

KAUK320003272019



**IN THE COURT OF THE SENIOR CIVIL JUDGE, BHATKAL,
AT: BHATKAL.**

PRESENT : SRI. KURANI KANT DHAKU
B.Com.LLB. [Spl.]
SENIOR CIVIL JUDGE & JMFC,
BHATKAL.

REGULAR APPEAL No.41/2019.

DATED THIS 29th DAY OF OCTOBER-2024.

BETWEEN:

1. SRI. JOSEPH S/O: MARTIN D'SOZA

----- **APPELLANT.**

AND:

1. SRI. TONY S/O: DUMING D'SOZA AND OTHERS.

----- **RESPONDENTS.**

PARTIES TO THE I A No.III.

BETWEEN:

1. SRI. JOSEPH S/O: MARTIN D'SOZA

----- **APPLICANT.**

[ORIGINAL APPELLANT]

AND:

1. SRI. TONY S/O: DUMING D'SOZA AND OTHERS.

----- **OPPONENTS.**

[ORIGINAL RESPONDENTS]

[BY SRI. K. R. NAIK ADVOCATE FOR APPELLANT/APPLICANT]

[BY SRI. S.V. ADI ADVOCATE FOR RESPONDENT No. 8]

DETAILS OF INTERLOCUTORY APPLICATION AS PER CIRCULAR NO. R.J.163/2023
DATED 24.08.2023 AND WP NO. 201865/2023.

Provision under which application is filed	U/O. 41 Rule 27 of CPC
Relief sought for	Production of additional evidence.
The date on which the application is filed	24/11/2023.
No. of application	I A No. III.
Date on which the objections are filed by different opponents	15/12/2023.
The date of order.	29/10/2024.

Sd/-

SRI. KURANI KANT DHAKU.
SENIOR CIVIL JUDGE, BHATKAL.

ORDER ON I. A. No. III.

The present IA.No.III is U/Order XLI Rule 27 of CPC filed by applicant/Appellant, seeking permission to produce the additional evidence.

2. In the affidavit, it is stated that the present Appellant has filed OS 34/2011 before the Addl. Civil Judge, Bhatkal for the relief of declaration and consequential relief of permanent injunction. The Trial Court was heard the matter and dismissed the suit. Further, it is stated that the Trial Court has allotted share in the 'B' suit schedule property. But, the share was not allotted in

the 'A' suit schedule property. Hence, the present Applicant/Appellant has preferred appeal before this Court.

3. Further, it is stated that the respondents/ opponents have sold the mulgeni property in favour of respondent No.8 illegally. Hence, the sale deed executed in favour of respondent No.8 is illegal and not binding on the share of the Appellant. Further, it is stated that the present Appeal is filed by the Appellant aggrieving the judgment and decree of the Trial Court in OS 34/2011. Further, it is stated that after the dismissal and disposal of the suit, the Appellant obtained certain documents from the Land Tribunal. Hence, the Appellant is entitled 1/3rd share in the suit schedule property and to prove the above facts, the documents obtained from Land Tribunal are very much necessary to produce before this Court to determine the dispute between the parties. Further, it is contended that the documents obtained from the Land Tribunal are public documents and he obtained from the Tribunal on the day when he came to the knowledge of the documents. Hence, there is no intentional delay to produce the above said documents. Hence, prays to treat the above documents as additional evidence and permit the Appellant/Applicant to adduce the additional evidence for the interest of equity and justice. Further, it is stated that no harm or loss caused to the opposite party, if the application is allowed. But, if the application is not allowed irreparable losses will cause to the appellant/applicant, which is not

compensated in terms of money. Hence, prays to permit the appellant/applicant to adduce the additional evidence.

4. On the other hand, in the instant Appeal, respondent No.1 to 6 are placed ex-parte and respondent No.7 is dead. The respondent No.8 filed objections to the I.A. denying the entire contents of the affidavit and contended that the present I.A. is not maintainable under law or facts and contended that the IA is not maintainable at this stage and contended that there is no sufficient and cogent reason to allow the I.A. Further, it is contended that the present Appellant/applicant has not stated proper reason that what prevent him to produce the above said documents before the Trial Court. Hence, the present application is filed by the appellant/applicant only to fill-up the locunas. Further, it is contended that the Trial Court has already heard the matter and rightly passed judgment and decree. Further, it is contended that the approach of the appellant is not bonafide one and he filed the present application just to protract the present case. Further, it is contended that the documents sought for production are not relevant for adjudication of the Appeal. Hence, prays to reject the I.A. in the interest of equity and justice.

5. I have heard arguments of both sides and perused material records.

6. On perusal of entire material records, the points would arise for consideration are:

P O I N T S:

POINT No.1: Whether the Appellant/Applicant has made out sufficient grounds to allow the I.A. No. III Under Order XLI Rule 27 of CPC?

POINT NO.2: What order.?

7. On careful scrutiny of entire material records, my findings to the above points are:

F I N D I N G S:

POINT No.1: In the Negative.

POINT No.2: As per my final order for the following:

R E A S O N S:

8. POINT No.1 : The present I.A.No.III is filed by the Appellant/Applicant seeking permission to adduce the additional evidence.

