

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.393 of 2016

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Md. Makhi Ahmad s/o late Abdul Majid r/o vill Badharwa Lakhansen Dolia Parsa
P.S. Dhaka Dist. East Champaran. Appellant/s

Versus

1. Shekh Kadir.
2. Shekh Jahir both s/o late Bholgim Hussain r/o vill Badharwa Lakhansen Dolia
Parsa P.S. Dhaka Dist. East Champaran. Respondent/s

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Appearance :

For the Appellant/s : Mr. Dhannjay Kumar No 2, Adv.
For the Respondent/s : Mr. Saba Ashfaque, Adv.
Mr. Asif Kalim, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 15-05-2017

Heard learned counsel for the parties.

The legal acceptability of the impugned order by which the learned court below has allowed the prayer of the defendant for stay of the further proceeding of the suit under Section 10 C.P.C. has been questioned by the plaintiff-petitioner of the said suit.

After considering the submissions and the materials on record filed by the plaintiff-petitioner, it is transparent that the suit property subject matter of the present T.S. No. 493 of 2004 originally belonged to the defendant no. 1 and his co-sharers. The claim of title and right to possession over the suit property by the plaintiff-petitioner is on the basis of the two sale deeds dated 27.06.1964 executed by Most. Hakiman as de facto guardian of the



defendant-respondents. The T.S. No. 392 of 1986 was filed by the defendants for setting aside the two sale deeds and also for partition of the suit land. The said suit was decreed granting the relief to the plaintiffs of that suit as prayed. However, in appeal, the said judgment and decree were set aside and the T.S. No. 392 of 1986 was dismissed. It is also admitted fact between the parties that the two second appeals i.e. S.A. No. 154 of 2004 and S.A. No. 346 of 2004 have been filed respectively by the defendant-respondents and those appeals are still pending.

The plaintiff-petitioner, however, has filed T.S. No. 493 of 2004 praying for recovery of possession over the suit land from the defendants alleging his forcible dispossession by the defendants. The defendant-respondents filed a petition under Section 10 C.P.C. in the said suit praying for stay of further proceeding of the suit till the pendency of the two second appeals before the High Court. By the impugned order, the learned court below has allowed the prayer made by the defendant-respondents and has stayed the further proceeding of the suit till the disposal of the S.A. No. 154 of 2004 pending before this Court.

Learned counsel appearing on behalf of the petitioner has submitted that the learned court below has failed to consider that the provision of Section 10 C.P.C. is not at all attracted in the facts



and circumstances of the present case. Developing the submission, it has been contended that the T.S. No. 493 of 2004 has been filed by the plaintiff-petitioner only for the relief for recovery of possession over the suit land and the issue of possession or dispossession was not an issue arising between the parties in the earlier suit out of which the second appeal has been filed and is pending before the High Court. It has been propounded that the provisions of Section 10 C.P.C. for stay of further proceeding of the suit is attracted only in the circumstance where the judgment and decree passed in the earlier suit would operate as res judicata in the subsequent suit but the said position is not present in the facts and circumstances of the case. After placing the decision of the Apex Court in the case of **National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, (2005) 2 SCC 256**, it has been argued that the fundamental test to attract Section 10 C.P.C. is a situation where the decision in the previous suit would operate as res judicata in the subsequent suit. It has also been submitted that there must be identity of the matter in issue in both the courts below before application of the provision of Section 10 C.P.C.

Learned senior counsel for the respondents, however, has supported the impugned order and has submitted that in the present fact situation the decision in the case of **National Institute of**



Mental Health and Neuro Sciences (supra) actually supports the case of the respondents.

After considering the submissions and perusal of the materials on record, it is pellucid that the relief for recovery of possession as prayed by the plaintiff-petitioner in the suit is on the basis of the claim of title over the suit land through two sale deeds dated 27.06.1964. It is not in dispute between the parties that the defendant-respondents have filed T.S. No. 392 of 1986 challenging the said two sale deeds and for partition, and the matter is pending adjudication at the second appellate stage in S.A. No. 154 of 2004. It also stands admitted from the averments made in the plaint (Annexure-1) that the two sale deeds dated 27.06.1964 were executed by Most. Hakiman as guardian of the defendant-respondents. Though, learned counsel for the petitioner has submitted that the two sale deeds would be valid at least to the extent of the share of Most. Hakiman but this Court does not find that any such pleading has been made in the plaint or necessary fundamental facts have been averred supporting the distinction and specification on this basis over the land claimed in the suit. It is, therefore, demonstrably clear that the prayer for recovery of possession in the suit has been made by the plaintiff-petitioner on the basis of claim of title through two sale deeds the validity of



which is still subjudice before this Court in S.A. No. 154 of 2004. Though, learned counsel for the petitioner has been emphatic in his submission that Section 10 would apply only if the whole of the subject matter in both the proceedings is identical, this Court is not inclined to align with this submission in the present fact situation. It is not the case on behalf of the petitioner that the decision in Second Appeal No. 154 of 2004 would have no effect on the outcome of the present suit. It would be fruitful here to notice the observations of this Court in **M/s Fulchand Motilal Vs. M/s Manhar Lall Jetha Lall Mehta A.I.R. 1973 Pat. 196** where while considering the ambit and scope of Section 10 C.P.C. it has been observed as follows:-

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.....

Having ascertained this, the Court has further to consider whether or not the matter directly and substantially in issue in both the suits is the same. The test to be applied for this purpose is not whether the cause of action or the reliefs claimed in both the suits are the same, nor whether one of the issues arising in both of them is the same. The test is whether the decision of the matter directly and substantially arising in the former suit will decide not merely that suit, but will also operate as res judicata in the subsequent suit between the



parties.....”

At this juncture, the submission has also been made on behalf of the petitioner that in view of Section 144 C.P.C. the defendants have not been left without legal remedy and in that view of the matter also the learned court below ought not to have allowed the prayer as made on behalf of the petitioner to stay of the proceeding of the suit. This Court again is not persuaded to uphold this proposition on behalf of the petitioner. The provision of Section 144 C.P.C. cannot be interpreted to override the wholesome doctrine of res subjudice which is clearly intended to avoid chance of inconsistent decree or order on the same issue between the same parties with regard to the same property. The stage of Section 144 C.P.C. definitely arrives later on.

For the aforesaid reasons and discussions, this Court does not find that there is any merit in this application, which is, accordingly, dismissed.

Devendra/-

(V. Nath, J)

AFR/NAFR	
CAV DATE	
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