IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

and

THE HON'BLE MS JUSTICE J. UMA DEVI

A.S.No.1239 of 2017 and C.R.P.Nos.7245 and 7283 of 2017

Date: 22-10-2018

A.S.No.1239 of 2017

Between:

Gullipalli Theresamma (died), D/o late Appanna
@ Rayappa, aged about 84 years, residing at
34-3-58, Main Road, Gnanapuram, Visakhapatnam
and another

… Appellants

Vs.

Gullipalli Deva Pratap Raju, S/o Mariadas,
Residing at 34-3-58, Main Road, Gnanapuram,
Visakhapatnam and 4 others

.. Respondents

C.R.P.No.7245 of 2017

Between:

Gullipalli Theresamma (died), D/o late Appanna
@ Rayappa, aged about 84 years, residing at
34-3-58, Main Road, Gnanapuram, Visakhapatnam
and another

… Peititioner

Vs.

Gullipalli Deva Pratap Raju, S/o Mariadas,
Residing at 34-3-58, Main Road, Gnanapuram,
Visakhapatnam and 4 others

.. Respondents

C.R.P.No.7283 of 2017

Between:

Gullipalli Theresamma (died), D/o late Appanna @ Rayappa, aged about 84 years, residing at 34-3-58, Main Road, Gnanapuram, Visakhapatnam and another

… Appellants

Vs.

Gullipalli Deva Pratap Raju, S/o Mariadas, Residing at 34-3-58, Main Road, Gnanapuram, Visakhapatnam and 4 others

.. Respondents

For Appellant/Petitioner : Mr. M. Bala Subramanyam

For Respondents : Mr. K. Kanaka Raju
Mr. V. Eswaraiah Chowdary
Mr. I.V. Radhakrishna Murthy

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

A.S.No.1239 of 2017 and C.R.P.Nos.7245 and 7283 of 2017

COMMON ORDER: ***(V. Ramasubramanian, J)***

Since the appeal as well as the revisions arise out of the common proceedings, they are taken up together for disposal.

2. Heard Mr. M. Bala Subramanyam, learned counsel appearing for the appellant in the first appeal and the petitioners in the Civil Revision Petitions. We have also heard Mr. V. Eswaraiah Chowdary and Mr. I. V. Radha Krishna Murthy, learned counsel for the respondents.

3. One Smt. Theresamma, who is now no more, filed a suit in O.S.No.260 of 2007 on the file of I Additional District Court, Visakhapatnam, praying for partition and separate possession of her half share in the suit schedule property and also for declaration that the sale deed executed by the Union Bank of India (4th defendant in the suit) in favour of the 5th respondent on 25-04-2007 was not binding on her.

4. It appears that during the pendency of the suit, the sole plaintiff Theresamma executed a Will dated 18-05-2011, bequeathing her claim to a half share in the suit schedule property, in favour of son of the 1st defendant. Thereafter, the sole plaintiff also died on 13-10-2015.

5. After the death of the sole plaintiff, on 13-10-2015, the 1st defendant's son, who claimed to be a legatee under the Will, moved an application in I.A.No.1480 of 2017 under Order XXII Rule 3 of the Code of Civil Procedure, 1908, for bringing him on record as the legal representative of the deceased sole plaintiff. Finding that such an application may not be maintainable, the same person moved another application in I.A.No.1481 of 2017 under Order VI Rule 17 CPC seeking amendment of the Original Application as one under Order I Rule 10 CPC.

6. By a separate order dated 27-10-2017, the trial Court dismissed both the interlocutory applications. On the very same day namely 27-10-2017, the trial Court also dismissed the suit as not maintainable in view of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "Securitisation Act").

7. Aggrieved by the dismissal of his interlocutory applications, the legatee under the Will has come up with two revision petitions namely C.R.P.Nos.7245 and 7283 of 2017. Similarly, the legatee has come up with the regular first appeal in A.S.No.1239 of 2017, as against the dismissal of the suit.

8. The main contention of Mr. M. Balasubramanyam, learned counsel for the appellant is that the suit was filed in the year 2007 and that when the trial was half way through in the year 2017, the trial Court aborted the proceedings and found it a shortcut to dismiss the suit on the ground of maintainability in terms of Section 34 of the Securitisation Act, 2002. This, according to the learned counsel for

the appellant, is contrary to law and the appellant ought to have been given a fair trial and the trial Court ought to have decided the suit with reference to all the issues.

9. We have carefully considered the above submissions.

10. We will first take up the regular appeal for disposal. It is only then that we would know whether anything would survive for adjudication in the Civil Revision Petitions.

11. In the first appeal A.S.No.1239 of 2017, the points arising for determination are:

1) Whether the disposal of the suit by the trial Court, without answering all the issues were correct or not?

2) If the answer to the first question is in the affirmative, to what relief the appellant would be entitled to?

Point No.1:

11. As seen from the judgment of the trial Court, the trial Court framed four issues for consideration. They are as follows:

1) Whether the plaintiff is entitled to partition of plaint schedule property?

2) Whether the plaintiff is entitled for damages as prayed for?

3) Whether the sale deed dated 25-04-2007 is not valid, binding on the plaintiff?

4) To what relief?

12. After framing the aforesaid issues, the trial Court did not proceed to answer any of the four issues. On the other hand, the trial Court held that the suit was not maintainable in view of the bar under Section 34 of the Securitisation Act, 2002. It is a pity that the trial

Court did not even frame an issue relating to the maintainability of the suit. In other words, the bar under Section 34 of the Act was not even framed as one of the issues for consideration by the trial Court.

