

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

CO. No. 1549 of 2021

**Rajesh Narayan & Anr.
Vs.
Sneha Bhattacharya (Nee Chatterjee)**

For the Petitioners/	: Mr. Joydip Kar, Ld. Sr. Adv. Mr. Debjit Mukherjee, Adv. Ms. Sayani Bhattacharyya, Adv. Ms. Antara Chowdhury, Adv. Mr. Jushnujit Roy, Adv. Mr. Amitava Mitra, Adv.
For the Opposite Party	: Mr. Probal Mukherjee, Ld. Sr. Adv. Mr. Souradipta Banerjee, Adv. Mr. Subhojit Mullick, Adv.
Heard On	: 16.09.2021
Judgment	: 01.10.2021

Subhasis Dasgupta, J:-

The subject matter of challenge in this revisional application is against the rejection of an application under Section 10 of the Code of Civil Procedure, filed by the petitioners/defendants in Title Suit No. 1691 of 2018, praying for stay of suit pending before the learned Judge, 6th Bench City Civil Court, at Calcutta.

Mr. Joydip Kar, learned senior advocate representing the petitioner, being assisted by Mr. Debjit Mukherjee submitted that the learned court below had erroneously rejected the application under Section 10 of the Code of Civil Procedure without adhering to the mandatory requirement pertaining to the conditions applicable under Section 10 of the Code of Civil Procedure, and its test thereunder, and thus rejected the prayer most mechanically. It was further contended that after rejecting the prayer for stay of suit, the court below by the impugned order most gratuitously suggested for a joint trial, and allowed analogous trial of two suits, pending in two different courts, what was not the actual prayer advanced before the court below.

It was also contended by the petitioners that in view of the facts and circumstances involved in this case, the court below fell into an error of law in rejecting the application under Section 10 of the Code of Civil Procedure without considering the fundamental test as to whether the decision of the previously instituted suit (T.S. No.554 of 2006 pending before the learned Judge 4th Bench, City Civil Court at Calcutta, filed by the petitioners) would operate as res judicata in the subsequently instituted suit (T.S No. 1691 of 2018 pending before the learned Judge 6th Bench City Civil Court at Calcutta, filed by the opposite party), on the simple score that not only in both the suit, there were identity of the parties, but there was also familiarity, commonness in respect of the

matter in controversy surfaced between the two sets of litigation, pending in two different courts.

Disputing with the impugned order allowing analogous trial of both the suits referred above, and thereby facilitating consolidation of two suits, Mr. Kar strenuously argued that consolidation of two suits could not be allowed to be made making departure of the provisions of law.

Per contra Mr. Probal Mukherjee, learned senior advocate for the opposite parties being assisted by Mr. Souradipta Banerjee, supporting the order of the learned court below, submitted that learned court below had rightly rejected the prayer for stay of suit, and thereby allowing analogous trial of the two suits pending between the parties in two different courts, simply to facilitate consolidation of two suits, so that there could not be any conflicting decisions, and more so there would be saving of time as regards tenure of litigation.

Mr. Mukherjee replied that when the learned court below in exercise of lawful authority reasonably and most judiciously exercised his discretion, while allowing analogous trial of the two suits, referred above, after rejecting the prayer for stay of the suit under Section 10 of the Code of Civil Procedure, such discretion being judiciously exercised, and also aiming at for the benefit of the parties to this case must go unaltered. The revisional application, according to Mr. Mukherjee, would necessarily fail being without any merits, and as such no interference is necessary.

The point requiring address by this court in context with the submission advanced by both the parties to this case, is whether the learned court below rightly decided the prayer for stay of suit in terms of the provisions as available under Section 10 of the Code of Civil Procedure.

Before addressing the issue mentioned hereinabove, a reference to some of the facts may be of useful assistance for perfectly addressing the issue. The petitioners claimed themselves to be owners of flat No. 10A situated on 10th floor with open parking space in the ground floor, on the strength of their purchase deed, dated 22.02.2005. According to the petitioners, one Jayanti Lal Gupta was the erstwhile owner of the suit property. She was unmarried and died intestate, leaving behind her three (03) brothers and two (02) sisters, as legal heirs. The two sisters gifted their shares in the property to their three (03) brothers, and consequently the three brothers, being the owners of the suit property sold out the same to petitioners, as their vendors. Apprehending dispossession at the instance of the opposite parties, petitioners filed a suit for declaration and permanent injunction, and other consequential relief, valued at Rs. 1,00,000/-, being T.S. No. 554 of 2006 of learned Judge, 4th Bench City Civil Court at Calcutta (previously instituted suit by the petitioners).