9. Admittedly, OS No. 34/2011 was filed by the present appellant/applicant against the respondents/opponents for the relief of declaration, declaring that the sale deed executed by defendant No.1 to 7 in favour of defendant No.8 dated 30.04.2009 is illegal, concocted, fabricated, created and never acted upon and also sought for consequential relief of permanent injunction. Furthermore, admittedly the present appeal is filed before this Court challenging the judgment and decree of the Trial Court on several grounds.

10. A perusal of judgment and decree of Trial Court in OS 34/2011, it is noticed that the present appellant has filed suit for declaration and permanent injunction. Further, it reveals that after hearing the matter, the Trial Court has dismissed the suit of the plaintiff .

11. In the affidavit, it is stated that presently the appellant/applicant has intend to adduce the additional evidence. It is stated that after the dismissal of OS No. 34/2011 he obtained certain documents from the Land Tribunal. So, the said documents are necessary for complete adjudication of appeal. On the other hand, the respondent No.1 to 6 are placed ex-parte and respondent No.7 is dead. The respondent No.8 has filed his objections and denied all the contents of the application.

12. Admittedly, the present appellant/applicant is sought permission for adduce the additional evidence in the appellant stage. So, before going to the merits of the application, it is proper to know the relevant provisions under order XLI Rule 27 of CPC, the said proviso reads as under:

Order XLI Rule 27 of CPC:- 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.

13. On plain reading of above proviso, it is clear that in appellant stage the parties are not permitted to adduce the additional evidence unless the Trial Court refused to admit the evidence. Under the above said proviso, the parties are admitted to adduce the additional evidence in the Appellant stage when the said fact was not within his knowledge and proves that by exercising due diligence he has not produce the additional evidence before the Trial Court. In the instant case, the appellant/applicant himself stated that after dismissal of OS 34/2011, he obtained certified copies from the Land Tribunal. Admittedly, the documents sought for production are public documents, but the appellant/applicant has not placed any proper reason and documents to show that the above said documents are not within his knowledge. Hence, the reasons given by the appellant/applicant are not just and proper and hence, the IA is not maintainable.

14. In addition to the oral arguments, the learned Counsel for the Appellant/applicant has placed his reliance on the following decisions:

1. ILR 2007 KAR 1127
2. Judgment of Hon'ble High Court of Karnataka in its MSA 66/2007
3. 2015 SAR (Civil) 333

15. With due respect I have carefully gone through the above all decisions. In the decision reported in **ILR 2007 KAR 1127 held between Shanthaveerappa V/s. K.N. Janardhanchari.** In the said decision the Hon'ble High Court of Karnataka has discussed about the order of Re-Trial of appeal and remanding the matter. Hence, the said decision is not assist to the appellant/applicant.

16. In the decision of **Hon'ble High Court of Karnataka in its MSA 66/2007 held between Smt. Uma Shetty and Sri. Venkatraman Shetty V/s. N.V. Rajachari, Smt. Sarasvathi and Smt. Uma.** In the said decision of Hon'ble High Court of Karnataka, it is held that if the appellate Court come to the conclusion that the material issue had not been raised and the evidence on record are in sufficient to decide the issue in that event, the appellate Court shall raised additional issue and record the additional evidence without remanding the matter to the Trial Court. In the present case the Trial Court has

already framed sufficient issues, recorded the evidence from both sides. Hence, this judgment is also not assist to the appellant/applicant.

17. Further, in the decision reported in 2015 SAR (Civil) 333 held between Zai Ahamad (D) their LR's and another V/s. Mohd. Farooq. In the said decision, the Hon'ble Apex Court, it is held that the appellate court to empower to remand the matter, but its simultaneously empowers to take additional evidence or to required to such evidence to be taken. In the present case, the question before the Court only adjudication of production of additional evidence by the appellant and in the instant application, the appellant has not full-fill the ingredients of order XLI Rule 27 of CPC. Hence, this decision is also not assist to the appellant/applicant to get allow his application.

18. Per contra, the learned Counsel for respondent No.8 has placed his reliance on the decision reported in 2013 (3) KCCR 2170 held between the Deputy Commissioner, Raichur and another V/s. Chennaveeraiah and another and decision reported in 2012 (2) SCCR 313 held between Union of India V/s. Ibrahim Uddin and another. In the decision the Hon'ble High Court of Karnataka, it is held that application in Appeal seeking production of documents is to be considered along with the Appeal. In the second decision, the Hon'ble Apex Court, it is held that an Appellate Court should not be travell outside the record of Lower Court and cannot take any evidence in Appeal. So,

in the present case, admittedly, sought permission to adduce the additional evidence. But, the Appellant has not shown any proper reason to permit him to adduce the additional evidence and the appellant has also not proved fact that the said documents were not within his knowledge. Hence, considering the above two decisions of the Hon'ble High Court and Apex Court, the application of appellant is not maintainable. Therefore, on careful perusal of entire material record, the appellant has not made sufficient grounds to allow his I.A.No.III. Hence, I answer POINT No.1 in the Negative.

19. POINT No.2.: As reasons discussed supra, I proceed to pass the following:

ORDER:

**The I A No.III U/O XLI Rule 27 r/w section 151
of CPC filed by the Appellant is hereby DISMISSED.**

[Dictated to the Stenographer directly on computer, typed by her, corrected by me and then pronounced in the Open Court on this 29th day of October -2024]

Sd/-
(Kurani Kant Dhaku)
Senior Civil Judge & JMFC,
Bhatkal