

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 27th May, 2021**

Pronounced on: 31st May, 2021

+ **CM (M) 381/2021**

DHARAM DEV & ANR.Petitioners

Through: Mr. Vivek Sharma, Advocate

Versus

ASHOK KUMARRespondent

Through: Mr. Charu Tandon & Mr. Mayank
Mehandru, Advocates with
respondent in person.

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

**CM (M) 381/2021 & CM APPLN.17125/2021 (by the petitioners u/S
151 CPC for stay)**

1. This petition has been filed under Article 227 of the Constitution of India by the defendants before the learned Trial Court praying that the order dated 16th February, 2021 passed by the learned Trial Court be set aside.

2. The facts as are relevant for the disposal of the present petition are that the suit bearing No. CS 8173/2016 (Old No.236/2010) was filed by the respondent/Ashok Kumar on 9th July, 2010 seeking declaration and

permanent injunction against the present petitioners and late Sh. Ram Dev (father of the petitioner No.1 and the respondent). The respondent/Ashok Kumar subsequently filed another suit on 10th September, 2012 before the High Court bearing No. CS(OS) 2755/2012 seeking partition, possession, cancellation, declaration and permanent injunction. Issues have been framed in both the suits and evidence is being recorded.

3. In the suit bearing No. CS 8173/2016, at the stage of defendants' evidence, the petitioners moved an application under Section 10 read with Section 151 of the Code of Civil Procedure, 1908 (for short, "CPC") seeking stay of the suit on the plea that the issues in this suit and the suit bearing No. CS(OS) 2755/2012 before the High Court were the same. Vide impugned order dated 16th February, 2021, the learned Trial Court dismissed the application holding that only a subsequently instituted suit was liable to be stayed and since the instant suit had been filed prior to the suit pending before the High Court, it could not be stayed. A cost of Rs.10,000/- was also imposed on the petitioners for filing what it termed was a frivolous application.

4. Sh. Vivek Sharma, learned counsel for the petitioners submitted that there was no error in the view taken by the learned Trial Court insofar as Section 10 CPC was concerned that it was only a subsequent suit that could be stayed. However, his grievance was that the learned Trial Court, in the facts of the case, ought to have exercised its powers under Section 151 CPC and to have allowed the application and stayed the trial. It was the contention of the learned counsel for the petitioners that since the subsequent suit was pending before the High Court and the

High Court was a 'Court of Record', the findings of the High Court would be binding on the Court of the Senior Civil Judge. The learned counsel has placed reliance on the judgments of the Supreme Court, reported as *Baradakanta Mishra Ex-Commissioner of Endowments v. Shri Bhimsen Dixit* (1973) 1 SCC 446, *Union of India and Others v. Kamlakshi Finance Corporation Ltd.* 1992 Supp (1) SCC 443 and *Suganthi Suresh Kumar v. Jagdeeshan* (2002) 2 SCC 420, to fortify this submission.

5. On the other hand, Sh. Charu Tandon, learned counsel for the respondent appearing on advance notice has submitted that the learned Single Judge of this Court while dealing with suit No. CS(OS) 2755/2012 had vide orders dated 2nd February, 2018 recorded that the plaintiff i.e. the present respondent, had given up the relief of declaration with respect to property No.11/144, Geeta Colony, Delhi and that in any case, the issues as framed by the learned Single Judge on that date and the issues framed in the instant suit were not the same. Further, the learned counsel pointed out that vide order dated 11th May, 2018, the learned Single Judge had held that if a co-owner first filed a suit for declaration of his rights as co-owner, the same could not bar him from subsequently seeking partition. He, therefore, submitted that the application for stay of the instant suit was rightly rejected by the learned Trial Court. Learned counsel further submitted, relying on *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* AIR 1962 SC 527(1), that the powers under Section 151 CPC could not be exercised when specific provisions existed to deal with the matter.

6. Before proceeding further, Section 10 CPC may be reproduced as

below:

“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] have 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.”

7. Clearly the learned Trial Court was correct in holding that under Section 10, it was only a subsequent suit that could be stayed.

