

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

APPEAL SUIT No.155 OF 2016

JUDGMENT:

The present Appeal Suit is preferred by the defendant No.7 in O.S. No.248 of 2010 on the file of the III Additional District Judge, Bhimavaram, West Godavari District (for short, 'the trial court'), questioning the preliminary decree dated 06.07.2015 for a sum of Rs.9,96,554/- with interest at 6% per annum from the date of suit till realization, on the ground that though, written statement was filed, still, he was set *ex parte* by recording that additional written statement was not filed and on that ground setting him *ex parte*.

2. Heard Sri Virupaksha Dattatreya Gouda, learned counsel for the appellant-defendant No.7, and Sri P.Durga Prasad, learned counsel for respondent No.1-plaintiff. Respondent Nos.2 to 16, who are defendant Nos.1 to 6 and 8 to 16 in the original suit, are shown in the cause title of the grounds of appeal as not necessary parties to the present appeal.

3. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the trial court in the original suit.

4. The preliminary decree passed by the trial court which is under challenge is an *ex parte* decree.

5. The suit was filed for recovery of Rs.9,96,554/- due from defendant Nos.7 and 11 and also from late Badiga Rama Koteswara Rao, late Badiga Rambabu, and late Badiga Srikrishna requesting to award rate of interest at 24% per annum showing an extent of Acs.2-79 cents of land, which is southern portion of a total extent of Acs.8-36 cents in R.S.Nos.171/1 and 172/1 in Kalla village of Kalla Mandal, West Godavari District, in the plaint schedule.

6. The facts would show that defendant Nos.1 and 2 are daughter and son of defendant No.3 and late Badiga Rambabu; defendant Nos.4 and 5 are the daughters of defendant No.6 and late Badiga Sri Krishna; defendant No.7 is the father of defendant Nos.8 and 9 and husband of defendant No.10; and defendant No.11 is the son and defendant Nos.13 to 16 are the daughters of defendant No.12 and late Badiga Rama Koteswara Rao. Plaint shows that a sum of Rs.4,00,000/-, was obtained as loan under a non-possessory mortgage dated 10.12.1998, executed by defendant Nos.7 and 11 along with late Badiga Rama Koteswara Rao and Badiga Rambabu and Badiga Sri Krishna. Since the said loan stood un-discharged despite repeated demands, the aforesaid suit was laid for recovery of the principal amount of Rs.4,00,000/- and interest charged at 13% per annum from the date of mortgage deed till the date of filing of the suit, which was worked out to Rs.5,96,554/-.

7. Defendant No.7 filed written statement as could be seen from the material papers and even as argued by the learned counsel

for defendant No.7 (appellant), which fact is admitted by the learned counsel for the plaintiff (respondent No.1 herein).

8. It appears, when certain amendments were introduced by filing relevant applications, in which, orders were passed by the trial court, the suit was coming up for filing additional written statement. At that stage, somehow, the trial court, on 16.06.2015, recording that additional written statement was not filed by the defendant No.7 and he was called absent, set him *ex parte* and posted the suit to 06.07.2015 for plaintiff's evidence; and, on 06.07.2015, by recording the evidence of the plaintiff as P.W.1, disposed of the suit and also two other suits, i.e., O.S. No.246 of 2010 and O.S. No.247 of 2010, from which, the present appeal and A.S. No.176 of 2016 and A.S. No.154 of 2016, respectively, have arisen.

9. During the course of arguments, the learned counsel for the plaintiff does not dispute filing of written statement by defendant No.7. In fact, the docket proceedings would also reflect the same. *Ex facie*, the trial Court committed a mistake, which is patent from the docket proceedings, a copy of which is generated by the learned counsel for defendant No.7-appellant, as the records yet to be received. They clearly indicate in O.S. No.247 of 2010 thus:

"01-04-2015---- call on 28-4-2015

28-04-2015----- IA 146/2011 is allowed. For carrying out

amendment and filing NCP by 05-06-2015

05/06/2015----- P.O. is on O.D. Hence this matter is posted

to 16-6-2015

16-06-2015----- Addl written statement not filed

D7 called absent and D7 is set exparte, for
plaintiff side evidence 6-7-2015

06/07/2015----- Disposed."

10. In case, the additional written statement is not filed by defendant No.7, the proper course open for the trial Court was to forfeit the right of defendant No.7 and settle the issues in the light of the defence taken by defendant No.7. Only when the suit was coming up for trial, in case, defendant No.7 does not appear, the trial Court was competent to set defendant No.7 *ex parte*, but not in a situation like the one occurring in the instant case. Thus, the trial Court went completely wrong in setting defendant No.7 *ex parte* and proceeding with recording the evidence of P.W.1 and passing a preliminary decree, which is under challenge herein. Thus, the present case is concrete example of complete deviation in adhering to the procedure mandated by the Code of Civil Procedure, 1908, in other words, it is to be said that a complete goby is given to the principles of natural justice embedded in the rules of procedure contained in the Code for the reason that the written statement filed by defendant No.7 is not at all taken note of and even no reference at all is made in the judgment under challenge.

11. Therefore, this Appeal Suit is allowed, setting aside the judgment and decree passed by the trial, Court with a direction to the

trial Court to settle relevant issues and dispose of the suit within a period of six months from the date of receipt of a copy of this judgment.

12. As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, stand closed.

A. SHANKAR NARAYANA, J

15th September, 2016

siva

