

Civil Revision Petition No.951 OF 2016

ORDER:

The revision petitioner is the unsuccessful petitioner/third party to O.S.No.3 of 2014 (suit for recovery of alleged mortgage money for mortgage preliminary decree) in I.A.No.11 of 2015 seeking to come on record as 4th defendant invoking Order I Rule 10 CPC vide dismissal order dated 22.12.2015.

2. The contentions in the grounds of revision are that the trial Court should have even allowed instead of dismissing the application for the proposed 4th defendant, who is the petitioner herein, is not only a proper party but necessary party for effective adjudication of the lis and to demonstrate that the suit mortgage debt is a concocted one and being the agreement holder, he is entitled to attack the genuineness of the alleged mortgage debt to protect his rights under the agreement and the observation of the trial Court that the remedy is to file a separate suit and not a necessary party to the lis, is unsustainable and improper exercise of power vested that results in substantial injury to the petitioner and thereby seeking to set aside the impugned order by allowing the revision under Article 227 of the Constitution of India.

3. The learned counsel during the course of hearing by reiterating the revision grounds, placed reliance upon the expressions in **T.Chandrasekhar Vs. Sunchu Rajamallu**^[1] and **Khaja Abdul Khader Vs. Mahaboob Saheb**^[2].

4. Whereas, it is the contention of the revision respondents 2 to 4 (respondents 2 to 4 in I.A.No.11 of 2015 and defendants in the suit being the legal representatives of the 1st defendant) that the suit for specific performance pursuant to the alleged agreement which is a collusive outcome, agreement for sale and in the suit the legal representative of defendants even remained exparte is no way creating any right to the revision petitioner to come on record either as a necessary party or proper party for no transfer of interest much less any title and thereby for this Court while sitting in revision, there is nothing to interfere and to that submission placed reliance upon **Babulal Vs. Hazarlal Kishanlal**^[3] that is also referred and relied by this Court in **K.Venkateshwarlu Vs. Pedda Venkaiah**^[4].

5. Heard and perused the material on record.

6. The factual background necessary for deciding the revision is that the plaintiff in O.S.No.3 of 2014 is the alleged mortgagee from the late 1st defendant whose legal representatives were impleaded in the suit as defendants 2 to 4. Earlier self-same plaintiff against late 1st defendant maintained O.S.No.2 of 2014 and obtained *exparte* decree based on registered equitable mortgage for Rs.10 lakhs alleged principal amount with contractual rate of interest referred in the registered equitable mortgage. The case of the mortgagee-plaintiff in the present suit O.S.No.3 of 2014 is that on the self-same deed of registered equitable mortgage covered by O.S.No.3 of 2014, the 1st defendant (since died) borrowed another Rs.10 lakhs and created equitable mortgage for the self-same property. However, it is unregistered mortgage. There is no separate deposit of title deeds according to the suit claim. No doubt but for any intention of creating on the existing deposit of title deeds which is the subject matter of O.S.No.2 of 2014 to the suit claim in O.S.No.3 of 2014, leave about earlier suit for mortgage O.S.No.2 of 2014 obtained preliminary decree and in the suit pending from the defendants 2 to 4, legal representatives of the 1st defendant, remained *exparte* and also in deciding the proposed party who sought to come on record vide I.A.No.11 of 2015 before the lower Court in this suit O.S.No.3 of 2014 is with the claim as agreement holder from said late 1st defendant for Rs.84 lakhs for the so called mortgage schedule property as item No.2 and another property as item No.1 and by stating 80 lakhs already paid in cash and only Rs.4 lakhs balance is payable pursuant to the terms of the agreement dated 30.06.2012. It is pursuant to the agreement, the claim in the suit O.S.No.47 of 2013, which is earlier to the two mortgage suits *supra* stated pending and he is seeking to come on record invoking Order 1 Rule 10 CPC in this suit O.S.No.3 of 2014 as referred *supra*, which petition the trial Court dismissed by left open any remedy of filing independent suit since impugned in the revision petition.