13. Therefore, the learned counsel for the appellant is justified in his contention that the manner in which the suit was disposed of, is not in accordance with the procedure stipulated by the Code. But that by itself will not entitle the appellant to a remedy before this Court, unless on merits, the appellant has established a case for the grant of relief. It is needless to point out that the powers of the First Appellate Court as enunciated in Section 107 CPC are as wide as that of the trial Court. In fact, sub-section (2) of Section 107 CPC uses two phrases which are of importance. The first is "same powers". The second is "same duties". Therefore, this Court has the same powers and also has the same duties as are conferred and imposed upon the courts of original jurisdiction. Hence, it is our duty to find out whether the suit was maintainable, in the light of a specific stand taken by the 5th respondent with regard to the maintainability of the suit in terms of Section 34 of the Securitisation Act.

14. One of the powers that this Court has as the First Appellate Court, is to reframe the issues that the trial Court failed to frame and to answer the same, if the evidence on record was sufficient. Therefore, while answering the first point arising for determination in favour of the appellant, we are obliged to frame an additional issue that was omitted to be framed by the trial Court. The issue to be framed is as follows:

“Whether the suit was maintainable in the light of Section 34 of the Securitisation Act, 2002?”

15. The answer to the additional issue now framed, is too obvious to be stated. This can be seen from the sequence of events that have happened in this case. The timeline of events can be presented as follows:

i) Even according to the sole plaintiff in the suit, the suit schedule property was originally a vacant site allotted by Roman Catholic Mission, Gnanapuram in favour of the sole plaintiff’s father and the plaintiff’s father put up a structure. As per paragraph III (c) of the plaint, the plaintiff’s father had no title, but had only a permissive enjoyment of the property from Saint Peter’s Cathedral Church.

ii) As per the plaint averments, the plaintiff’s father died intestate in the year 1962/1963 leaving behind him surviving, one son by name Mariadas and one daughter by name Theresamma (sole plaintiff).

iii) On 31-01-2001, the sole plaintiff’s brother Mariadas executed a Gift Settlement Deed conveying the suit schedule property in favour of his three sons. Thereafter, the sole plaintiff’s brother Mariadas died in the year 2004.

iv) According to the plaintiff, she always resided with her brother till his death and with the brother’s children after her brother’s death.

v) Even as per the plaint averments, the defendants 1 to 3 (children of the plaintiff’s brother) mortgaged the suit schedule property with the Union Bank of India (4th defendant) and secured a loan. The loan was secured even during the life time of their father Mariadas.

vi) Due to the default committed by the defendants 1 to 3, the bank proceeded against the property under the provisions of the Securitisation Act. As per the written statement, possession notice was issued on 20-10-2005 and an order under Section 14 of the Securitisation Act was obtained from the Court of Chief Metropolitan Magistrate on 07-11-2005. Delivery was recorded on 27-02-2006.

vii) Sale notices were issued in two leading newspapers on 03-08-2006 and 04-08-2006.

viii) Auction was conducted on 05-09-2006 and the 5th respondent became the highest bidder.

ix) A sale certificate was issued on 25-09-2006 by the Authorized Officer of the bank in favour of the 5th respondent. Thereafter, a sale deed was also registered on 25-04-2007.

x) The suit for partition was filed by the sole plaintiff, after four months of the registration of the sale deed, in August, 2007. In the suit, the sole plaintiff not only impleaded her brother's children as defendants 1 to 3, but also impleaded the Union Bank of India and the auction purchaser as defendants 4 and 5. She in fact sought a declaration that the sale deed executed by the Union Bank of India in favour of the 5th respondent was null and void.

xi) During the pendency of the suit, she is said to have executed a Will on 18-05-2011 in favour of the 1st defendant's son. The sole plaintiff subsequently died on 13-10-2015.

xii) Thereafter, the suit was taken up for hearing and it was disposed of in the manner that we have narrated above.

16. It will be amply clear from the timeline of events that we have given above, that what was sought to be bequeathed in the year 2011 by the sole plaintiff in favour of the 1st defendant's son, was only her right to litigate. The sole plaintiff's rights over the suit schedule property had not crystallized in the form of preliminary decree for her to bequeath the same.

17. The moment a prayer is made by the plaintiff in a suit, to set aside a sale executed in terms of the Securitisation Act, the appropriate remedy open to such a person is only to go before the Debts Recovery Tribunal. The law in this regard is well settled by the judgment of the Supreme Court in ***M/s. Sree Anandhakumar Mills v. Indian Overseas Bank*** in Civil Appeal Nos.7214-7216 of 2012, decided on 03-05-2018.

18. From the very pleadings contained in the plaint, it is obvious that the suit was instituted for the purpose of attacking the proceedings under the Securitisation Act collaterally. Therefore, the finding recorded by the trial Court that the suit was barred by Section 34 of the Securitisation Act cannot be taken exception to. Hence, we answer the additional issue that we have framed herein against the appellant and in favour of the respondents 4 and 5.

19. Once we find on the additional issue that the suit was not maintainable, it should follow as a corollary that the suit was liable to be dismissed and it was rightly dismissed by the trial Court. Therefore, both points arising for determination in this appeal are answered against the appellant and A.S.No.1239 of 2017 fails and it is accordingly dismissed.

20. Once the regular appeal goes, the Civil Revision Petitions filed as against the orders passed in the Interlocutory Applications should also go. The execution of the Will during the pendency of the suit for partition, is obviously a ruse to pass the baton of litigation. Therefore, that litigation should come to an end with the first appeal coming to an end.

Hence, C.R.P.Nos.7283 and 7245 of 2017 are also dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J

Date: 22-10-2018

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