



2023:DHC:7692



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

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Reserved on :

7th August, 2023

Pronounced on:

20th October, 2023

+ C.R.P. 235/2019

KUMARI LAXMI

..... Petitioner

Through: **Mr. Manoj V. George and Mr. KM Vignesh Ram, Advocates.**

versus

RAMA DEVI & ORS

..... Respondents

Through: **Mr. Praveen Agrawal, Mr. Manish Gandhi and Mr. Chirag Kaushik, Advocates**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant revision petition is preferred against the stay of the partition suit under Section 10 of the Civil Procedure Code, 1908 ('CPC' hereinafter) granted by the learned Trial Court, wherein the Court had stayed the suit for partition filed by the petitioner in New Delhi *vide* order dated 31st august, 2019.

FACTUAL MATRIX

2. The petitioner is the daughter of late Shri Brajbihari Prasad ('the deceased' hereinafter) who died intestate on 13th June, 1998. The



respondent no. 1 is the wife of the deceased and the other respondents are the children of the deceased.

3. The respondent no. 5, son of the deceased filed a suit for partition bearing no. 71/2018 ('Bihar Suit' hereinafter) on 28th February, 2018 in Bihar before the Motihari District Court for apportioning the properties of the estate located only in Bihar.

4. Subsequently, the petitioner, i.e., the plaintiff before the learned Court below, filed a suit for partition before the Tis Hazari Court, New Delhi, bearing Civil Suit No. 876/2018 ('New Delhi' Suit hereinafter) on 14th March, 2018 seeking partition of the immovable properties that are situated in New Delhi on the ground that the same were not included in the partition suit filed by the respondent no. 5 in Bihar.

5. Consequently, the respondent no. 5, i.e., the defendant before the learned Trial Court filed an application under Order VII Rule 11 of the CPC read with Section 10 of the CPC on the grounds that a suit for partition had already been filed before the Trial Court in Bihar and therefore, the suit filed by the petitioner is liable to be stayed and dismissed.

6. During the pendency of the said application, the matter was referred for mediation and was pending before the Delhi High Court Mediation Centre for a year and had more than 20 sittings. However, the parties could not arrive at an amicable settlement.

7. Consequently, *vide* the impugned order dated 31st August 2019, the learned Trial Court allowed the application *qua* Section 10 of the CPC, thereby, staying the operation of the above said on the ground that a former suit was pending before the Trial Court in Bihar.



8. Further, *vide* the same order the learned Trial Court dismissed the application *qua* the rejection of the plaint, since the applicability of the provisions under Order VII Rule 11 of the CPC does not exist in the Suit before it.

9. In the said impugned order, the learned Trial Court held that the entire property, be it in Delhi or in Bihar, constituted a single estate of the deceased which is the subject matter of partition and the same cannot be split so as to seek piecemeal partition and therefore, Section 10 application filed by the respondent was allowed.

10. Aggrieved by the same, the petitioner has preferred the present revision petition under Section 115 of the CPC, seeking the following reliefs:

- “a) To summon the record of the Civil Suit being CS No. 876/2018. and/or*
- b) Set-aside the Impugned Judgment/Order dated 31.08.2019 passed by the Ld District Sessions Court, Tis Hazari, in CS No. 876/2018, titled Lakshmi Kumari vs Rama Devi & Ors, and revive the stayed suit; and/or*
- c) Direct the revived suit to be disposed of in a time bound manner.*
- d) Pass any other and/or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”*

SUBMISSIONS

(On behalf of the petitioner)

11. The learned counsel appearing on behalf of the petitioner submitted that the application filed by the respondent no. 5 was *per se* not maintainable as the two provisions under which it was filed had two different outcomes and consequences i.e., the Order VII Rule 11 of the



CPC, having the outcome of the plaint being rejected for any of the grounds as envisaged thereunder, thereby leading to dismissal of the entire suit, whereas Section 10 of the CPC having the outcome of staying the suit. Thus, the application *ex facie* was untenable.

12. It is submitted that the subject matter of the latter suit filed in New Delhi was different and was not within the purview of the Suit filed before the Trial Court in Bihar. The suit filed before the Court in Bihar covered only the properties situated in Bihar and left out the properties which were located in New Delhi.

