

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.636 of 2016

ORDER

This petition under Section 115 of Civil Procedure Code is filed assailing the order in I.A.No.939 of 2015 in O.S.No.4 of 2010 dated 05.10.2015 passed by the Principal Junior Civil Judge, Chirala, dismissing the petition filed under Order I Rule 10 of CPC filed by petitioner.

2. The petitioner, who is a third party, filed a petition under Order I Rule 10 of CPC to implead him as third plaintiff in the above suit, afford an opportunity to prosecute the suit along with other plaintiffs, alleging that plaintiffs 1 and 2, respondents 3 and 4 herein, filed suit for mandatory injunction and for perpetual injunction against defendants 1 and 2, respondents 1 and 2 herein, and that the first plaintiff is his father and second plaintiff is his brother. Petitioner states that during pendency of the suit, a family partition took place on 26.03.2015 under registered partition deed and the building situated on the southern side of defendants' house was allotted to his share and thereafter, he came into possession and enjoyment of the same with absolute rights. Therefore, he is a necessary party to the suit and prayed the Court to permit him to come on record as third plaintiff in the suit to prosecute further proceedings.

3. The respondents filed counter denying the material allegations *inter alia* contending that the partition deed dated 26.03.2015 was invented by petitioner in collusion with the plaintiffs and that he is neither proper nor necessary party to the suit and that the suit is coming up for arguments after closure of evidence of both the parties. At this stage, the petitioner filed this petition without any basis and prayed for dismissal of the petition. It is also contended that there is a clear admission in the evidence of second plaintiff about the dispute in the suit and that he has no title or possession over the alleged schedule properties and therefore, the conduct of the petitioner is blameworthy and he cannot come on record as necessary party to the suit.

4. The trial Court, upon hearing argument of both the counsel, concluded that the petitioner is not a necessary party and he is only a transferee pendente lit and the transaction is hit Section 52 of Transfer of Property Act and thereby the petitioner cannot be permitted to come on record as necessary party to the suit at this stage and that he cannot claim any interest adverse to the interest of plaintiffs 1 and 2 by filing the petition and accordingly, dismissed the petition.

5. Aggrieved by the said order, the present revision is filed by petitioner on various grounds, mainly, contending that the transaction is not hit by Section 52 of Transfer of Property Act and that since the suit is filed for mandatory injunction and consequential permanent injunction, the petitioner, who is one of

the persons, entitled to claim right in the passage and is entitled to come on record, but the trial Court did not consider the necessity of the petitioner to come on record and prayed to set aside the order passed by the trial Court in I.A.No.939 of 2015 in O.S.No.4 of 2010 dated 05.10.2015 by allowing this revision.

6. During hearing, Sri P. Rama Sharana Sharma, learned counsel for petitioner, strenuously contended that the petitioner being son of the first plaintiff became the owner of the property by virtue of the registered partition deed and thereby he became the owner of the terraced house, which is adjacent to the suit schedule property, thereby he is entitled to come on record. He contended that the petitioner also filed a copy of partition deed, which was marked as exhibit before the trial Court and that in the absence of petitioner, the dispute cannot be decided effectively and his presence is necessary, otherwise, his right would be affected. He placed reliance on the judgment of the Apex Court in Savitri Devi V. District Judge, Gorakhpur and others<sup>1</sup>; and the judgments of other High Courts in Fordie Metals Ltd., V. M.V.Tibor Szamuely<sup>2</sup>; Baijnath and another V. Smt Ganga Devi and another<sup>3</sup>; and also the judgment of this Court in B. Basheer Khan V. Syed Shareef and another<sup>4</sup>.

7. Learned counsel for the respondents would contend that the petitioner at this stage cannot come on record and if such practice is allowed, there will not be no end for litigation. That apart, the

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<sup>1</sup> AIR 1999 SC 976

<sup>2</sup> AIR 2000 BOMBAY 174

<sup>3</sup> AIR 1998 RAJHASTHAN 125

<sup>4</sup> 2006(3) ALT 261

alleged partition took place on 26.03.2015, but he filed the present petition on 19.08.2015 when the suit was posted for arguments of both the counsel and therefore, the petitioner is not a necessary party to the suit and prayed for dismissal of the revision affirming the order passed by the trial Court in view of the limited jurisdiction of this Court under Article 227 of the Constitution of India.