8. With regard to the submission that the learned Trial Court ought to have exercised its powers under Section 151 CPC only because one suit was being heard by the High Court, does not appeal to reason. No doubt, under the law of precedent, the decisions of the superior Courts as *ratio decidendi* would be binding on the Courts below. But here there are two suits that are under trial, one before the Senior Civil Judge and the other before the High Court and no finding has yet been returned.

9. In any case, from a perusal of the issues that have been framed in both the suits, it is clear that they are not identical. Moreover, the High Court while dealing with an application moved under Order VII Rule 11 read with Order II Rule 2 CPC by the present petitioners, had held that

both the suits were maintainable and further observed that as per the order dated 2nd February, 2018, the controversy for adjudication before the High Court was limited to the issues framed on that date. It may be useful to reproduce the issues framed in both suits at this stage, as under:

Issues framed in CS(OS) 2755/2012

*“(i) Whether there was any Family Settlement as claimed by the defendants and the same was acted upon and if so, what effect? **OPD 1 to 3***

*(ii) Whether the document dated 3rd May, 2007 is the validly executed last Will of the father of the plaintiff? **OPD 1 to 3***

*(iii) If the above issues are decided in favour of the plaintiff, then to what consequential reliefs is the plaintiff entitled to? **OPP***

(iv) Relief.

Issues framed in CS 8173/16 (Old No. CS 236/10)

*1. Whether property bearing no. 11/144, Geeta Colony, Delhi was purchased from the funds of HUF and it was purchased in the name of defendant no. 1 being the karta and further construction over the said plot and was raised by plaintiff with his own funds? **OPP***

*2. Whether plaintiff is entitled to decree for declaration as prayed for? **OPP***

*3. Whether plaintiff is entitled to decree for permanent injunction as prayed for? **OPP***

*4. Whether plaintiff has not approached this court with clean hands and has suppressed material facts from this court? If so, to what consequences? **OPD***

5. *Whether suit has been filed by plaintiff without any cause of action in his favour? OPD*
6. *Whether suit property is property of defendant no.1 who purchased the same from his own funds and raised construction thereupon with his own funds? OPD*
7. *Whether plaintiff has not valued the suit properly and this court has no pecuniary jurisdiction to adjudicate the present suit in question? OPD*
8. *Relief.”*

10. There does not, on a plain reading, appear to be any identity of the issues in the two suits.

11. Learned counsel for the petitioners has explained that the issue No.4 as framed in CS 8173/2016 encompasses within it the question of the Family Settlement in relation to which issue No.1 has been framed by the High Court in CS(OS) 2755/2012. This, he says, is because the written statement referred to the Family Settlement and alleged that the respondents/plaintiffs had suppressed the fact of Family Settlement, on the basis of which pleadings the issue No.4 was framed by the learned Senior Civil Judge.

12. Learned counsel for the petitioners has further submitted that the observations of the learned Single Judge in para 5 of the order dated 11th May, 2018 to the effect that it has been held in ***Vijay Manchanda v. Ashok Manchanda*** 2010 (114) DRJ 467 that a co-owner cannot be compelled to sue for partition, if he did not desire partition and only desired the declaration of the status of jointness of ownership to continue, was incorrect as in ***Vijay Manchanda (supra)***, the said observations were

made only in passing and did not constitute the main issue decided in the said case. The order of the learned Single Judge dated 11th May, 2018 itself records that SLP against *Vijay Manchanda (supra)* has been dismissed and further the learned counsel for the petitioners concedes that the order of the learned Single Judge dated 11th May, 2018 was never challenged by way of an appeal. This Court cannot be expected to go behind the observations made by a Coordinate Bench of this Court. Nothing more needs to be said in this regard.

13. In the light of the fact that the issues are not identical and that the High Court itself has held that both suits are maintainable, even by the reasoning of the learned counsel for the petitioners that the orders of the High Court are binding on the Civil Judge, it is apparent that there was no cause for the learned Trial Court to exercise its powers under Section 151 CPC to stay the proceedings in the instant suit. It cannot also be overlooked that when the CPC has specific provisions to deal with specific situations such as Section 10 for stay of a subsequent suit, recourse to inherent powers under Section 151 CPC are uncalled for.

14. There is no merit in the present petition, which is accordingly dismissed along with the pending application.

15. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

MAY 31, 2021
s/ck