13. It is submitted that Section 10 of the CPC shall have application only if the former suit's matter is directly and substantially in issue in the latter suit as well. However, in the instant case, the matter in issue is whether the properties in New Delhi were self acquired properties of the respondent no. 1, as claimed by her, and if the same is not held in affirmative, then whether the petitioner is entitled to her legitimate share as envisaged under the Hindu Law - which is not the issue and case before the former Bihar Suit.

14. It is submitted that the learned Trial Court had overlooked the aspect that the word "Court" used in Section 10 of the CPC refers to a competent Court having jurisdiction to entertain a matter. The competent Court before which the New Delhi suit was filed for partition was empowered under Section 16 of the OF THE CODE OF CIVIL PROCEDURE, 1908 and since the case falls under its territorial jurisdiction, therefore, it was well empowered to proceed with the trial of the case. The petitioner cannot be constrained to contest the same in Bihar, for the properties that are situated in New Delhi.



15. It is submitted that the properties in New Delhi neither being added in the Bihar Suit nor being divided by metes and bounds, the cause of action for the same was still in survival and existence and that the petitioner was well empowered to seek for partition of the same by metes and bounds, as it is trite law that the cause of action for partition is recurring and continuous, and the same survives till there is severance in the joint status of the estate of the deceased.

16. It is also submitted that the learned Trial Court had overlooked the fact that all the respondents have acceded to its jurisdiction by filing Written Statement and by participating in the process of Mediation before the Hon'ble Delhi High Court Mediation Centre, for a period of one year.

17. It is further submitted that the respondents preferred the application only after failing of the said mediations and therefore, they cannot be allowed to reap any benefit from the stay application filed under Section 10 of the CPC. Henceforth, the respondents are estopped from taking a contrary stand after approbating and participating in the process of mediation, thereby subjecting themselves to the jurisdiction of the learned Trial Court.

18. Therefore, in light of the foregoing submissions, it is prayed that the present petition may be allowed and relief may be granted, as prayed.

(On behalf of the respondents)

19. The learned counsel appearing on behalf of the respondents submitted that the petitioner has filed the present petition by concealing the material facts and therefore, the present petition is liable to be dismissed.



20. It is submitted that the Hon'ble Supreme Court as well as various High Courts have recognised the concept of HotchPot, whereby the Hon'ble Supreme Court clarified that all properties of a joint family are to be partitioned by combining/including into a same suit of the partition, and since the partition suit has already been filed by the respondent no. 5 in Bihar, the learned Trial Court rightly stayed the suit filed by the petitioner.

21. It is submitted that it is an admitted and undisputed fact that the alleged property claimed for partition in Delhi is purchased and acquired by the respondent no. 1 in her own title even much prior to the demise of the deceased and deems to be an absolute property of the respondent no.1 therefore, imposing a bar under Section 14 of the Hindu Succession Act, 1956 which provides for a female to be an absolute owner of a property if the same is in her name.

22. It is submitted that the suit filed by the petitioner and the partition suit filed before the Bihar Court arise from the same cause of action i.e. death of the deceased. Therefore, the suit preferred by the petitioner in the Trial Court in Delhi is liable to be stayed as per the application of Section 10 of the CPC.

23. It is submitted that the property situated in Delhi belongs to the respondent no. 1 and therefore the same could not be included in the partition suit filed in Bihar as the said properties do not constitute the estate of the deceased.

24. It is also submitted that the contention regarding tenability of the application filed by the respondent before the learned Trial Court is



wrong as it is a settled position of law that an application, despite quoting wrong provision of law, cannot be dismissed solely on the said ground.

25. It is further submitted that the present petition does not satisfy the ingredients of Section 115 of the CPC, as the requirements enshrined under the said section are not met out by the present petition.

26. Hence, in view of the foregoing submissions, the respondents prayed that the present petition, being devoid of any merits, may be dismissed.

