

CIVIL REVISION PETITION No.4387 of 2015

ORDER:

The revision petitioner is the unsuccessful third party petitioner in I.A.No.221 of 2015 in O.S.No.5 of 2014, the suit was maintained by two plaintiffs against sole defendant, who are respondents 1 and 2 and respondent No.3 in I.A.No.221 of 2015.

2. The application was filed under Order 1 Rule 10 of the Code of Civil Procedure (for short 'C.P.C.') seeking to come on record by the third party petitioner as proposed 2nd defendant.

3. It is the contention that the suit filed is for recovery of the non possessory mortgage debt of Rs.10,00,000/- said to have been obtained from the plaintiffs (Respondents 1 and 2 of the petition) by the sole defendant (3rd respondent to the petition), however he is a bonafide purchaser from the sole defendant and is interested in the property and thereby he is a necessary party. It is also alleged that there is a collusion between plaintiffs and defendant to obtain a decree to deprive her rights as bonafide purchaser for consideration. In the application before the trial Court, the 3rd respondent/sole defendant remained exparte (having unclaimed the registered post notice as per postal endorsement of sufficient service). The plaintiffs as respondents 1 and 2 of the application resisted the same with the contentions in their counter while denying the claim of bonafide purchaser, by saying it is a fraudulent transaction to come in the way to disposal of the suit on mortgage and thereby he is neither necessary nor proper party to the suit and he is interested at the instance of the defendant to drag on the proceedings.

4. It is after hearing both sides, the lower Court dismissed the application with the observation mainly at para Nos.8 to 10 that in the suit, the defendant filed written statement admitting the receiving of mortgaged money and execution of the mortgage debt and inability to discharge and by claiming that he filed I.P. and his wife also indebted to the plaintiffs who obtained 15 blank promissory notes and filed another suit

in O.S.No.69 of 2013 by showing as the plaintiffs their kith and kin. There from after formulation of the issues from hearing trial is commenced. The 1st plaintiff filed chief examination affidavit and exhibited documents and was cross examined by the sole defendant. The defendant after closure of the plaintiffs' evidence filed petition to recall PW.1 for further cross examination which is pending. It is at that stage this implead petition filed by the third party claiming as bonafide purchaser of the suit schedule property (mortgage property). The trial Court held there from that he is neither necessary nor proper party to the suit and thereby the petition deserves to be dismissal and accordingly dismissed.

5. It is impugning the same, the present revision is filed, with the contentions that the trial Court gravely erred in understanding the scope of Order 1 Rule 10 C.P.C. and if not necessary atleast he is a proper party to the suit having interested in the mortgage property and when there is a collusion between the parties to the suit and thereby the petition ought to have been allowed by the trial Court and sought for allowing the revision. The learned counsel for the revision petitioner reiterated the same.

6. Notice sent to the 3rd respondent is unclaimed from continuous absence and thus treated as sufficient service and taken as heard. Whereas, it is the contention of the learned counsel for the plaintiffs/respondents 1 and 2 that that the lower Court is correct for the proposed party is neither necessary nor proper party for the adjudication of the *lis* and there is nothing for this Court to sit in revision against the impugned order of the lower Court and sought for dismissal of the revision.

7. In support of the respective contentions in the revision, the revision petitioner placed reliance upon **Amit Kumar Shaw v. Farida Khatoon**^[1] and the revision respondents 1 and 2 placed reliance on the unreported judgment of the learned Single Judge of this Court in C.R.P.No.534 of 2013 dated 19.06.2014 in **Matta @ Palina Bhavani v. Matta Tulasi Rao**, which referred several expressions of the Apex Court including the expression of **Mumbai International Airport Pvt. Ltd v. Regency Convention Centre & Hotels Pvt. Ltd**^[2].

