THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4486 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.893 of 2017 in O.S.No.43 of 2011 dated 17.08.2017 passed by the Principal District Judge, Kadapa.

The petitioner filed I.A.No.893 of 2017 under Order I Rule 10 C.P.C to permit the petitioner to implead her as defendant no.2, alleging that she has got interest in the property described in the schedule of plaint and that one Palle Sreenivasulu/respondent No.2 approached her through known persons for loan assuring that he was prepared to create equitable mortgage for the discharge of the debts due by him. Accordingly, he received different amount periodically, totalling to an amount of Rs.1,05,00,000/- through various cheques. On 09.07.2010 Palle Sreenivasulu along with his wife Palle Nirmala had acknowledged the deposit of the title deed described hereunder as security for the loan of Rs.45,00,000/- received by him by way of cheques. Even before the execution of equitable mortgage, Palle Sreenivasulu/ respondent No.2 had executed promissory notes undertaking to discharge the due amount together with interest on demand either to her to her order. After ascertaining the amounts due, respondent no.2 had deposited the General Power of Attorney in his favour executed by the late respondent No.3 which itself was a registered document bearing No.904/2010. Though, only for Rs.45,00,000/- was mentioned as the amount received by way of cheques and for the aforesaid amount, equitable mortgage was created, the second respondent later acknowledged by another letter dated 10.07.2010 that, in fact the due amount by way of cheques is Rs.1,05,00,000/- and the operation of equitable mortgage would be to the extent of the entire due amount. As such she is entitled to recover Rs.1,05,00,000/- being the amount due by the second respondent, who has created equitable mortgage on 09.07.2010 and 10.07.2010. Moreover, the falsity of the transaction could be easily seen by the fact of depositing the certified copy of General Power of Attorney created by Smt. Shabbirunnissa/the third respondent. Even otherwise, in view of the proviso to Section 48 of the Indian Registration Act, the equitable mortgage in her favour shall take effect against the alleged subsequent mortgage in favour of the first respondent/plaintiff and she came to know the facts of the collusive suit only recently, as she is living far away from kadapa where the suit property is situated and any decision and decree in favour of the first respondent would be defeating her claim totally. So, to avoid multiplicity of proceedings on recovery of amount, based on equitable mortgage, the petitioner filed I.A.No.893 of 2017 to come on record as proper and necessary party, being the mortgagee of the property.

The first respondent filed counter, denying the material allegations made in the plaint, *inter alia*, contending that the Chupudayam agreement dated 09.07.2010 is not valid and it is not enforceable under law. Further, the right to recover the due amount through process of the Court was barred by limitation on 09.07.2010. Hence, it is stated that the petitioner ought to have filed the suit by 07.07.2014, but he filed the petition in June, 2016, by which date the claim of third party was barred and as such, time barred claims need not be adjudicated and the petitioner is not entitled to come on record. Further, on plain reading of instrument dated 09.07.2010, it is categorically revealed that no amount was lent by the third party on 09.07.2010. The alleged Chupudayam agreement is hit by Section 58-F of Transfer of Property Act and thereby, petitioner is not entitled to come on record as proper and necessary party basing on the inadmissible document and prayed for dismissal of I.A.No.893 of 2017.

Respondent Nos.2, 4 and 6 have not filed counters and no oral or documentary evidence of both parties was adduced.

Upon hearing argument of both the counsel, the Court below dismissed I.A.No.893 of 2017 on the ground that the petitioner is not a proper and necessary party and she is not entitled to come on record, as the claim of the petitioner to recover the amount is barred by limitation.

Aggrieved by the order passed in I.A.No.893 of 2017 in O.S.No.43 of 2011 dated 17.08.2017 passed by the Principal District Judge, Kadapa, the present civil revision petition is preferred on various grounds, mainly on the ground that the petitioner is entitled to come on record, as all persons having an interest either in the mortgage security or in the right of redemption shall be jointed as parties to any suit relating to the mortgage, in view of Order XXXIV Rule 1 of C.P.C and this petitioner being one of the mortgagees is entitled to come on record, being the proper and necessary party, so as to recover the amount after satisfying the debt due to the mortgagee who approached the Court. But, the Court below did not consider this contention in proper perspective and committed an error in dismissing I.A.No.893 of 2017.

