

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6644/2015

Smt. Chandraben K. Bhatt

... Petitioner

V/s.

Mr. Kiritkumar Bhatt

... Respondent

Ms. Mamta Sadh i/b. Mrs. Zohair H. Zaidy for the petitioner
Mr. Shyamprasad R. Mishra for the Respondent.

CORAM: K.K. TATED, J.
DATED : APRIL 13, 2016

P.C. :

1. Heard the learned counsel for the parties.
2. By this petition under Article 227 of the Constitution of India the petitioner - defendant challenges the order dated 03.12.2012 passed by the Court of Small Causes, Mumbai below Exhibit- 24 in RAD No.1266/1995 rejecting her application u/s. 10 of the Code of Civil Procedure, 1908 for stay of the suit RAD No.1266/1995 filed by the respondent - plaintiff for declaring him as tenant of the suit premises i.e. Block No.5, admeasuring 500 sq.ft., Bajaj Road, Vile Parle (West), Bombay – 400 056.
3. The respondent filed RAD Suit No.1266/1995 on 15.05.1995 in the Court of Small Causes, Mumbai for declaring him as tenant of petitioner in respect of the suit premises with following prayers:

“(a) For decree and judgment of this Hon'ble Court declaring that the respondent is the tenant of the petitioner No.1 in respect of suit premises namely Block No.5, Shree Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056, and petitioner No.1 is not entitled to disturb the possession of the respondent of the suit premises without following due process of law.

(b) For a permanent order of injunction, restraining the petitioner s, their servants and agents or any other person or persons claiming through or under them from disturbing and/or interfering with the peaceful possession of the respondent of the suit premises namely, flat No.5, Shree Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056, without following the due process of law.

(c) That pending the hearing and final disposal of the suit, the petitioner s their servants and agents or any other person or person claiming through or under the petitioner s be restrained by an order of injunction of this Hon'ble Court from disturbing and/or interfering with the peaceful possession of the respondent of the suit premises namely, flat No.5, Shree Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056, without following the due process of law.

(d)
 (e)
 (f)”

4. During pendency of the suit filed by the respondent, the petitioner also instituted L.E. & C. Suit No.75/88/2000 in the Court of Small Causes on 21.10.2000 for declaration that the respondent is a gratuitous licensee and for vacant and peaceful possession of the suit premises. In the subsequent suit, the petitioner made following prayers:

“(a) that the petitioner herein be ordered and decreed to hand over vacant and peaceful possession of the suit premises viz. flat No.5, Shri Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056, to the respondent .

(b) Pending the hearing and final disposal of the suit that the petitioner be ordered to pay Rs.1,08,000/- compensation for the period 01/10/97 to 30/09/2000 @ Rs.3000/- per month and further be ordered to pay Rs.3000/- p.m. till the petitioner handover the possession of the suit premises to the respondent .

(c) that pending the hearing and final disposal of the suit the Court Receiver with all powers under Order 40 Rule 1 of CPC. be appointed to take possession of the suit premises i.e. flat No.5, Shri Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056 and to appoint the respondent as the Agent of the Court Receiver on the terms and conditions fixed by this Hon'ble Court.

(d) that pending the hearing and final disposal of the suit the petitioner their servants and agents be restrained by an order and injunction of this Hon'ble Court from dealing with and/or transferring and/or disposing off and/or parting with possession of the suit premises or to create any third party interest in the suit premises viz. flat No.5, Shri Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056 in any manner whatsoever.

(e) that pending the hearing and final disposal of the present suit, the petitioner their servants and agents by an order of injunction of this Hon'ble Court be restrained from carrying out any permanent additions and/or alterations in the suit premises i.e. flat No.5, Shri Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056.

(f) that pending the hearing and final disposal of the suit, the Court Commissioner be appointed to visit the suit premises i.e. flat No.5, Shri Niket, Bajaj Road, Vile Parle (West), Bombay – 400 056, to draw a rough sketch of the suit premises showing the measurement i.e. length, width, and height and of the additions/alterations made by the petitioner and to inquire as to who is in occupation of the suit premises and to make inventory of the articles lying in the suit premises and to make a report to this Hon'ble Court and to allow the respondent to take out the photos of the suit premises.

- (g) *Hearing of the suit be expedited.*
- (h) *for interim and ad-interim relief in terms of prayers (b) to (f) above.*
- (i) *that costs of the suit provided for;*
- (j) *any other and further reliefs be granted to the respondent as this Hon'ble Court deems fit and proper in the circumstances of the present case."*

5. The suit filed by the petitioner being L.E. & C Suit No.75/88/2000 was decreed by the Trial Court by the judgment and decree dated 18.01.2012 directing the respondent to hand over vacant and peaceful possession of the suit premises to the petitioner.

6. The judgment and decree passed by the Trial Court on 18.01.2012 in L.E. & C Suit No.75/88/2000 was challenged by the respondent by way of P.S.C.C. Appeal No.4/2012, which was admitted and decree directing the respondent to hand over possession of the suit premises to the petitioner was stayed on condition to pay monthly compensation of Rs.8000/- from the date of decree.

