

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.21652 of 2013

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Husana Ara @ Husana Ara Khatoon & Ors

.... Petitioner/s

Versus

Dharam Raj Sharma & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Md. Ataul Haque

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

2 22-09-2017 Heard the learned counsel, Mr. Md. Ataul Haque, appearing on behalf of the petitioner.

This application under Article 227 of the Constitution of India has been filed by the defendant petitioner for setting aside the order dated 20.07.2013 passed by learned 2nd Munsif, Ara in Title Suit No.74 of 2007 whereby the learned Munsif has rejected the application filed by the petitioner under Section 10 of the Code of Civil procedure which was filed by the petitioner for stay of the suit during the pendency of Second Appeal No.51 of 2002.

The learned counsel, Mr. Haque, for the petitioner submitted that parties are same and the property is also same in the previous suit giving rise to Second Appeal No.51 of 2002 which is still pending before the High Court. Again the present suit has been filed by the plaintiff which is with respect to same subject mater and the parties are also same but the Court below without



considering this aspect of the matter has rejected the application under Section 10 of the Code of Civil Procedure.

Perused the impugned order. From perusal of the impugned order, it appears that the Court below considered the relief claim in the earlier suit giving rise to Second Appeal and also the present suit and recorded clear finding that the earlier suit was simple for partition and the present suit is for removal of encroachment and, therefore, the final decree that has been passed in previous suit will operate as res judicata in the present suit and accordingly has rejected the Section 10 application.

The Hon'ble Supreme Court in the case of *National Institute of Mental Health and Nureao Science Vs. C. Parmeshwar AIR 2005 SC 242* has interpreted Section 10 of the Code of Civil Procedure has held 'the fundamental test to apply Section 10 is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit?'

In view of the settled provision of law when the Court below has categorically recorded a finding that the final decree passed in earlier suit will not operate as res judicata in the present suit of the year 2007, there is no question of application of Section 10 CPC arises and thus no case for interference in exercise of



supervisory jurisdiction is made out.

Accordingly, this writ application is dismissed.

(Mungeshwar Sahoo, J)

Sanjeev/-

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