7. Here, it is important to refer Section 146, Order XXII Rule 10 and Order 1 Rule 10(2) of CPC. So far as wording of Section 146 CPC concerned, "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." It is no doubt beyond the scope of Order XXII Rules 3 and 4 CPC of bringing the legal representatives on record and not confined to the stage

pending suit because it is extended to any proceeding till the suit is completely terminated by recording satisfaction of suit claim decreed if any and as the case may be. Coming to Order XXII Rule 10 CPC, it speaks on Procedure in case of assignment before final order in suit that *(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. (2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).*

8. Order XXII Rule 10 (2) supra has of no much relevancy which deals mainly with attachment of a decree pending appeal. So far as interest entitling a person to the benefit of Order XXII Rule 10(1) by assignment, creation or devolution during pendency of suit, with the leave of the Court, the suit may be continued by the person or against the person to or upon whom such interest has been given or devolved.

9. It is to say almost similar to the analogy of Section 146 of CPC sub Rule 1 of Rule 10 of Order XXII is couched and incorporated though scope and ambit of Section 146 CPC is something more to Order XXII Rule 10 CPC.

10. Coming to the scope of Order I Rule 10 (1) CPC which speaks that any institution of suit in the name of a wrong person or doubt as to it is properly instituted in the name of a right plaintiff, Court may at any stage of the suit if satisfied as outcome of bona fide mistake and felt necessary for the determination of the real matter in dispute, it can do so and or any other person substituted or added as plaintiff upon such terms, as the Court may thinks fit. Here it is not the case of the proposed party wants to come on record as co-plaintiff and thereby that sub rule has no application.

11. Coming to Order I Rule 10(2) of CPC, it speaks on the power of the Court that:- *The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.* The power of the Court to strike out or add any party is to exercise at any stage of the proceedings and it is not confined to prior to the decree or post preliminary decree or final decree proceeding even. A reading of Sub Rule 2 of Rule 10 of Order I thus gives discretion to the

Court to exercise judiciously to shorten the litigation and to put an end to the lis with effective adjudication where it is necessary to determine the real questions in controversy fully in the suit itself, instead of driving the parties to go to the ordeal of maintaining another suit, by amending the suit or other pending proceedings. No doubt, for that it must be shown that the person wants to come on record or to be impleaded by the Court either as plaintiff or defendant, as the case may be, is a necessary party to the lis or at least a proper party to the lis. So far as the necessary party to the lis concerned, it has to be demonstrated that without his presence the lis cannot be adjudicated. Thereby it has to be demonstrated to invoke the jurisdiction initially as a necessary party and examine the provision even enables to come on record or bring on record though not a necessary but at least a proper party. The proper party means even though the suit lis may be adjudicated without his presence, it cannot or could not have been effectively and completely adjudicated.

13. So far as Order XXII Rule 10 of CPC, assignment concerned, there must be a transfer of a right or interest. Here, the suit claim of the proposed party in O.S.No.47 of 2013 is for specific performance of the contract for sale by the time, the application is filed, the suit was pending. Now it is shown by both sides particularly by the revision respondents/defendants showing certified copy of the *ex parte* decree for specific performance dated 04.07.2016 in O.S.No.47 of 2013 in favour of the plaintiff from the 1st defendant, alleged vendor died and the legal representatives brought on record as respondents-defendant Nos.3 to 5 on 26.02.2014 who remained even *ex parte* and the 2nd defendant to the suit was one of the alienees to the part of the suit schedule property under suit sale agreement dated 30.06.2012. The 2nd defendant is deleted from the array of the defendants but in the suit subsequently impleadment of the defendant Nos.3 to 5 as can be seen from the record.