As against the claim of the petitioners, the opposite party similarly filed a suit in the year 2018 being T.S. NO. 1691 of 2018 before the learned Judge 6th Bench, City Civil Court at Calcutta (subsequently

instituted suit by the opposite parties) with a prayer for declaration, recovery of kash possession, and damages, total valued at Rs.9300/- tentatively. Subsequently instituted suit was filed by the opposite party claiming herself to be the owner of the suit property, on the strength of last Will of Jayanti Lal Gupta, executed in favour of the opposite party on 04.12.2001. The said Will upon being probated on 19.04.2005, the opposite party became owner of the suit property, as beneficiary of the Will, and filed the subsequent suit simply for the declaration and recovery of khas possession in repudiation of the sale deed of the petitioners, dated 22.02.2005 alleging, inter alia, that purported sale deed was made during the pendency of probate proceeding.

One revocation No. 184 of 2006 was filed by the vendors of petitioners to set aside the Will, said to have been executed by Jayanti Lal Gupta in favour of the opposite party, but the revocation case was ultimately dismissed. Against the dismissal of the revocation proceeding, an appeal has been preferred before this Court being FAT No. 521 of 2018, which is now pending impleading opposite party, as respondent therein.

In such factual aspects, the submission advanced by the petitioners is directed against two points. The first one is that the conditions for the applicability of the prayer for stay of the suit, as available in Section 10 of the Code of Civil Procedure have not been strictly adhered to by the learned court below, while rejecting the application for stay of suit, and the second point is that the test and the object of Section 10 of the Code of

Civil Procedure have not been taken into account, rendering the decision reached by the learned court below to be erroneous therefor.

On the other hand, the submission advanced by the opposite parties is directed against the point that when learned court below upon due exercise of its discretion allowed consolidation of two suits, thereby directing analogous trial of two suits to be held for the purpose, what was the just “needs” of two suits referred above, the learned court below should be presumed to have judiciously exercised its discretion upon consideration of the scope and applicability of Section 10 of the Code of Civil Procedure over the facts and circumstances of this case, as the same would be available from the citations considered by the Court below, while rejecting the application under Section 10 of the Code of Civil Procedure.

The proposition of law laid down in Section 10 of the Code of Civil Procedure signifies three essential conditions, which are necessary for due application of such provision, which are mentioned hereinbelow:

- (i) That the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit;
- (ii) That the parties to both the suits are same, or their representatives claiming under the same title; and
- (iii) That the Court, in which the previously instituted suit (first suit) is instituted, is a court of competent jurisdiction to grant

the relief claimed in the subsequently instituted suit (second suit).

Upon perusal of the order impugned it appears that parties in both the suits are same, and thus there being identity of the parties in both suits, there left no difference of opinion between the parties, as regards the identity of the parties in both the suits.

Mr. Mukherjee, while challenging the submission of the petitioners proceeded to rely upon decision reported in **2017 (2) ICC Cal 498** delivered in the case of **Pappu Kumar Singh Vs. Subhas Saha and Anr.** that the nature and dimension of two suits referred above, including its prayer contained therein, were entirely different, and would operate in two different fields/spheres with two different yardsticks to be applied for proof of the two suits, and mere identity of the parties in both the suits would not be sufficient enough to pass an order directing stay of previously instituted suit.

Reliance was placed on another decision by the opposite party reported in **(2005) 2 SCC 256** rendered in the case of **National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara** wherein in the Apex Court propounded the fundamental test, to be applied for attracting Section 10 of the Code of Civil Procedure, and that test is whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Subject matter in both the suits, as appearing in Section 10 of the Code of Civil

Procedure is relatable to situation/cases where whole of the subject-matter in controversy in both the suits is identical. Taking recourse to such decision, Mr. Mukherjee endeavored to establish that subject matter of two suits being operative in two different spheres, with two different cause of actions, being shown in two different suits pending in two different courts, Section 10 of the Code of Civil Procedure had nothing to do in the present context of this case.