8. Learned counsel for the petitioner mainly contended that the petitioner became the owner of the property in view of allotment of adjacent property on southern side of the disputed land by virtue of partition prior to examination of PW-1, but filed the petition on the same day when PW-1 was examined.

9. Learned counsel for the petitioner while contending that the petitioner who became the owner is proper and necessary party and he can implead himself as party and placed reliance on the judgment of the Apex Court in **KHEMCHAND SHANKAR CHOUDHARY AND ANOTHER v. VISHNU HARI PATIL AND OTHERS**<sup>5</sup> wherein the Apex Court held that transferees during pendency of partition suit can appear in such proceeding and claim equitable partition even though they were not parties to the suit in civil court. The principle laid down in the above judgment has no application for the reason partition of property is not a transferee of property during the pendency of the suit and it is only division of the property in which every member of the family is having undivided interest and such partition cannot be termed as transfer of property either to

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<sup>5</sup> AIR 1983 SC 124

conclude that such partition is hit by Section 52 of Transfer of Property Act or to allow the petitioner to come on record. Even if the above principle is applied to the present facts of the case, the petitioner is not a transferee during the pendency of the suit but he separated his interest from the undivided property, thereby the question of claiming equities as held in the said judgment would not arise in the present suit. The learned counsel for the petitioner further drawn the attention of this court to another judgment of Apex Court in SAVITHRI DEVI case 1<sup>st</sup> cited supra where a suit was filed by appellants against the sons for decree of maintenance and creation of charge over ancestral property restraining the sons from alienating the property and however, sold by one of the respondents, purchasers are necessary parties to the suit and their impleadment is necessary for deciding questions whether sales were committed in contempt and utter disregard of injunction.

10. Here in this case, no property was purchased by this petitioner and it was not transfer as discussed above and thereby the question of this petitioner impleading himself under Order I Rule 10 CPC would not arise.

11. Learned counsel for the petitioner further drawn the attention of this court to a judgment in Baijnath case 3<sup>rd</sup> cited supra wherein the Rajasthan High Court held that Order I, Rule 10(2) CPC gives a very wide discretion to the court to deal with any such situation which may result in prejudicing the interest of affected party if not impleaded in the suit and where the impleadment of the said party

is necessary and vital for the decision of the suit. The Bombay High Court also in Fordie Metals Ltd. Case 2<sup>nd</sup> cited supra discussed about powers of the court under Order I Rule 10(2) CPC to substitute the plaintiff in the suit who is a wrong person by right plaintiff if the court is satisfied that the suit has been instituted through a bona fide mistake.

12. In the present case it was not substitution of the petitioner as party to the suit when the suit was instituted in the name of wrong plaintiff, but claiming that he became the owner of the southern side property of the suit schedule. Therefore, the principle laid down by Bombay High Court has no relevance to the present facts of the case since it was not a substitution of the plaintiff. Even according to the judgment of the Rajasthan High Court the court may permit the parties to come on record or implead on his motion when third party presence is vital for decision in the suit.

13. Here, the petitioner himself filed an application under Order I Rule 10 CPC claiming that he became the owner of the property by virtue of the partition among the members of the joint family and this partition took place only during the pendency of the suit. However, the other owners are parties to the suit through whom this petitioner is claiming a right in the property in the partition. Therefore, whatever plea the other plaintiffs raise, the proposed party is entitled to raise such plea but he is not entitled to set up a different plea in the suit, since, he is claiming right through the plaintiffs already on record. In fact, the entire trial was over and the

suit was posted for arguments. At this stage, the petitioner came up with the petition under Order I Rule 10(2) CPC and since the petitioner is claiming right through the plaintiffs who are already on record, the decree whatever passed against the defendants, the petitioner is entitled to claim benefit of the decree while claiming right through the plaintiffs who are already on record. Therefore, the petitioner is not entitled to come on record in view of the partition effected during the pendency of the suit and the decree whatever passed in favour of the plaintiffs, the petitioner is entitled to claim the benefit of decree passed in favour of the plaintiffs.