14. The proposition relied upon by the respondents to the litigation particularly from **Babulal** supra placed reliance which referred in **K.Venkateshwarlu** supra speaks as to without transfer of a right, an agreement holder cannot claim to come on record. **Babulal** (supra) is, no doubt, has authority on the scope of Order I Rule 10 CPC and Order II Rule 3 of CPC also, however Full Bench in **K.Venkateshwarlu**(supra) did not refer specifically the scope of Order I Rule 10 or Section 146, or XXII Rule 10 CPC., but for in dealing with Andhra Pradesh Vacant Lands (Prohibition of alienation) Act, 1972, Section 10 and 53 of the Transfer of

Property Act, The Urban Land (Ceiling and Regulation Act) 1976, Section 3(1) of the A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973, Section 47 and 50 of the Tenancy Act etc., The revision petitioner placed reliance on the expression of a Single Judge in **T.Chandrasekhar** supra in which no doubt referred **K.Venkateshwarlu**(supra) also though not **Babulal** supra. It was on facts allowed impleadment of the agreement holder to come on record to oppose the suit claim. There particularly an expression of the Apex Court in **Amith Kumar Shah Vs. Farida Khatoon**^[5] was referred with observation therein of an alienee pendent-lite is bound by the final decree that may be passed in the suit and thus such alienee can be brought on record. Here, the stress is to the alienee. If there is a sale deed either voluntary or through Court by involuntary obtaining from the Court auction pursuant to the decree, it can be called an alienation. It is after decree passed, a either final decree application also can be filed in the suit for specific performance which is in the nature of a preliminary decree practically, though not in practice for only execution petitions are filed for execution of sale deed by invoking Order XXI Rule 32 CPC.

15. Now, it is important to note the proposed party who wants to come on record in O.S.No.3 of 2014 did not come on record of the disposed suit O.S.No.2 of 2014 and there is no whisper about the suit for specific performance even filed prior to the two suits O.S.No.2 and 3 of 2014 in the pleading and undisputedly he did not choose to implead the mortgagee/plaintiff of O.S.No.2 and 3 of 2014 as co-defendant to the suit for specific performance if at all to dispute the alleged mortgage or both mortgages, as the case may be, for not an assignment to come on record, from the agreement for sale. No doubt the law is very clear that in a suit for specific performance, subsequent alienee need not and cannot have as of right to come on record. The third party's right to come on record thereby different to the plaintiffs' impleadment of the third party as a necessary or a proper party to the effective and complete adjudication of his lis involving the claim by third party also, to say in his presence if the lis is adjudicated, it may be effective. The proposed petitioner to come on record in O.S.No.3 of 2014 did not do so. In the meantime from the subsequent developments as referred supra, there was an exparte decree for the specific performance of the contract for sale on 04.07.2016. There is already a decree thereby. A perusal of the record shows, the so called vendor/mortgager since died and the legal representatives are not interested in contesting the suits, by leaving the respective plaintiffs to fight for their rights created by them, one is the so called first mortgage on

the self-same day another mortgage, alleged and the other is the so called agreement for sale which is undisputedly subsequent to the alleged registered mortgage.

16. In the factual scenario, once the trial Court exercised discretion not to implead though Order I Rule 10 (2) CPC, empowers the Court to exercise the discretion to avoid multiplicity of the suits and in the interest of justice and to decide all the questions relating to the subject matter of the suits to construe the provision liberally from the expression supra, instead of reversing said finding of trial Court, it is made clear while disposing of the revision that by filing applications in the suit O.S.No.47 of 2013 for specific performance and in the suit O.S.No.3 of 2014, since decreed, the respective parties can prove their rights for deciding all the matters taking thereupon as in the mortgage suits preliminary decree, the Decree holder requires to obtain final decree invariably and the suit for specific performance even decreed that itself is virtually in the nature of preliminary decree and for no bar to file applications by the plaintiffs in both the suits and vice versa, subject to that right now left open to the parties to avail, the revision can be disposed of.

17. In the result, the Revision is disposed of, with the observations supra. No costs. Pending miscellaneous petitions, if any, pending in this revision shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 27.07.2016

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[\[1\]](#) (2014) 6 ALD 58

[\[2\]](#) AIR 1979 AP 152 DB,

[\[3\]](#) AIR 1982 SC 818

[\[4\]](#) AIR 2002 AP page 8

[\[5\]](#) (2005) 4 ALD 98 SC