Supporting the consolidation of suits, Mr. Mukherjee proceeded to derive capital from a decision reported in **(2013) 4 SCC 404** delivered in the case of ***Mahalaxmi Cooperative Housing Society Limited and Ors. Vs. Ashabhai Atmaram Patel (dead) Through LRs. And Ors.*** that the purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The consolidation of suits is done for meeting the ends of justice, as it saves the parties from multiplicity of proceedings, delay and expenses and the parties are relieved of the need of adducing same, or similar documentary, or oral evidence twice over in the two suits at two different trials. Upon referring such decision, Mr. Mukherjee was of the view that the order directing analogous trial was for the effective adjudication of the two suits, referred above, and the learned court below in exercise of its lawful authority suggested for a joint trial of both the suits, on the simple score that some of the issues being over lapped and the decision of one suit will have direct impact on the related suit.

Reliance was further placed by Mr. Mukherjee, as regards the consolidation of two suits, on a decision reported in **2004 (3) SCC 85** delivered in the case of ***Chtivalasa Jute Mills Vs. Jaypee Rewa Cement*** that unless specifically prohibited, the civil court has inherent power to make such order as may be necessary for the ends of justice, or to prevent abuse of the process of the court. Therefore, consolidation of two suits is ordinarily done for meeting the ends of justice, as it saves the parties from multiplicity of proceedings, delay and expenses etc.

Mr. Kar, learned senior advocate in reply submitted that none of the decisions cited above would be applied over the facts and circumstances of the case, as the consolidation of suits was neither prayed for, nor both the suits are pending in self-same Court. While distinguishing the judgment favouring consolidation, Mr. Kar with much stress submitted that complete or even substantial and sufficient similarity of the issues arising for decision in two suits enable the two suits being consolidated for trial and decision, what was not the case in hand.

Upon perusal of the impugned order, it appears that the fundamental test to attract Section 10 of the Code of Civil Procedure being to ascertain as to whether final decision being reached in the previously instituted suit, such decision would operate as *res judicata* in the subsequent suit, has not been taken into account by the learned court below, while rejecting the prayer for stay of suit, and thereby allowing analogous trial to be conducted for both the suits pending in different two

courts. The object underlying Section 10 of the Code of Civil Procedure is to avoid parallel trials on the same issue by the two courts, and to avoid recording of conflicting findings on issues, which are directly and substantially issue in previously instituted suit. The words “directly and substantially in issue” are used in contradistinction to the words ‘incidentally or collaterally in issue’, the authority of which may be found in the decision of ***National Institute of Mental Health and Neuro Sciences (supra)***. More so, the conditions underlying Section 10 of the Code of Civil Procedure requiring strict adherence even could not be considered by the learned court below, while rejecting the prayer for stay of suit.

This court is not oblivious of the settled legal proposition that the Code of Civil Procedure though does not specifically speak for consolidation of suits, but the same can be done upon invoking inherent power of the court flowing from Section 151 of the Code of Civil Procedure in appropriate cases depending upon the facts and circumstances of the case, apart from the general power of transfer and withdrawal of suit, as available under Section 24 of the Code of Civil Procedure. Since no independent decision has been reached subscribing any reasons therefor, by the learned court below with respect to prayer under Section 10 of the Code of Civil Procedure, coming to an abrupt decision for consolidation of two suits falls short of propriety of the order impugned.

The decision thus reached by the impugned order, for the discussions made hereinabove, is not sustainable. In the given circumstances of this case, a decision afresh with respect to the prayer under Section 10 of the Code of Civil Procedure, filed by the petitioners, is thus obligatory. The impugned order is thus set aside.

The revisional application succeeds.

The learned court below is directed to rehear the application under Section 10 of the Code of Civil Procedure filed by the petitioners within three (03) months from the date of communication of this order, providing sufficient opportunity of hearing to either of the parties to this case, and decide the same in accordance with the provisions of law.

Urgent certified copy of this order and judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary formalities.

(Subhasis Dasgupta, J.)