7. Thereafter the petitioner made an application u/s. 10 of the Code of Civil Procedure, 1908 in a suit filed by the respondent i.e. RAD Suit No.1266/1995 below Exhibit- 24 for stay of further proceedings on the ground that the appeal preferred by the respondent being No.P.S.C.C. No.4/2012 is pending for hearing and final disposal on merits. That application was rejected by the Trial Court on the ground that, u/s. 10 of the Code of Civil Procedure, 1908 the court can stay the proceedings of the subsequent suit filed for the same cause of action between the parties and not the previous suit.

8. The learned counsel for the petitioner submits that the Trial Court erred in coming to the conclusion that the application made by the petitioner u/s. 10 of the Code of Civil Procedure, 1908 is not maintainable. She submits that there is no dispute that the suit filed by the petitioner was decreed by the Trial Court on 18.01.2012 directing the respondent to handover vacant and peaceful possession of the suit premises. That decree was challenged by the respondent before the Appellate Bench of Small Causes Court and same was stayed. She submits that the issue involved in both the suits are same. She submits that in the suit filed by the respondent the issue is “whether the respondent - plaintiff can claim tenancy in respect of the suit premises against the petitioner - defendant ?” She submits that in view of the decree passed by the Trial Court in a suit filed by the petitioner, there is no question of deciding the same issue again in a suit filed by the respondent . Hence, the petitioner filed an application u/s. 10 of the Code of Civil Procedure, 1908 for stay of respondent's suit. She submits that though the suit filed by the petitioner was later in point of time than the suit filed by respondent, same can be stayed because the issue involved in both the suits is similar. The suit filed by the petitioner was decreed. Therefore, there is no question of again directing the parties to lead evidence in a suit filed by the respondent. In support of her contention, the learned counsel for the petitioner relies on the judgments in the matter of *Raj Shipping Mills, Amritsar Vs. A.G. King Ltd. Excelsior Mills AIR 1954 Pujnab 113*, *Mahangu Prasad Sah and Anr. Vs. Pravag Sah and Ors. AIR 1975 Gauhati 40*, *Munilal Vs. Sarvajeet AIR 1984 Rajasthan 22* and *M/s. O. P. Steel*

Traders Vs. M/s. Steel Strips Ltd. AIR 1992 Punjab and Haryana

217. On the basis of these submissions and the authorities, the learned counsel for the petitioner submits that the impugned order passed by the Trial Court dated 03.12.2012 be set aside and the application u/s. 10 of the Code of Civil Procedure, 1908 being Exhibit- 24 be allowed by staying further proceedings in RAD No.1266/1995 till hearing and final disposal of the appeal preferred by the respondent before the Appellate Bench of Small Causes Court.

9. On the other hand, the learned counsel for the respondent vehemently opposed the Writ Petition. He submits that section 10 of the Code of Civil Procedure, 1908 is crystal clear. He submits that the court can stay further proceedings only in respect of the subsequent suit filed for the same cause of action between same parties. Same view is taken by the Trial Court after considering the pleadings of both parties. He submits that the impugned order is passed on 03.12.2012 and petition filed has been on 19.01.2015 i.e. after two years. Hence, there is no question of entertaining the Writ Petition. Same is liable to be dismissed with costs.

10. Heard the learned counsel for the parties at length. I have gone through copy of the plaint and other proceedings filed by both the parties in respective suits.

11. It is to be noted that there is no dispute in the present proceedings that the suit being RAD Suit No.1566/1995 was filed on 15.05.1995 for declaring the respondent as tenant of the suit premises

whereas, the petitioner filed L.E. & C. Suit No.75/88/2000 on 25.10.2000 for vacant and peaceful possession of the suit premises on the ground that the respondent was a gratuitous licensee. Section 10 of the Code of Civil Procedure, 1908 reads thus:

10. Stay of suit — *No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.*

Explanation — *The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.*

12. Bare reading of section 10 shows that the court can stay further proceedings of subsequent suits only. In the authorities relied on by the petitioner in the matter of Raj Shipping Mills (supra), the suit was filed by the defendant for recovery of balance of money due and payable by the plaintiff on the basis of earlier suit. Hence, in that authority, the court held that the issue in both the suits were directly and substantially same and therefore, the test of *res-judicata* can be made applicable because the earlier suit was dismissed and the appeal was pending. That is not the case in hand.

13. In the case of M/s O.P. Steel Traders (supra), the court held that considering the facts and circumstances of the case, the court can take recourse to section 151 of the Code of Civil Procedure, 1908 for staying the proceedings in the previous suit. Paragraph 8 of the said authority,

reads thus:

“8. The learned counsel for the respondent has further submitted that where the requirements of S.10, Code of Civil Procedure, are not satisfied, recourse to S.151, Code of Civil Procedure, is permissible for staying a suit, provided the Court is satisfied that such a recourse is necessary for the ends of justice or to prevent abuse of the process of the Court, and it is not violative of any express or specific provision of the Code of Civil Procedure or any other law applicable to the case to be stayed. In support of his argument, he has relied upon Subho Ram Kalita (deceased by L.Rs) Vs. Dharmshwar Das Koch, AIR 1987 Gau 73.”