FINDINGS AND ANALYSIS

27. Heard the learned counsel for the parties and perused the records. This Court has given thoughtful consideration to the submissions made by the parties. Under the instant circumstances, this Court needs to analyze and examine the following issue-

a) Whether a party to a previous partition suit can file a subsequent suit for partition of the properties not included in the previous suit? If yes, can the said suit be adjudicated parallel to the pending suit, or the same needs to be stayed under Section 10 of the CPC.

28. Since some of the contentions raised by the parties involve the exercise of getting into the fact finding, it is imperative for this Court to discuss the scope of the revision powers conferred to this Court under Section 115 of the CPC.

29. It is well settled that the revision power of the High Court is a part and parcel of the appellate jurisdiction of the High Court and the same is

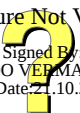


done by the aggrieved parties for interference of the superior Court for the purpose of rectifying the error of the Court below.

30. The power conferred to the Court under Section 115 of the CPC is limited to the aspect of keeping the subordinate Court within the bound of their jurisdiction and the said provision does not empower this Court to get into the facts of the case decided by the Court below.

31. The aspect related to the revision powers given to the High Court has been extensively dealt with by the Hon'ble Supreme Court in a catena of judgments, whereby the Hon'ble Court discussed the meaning and scope of the said provision. In ***State of A.P. v. Vatsavyi Kumara Venkata Krishna Verma***, (1999) 2 SCC 297, the Hon'ble Supreme Court answered the question of scope and ambit of the said provision and held as under:

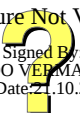
“10. So far as Section 115 is concerned, the scope and ambit of the revisional jurisdiction under the said section as conferred on the High Court is now well settled by a series of decisions of this Court. It is obvious that the revisional jurisdiction under Section 115 CPC or for that matter, under the pari materia provision of Section 21 of the Act, is not an appellate jurisdiction and a pure finding of fact reached by the court of appeal could not be interfered with. The court can interfere in revision only when it is satisfied that the findings reached by the court below suffer from any jurisdictional errors. In this connection, we may usefully refer to two decisions of this Court. In the case of Hari Shankar v. Rao Girdhari Lal Chowdhury [AIR 1963 SC 698 : 64 Punj LR 1097] Hidayatullah, J. speaking for two other learned Judges, distinguished revisional jurisdiction under Section 115 CPC with revisional jurisdiction under other Acts which conferred a wider jurisdiction on the High Court. The following observations in para 7 of the Report deserve to be noted in this connection:





“The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone.”

11. *The same view is reiterated in a later decision of this Court in the case of Managing Director (Mig) Hindustan Aeronautics Ltd. v. Ajit Prasad Tarway [(1972) 3 SCC 195] wherein a three-Judge Bench of this Court speaking through Hegde, J. clearly stated that the High Court under Section 115 CPC had no jurisdiction to interfere with the order of the first appellate court based on facts or even involving any error of law. It was next observed that it was not the conclusion of the High Court that the first appellate court had no jurisdiction to make the order that it made. The order of the first appellate court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear, that it had jurisdiction to make that order. It was not the case that the first appellate court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under Section 115 of the Civil Procedure Code.”*





32. In *Nawab Shaqafath Ali Khan v. Nawab Imdad Jah Bahadur*, (2009) 5 SCC 162, the Hon'ble Supreme Court decided the issue related to the jurisdiction of a Court in a civil revision petition and held that the jurisdictional questions may not arise only when the Courts act wholly without jurisdiction, but can also arise where other jurisdictional errors are committed by the Subordinate Court. The relevant paragraph is reproduced herein:

“43. A civil revision application although must necessarily having regard to the terminologies used in Section 115 of the Code of Civil Procedure involve the question of jurisdiction, the question which would arise is as to what are the jurisdictional questions. A jurisdictional question may arise not only when a court acts wholly without jurisdiction but also in a case where jurisdictional errors are committed while exercising jurisdiction. There are various facets of “jurisdictional errors”. Taking into consideration any irrelevant fact or non-consideration of a relevant fact would involve jurisdictional issue.”