During hearing, learned counsel for the petitioner Sri G. Vasantha Rayudu contended that, when a suit is for recovery of amount based on mortgage, all the mortgagees are entitled to come on record, in view of Order XXXIV Rule 1 of C.P.C. But, Trial Court erroneously dismissed I.A.No.893 of 2017 and placed reliance on judgments of the Supreme Court in **Devathi Subbarayudu and others v. Puvvadi Chinna Venkatasubbiah[1], Khaja Abdul Khader v. Mahabub Saheb & others[2], Chinnu Pillai and others v. Venkatasamy Chettiar[3] and Areti Maramma v. State Bank of India, Secunderabad[4]** in support of his contentions.

On the other hand, learned counsel for the respondent supported the order under challenge, while contending that the claim of the petitioner by the date of alleged creation of mortgage is barred by limitation, so also by the date of filing the petition in the month of June 2016 and right to recover the amount through process of Court is barred and the petitioner is not entitled to come on record and prayed to dismiss the civil revision petition, confirming the order passed by the Court below.

---

[1] AIR 1960 ANDHRA PRADESH 592 (V 47 C 191)
[2] 1979 AIR (AP) 152
[3] 34 Ind Cas 507
[4] 2002 (3) ALT 424

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

"***Whether the petitioner/third party to O.S.No.43 of 2011 is a proper and necessary party to the suit, filed for recovery of amount. If so, whether the petitioner entitled to come on record and participate in the trial of the suit?"***

P O I N T:

The main contention of this petitioner is that, an equitable mortgage was created in her favour by depositing registered General Power of Attorney-cum-Agreement of Sale bearing No.904/2010 and executed a letter acknowledging deposit of title deed dated 10.07.2010.

Order XXXIV Rule 1 C.P.C deals with Parties to suits for foreclosure, sale and redemption and according to it, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Explanation thereof, says that a puisne mortgage may sue for foreclosure or for sale without making the prior mortgage a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Thus, all the persons having interest in the mortgage security can come on record by invoking Order I Rule 10(2) C.P.C. The petitioner is claiming that she is a mortgagee and the second respondent created mortgage by deposit of title deeds i.e. registered General Power of Attorney-cum-Agreement and executed a letter acknowledging deposit of title deed dated 10.07.2010. The first respondent filed O.S.No.43 of 2010 against Sri P. Sreenivasulu and Smt. Shabirunnisa, who crated a mortgage by deposit of deeds i.e certified copy of registered Agreement of Sale-cum-General Power of Attorney bearing Document No.2170/2010 dated 19.04.2010, creating a security for due payment of the debt, alleging that both the defendants borrowed Rs.20,00,000/- from the plaintiff agreeing to repay the same with interest at the rate of 24% per annum within stipulated time for sale of the mortgage security, granting time to redeem the mortgage by the mortgagee and for other reliefs. Thus, filing of a suit by the first respondent against respondents 2 & 3 is an undisputed fact, but the question is whether this petitioner can be permitted to come on record as one of the mortgagee having interest in the mortgage security, she being a proper and necessary party to the suit, in view of Order XXXIV Rule 1 C.P.C r/w Order I Rule 10(2) C.P.C.

The deposit of registered Power General of Attorney-cum-Agreement bearing No.904/2010 executed by the third respondent in favour of the second respondent, creating security for the debt amount of Rs.45,00,000/- would amount to creation of mortgage by deposit of title deeds, is a question. A registered Power General of Attorney-cum-Agreement does not create any interest or confer any right in the immovable property as per Section 54 of Transfer of Property Act. But, when an agreement of sale coupled with interest i.e. irrevocable General Power of Attorney was executed, the power of attorney holder is entitled to claim right under Section 202 of the Indian Contract Act, as it is an agency coupled with interest. But, such document cannot be termed as a title deed to create a mortgage by deposit of title deeds as security for due payment of the amount within the definition of Section 58-F of Transfer of Property Act. Therefore, the agency at best between the second respondent and the third respondent is only an agency coupled with interest is irrevocable, unless there is a contract to the contrary, in view of Section 202 of the Indian Contract Act. But, it cannot be termed as a title deed, as document would not create or confer any title or interest in the immovable property, as per Section 54 of the Transfer of Property Act and it is extracted hereunder.

