiff filed appeal (A.S. No. 55 of 2007) before the first appellate court, i.e. Subordinate Judge, Virudhunagar.

During the pendency of A.S. No. 55 of 2007 before the first appellate court, an application (I.A. No. 3 of 2008) was moved on behalf of the plaintiff with following prayer: -

"Therefore it is just and necessary that this Hon'ble Court be graciously pleased to direct a scientific investigation to find out whether the signature of Ayyappan Chettiar, my father in Ex. A-4 is genuine by comparing the signature of Ayyappan Chettiar, in Ex. A-4 with his admitted signatures in Ex. B-1 to B-3, by a competent hand-writing expert, and further direct him to file a report to the scientific investigation done by him and justice thus rendered." The first appellate court, vide order dated 12.03.2008, allowed the I.A. No. 3 of 2008, and directed the appellant to deposit a sum of Rs.5000/- as fee.

The defendant challenged the order passed by the first appellate court, allowing the application for additional evidence, before the High Court in Civil Revision Petition (PD) (MD) No. 1787 of 2008, which is allowed by said court by the impugned order assailed before us.

Under the scheme of Code of Civil Procedure, 1908 (for short "the Code") whether oral or documentary, it is the trial court before whom parties are required to adduce their evidence. But in three exceptional circumstances additional evidence can be adduced before the appellate court, as provided under S. 107(1)(d) read with Rule 27 of Order XLI of the Code. Rule 27 of Order XLI reads as under: -

"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 – 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 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." (emphasis supplied) From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved

before the trial court seeking scientific examination of the document (Ex.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition, i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not.

In K.R. Mohan Reddy v. Net Work Inc.[1], this Court has held as under: -

"19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction....." In North Eastern Railway Admn. v. Bhagwan Das[2], this Court observed thus:

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"13. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 CPC. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist....." In N. Kamalam (dead) and another v. Ayyasamy and another[3], this Court, interpreting Rule 27 of Order XLI of the Code, has observed in para 19 as under: -

"..... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorize any lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way." In Union of India v. Ibrahim Uddin and another[4], this Court has held as under: -

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce

judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced....." Learned counsel for the appellant argued before us that the High Court, in revision, at an interim stage of appeal pending before the lower appellate court, should not have interfered in the matter of requirement of additional evidence.

We have considered the argument advanced on behalf of the appellant and also perused the law laid down by this Court as to the exercise of revisional power under Section 115 of the Code in such matters. In Mahavir Singh and others v. Naresh Chandra and another[5], explaining the scope of revision in the matters of acceptance of additional evidence by the lower appellate court interpreting expression "or for any other substantial cause" in Rule 27 of Order XLI, this Court has held as under: -

"The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in Kessowji Issur v. G.I.P. Rly. [ILR (1907-08) 31 Bom 381]. It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, have interfered with such an order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order 41 Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC." In Gurdev Singh and others v. Mehnga Ram and another[6], this Court, on similar issue, has expressed the view as under: -

"We have heard learned counsel for the parties. The grievance of the appellants before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order XLI, Rule 27(b), Code of Civil Procedure (CPC) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to be produced as requested by the appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction under Section 115 CPC took the view that the order of the appellate court could not be sustained. In our view the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the appellate court. The reason is obvious. The appellate

court hearing the matter finally could exercise jurisdiction one way or the other under Order XLI, Rule 27 specially clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned counsel for the parties regarding additional evidence, we allow this appeal, set aside the order of the High Court." In view of the law laid down by this Court, as discussed above, regarding exercise of revisional powers in the matter of allowing the application for additional evidence, when appeal is pending before the lower appellate court, the impugned order passed by the High Court cannot be upheld and the same is set aside. However, to do complete justice between the parties, we think it just and proper to direct the first appellate court to decide the application for additional evidence afresh in the light of observations made by this Court regarding principles on which such an application can be allowed or rejected. We order accordingly. We further clarify that we have not expressed any opinion as to the merits of the case. Accordingly, the appeal is disposed of. No order as to costs.

.....J. [Dipak Misra] .....J. [Prafulla C. Pant]
New Delhi;

December 08, 2015.

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[1] (2007) 14 SCC 257
[2] (2008) 8 SCC 511
[3] (2001) 7 SCC 503
[4] (2012) 8 SCC 148
[5] (2001) 1 SCC 309
[6] (1997) 6 SCC 507