On the facts of the case in hand, this authority is also not applicable.

14. In the matter of Raj Shipping Mills (supra) the Punjab and Haryana, the High Court held that if the provisions of section 10 of the Code of Civil Procedure, 1908 are not applicable, then only the court can take recourse to section 151 of the Code of Civil Procedure, 1908. That is not the case in hand. In the present proceedings, there is no dispute that the respondent had filed suit for declaration as tenant on 15.05.1995 whereas the petitioner had filed a suit for the similar cause of action i.e. for recovery of possession of suit premises on 21.10.2000. Hence, said authority is not applicable in the present proceedings.

15. In the matter of **Munilal (supra)**, the learned counsel for the petitioner relied on paragraph 16 of the said judgment, which reads thus:

“16. Thus, while holding that the provisions of S.10 C.P.C. are mandatory and the trial of a subsequently instituted suit is bound

to be stayed if any party makes a request before the Court trying that suit that a previously instituted suit is pending determination either in the trial court or the first appeal or second appeal arising therefrom is pending for decision. But if the trial of the subsequently instituted suit has proceeded without any objection and the same has terminated with the delivery of the judgment and the preparation of the decree of that court then S.10 C.P.C. has no relevance because it only prohibits the 'trial of the suit' and no further. Following the dictum of Vivian Bose J. in Gangaprasad's case (AIR 1937 Nag 132) as no objection under S.10. CPC. to the trial of the subsequently instituted suit was taken until the termination of the proceedings in the suit the objection must be deemed to have been waived by the petitioner and it is not open to him to raise such an objection in the appeal arising out of the subsequently instituted suit."

In this authority, the Rajasthan High Court held that if the trial of the subsequently instituted suit has proceeded without any objection and the same has terminated with the delivery of the judgment and the preparation of the decree of that Court, then section 10 of Code of Civil Procedure, 1908 has no relevance, because it only prohibits the "trial of the suit" and no further. Considering these facts, said authority is not applicable in the case in hand.

16. In the present proceedings, the suit filed by the petitioner was subsequent suit and thereafter the application was filed by the petitioner u/s. 10 of the Code of Civil Procedure, 1908 to stay the suit filed by the respondent, which was earlier suit, which cannot be entertained. In view of the Apex Court judgments in the matter of ***M/s. Gupte Cardiac Care Centre and Hospital Vs. olympic Pharma Care Pvt. Ltd. AIR 2004 SC 2339, Samat Kumar Mundhra Vs. Smt. Suman Kabra and Anr. AIR 2005 Gauhati 154 and M. V***

Rajashekhar Vs. Smt. M. V. Rajamma (deceased by L.Rs.) and others

AIR 2004 Karnataka 280, it is settled principle of law that under section 10 of the Code of Civil Procedure, 1908 only later suit would be stayed, earlier suit would not be stayed.

17. The Trial Court, at the time of deciding the application filed by the petitioner below Exhibit- 24 in RAD No.1266/1995 considered all these facts. The relevant portion of the said order is in paragraph 4, which reads thus:

4. *“Both the parties to this suit have admitted and not disputed the fact that the respondent has filed this suit for declaration that he is the tenant of the petitioner No.1 in respect of the suit premises and for permanent injunction, restraining the petitioner s from interfering, obstructing and disturbing his peaceful possession of the suit premises without due process of law against the petitioner s. Thereafter, the petitioner No.1 has filed the L.E.& C. Suit No.75/88/2000 against the respondent , was the subsequent suit between the respondent and petitioner No.1. It is also settled principle of law that the appeal is the continuation of the suit which means that the said subsequent suit filed by the petitioner No.1 is continued in appeal and pending before the Appellate Bench of ths court. Admittedly, the issues in both the suits are seemed to be similar one. Now, according to the provisions of section 10 of C.P.C., no court shall proceed with the trial of any subsequent suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or any of them claim litigating under the same title where such suit is pending in the same court or any other Court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Govt and having like jurisdiction or before the Supreme Court. Thus, this is previously instituted suit while L.E. & C. Suit No.75/88/2000 is the subsequent suit wherein the appeal No.4/2012 is pending before the Hon'ble Appellate Bench of this Court. Therefore, from the provisions contained under section 10 of C.P.C. it is crystal clear*

that this is previously instituted suit not a subsequent suit, while L.E. & C. Suit No.75/88/2000 is the subsequent suit between respondent and petitioner No.1 and therefore, this cannot be stayed.”

Apart from that, there is laches of more than two years on the part of the petitioner in filing the petition. There is no explanation in the petition for the same.

18. Considering these facts, I do not find any reason to entertain with the well reasoned order passed by the Trial Court. Hence, the Writ Petition stands rejected.

19. The petitioner to pay cost of Rs.5000/- to the respondent within eight weeks.

(K.K. TATED, J.)