33. The issue regarding scope of the revision powers conferred to the High Court was recently discussed by the Hon'ble Supreme Court in *Rahimal Bathu v. Ashiyal Beevi*, 2023 SCC OnLine SC 1226, whereby, the Hon'ble Court extensively dealt with the nature and scope of the said provision. The relevant paragraph of the judgment is reproduced herein:

“20. In Major S.S. Khanna (supra), in a civil suit an issue was framed as to whether the suit was maintainable. The said issue was tried as a preliminary issue. The trial court held the suit not maintainable. Against the order of the trial court, a revision was preferred before the High Court under Section 115 of the CPC. The High Court of Punjab set aside the order and directed that the suit shall be heard and



disposed of according to law. Aggrieved by the order of the High Court, a Special Leave Petition was filed before this Court. Before this Court it was urged : (a) that the order under challenge before the High Court did not amount to “a case which has been decided” within the meaning of Section 115 of the CPC; (b) that the decree which may follow would be subject to an appeal to the High Court therefore, the power of the High Court was, by the express terms of Section 115 of the CPC, excluded; and (c) that the order did not fall within any of the three clauses (a), (b) and (c) of Section 115 of the Code. In that context, this Court observed:

“6.....The validity of the argument turns upon the true meaning of Section 115 of the Code of Civil Procedure, which provides:

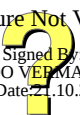
“The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.”

The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises i.e. there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of “any case which has been decided”. The expression “case” is not defined in, the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a civil court : Balakrishna Udayar v. Vasudeva Aiyar [(1916-17) 44 IA 261]; it includes a proceeding in a civil court in which the jurisdiction of the Court is invoked for the





determination of some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amounts to a “case which has been decided”, there has arisen a serious conflict of opinion in the High Courts in India and the question has not been directly considered by this Court. One view which is accepted by a majority of the High Courts is that the expression “case” includes an interlocutory proceeding relating to the rights and obligations of the parties, and the expression record of any case includes so much of the proceeding as relates to the order disposing of the interlocutory proceeding. The High Court has therefore power to rectify an order of a Subordinate Court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved i.e. by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression “case” does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of a suit or proceeding is not a “case which has been decided”, and the High Court has no power in exercise of its revisional jurisdiction to correct an error in an interlocutory order.

7. An analysis of the cases decided by the High Courts — their number is legion — would serve no useful purpose. In every High Court from time to time opinion has fluctuated. The meaning of the expression “case” must be sought in the nature of the jurisdiction conferred by Section 115, and the purpose for which the High Courts were invested with it.

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10. The expression “case” is a word of comprehensive import; it Includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression “case” as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the



jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.

11. It may be observed that the majority view of the High Court of Allahabad in *Buddhulal v. Mewa Ram* [ILR 43 All 564] founded upon the supposition that even though the word “case” has a wide signification the jurisdiction of the High Court can only be invoked from an order in a suit, where the suit and not a part of it is decided, proceeded upon the fallacy that because the expression “case” includes a suit, in defining the limits of the jurisdiction conferred upon the High Court the expression “suit” should be substituted in the section, when the order sought to be revised is an order passed in a suit. The expression “case” includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone.

(Emphasis supplied)

21. After observing as above, in paragraph No. 12, it was observed:

“12. That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate Court and the conditions in clauses (a), (b), or (c) are satisfied. Exercise of the jurisdiction is discretionary : the High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal, from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction.”

(Emphasis supplied)



22. The law laid down in *Major S.S. Khanna (supra)* by a three-Judge Bench of this Court still holds the field. Thus, it is settled that the expression “case” used in Section 115 of the CPC is of wide amplitude. It includes civil proceedings other than suits, and is not restricted to the entirety of the proceeding in a civil court. In that sense, rejection of a review application would also be a case which has been decided and, therefore, it could be canvassed that as no appeal lies against such an order, the same is amenable to the revisional jurisdiction under Section 115 of the CPC. However, at the same time, it cannot be overlooked that exercise of revisional powers cannot be claimed as of right. It is a discretionary power. The revisional Court is not bound to interfere merely because any of the three conditions, as laid down in Section 115 of the CPC for exercise of such power, is satisfied. Rather, the Court, exercising revisional powers, must bear in mind, inter alia, whether it would be appropriate to exercise such power considering the interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal, from the ultimate order or decree in the proceeding, or by a suit, and the general equities of the case.

