

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.1697 of 2016

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the Order in I.A.No.506 of 2015 in O.S.No.32 of 2014 passed by the Judge, Family Court-cum-III Additional District Judge, Vizianagaram, dt. 06.01.2016, whereby the petition filed under Order XVIII Rule 1 CPC was allowed, directing the defendant to adduce his evidence and to commence the trial in the suit, on the ground that the petitioner herein, the defendant before the trial Court, admitted the transaction while pleading payment of interest to the plaintiff, but the same was not endorsed on the reversal of the mortgage deed (vide para No.6 of the Written Statement).

The petitioner/defendant filed the present Petition being aggrieved by the Order dt. 06.01.2016 raising a specific contention that the plaintiff has to commence the trial by adducing evidence. After closure of evidence, the defendant has to commence the trial since initial burden is on the plaintiff to prove his positive case and that the defendant did not admit any of the transaction either directly or indirectly in the Written Statement and requested to set aside the Order passed by the trial Court.

During hearing, learned counsel for the petitioner/defendant reiterated the contentions urged in the petition, whereas the counsel for respondent, while placing reliance on a judgment report in *Chandralatha v Annamallai Finance Limited*¹, requested this Court to dismiss the petition affirming the Order passed by the trial Court.

The suit was filed based on a mortgage deed to pass a preliminary decree granting time for redemption. But, the petitioner herein/defendant

¹ 1996 (1) Ker Lt 517

filed Written Statement denying the material allegations in para No.1 as usual and in para No.2 called the plaintiff to put the averments made in the plaint to strict proof. In para No.3, he denied the alleged borrowing, mortgage of the property, execution of the mortgage deed and liability to repay the same together with 24% etc.,

Similarly, in para No.4, he denied the alleged demands, but fortunately in para No.6, the petitioner admitted as follows:

“ The defendant submits that the plaintiff suppressed the fact that he has collected the interest regularly from the defendant, as both the plaintiff and defendant are close friends, this defendant has not insisted for making endorsement on the mortgage deed and taking advantage of the same, the plaintiff filed the suit suppressing the true and correct facts.” Based on this admission regarding payment of interest, the trial Court concluded that the defendant admitted the execution of the mortgage deed and payment of interest therein on every month, but they were not endorsed. Therefore, the burden is upon the defendant to commence the trial and after discharge of initial onus of proof by the defendant, the onus of proof will shift to the plaintiff.”

Basing on the pleadings, the trial Court framed the following three issues and not even adverted to para No.6 of the Written Statement.

- 1) whether the plaintiff is entitled for preliminary decree for recovery of the suit amount of Rs.48,30,000/- from the defendant due under the mortgage deed dt. 29.08.2011 together with future interest as per mortgage deed ?
- 2) Whether the plaintiff is entitled for final decree for sale of the mortgage property in case the defendant failed to pay the amount within the stipulated by the Court for realization of the mortgage deeds ?
- 3) Whether the plaintiff is entitled for personal decree against the defendant for realization of the mortgage debt, if the sale proceeds of mortgage property are not sufficient to discharge debt ?
- 4) To what relief ?

In those circumstances, unless the issues are framed properly, it is difficult to decide whether the defendant admitted the transaction of

mortgage deed and payment of interest. But, this Court cannot exercise power under Order XIV (5) CPC to frame additional issue or recast the issues already framed by the trial Court, while exercising power under Article 227 of the Constitution of India.

It appears from the issues framed, issue No.3 is irrelevant at this stage as it relates to passing of final decree for sale of the property and at most, the trial Court totally ignored the contents in para No.6 of the Written Statement and failed to frame an issue. Order XIV Rule 1 CPC deals with the issues. According to it, issues are two types viz., Issue of fact and Issue of law. The question of framing issue would arise when the material proposition of law or fact is affirmed by one party and denied by the other party. The material propositions are those propositions of law or fact, which the plaintiff must allege in order to constitute his defence. Therefore, each material proposition, affirmed by one party and denied by the other, shall form the subject of distinct issues either issue of fact or issue of law. Framing of an issue under Order XIV Rule (4) 1 CPC, the Court has to frame issue confining the pleadings depending upon the nature of the dispute before the Court. No issue of fact or law can be framed unless such proposition of fact or law is affirmed by one party and denied by other. Here in the present case, the plaintiff asserted that no amount was paid despite repeated demands under the suit mortgage, but the defendant, while denying its execution of the documents, borrowing of any amount, execution of mortgage, agreeing to repay the amount together with interest at 24% p.a., but for the reasons best known to him, in para No.6, he admitted the payment of interest to the plaintiff while pleading that monthly interest paid was not endorsed on the reversal of the mortgage deed, but this fact was not taken note of by the trial Court while framing issues. Therefore, the trial Court is directed to frame appropriate issues, keeping in mind the scope of Rule 1 and 5 of Order XIV

CPC to frame an additional issue or strike out any issue or recast any issue based on the pleadings. Such power can be exercised by the trial Court itself *suo mottu* even in the absence of any application. But, the trial Court, without framing an issue concluded that the defendant has to commence trial, in view of the admission regarding payment of interest in para No.6 of the written Statement and such approach of the trial Court is contrary to the law and firstly the Court has to frame appropriate issues and then proceed to decide who will commence trial of the suit. Therefore, the Order passed by the trial Court is hereby set aside while permitting the trial Court to frame appropriate issues, as discussed in the earlier paras, and pass appropriate Order afresh within a period of two months from the date of receipt of a copy of this Order.

Accordingly, the Civil Revision Petition is disposed of. No costs. As a sequel, miscellaneous applications pending, if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 20-11-2018
eha



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.1697 of 2016

Dt. 20-11-2018

eha

