

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11643 OF 2019**

the second suit i.e. R.C.S. No.486 of 2015.

2] In the aforesaid backdrop, under Section 10 of the CPC, application-Exhibit-35 preferred by the Petitioners came to be rejected vide impugned order dated 11/7/2019.

3] Submissions are, order impugned is not sustainable as the Court below failed to consider nature of claim in both the suits so also parties and issues involved therein. According to the learned Counsel for the Petitioners, property which is subject matter of both these suits is very much identifiable and that being so, court below, while rejecting the prayer, committed an error.

4] Considered submissions.

5] Fact remains that first suit by the Petitioners is for declaration and injunction which is based on theory of already existing partition. The suit was dismissed on 4/7/2015 and appeal is pending in the Court of District Judge, Satara. True it is that property mentioned in the aforesaid appeal is also subject matter of the second suit i.e. RCS

No. 486 of 2015 which is for partition. Petitioners in the first suit have failed to establish their claim that suit property was subjected to partition.

6] In the aforesaid backdrop, if we consider very scheme of Section 10 of the CPC, same is procedural in nature. Any decree passed contrary to the said provision of Section 10 cannot be termed as void and that being so, it cannot be inferred that the provisions are mandatory in nature. Always a lever is given to the Court to deal with the proceedings before it in accordance with law.

7] As far as aforesaid findings are concerned, support can be drawn from the judgment of the Apex Court in the matter of *Pukhraj D. Jain and others vs. G. Gopalakrishna* reported in **AIR 2004 SC 3504**.

8] In the aforesaid backdrop, the Court below, in my opinion, was justified in dismissing the Application.

9] In view of above, Petition stands dismissed.

(NITIN W. SAMBRE, J.)