

(2013) 07 PAT CK 0008

Patna High Court

Case No: CWJC No. 6184 of 2010

Rajesh Kumar Choudhary and
Others

APPELLANT

Vs

Pradeep Kumar Choudhary and
Others

RESPONDENT

Date of Decision: July 19, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 10
- Constitution of India, 1950 - Article 227

Citation: (2013) 3 PLJR 782

Hon'ble Judges: Chakradhari Sharan Singh, J

Bench: Single Bench

Advocate: Upendra Prasad and Mrs. Veena Kumari Jaiswal, for the Appellant; Rajendra Narain, Dr. Manoj Kumar, Prahlad Kr. Bhagat and Raunak Kr. Pankaj for State, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Chakradhari Sharan Singh, J.

Heard learned counsel for the parties. The petitioners in the present application under Article 227 of the Constitution of India are aggrieved by the order dated 16.3.2010 passed by learned Sub-Judge-VIII, Bhagalpur in Title Suit No. 260 of 2006 (hereinafter second suit) whereby the court below rejected the prayer of the petitioners u/s 10 of the CPC for stay of the proceeding of Title Suit No. 260 of 2006 till disposal of Title Suit No. 226 of 2006 (hereinafter referred to as the first suit) pending in the Court of Sub-Judge-VII, Bhagalpur.

2. The petitioners are the plaintiffs in Title Suit No. 226/2006 (first suit) whereas the respondents, the defendants in the second suit. A registered sale deed executed on 24.3.2006 by Most. Sumitra Devi (since deceased) is under challenge which

appertains to suit land admeasuring 2204 Sq. ft., which according to petitioners, is undivided part or portion of schedule-A property of the plaint, total of which measures .1140 hectares equivalent to nearly 10,000 Sq. ft. Subsequent to the said first suit Title (Partition) Suit No. 260/2006 i.e. second suit has been filed by Pradip Kumar Choudhary, who is respondent No. 1 in the present application, seeking preliminary decree of partition to the extent of 1/8th share and interest in the suit property described in schedule-A of the plaint having total area of .1140 hectares equivalent to 10,000 Sq. ft. To be precise, the dispute in the first suit is with regard to validity of a sale deed appertaining to part of the total land of the joint family property whereas in the second suit, one of the co-sharers in the family has sought partition claiming share to the extent of 1/8th of the schedule-A property.

3. In view of the nature of and the property in dispute in the two suits, the petitioners filed a petition u/s 10 of the CPC for stay of the second suit as matter in issue in the second suit, according to them, was directly and substantially in issue in the first suit. The petitioners took a plea in their petition that both the suits have been instituted between the same parties. The court below, however, rejected the petition by the impugned order on the ground that the matter in issue was not directly or substantially the same in both the suits.

4. The present application, thus, involves the only question as to whether the matter in issue in both the suits is directly and substantially the same.

5. Mr. Upendra Prasad, learned counsel appearing on behalf of the petitioners, has vehemently contended, with reference to the property involved, that in both the cases same piece, of land is in dispute and in terms of Section 10 of the CPC it is mandatory that first suit should be tried first and till conclusion of the trial of the first suit, trial of second suit should be stayed.

6. Mr. Rajendra Narain, learned senior counsel, appearing on behalf of the respondents, on the other hand, has submitted that matter in issue in both the cases are neither substantially nor directly the same. He submits that in the first suit, sale deed with respect to only part of the entire property is under challenge whereas in the second suit, the plaintiff has sought for partition in the entire joint family property having area of .1140 hectares equivalent to 10,000 Sq. ft.

7. The principle underlying Section 10 of the CPC is based on the well recognized doctrine of res sub judice object of which is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and same relief but intends to protect a person from multiplicity of proceedings and to avoid conflict of decisions. The test for applicability of Section 10 has been clearly laid down by Supreme Court in the case reported in [National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara](#), , relevant portion of paragraph 8 of which reads as follows:--

8. The object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is Identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.

8. As per the said judgment the fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. The Supreme Court held that Section 10 will apply only in such cases where the whole of the subject matter in both the suits is identical, while interpreting "the matter in issue is directly and substantially in issue".

9. Similar test has been laid down and adopted by the Supreme Court in a recent judgment reported in [Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor](#), for applying Section 10 of the Code. Relying upon earlier Supreme Court judgment in case of National Institute of Mental Health & Neuro Science vs. C. Parameshwara (supra), the Supreme Court in case of Khushroo Rustom Dadyburjor held in paragraph 11 as follows:--

11. In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in a previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in the affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

10. This is an admitted position that first suit was filed for declaration of sale deed with respect to 2204 Sq. ft. of land as illegal and invalid whereas in the second suit the plaintiff had sought partition of the entire property. Seemingly, the subject matter of the two suits are different. Further, the land which is subject matter of the first suit is only a portion of the entire property partition with respect to what has

been sought for in the second suit.

11. In such circumstances, applying the test laid down by the Supreme Court as indicated above, I am of the view, which according to me is evident, that the decision reached in the first suit will not operate as res judicata in the subsequent suit.

12. In such view of the matter, I do not find any illegality in the impugned order. However, I am of the view, keeping in mind the nature of the dispute, that to avoid inconsistency in decision and inconvenience to the parties both the suits are tried by one court. Accordingly, I request learned District Judge, Bhagalpur to ensure that both the suits are tried by one court, side by side.

This application is, accordingly, dismissed with the observation as aforesaid.