23. In *Major S.S. Khanna (supra)* the order impugned before the revisional court was an order by which the trial court while deciding a preliminary issue held the suit as not maintainable though, the suit itself was not decided. Therefore, there was no appealable decree in existence at the time when the revisional jurisdiction was invoked. Whereas, in the case at hand there was already an appealable decree in existence when the revisional powers were invoked. In fact, the review application sought review of an appealable decree and not just a mere order that might have been passed by the court in the course of a suit. The revision was filed against rejection of that review application. At that stage, when the review application was rejected, the aggrieved party had a right to question the decree of the trial court in an appeal. In these circumstances, the question that needs determination is,



whether, against an order of the Subordinate Court rejecting on merits an application for review of an appealable decree, a revision be entertained.

24. In DSR Steel Pvt. Ltd. v. State of Rajasthan, this Court had the occasion to examine different situations which may arise in relation to orders passed in a review petition. While dealing with those situations, it was observed:

“25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question

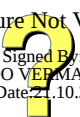


of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.”

(Emphasis supplied)

25. What is clear from the above observations is, that where the review is allowed and the decree/order under review is reversed or modified, such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated, reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law. But where the review petition is dismissed, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

26. Apart from above, there is another reason also for a revisional court not to entertain a revision against an order rejecting on merits an application for review of an appealable decree, which is, if the revisional court sets aside or modifies or alters a trial court's decree, the decree of the trial court would merge in the one passed by the revisional





court. In consequence, the right of the party aggrieved by the trial court's decree to file an appeal would get affected. Further, there may be a case where a person is aggrieved by a finding of the trial court on any issue, even though the trial court's decree may be in its favour. In that scenario, if there is an appeal by a party aggrieved by the decree, that person would have a right to take an objection against the adverse finding with the aid of the provisions of Order XLI, Rule 22 of the CPC, but in the event of there being no appeal against the decree, such a person would lose its right to take an objection, under Order XLI, Rule 22 of the CPC, against that adverse finding.

27. No doubt revisional powers may be available on limited grounds, primarily to correct jurisdictional errors, but still it is a part of the general appellate jurisdiction of the High Court as a superior court. In *Shankar Ramchandra (supra)*, this Court observed:

“6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal.”

34. On perusal of the aforesaid judicial dicta, it is evident that the revision powers of the High Court are limited to the question of



jurisdiction, whereby, the decision of the subordinate Court on the questions of law and fact not touching its jurisdiction can be termed final.

35. The aforesaid decisions given by the Hon'ble Supreme Court also clarifies that the assumption of jurisdiction by the subordinate Court, not permitted under the law, can be interfered by the High Court under the revisional powers conferred by Section 115 of the CPC.

36. Therefore, the foregoing discussion clarifies the question of scope and ambit of the powers conferred to the High Courts under the said provision of the CPC.

37. Now, coming to the merits of the case, the learned Trial Court had allowed the application filed by the respondent under Section 10 of the CPC and held that the partition suit pending before the Motihari District Court, Bihar constitute as a previous suit, a condition necessary to be met for stay of the subsequent suit. Before delving into the reasoning provided by the learned Court below, it is apposite for this Court to deal with Section 10 of the CPC and delineate the necessary ingredients for its applicability to stay a subsequent suit.

38. Section 10 of the CPC, which is also termed as *res sub judice* deals with the stay of civil suits where, the trial of a subsequent suit in which the matter in issue is directly and substantially the issue in the previously instituted suit between the same parties. The said provision is reproduced herein:

“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



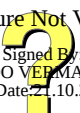
is pending in the same or any other Court in [India] have jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by 2[the Central Government 3 * *.] and having like jurisdiction, or before [the Supreme Court].*

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.”

39. As stated earlier, the abovesaid provision indicates that in order to attract stay on the subsequent suit, there have to be two suits between the parties, in which the matter in the issue is also directly and substantially the issue in the previously instituted suit. The use of the expression ‘suit’, is material, in as much as, the substantive rights of the parties, are decided by a Court of the competent jurisdiction, in a suit.

