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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 986/2022, CM 41060/2022 & CM 41061/2022
KAILASH KUMAR Petitioner
Through: Mr. Ashim Shridhar, Adv.

versus

RUDRA DEV DECEASED & ORS. Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

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27.09.2022

1. Mr. Ashim Shridhar, learned Counsel for the petitioner, after some hearing, sought leave to withdraw this petition with liberty to seek consolidation of CS DJ 599/2021 with CS SCJ 1737/2021, as per law.
2. Leave and liberty is granted as prayed for.
3. However, as this case raises an issue which may have a cascading effect on other cases, I deem it appropriate to express my views thereon.
4. The issue is limited.
5. CS DJ 599/2021 (*Rudra Dev v. Kailash Kumar*) was filed by the respondents against the petitioner for recovery of an amount



of ₹ 9,20,142/-.

6. The petitioner moved an application under Section 10 of the Code of Civil Procedure, 1908 (CPC) for stay of trial of CS DJ 64/2021, on the ground that CS SCJ 1737/2021, dealing with the same issue, was earlier filed and pending before the learned Senior Civil Judge (“the learned SCJ”).
7. The learned Additional District Judge (“the learned ADJ”) has, by the impugned order dated 6th July 2021, dismissed the application on the ground that the learned SCJ, in seisin of CS SCJ 1737/2021, lacked the pecuniary jurisdiction to decide CS DJ 599/2021.
8. The issue that arises for consideration is, therefore, whether, in order for trial of a suit, instituted later in point of time, to be stayed under Section 10 of the CPC, on the ground that an identical issue is pending in a suit instituted earlier in point of time, one of the pre-requisite conditions is that the Court seized with the earlier suit must possess pecuniary jurisdiction *to decide the later suit*.
9. Section 10 of the CPC reads thus:

“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.”

10. Section 10 prohibits the Court seized of the later suit from proceeding with trial thereof. Vivisected to its essentials, the ingredients of Section 10 are that

- (i) the matter in issue in the later suit is directly and substantially in issue in the earlier suit,
- (ii) both suits are between the same parties or between the parties under whom they or any of them claim litigating under the same title,
- (iii) the earlier suit is pending (a) in the same Court or (b) in any other Court in India *having jurisdiction to grant the relief claimed*, or (c) in any Court beyond the limits of India established or continued by the Central Government having like jurisdiction or (d) before the Supreme Court.

11. The nub of controversy is the expression “having jurisdiction to grant the relief claimed”. Does, this expression means that the Court seized with the earlier suit should have the jurisdiction to grant the relief claims in the earlier suit, or the relief claimed in the later suit?

12. The words “where such suit is pending”, read in conjunction



with the words “having jurisdiction to grant the relief claimed” makes it apparent, to me, that the issue of jurisdiction has to be decided vis-à-vis the suit before the Court before which the earlier suit is pending, and not the suit before which the later suit is pending.

13. I may note that the Division Bench of the High Court of Bombay has, in *Manilal Premji Gala v. Boman P. Irani*¹, held in para 16 of the report, thus:

“16. It is not possible to accept the contention of the learned Counsel for appellant. We have already pointed out that, consistently and overwhelmingly, the courts in this country have interpreted section 10 and held that *the Court entertaining the subsequent suit should have the jurisdiction to grant the relief claimed in the first suit in order to enable the stay of the second suit*. It is undoubtedly true that when all these decisions were rendered. Explanations VII and VIII were not on the statute book. That, however, makes no difference to the situation, in our judgment. The fact that Parliament has now introduced Explanations VII and VIII does not and cannot detract from the interpretation consistently given to Section 10 of the Code which in no way has been amended. In our judgment, therefore, notwithstanding the amendment made in Section 11 by addition of Explanations VII and VIII, the interpretation consistently given to Section 10 of the Code must remain unaffected.

(Emphasis supplied)”

14. With greatest respect, it appears to me that the above noted view expressed by a Division Bench of the High Court of Bombay is contrary to the plain wording of Section 10. The expression “having jurisdiction to grant the relief claimed”, as employed in Section 10, on

¹ 2002 Supp Bom CR 623



a plain reading, appears to pertain to the Court before which the previously instituted suit is pending, and not the Court *before which the later instituted suit is pending*. I, therefore, express my respectful disagreement with the aforementioned decision of the High Court of Bombay.

15. That, however, is not the main issue in controversy. The question that arises is, whether the Court in seisin of the earlier instituted suit “should have jurisdiction to grant the relief claimed”. To reiterate, does this mean that the Court which earlier instituted suit should have the jurisdiction to grant the relief claimed in that suit, or to grant the relief claimed in the later instituted suit, the trial of which is sought to be stayed? The learned ADJ has, in the impugned order dated 6th July 2022, inclined to the later view.