> "*Contract for sale* :- A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

Thus, on the basis of such registered General Power of Attorney-cum-Agreement, the purchaser cannot claim title or interest in an immovable property. But, an agreement of sale coupled with General Power of Attorney is on different footing and as discussed above, it would create an irrevocable agency subject to terms and conditions of the contract.

Section 58(f) of Transfer of Property defined Mortgage by deposit of title-deeds and according to it, where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his <u>agent documents of title to immoveable property</u>, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

In view of the language used in Section 58(f) of Transfer of Property Act, the words *'document of title to immovable property'* assumes importance. As per the contention of the learned counsel for the petitioner, a registered General Power of Attorney-cum-Agreement was allegedly deposited with the petitioner by the second respondent executed by the third respondent in favour of the second respondent. Therefore, the registered Power General of Attorney-cum-Agreement would not fall within the definition of title deeds.

To determine whether the document deposited is a title deed or not, depends upon the nature of document. Title in legal term means, ownership, right to property. Title is evidence of right of ownership and title created by act of parties or by operation of law. An agreement of sale is only to be executed through registered document in future in terms of agreement between the parties relating to consideration of the property to be transferred. Thus, the word 'as to all title to immovable property' of a document creating title to the property.

In **V.E.R.M.A.R. Chettyar Firm v. Ma Joo Teen and Ors[5]**, the High Court of Rangoon, in paragraph 12 of the judgment, held as follows:

> ***"12. Such a document in India must be registered; and if not registered would be inadmissible as evidence of any transaction affecting the property. On the other hand, <u>if the documents of title deposited with the creditor are in such a form that from the deposit of such documents alone the Court prima facie would infer an agreement to create a security by way of mortgage, parol or documentary evidence corroborating or merely recording the terms of such an agreement would be admissible, and a written instrument adduced in evidence for such a purpose would not be inadmissible merely on the ground that it had not been</u>***

---

[5] AIR1933Rangoon299

> ***registered.*** ***Bearing in mind that, in determining whether or not a transaction amounts to a mortgage by deposit of title-deeds, the Court has regard rather to the acts than to the words of the parties, and pays more attention to what they do than to what they say; and steadily adhering to the reasoning which induced the Court of Chancery to sanction this form of security, the question as to what must be the form of the documents that are deposited in order that they may be brought within the terms "documents of title" or "title-deeds" as used in Sections 58 and 59, T.P. Act, appears to me to be free from difficulty. In my opinion, the terms "documents of title" and "title-deeds" denote such a document or documents as show a prima facie or apparent title to the property in the depositor. Merely because a document relates to the title to the property it is not a "document of title" or a "title-deed" within Sections 58 and 59. I am of opinion that the document or documents of title deposited must not only relate to the mortgagor's title to the property, but must disclose any apparent title in the mortgagor to the property or to some interest therein. It is not, of course, necessary that every document that forms a link in the chain of the mortgagor's title should be deposited with the creditor, or that the document or documents deposited should disclose a title in the mortgagor so clear and irrefragable that it would have passed the scrutiny of an old time conveyancer, but the form of the documents that are deposited must be such that there-under the apparent title of the depositor to the property or to an interest therein is disclosed."***

From this finding of the Court, the document must denote that *prima facie* title to the property of the mortgagor. In the present facts of the case, deposit of registered General Power of Attorney-cum-Agreement do not create or confer any right to the immovable property, as per Section 54 of the Transfer of Property Act, as discussed above and at the same time, at best, it would create an agency coupled with interest. That does not mean that it is apparent or prima facie title to the property.