40. The scope and test of the applicability of Section 10 of the CPC, has been explained by the Hon’ble Supreme Court in “**National Institute of Mental Health & Neuro Sciences vs. C Parameshwara, (2005) 2 SCC 256**, where the applicability of the said section was tested between the suit instituted in a civil court *qua* the proceedings before the Labour court in the following manner:

“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 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 contradistinction 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 the subject-matter in both the proceedings is identical.”

41. In **Aspi Jal v. Khushroo Rustom Dady Burjor, (2013) 4 SCC 333**, the Hon'ble Supreme Court reiterated the ratio laid down in the previously referred judgment and held as under:

“9. Section 10 of the Code which is relevant for the purpose reads as follows:

“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 having 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.”

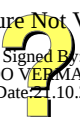
From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a court to which provisions



of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10 i.e. “no court shall proceed with the trial of any suit” makes the provision mandatory and the court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject-matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

10. *The view which we have taken finds support from a decision of this Court in National Institute of Mental Health & Neuro Sciences v. C. Parameshwara [(2005) 2 SCC 256] in which it has been held as follows: (SCC pp. 259-60, para 8)*

“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 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





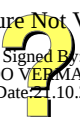
same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. 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 contradistinction 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 the subject-matter in both the proceedings is identical.”

42. A perusal of the above judgments makes it clear that the said Section 10 would apply only if the matter in the subsequent suit is wholly and substantially identical to the previous suit.

43. Thus, from the aforesaid judgments, the following essential ingredients for allowing the application and staying the proceedings under Section 10 of the CPC can be made out-

- i) There must be two suits;
- ii) The parties to both the suits must be same or are litigating under the same title or claim;
- iii) The matter in the issue should be in the previous suit, directly and substantially both.
- iv) The previously instituted suit must be pending.

44. For any party to succeed in the claim under Section 10 of the CPC, the aforesaid essential ingredients need to be satisfied. For the same, it is pertinent for this Court to refer to the material on record to examine whether the said conditions were met in the application filed by the





respondents before the learned Court below. The relevant parts of the application filed before the learned Trial Court are as under:

“4. That it is to state that all parties to the present suit are family members and the suit is instituted for seeking partition of certain properties, belongs to demised husband of Defendant No.1 and father of Plaintiff as well as all defendants (except to defendant no. 1) i.e. of Late Shri Barj Bihari Prasad.

5. That it is respectfully submitted that much prior to the filing of aforementioned suit for seeking partition by the Plaintiff, the applicant / Defendant No. 5 has instituted a consolidated suit for partition bearing Partition Suit. No. 71 of 2018, in respect of all properties belongs to Late Shri. Barj Bihari Prasad in the Hon'ble Court of Sub-Judge, Motihari District Court, Bihar Certified Copy of aforesaid suit for partition, preferred by the Applicant / Defendant No.5, is annexed herein as Annexure A-1.

6. That it is submitted that the Applicant / Defendant No.5 has preferred the aforesaid suit, by not merely including all properties belongs to Late Shri Barj Bihari Prasad but also duly impleaded all persons, including plaintiff and Defendant No. 1 to 4, as proper and necessary party, in the said suit for partition.

7. That it is pertinent to mention here that it is apparent from the record that the suit for partition was instituted applicant/defendant no. 5 herein, pending adjudication before the Hon'ble Court of Sub Judge, Motihari District Court, Bihar, was instituted on 28.02.2018.

8. That it is respectfully submitted that the records of both the matters/suit i.e. (i) Suit for partition pending adjudication before this Hon'ble Court, suit bearing no. 876/2018 titled as "Kumari Laxmi Vs Mrs. Rama Devi & Ors" and (ii) Suit for Partition pending adjudication before the Court of Sub Judge, Motihari, Bihar bearing Partition Suit no. 71/2018 titled as "Devashish Kishore Vs Kunal Kishore & Ors." reveals that the parties in both suits are same as well as the nature of suit, directly involving similar



issue of partition. Further, the present suit has been instituted on 14.03.2018 and the suit before the Court of Sub Judge, Motihar, Bihar was instituted on 28.02.2018. 9. That without prejudice, it is submitted that the present suit is an apparent abuse of process of law as the Plaintiff has preferred the present suit being well known to the fact of institution of suit for partition by the defendant no. 5/ Applicant.

