

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.2326 OF 2017

ORDER:

This petition under Article 227 of the Constitution of India is filed challenging the order in I.A.No.362 of 2017 in O.S.No.10 of 2012 passed by the II Additional Chief Judge, City Civil Court, Hyderabad, whereby, the petition filed under Order I Rule 10 r/w Section 151 C.P.C was allowed, impleading the first respondent herein as defendant no.15 in O.S.No.10 of 2012.

The petitioner herein filed O.S.No.10 of 2012 for partition and the respondents obtained agreement of sale, filed O.S.No.182 of 2012, obtained a decree on 14.07.2014 and later filed E.P.No.25 of 2015 for deposit of balance sale consideration, as directed by the Court. At that stage, a petition was filed to set-aside the exparte order and accordingly, the petition was allowed and now, the suit is pending for adjudication before the Court. Moreover, the third defendant in the suit filed an application under Order I Rule 10(2) C.P.C to implead him in the suit, which was allowed and the suit is pending for adjudication. The schedule property in O.S.No.182 of 2012 is part of the suit schedule property in O.S.No.10 of 2012 and therefore, the first respondent herein/15th defendant cannot be impleaded as he has no direct interest in the suit schedule property and prayed for dismissal of the petition.

Upon hearing argument of both the counsel, the Trial Court came to a conclusion that, in case the suit is decided in the absence of proposed party, it will have its own effect on the rights

of the proposed party and therefore, he is a proper and necessary party to decide the *lis* pending before the Court and ordered the petition, impleading the first respondent herein as 15th defendant in the suit.

The present revision is filed under Article 227 of the Constitution of India, raising a specific contention that, unless the petitioner has got direct interest in the property, he is neither a necessary party nor proper party. It is also contended that the Trial Court did not exercise its discretionary power properly and committed an error in allowing the petition. It is also finally contended that, when the parties entered into compromise and no claim has to be adjudicated by the Court, the third party cannot be permitted to come on record. But the Trial Court committed a serious error in exercising its discretion and prayed to set-aside the order under challenge.

During hearing, learned counsel for the petitioner Sri Mirza Nisar Ahmed Baig Nizami while reiterating the contention, placed reliance on judgments of the Apex Court in **Razia Begum v. Sahebzadi Anwar Begum and others¹**, **Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar²** and **The State Financial Corporation v. M/s. Jagdamba Oil Mills³**.

On the strength of the law declared by the Apex Court in the above judgments, learned counsel for the petitioner contended that, when the petitioner had no interest in the property, since the

¹ AIR 1958 SUPREME COURT 886

² AIR 1963 SUPREME COURT 786

³ AIR 2002 SUPREME COURT 834

agreement to sell will not confer or create any interest in the immovable property, he cannot be impleaded in a suit for partition as a party. It is also contended that, when the compromise was made subject to outcome of O.S.No.182 of 2012, the decree, if any passed on compromise would not have any effect on the rights of the respondents and prayed to allow this revision petition by setting aside the order passed by the Court below.

Whereas, learned counsel for the respondents supported the order of the Trial Court in all respects, mainly contending that, when the petitioner is entitled to claim relief of specific performance, he is entitled to come on record as purchaser of part of the property and if any decree is passed either on merits or on compromise, certainly, it would cause serious loss to this petitioner and it will have its own effect on O.S.No.182 of 2012 pending adjudication and prayed for dismissal of the revision, confirming the order passed by the Court below.

Considering rival contentions, perusing the material available on record, the sole point that arose for consideration is:

“Whether the first respondent herein/petitioner in I.A.No.362 of 2017 in O.S.No.182 of 2012 filed for specific performance, is proper and necessary party. If so, whether the first first respondent herein be impleaded as 15th defendant in the suit O.S.No.10 of 2012 filed for partition?”