In the facts of the judgment in **V.E.R.M.A.R. Chettyar Firm v. Ma Joo Teen and Ors** (referred supra), the debtor deposited tax receipt and a certified copy of a survey map relating to the land in Rangoon were delivered to a creditor with intent to create a security thereon is "a mortgage by deposit of title deeds" within Sections 58(f) and 59, T.P. Act, (4 of 1882 as, amended) and after relying on the judgments in Russell v. Russell (1783) 1 Bro C C

269, Goodwin v. Waghorn (1835) 4 L J Ch 172, [Subramonian v. Lutchman AIR 1923 PC 50 and Sher Khan v. Muzaffar Khan AIR 1920 Lah 321, concluded that the tax receipts and certified copy of a survey map relating to the land in Rangoon, would not fall within the definition of **'title deed'**. In Russel v. Russel (1783) 1 Bro C C 269, a lease of lands that had been granted to the mortgagor was deposited with the creditor as security for the debt. Such a document conforms to the test that, in my opinion, has to be applied, for it is obvious that the apparent title, to the lease-hold interest in the property was vested in the lessee.

The Rangoon High Court finally concluded that the tax receipts and certified copy of survey maps would not come within the definition of title deeds or documents of title to create a mortgage by deposit of title deeds within the meaning of Section 58-F of Transfer of Property Act.

Similar question came up before the Supreme Court with regard to creation of right or interest in the immovable property by account of execution of General Power of Attorney-cum-Agreement of Sale in **Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana and others**[6], wherein, the Supreme Court made it clear that

(a) there cannot be a transfer of title in an immovable property by execution of agreement/general power of attorney. Any presumption of transfer of title by execution of sale agreement/general power of attorney is not legally valid.

(b) The execution of sale agreement/general power of

[6] 2009 (7) SCC 363

attorney is not transfer or sale and such transaction cannot be treated as completed transfer or conveyance.

(c) the development authorities, municipal authorities, revenue authorities are not to henceforth effect mutation of revenue records based on the sale agreement/general power of attorney

(d) A person can enter into a development agreement, agreement of sale, power of attorney empowering the developer to execute the sale in favour of the prospective purchasers and such transactions would be valid.

In view of the law declared by the Apex Court in **Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana and others** (referred supra), the agreement of sale-cum-general power of attorney would not create or confer any title or interest of immovable property in favour of holder of agreement-cum-general power of attorney.

Similar question came up for consideration before the Apex Court in **Syndicate Bank vs. Estate Officer and Manager, A.P.I.I.C. Ltd. and Ors**[7]. But, the Division Bench of the Apex Court expressed doubts about the validity and enforceability of such transaction creating a mortgage by deposit of title deeds and referred the matter to Full Bench of the Supreme Court for authoritative pronouncement. But, the matter appears to have been still pending before the Supreme Court and none of the

[7] (2007) 8 SCC 361

counsel brought to the notice of this Court about the order, if any, passed by the Supreme Court.

However, as on today, the law declared by the Supreme Court and Division Bench of this Court in **Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana and others** (referred supra) and **Bharat Tubes and Tins Printers A Partnership Firm rep. by its partner Smt. Anita Kedia vs. The Andhra Pradesh State Financial Corporation Ltd. A Govt. Corporation rep. by its Managing Director and Ors** (referred supra) are binding precedents and if, those principles are applied to the present facts of the case, the deposit of registered General Power of Attorney-cum-Agreement of Sale does not amount to mortgage by deposit of title deeds within the definition of Section 58-F of Transfer of Property Act. Though, the basis for filing the petition before the Trial Court is that, there is a deposit of registered General Power of Attorney-cum-Agreement of Sale and execution of letter acknowledging deposit of document dated 10.07.2010, but for the reasons best known to the petitioner, the document was not placed on record for perusal of this Court to find out whether the document allegedly deposited would fall within the definition of title deed or document of title to create a mortgage by deposit of title deeds as defined under Section 58-F of Transfer of Property Act. Therefore, it is difficult for me to decide whether there was any valid mortgage, creating direct interest in the subject matter to implead himself as a party to the suit. Therefore, the law declared by various Courts referred in the judgments supra is only to enable the Trial Court to decide the validity of the alleged mortgage which created direct interest in the subject matter of the suit allegedly in favour of this petitioner by the Trial Court itself.