8. Heard and perused the material on record.

9. Section 146 C.P.C. speaks that save as otherwise provided by this Court or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or application may be made by or against any person claiming under him. Here, the proposed party is claiming under the sole defendant over the property which is subject matter of mortgage. No doubt, with further claim of he is a bonafide purchaser for consideration. If it is prior to the mortgage he may have any preference and once it is subsequent to mortgage, he cannot claim any independent right but for stepping into the shoes of the defendant if at all to contest at best to protect the property from his contention in the application of this mortgage proceedings if at all of collusive outcome between the plaintiffs and defendant. It is because the scope of Section 146 says even against a person claiming under the defendant, the suit proceedings are binding. Apart from it, under Order 22 Rule 10 CPC in case of any assignment or creation or devolution of interest during pendency of a suit, the suit may be with leave of the Court be continued by or against the person too or upon whom such interest has given or devolved. Here, it is thereby leave sought by the proposed third party who is a vendee under the defendant to the suit for recovery of mortgage debt to come on record though under Order 22 Rule 10 and Section 146 C.P.C. not mentioned but for Order 1 Rule 10 CPC. on the scope of Order 1 Rule 10 CPC in **Amit Kumar Shaw** (supra) it was observed that a transferee pendente lite bound by Section 52 of the Transfer of Property Act as per the scope of Order 1 Rule 10 Order 22 Rule 10 CPC when sought to come on record having been acquired interest from the defendant is to say vitally interested in the litigation, where the transfer is of the entire interest of the defendant and the latter is having no more interest in the property and from that he may not properly defend the suit or he may collude with plaintiffs. Hence, though the plaintiff is Diminus litis and is under no obligation to make a lis pendens transferee a party to the suit. Thus, the transferee pendente lite who is having interest in the immovable property as a representative-in-interest of the party from whom he has acquired that interest, he can

be impleaded in the suit other proceedings. Once he is a proper party from the discretionary power of the Court to exercise judicially under the provisions.

10. Coming to **Matta @ Palina Bhavani (supra)**, where the expressions of the Apex Court in **Mumbai International Airport Pvt. Ltd**, was mainly relied and where it was observed in para-8 that a 'necessary party' is a person ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. It is further held that where there is no new cause of action or change of cause of action and nature of lis a proper party for complete adjudication of the lis can be impleaded by the Court at any stage of the proceedings before it.

11. It was also observed that the expression in **Kasturi v. Iyyamperumal**^[3] was in a suit for specific performance of contract of sale and a stranger to the contract of sale when chosen to make an independent claim over the property by coming on record as a third party, the Apex Court negated the claim as it is outside the purview the principle and the facts therein and thus has no application. In **Basant Kumar Soni v. Mukund Das Soni**^[4] that also a suit for specific performance, it was observed that proposed party could show any semblance of interest in the subject matter of the lis either direct or indirect to come on record under Order 1 Rule 10 CPC. In **Racharla Thirupathi v. Gundala Shobha Rani**^[5] it was observed that Order 1 Rule 10 CPC enables the Court within its discretionary power, either to strike or add a party at any stage of the proceedings. However, the criteria is to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Whether the person is a necessary or proper party, it all depends upon the nature of dispute raised and the relief claimed etc., facts. These are the expressions of the Apex Court referred in C.R.P.No.534 of 2013 dated 19.06.2014 in **Matta @ Palina Bhavani (supra)** in coming

to the conclusion on own facts of the matter.

12. From that now coming to the facts, the third petitioner in I.A.No.221 of 2015 before the lower Court wants to come on record claiming that she is a bonafide purchaser from the defendant and there is a collusion between plaintiffs and defendant that the plaintiffs to obtain mortgage decree and he is a necessary party having interested in the subject matter of the property because interest of the defendant is transferred to her pending mortgage debt. Once such is the case as held in **Amit Kumar Shaw** (supra) he is even not necessary party, being a proper party to participate in the suit proceedings for recovery of the mortgage debt by the plaintiffs against defendant and that defendant alienated the property for consideration as per the claim of the plaintiffs and she is squarely within the purview of Section 146, Order 22 Rule 10 and Order I Rule 10(2)CPC and thereby the trial Court committed an error in saying the proposed party is neither necessary nor even a proper party to the suit.

13. Accordingly, this Civil Revision Petition is allowed setting aside the order dated 11.09.2015 in I.A.No.221 of 2015 in O.S.No.5 of 2014. The trial Court is directed to implead the petitioner as 2nd defendant to the suit, with right of filing written statement within one week from the date of receipt of a copy of this order, failing which to forfeit the right of filing of the written statement and after written statement filed if any with the right of reformulation of issues if any after hearing and to complete any further chief examination of PW1 and also for examination of PW1 by recall if any with right of cross examination by the proposed 2nd defendant and to proceed with the trial. There is no order as to costs.

14. Miscellaneous petitions, pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:03-08-2016

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[\[1\]](#) AIR 2005 SC 2209(1)

[\[2\]](#) AIR 2010 SUPREME COURT 3109

[\[3\]](#) (2005)6 SCC 733

[\[4\]](#) 2010(4) ALT 790

[\[5\]](#) 2013(5) ALD 209