P O I N T:

Undisputedly, the petitioner herein filed O.S.No.10 of 2012 for partition against several defendants. The first respondent herein filed O.S.No.182 of 2012 for specific performance of agreement of sale, claiming that he purchased Item Nos.1 & 2 of 'A' schedule property which is the subject matter of O.S.No.10 of 2012. Therefore, filing of two suits is not in dispute for different reliefs by the petitioner and first respondent. Further, the suit schedule property in O.S.No.182 of 2012 is part of the schedule property in O.S.No.10 of 2012 to implead him as the second defendant, which is pending for adjudication.

The main contention before this Court is that, since the agreement of sale would not create or confer any interest in the immovable property, it has no direct interest in the property, thereby not entitled to invoke Order I Rule 10(2) C.P.C to implead himself as party to the partition suit O.S.No.10 of 2012.

In **Udit Narain Singh Malpaharia**² case, the Supreme Court in paragraph 7, held that the law as to who are necessary parties to a proceeding is well settled. A necessary party is one without whom no order can be made effectively, a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The Supreme Court only defined who is proper party and necessary party in a pending suit.

In paragraph 13 of **Razia Begum**¹ case, the Supreme Court arrived at certain conclusions while deciding an application under

Order I Rule 10(2) C.P.C and laid down the following principles to decide such applications:

“(1) That the question of addition of parties under r. 10 of O. 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in section 115 of the Code;

(2) That in a suit relating to property in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject-matter of the litigation;

(3) Where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position effectually and completely to adjudicate upon the controversy;

(4) The cases contemplated in the last proposition have to be determined in accordance with the statutory provisions of sections 42 and 43 of the Specific Relief Act;

(5) In cases covered by those statutory provisions the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission;

(6) The result of a declaratory decree on the question of status such as in controversy in the instant case affects not only the parties actually before the court but generations to come, and, in view of that consideration, the rule of 'present interest' as evolved by case law relating to disputes about property does not apply with full force; and

(7) The rule laid down in section 43 of the Specific Relief Act is not exactly a rule of res judicata. It is narrower in one sense and wider in another.”

In view of the law declared by the Apex Court in **Razia Begum**¹ case, unless the petitioner has got direct interest in the property, he cannot be impleaded as a party to the suit, since he is neither proper nor necessary party. Even in his absence, the *lis* pending before the Court can be adjudicated effectively and completely. But, the learned counsel for the respondents would draw the attention of this Court to the judgment of the Supreme Court in **M/s. Jagdamba Oil Mills**³ case.

Order 1 Rule 10 C.P.C deals with parties to the suit. It deals with necessity of bringing parties to the suit for proper and effectual adjudication of the matter in dispute. Order 1 Rule 10 of Code of Civil Procedure enables the court to add any person as party at any stage of the proceedings, if the person whose presence before the court is necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. It is well settled principle of law that basically, it is for the plaintiff in a suit to identify the parties against whom he has any grievance and to implead them as defendants in the suit filed for necessary relief. He cannot be compelled to face litigation with the persons against whom he has no grievance. Where, however, any third party is likely to suffer any grievance, on account of the outcome of the suit, he shall be entitled to get himself impleaded. The question as to whether an

individual is a proper or necessary party to a suit, would depend upon the nature of relief claimed in the suit and the right or interest projected by the persons, who propose to get themselves impleaded. No hard and fast rule can be weighed, that would cover a possible situation in this regard.

Dominus litus is the person to whom a suit belongs. This also means master of a suit. The person has real interest in the decision of a case. It is this person who will be affected by the decision in a case. This person derives benefits if the judgment is in his favour, or suffers the consequences of an adverse decision. Doctrine of "*Dominus litus*" is applied to one, who though not originally a party has made himself such, by intervention or otherwise, and has assumed the entire control and responsibility for one side and it is treated by the court as liable for costs and a person who is really and directly interested in the suit as a party. The principles governing the power of the court under Order 1, Rule 10 of C.P.C., are that as a rule the court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. The reason is that the plaintiff is the "*dominus litus*". He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. The theory of *dominus litus* should not be over stretched in the matter of impleading of parties, because it is the duty of the court to ensure that if for deciding the real matter in dispute, a person is necessary party, the court can order such person to be impleaded. Merely because the, plaintiff does not choose to implead a person is not sufficient for rejection of an