14. In one of the judgments of the Apex Court i.e. in **RAZIA BEGUM v. SAHEBZADIANWAR BEGUM AND OTHERS**<sup>6</sup>, the Apex Court discussed the scope of Order I Rule 10(2) CPC and held that the interest which the proposed party shall have in the suit to enable him to be impleaded therein, should be direct interest and not a commercial interest and referred relying on the decision, in re, Ibrahim Haji, Ramaswami, J. wherein the Apex Court while dealing with Order I Rule 10 (2) CPC it is held as under:

*"Order I Rule 10(2), C.P.C. confers wide discretion to the Court to meet every case of defect of parties but is subject to two limitations, viz., (1) that the Court has no power to join a person as a party if he could not have been originally impleaded under O.I Rule 1 or R.3 C.P.C. and (2) that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all points involved in the suit if persons who are sought to be impleaded have no subsisting right over the properties and they are sought to be impleaded only for the purpose of getting their evidence, and it would not be proper to make them parties to the*

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<sup>6</sup> AIR 1958 page 886

*suit and that the petitioner's apprehension that they would be driven to the necessity of filing a separate suit against these persons is not a sufficient justification to compel the plaintiff to implead them as parties to the suit."*

15. In the later judgment of Madras High Court reported in *Firm of Mahadeva Rice and Oil Mills Vs Chennimalai Gounder*<sup>7</sup> laid down certain guidelines to exercise power under O. 1, R. 10 of C.P.C. and they are as under:

*"(1) If, for the adjudication of the "real controversy" between the parties on record, the presence of a third party is necessary, then he can be impleaded; (2) It is imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided in the pending suit itself; (3) The proposed party must have a defined, subsisting, direct and substantive interest in the litigation which interest is either legal or equitable and which right is cognisable in law; (4) Meticulous care should be taken to avoid the adding of a party when the addition is intended merely as a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary or expedient to be considered by the Court in the pending litigation; and (5) It should always be remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has no nexus to the subject-matter of the suit."*

16. If these guidelines are applied to the present facts of the case coupled with the principle in *RAZIA BEGUM* case<sup>7th</sup> cited supra held that the interest which the proposed party shall have in the suit to enable him to be impleaded therein, should be direct

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<sup>7</sup> AIR 1968 Mad 287

interest and not a commercial interest. In the present case, the petitioner now claiming interest by virtue of partition that took place during the pendency of the suit and thereby he independently wants to come on record to prosecute the proceedings at the stage when the matter was posted for arguments. Taking into consideration the facts and circumstances of the case, the presence of the petitioner is neither necessary nor proper for deciding the real controversy since this petitioner is claiming right or interest in the property only through the plaintiffs who are already on record. Therefore, the petitioner is neither necessary nor proper party for effectively resolve the dispute between the parties or to avoid multiplicity of the proceedings.

17. The Court can exercise powers under Section 115 of CPC when the Court below fails to exercise its jurisdiction that vested on it or exercise jurisdiction which is not vested or exercised jurisdiction irregularly or illegally. But, no such allegation is made in the entire grounds of revision. Therefore, in view of the limited jurisdiction, in the absence of any material to establish any of three ingredients, it is difficult to exercise jurisdiction under Section 115 CPC. Therefore, I find no ground to interfere with the order while observing that the petitioner is entitled to claim benefits of the decree, if any, passed in favour of the plaintiffs.

18. In the result, the revision petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision petition shall stand closed.

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M. SATYANARAYANA MURTHY, J

Date:24-07-2017  
Sj/Ccm



HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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Date:24.07.2017

Ccm/sj