16. Section 10, plainly read, is somewhat ambiguous in this regard. The issue, however, appears to be settled by the judgment of the Supreme Court in *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara*², (NIMHASNS, hereinafter) which is regarded as an authority on Section 10. Para 8 of the report in the said case read thus:

“8. The object underlying Section 10 is to prevent *Courts of concurrent jurisdiction* from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and

² (2005) 2 SCC 256



substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil Court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent *Courts of concurrent jurisdiction* from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject-matter in both the proceedings is identical."

17. The Supreme Court has used, not once, but twice, the expression "courts of concurrent jurisdiction". The expression "concurrent jurisdiction" implies that the jurisdiction of both Courts, both subject-wise as well as pecuniary must be the same. Though Mr. Shridhar attempted to submit that the expression "concurrent jurisdiction" should mean that both Courts should have the jurisdiction to try the issue, and could not be treated as extending to pecuniary jurisdiction, there appears no reason for such a restricted interpretation to be accorded to the words "courts of concurrent jurisdiction" employed by the Supreme Court. The fact that the Supreme Court says that both Courts should have concurrent jurisdiction, indicates that the jurisdiction of both Courts, pecuniary and otherwise, must be the same.

18. "Concurrent" is defined in P. Ramanatha Aiyars' Law Lexicon



as “having the same authority, acting in conjunction, existing together agreeing in the same act; contributing to the same event; contemporaneous; running together; co-operating; contributing to the same effect; accompanying; conjoined; associate; concomitant; joint and equal; Running together in time or space; covering the same ground”. A prisoner who is directed to undergo, two sentences concurrently has to undergo both the sentence only once for the duration of that period of concurrence.”

19. The principle of concurrence, when it applies to judicial fora, therefore, implies equality of authority. Both Courts should, therefore, have jurisdiction to try both suits, it is only then the Courts can be said to be the Courts of concurrent jurisdiction.

20. Mr. Shridhar sought to press into service Section 11 of the CPC, which deals with *res judicata*, especially Explanation VIII thereto, to submit that, if such an interpretation were granted, it would run contrary to Explanation VIII to Section 11. Section 11 and Explanation VIII thereto read thus:

“11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation VIII.— An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue,



shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

21. The submission is, in my considered opinion, not acceptable. No doubt, for applying the principle of *res judicata*, pecuniary jurisdiction of the two Courts is not material, in view of the clear words in Explanation VIII “notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit”. *Res judicata*, as a principle, therefore, would apply irrespective of the pecuniary jurisdiction of the two Courts concerned, or whether the Court seized with the earlier suit did or did not, possess the jurisdiction to try the suit instituted later in point of time.

22. The Supreme Court in, *NIMHANS* and other decisions dealing with Section 10 has held that one of the definitive tests, while applying Section 11, is whether a decision in the earlier instituted suit would operate as *res judicata* in the later suit. Though a finding in an earlier instituted suit would, if other conditions of Section 11 apply, operate as *res judicata* in the later instituted suit irrespective of the pecuniary jurisdiction of the two courts, and an additional condition is prescribed in the statute for a Section 10 to apply, which is, that the earlier suit must have jurisdiction to grant the relief claimed. The expression “jurisdiction to grant the relief claimed”, applying *NIMHANS*, would imply that both Courts should have concurrent jurisdiction, i.e. that the Court in seisin of the earlier instituted suit must possess the pecuniary jurisdiction to decide the suit instituted later in point of time. That any finding in the earlier suit must operate



as *res judicata* in the later suit is an *additional* consideration which has to be satisfied in order for Section 10 to apply. These are two distinct considerations, both of which are cumulatively required to be satisfied for Section 10 to apply in a particular case.

23. I am in agreement, therefore, with the finding of the learned ADJ that, as the Court seized with CS SCJ 1737/2021 did not have the pecuniary jurisdiction to grant the relief claimed in CS DJ 64/2021, no case for stay of trial of CS DJ 64/2021 was made out.

24. As noted in the beginning of this judgment, Mr. Shridhar seeks to apply for consolidation of the two suits. Leave and liberty is granted to him to do so. Any such application if made would be decided on its own merits.

25. Needless to say, this Court has not, in the present judgment, examined the aspect of consolidation. The Court seized with the prayer for consolidation would, therefore, decide the issue irrespective of the observations in this decision.

26. This petition is dismissed as withdrawn. Miscellaneous applications do not survive for consideration and are disposed of.

C.HARI SHANKAR, J

SEPTEMBER 27, 2022

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