application for being impleaded. The power of Court as per Order 1 Rule 10(2) C.P.C., are very wide and the powers of the court are equally extensive. Even without an application to be impleaded as a party, the Court may, at any stage of the proceedings order that the name of any party, 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 adjudicate upon and settle all the questions involved in the suit, be added. The word 'necessary' and 'proper parties' are not defined anywhere, except in the law referred supra. 'Necessary party' means a person in whose absence the relief claimed in the suit cannot be granted. In other words, it means that for the grant of relief claimed in a suit, a person who ought to have joined must be added. Proper party means whose presence may be necessary with a view to fully adjudicate upon the matters involved in the suit.

In **Kasturi vs., Uyyamperumal and others**⁴, the Apex Court laid down two tests are to be satisfied for determining the question as to who is a necessary party.

Tests are –

- (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings
- (2) no effective decree can be passed in the absence of such party.
- (3) Addition of parties should not be made merely to avoid multiplicity of suits if their presence is not necessary for determining the real question. The said power can be exercised on either of the two grounds:

⁴ (2005) 6 SCC 733

(a) Such person ought to have been joined, either as a plaintiff or as a defendant, but is not so joined; or;

(b) Without his presence, the question involved in the suit cannot be decided finally and effectively. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness; it is not merely that he has an interest in the correct solution of some question involved and has thought of arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action. Therefore, the question to be settled must be a question in the action which cannot be effectually and completely settled **unless** he is a party. It is necessary that the person must be **directly** or legally interested in the action is the answer i.e., he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal right.

Therefore, a proper and necessary party to a suit can be brought on record either on the application of a party to the suit or without application, by the Court suo moto.

In **Mahadeva Rice & Oil Mills Vs. Chennimalai Gounder**⁵, the Madras High Court, explained shortly but vividly the basic

⁵ AIR 1968 Mad. 287

object of the provision Order 1 Rule 10 C.P.C., and laid down the following principles:

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 has a defined, subsisting, direct and substantive interests 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 if it 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.

In **Antony Devaraj v. Aralvaimozhi (Kurusadi)**
Devasahayam Mount Oor and Thuya Viagula, Annai Church rep
by the Trustee⁶, the Madras High Court considered the right of a
third party to claim addition of party. It was held as follows:-

- (iii). The person to be added as one of the parties must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to given on some of the questions involved, but it should make him as necessary witness.
- (iv). The third party cannot be considered to be a necessary party for deciding the main issue framed in the suit. Mere ground that inclusion of the proposed third party would not alter the structure of the suit may not entitle the party to ask the Court to implead the third party as a defendant.
- (v). The Court may upon an application or suo motu, in a fit and proper case, implead a new party as defendant, even against the plaintiff's consent under certain circumstances. The discretion vested with the Court though wide is however circumscribed by the limitations which are built in the provisions contained in Order 1 Rule 10(2), C.P.C. Where a person is neither necessary nor proper party, the Court has no jurisdiction to add him as a

⁶ 2004(2) C.T.C. 183

party. If the question at issue between the parties can be worked out without anyone else being brought in, the stranger should not be added as a party.

(vi) A person is not to be added as a defendant merely because he or she would be incidentally affected by the judgment. The main consideration is whether or not the presence of such a person is necessary to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit.

(vii) Persons whose interest would be affected by the litigation are entitled to come on record to protect their interest when those are jeopardized by the persons already on record”

In **Mumbai International Airport vs., Regency convention**

Centre⁷ the Apex Court gave some illustrations regarding exercise of discretion for adding of parties as follows:-

“1) If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order I. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party.

2) If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party. But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant in possession, then the tenant will be a necessary party in so far as the prayer for actual possession.

3) If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonfides etc., the court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may

⁷ AIR 2010 SC 3109

direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms.”

In view of the guidelines referred supra in favour decisions, it is abundantly clear that, when a person has got interest directly in the property, he is entitled to come on record, if his rights are being effected on account of passing decree in the pending suit.