The Trial Court dismissed the petition on the ground that the claim is barred by limitation. The Trial Court did not discuss anything as to the starting point of limitation to recover the amount based on the mortgage with reference to various provisions of Limitation Act. The alleged document was executed on 09.07.2010 and filed petition in June, 2016. If, the deposit of such document creates any mortgage by deposit of title deeds, as per Section 58-F of Limitation Act, the limitation is 12 years for recovery of the debt by sale of the property. But, the Court below did not examine the issue of limitation in proper perspective and committed an error.

The main endeavour of the learned counsel for the petitioner is that, when the petitioner is a mortgagee having interest over the subject matter of the property mortgaged, she is entitled to come on record, in view of Order XXXIV Rule 1 of C.P.C and placed reliance on the judgment of the Division Bench of this Court in **Devathi Subbarayudu and others v. Puvvadi Chinna Venkatasubbiah** (referred supra), wherein, this Court held as follows:

> "In support of this proposition; the learned Advocate-General relied on the following decisions: Mata Prasad v. Ram Charan Sahu, ILR 36 All 446 : (AIR 1914 All 173) and Mdhunt Das v. Nil Komul Dewan, 4 Cal WN 283.
>
> 21. Before we deal with these decisions, it would be useful to refer to the relevant portion of Order XXXIV, Rule 1, C. P. C. which is as follows :
> "Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.
> This rule enjoins that all persons interested either in the mortgage security or in the equity of redemption are to be

> joined as parties to any suit on the mortgage. The object of doing so is not merely to avoid multiplicity of suits, but also to en able the interested parties to raise necessary defences open to them in law. so that the same may be taken into consideration in dealing with the claim under the mortgage and in passing the preliminary decree thereon.
> That this is imperative is also inferable from the fact that Order XXXTV. Rule 4, C. P. C. provides for the passing of a preliminary decree fixing a time for payment into court of the amount for which the preliminary decree had been made, and in default whereof giving of a right to the plaintiff therein, to apply for a final decree directing that the mortgage property or sufficient part thereof be sold and the proceeds of sale paid into Court and applied in payment of what has been found due under the preliminary decree. This is an opportunity which is given to all persons interested in the equity of. redemption who are in the position of the present plaintiffs', and since the plaintiffs had not been made parties to the suit, O. S. No. 235 of 1943, the decree passed therein does not bind them."

Learned counsel for the petitioner also relied on judgments of various High Courts in **Khaja Abdul Khader v. Mahabub Saheb & others, Chinnu Pillai and others v. Venkatasamy Chettiar and Areti Maramma v. State Bank of India, Secunderabad** (referred supra) and the same principle was reiterated on various Courts including Apex Court in impleading this petitioner as a person interested.

Even to apply the principles laid down in the above judgments relied on by the learned counsel for the petitioners in the judgments referred supra, the Court is required to examine whether there is any valid mortgage *prima facie* within the definition of Section 58-F of Transfer of Property Act and if the Court finds that the mortgage is valid *prima facie*, for limited purpose of this petition, this examination is limited and pass appropriate orders keeping in view the law declared by various Courts referred above and Order XXXIV Rule 1 of C.P.C and Order I Rule 10(2) C.P.C. As the order passed by the Court below is not based on any law, without referring to the provisions of limitation, therefore, the order passed by the Trial Court is liable to be set-aside.

In the result, the civil revision petition is allowed, setting-aside the order in I.A.No.893 of 2017 in O.S.No.43 of 2011 dated 17.08.2017 passed by the Principal District Judge, Kadapa, while remanding I.A.No.893 of 2017 in O.S.No.43 of 2011 to the Court of Principal District Judge, Kadapa with a direction to restore the same to its original number in interlocutory application register and dispose of the interlocutory application, in accordance with law, affording reasonable opportunity to both the counsel on record and both the parties are directed to appear before the Trial Court on 26.04.2018 and no further notice is needed to be issued by the Trial Court. Further, the Trial Court is directed to dispose of both interlocutory applications and suit as expeditiously as possible, in any event, not later than two months from the date of receipt of copy of this order, since the suit is of the year 2011.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:03.04.2018

SP