Turning to the present facts of the case, the subject matter of the property in O.S.No.182 of 2012, is Item Nos. 1 & 2 of ‘A’ schedule property in the other suit. The first respondent allegedly purchased the property under agreement of sale, filed the suit for specific performance. Undoubtedly, the said agreement of sale will not create any interest or right in the immovable property, but, being the purchaser, he is entitled to enforce the agreement under the legal representatives of his vendor late Fazal Ahmed Khan and the first defendant in the suit is only a legal heir, according to the contention of the first respondent, but, the proposed petitioner since filed a suit for partition, the rights of the parties cannot be decided in the present revision. However, if any decree is passed, ignoring the agreement of sale, allegedly executed in favour of the first respondent by Fazal Ahmed Khan, it would certainly affect his rights. Therefore, when he has got interest to enforce his right under the agreement of sale by filing a suit for specific performance, he, instead of claiming equities in the final decree, the petitioner can, as well come on record only to claim equities in a suit for partition to allot the share of vendor of legal heirs, i.e. first defendant to the share of proposed party. Except that, he is

not entitled to raise any objection in a suit for partition filed by the petitioners against the others.

The other contention raised before this Court is that, the suit claimed is compromise and entered into memorandum of compromise by the original parties to the suit. On account of pendency of the petition under Order I Rule 10(2) C.P.C, compromise decree could not be passed and when the parties entered into compromise, the third party cannot come on record. As long as the suit is pending even after passing preliminary decree, any third party can come on record and mere entering into compromise to the detriment of the rights of the first respondent who filed suit for specific performance, is not a ground to dismiss the petition. Therefore, on these grounds, the discretionary order passed by the Trial Court having concluded that the first respondent is a proper and necessary party, this court cannot interfere with such order while exercising jurisdiction under Article 227 of the Constitution of India, since the jurisdiction is limited and this Court can exercise its jurisdiction in various circumstances.

This court can exercise revisional jurisdiction under Article 227 of the Constitution of India in limited circumstances and nature of the jurisdiction is supervisory over the subordinate courts or the tribunals under the control of the High Court. The power of revision under Article 227 of the Constitution of India is limited to find out whether the order under challenge, passed by the subordinate court or tribunal within their jurisdictional limits and the main intention of exercising both administrative and

judicial control under Article 227 of Constitution of India is to keep them within the bounds of their jurisdiction and not to allow them to transgress their jurisdictional limits, but not otherwise. The Court can exercise jurisdiction under Article 227 of the Constitution of India under the following circumstances:

- “a) When the inferior court assumes jurisdiction erroneously in excess of power.
- b) When refused to exercise jurisdiction.
- c) When found an error of law apparent on the face of record.
- d) Violated principles of natural justice.
- e) Arbitrary or capricious exercise of authority or discretion.
- f) Arriving at a finding which is perverse or based on no material.
- g) A patent or flagrant error in procedure.
- h) Order resulting in manifest injustice.
- i) Error both on facts and law or even otherwise.”

Similarly, the Court cannot exercise its discretion under Article 227 of the Constitution of India in the following circumstances:

- "a) Where the only question involved is one of interpretation of deed;
- b) On question of admission or rejection of particular piece of evidence, even though the question may be of everyday recurrence;
- c) To correct erroneous exercise of jurisdiction, as a Court of revision;
- d) To set aside an intra vires finding of the fact, except where it is founded on no material or is perverse;
- e) To correct an error of law, not being an error apparent on the face of the record;

- f) To interfere with the intravires exercise of discretionary power, unless it is violative of principles of natural justice;
- g) The Court shall not interfere on a merely technical ground which would not advance substantial justice."

Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised *suo motu*. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot Sandhu@ Afsan Guru**⁸ that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts.

Thus, keeping in view the limited scope of jurisdiction under Article 227, which is supervisory in nature, I find no *prima facie* error in the discretionary power exercised by the Court below, warranting interference of this Court in the present petition. Consequently, the revision is liable to be dismissed, as it is devoid

⁸ AIR 2005 SC 3820

of merits. However, the first respondent is entitled to claim only equities in case of ordering partition, but not otherwise.

In the result, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:30.01.2018

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