10. That it is respectfully submitted that the adjudication of present suit may cause recording of conflict findings on issues, which are substantially similar in both the suits. Further, the adjudication of present suit would lead to adjudication of two parallel trials.”

45. On perusal of the aforesaid paragraphs of the application, it is evident that the respondents had argued for stay of the suit on the ground of a partition suit filed by the respondent no. 5 for the partition of the estate of the deceased before the Trial Court in Bihar, however, the application is silent on the aspect of whether the properties situated in Delhi were duly included in the said suit or not.

46. As per material on record, the properties of the family situated in Delhi were neither included in the partition suit filed before the Bihar Court, nor disclosed by any of the respondents in the subsequent proceedings. Therefore, the said pending suit *prima facie* cannot be termed a ‘previous suit’.

47. At this juncture, it is apposite to refer to the impugned order, the relevant portion of which is reproduced herein:

“4, On the other hand, learned counsel for plaintiff argued that the word "Court" used in Section 10 CPC means a court of competent jurisdiction. It was also argued by learned counsel for plaintiff that since in Bihar suit, the defendant



no. 5 did not include the Delhi properties left behind by the deceased. Section 10 CPC cannot come into play. Learned counsel for plaintiff also argued that Bihar suit pertained only to movable properties, but on being interjected, counsel for plaintiff fairly admitted that Bihar suit covers immovable properties as well. Since Bihar suit does not cover Delhi property, according to plaintiff, the provisions under Section 10 CPC do not come into play.

5 Learned counsel for defendant no. 1 also addressed on the application, pointing out that in the present suit, plaintiff is also trying to, play fraud in so far .as the plaint refers to a property of Mall Road but the documents annexed pertained to a property of South Extension.

6. In the course of arguments, learned counsel for defendant no. 5 referred to the judgment of Hon'ble Madras High Court in case titled R. Palanisami vs R. Subrarnania Gounder, SA 1295 of 2008 decided on 22.04.2009 holding that there cannot be a piecemeal partition and in a partition suit all necessary parties should be added. Learned counsel for plaintiff did not dispute the legal proposition that partition of the estate left behind by the deceased cannot be carried out in piecemeal and the entire property left behind by the deceased has to be considered as a single estate.

7. At this stage, learned counsel for plaintiff seeks to clarify that according to him, the property in Delhi has not been divided by metes and bounds therefore cause of action is still surviving {dictated verbatim as submitted by learned counsel).. But that is not the question involved. It is Nobody's case that Delhi property already stood divided by metes and bounds. The proposition of law submitted by learned counsel for defendant no. 5. is to the effect that entire property, be it in Delhi or in Bihar, left behind by the deceased in the present case constituted single estate of the deceased which is subject matter of partition and the same cannot be split so as to seek piecemeal partition. To that effect, there is no challenge from the side of the plaintiff.

8. There is also a logic behind such interpretation. If partition is permitted in piecemeal manner, handled by



different courts, there can be a possibility of conflict of findings that must be prevented.

9. . Further, in the case of K. Ethirajan vs Lakshmi, Appeal (Civil) 8720 of 1997 decided by the Hon'ble Supreme Court of India on 26.09.2003, cited by learned counsel for defendant no. 5, the Hon'ble Supreme Court of India bserved thus:

"The argument that principle of res judicata cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject matter cannot be accepted The principle of res judicata under Section 11 of the Code of Civil Procedure is attracted where issues directly and substantially involved between the same parties in the previous and the subsequent suit are same - may be - in the previous suit only apart of the property was involved when in the subsequent suit the whole property is the subject matter".

I am conscious that in the above cited judgment, the Hon'ble Supreme Court of India was dealing with the principle of res judicata as stipulated under Section 11 CPC. But the issue of law dealt with by the Hon'ble Supreme Court of India was the analysis of the expression "directly and substantially in issue".

10. Coming to the argument of learned counsel for plaintiff that Bihar suit does not cover Delhi property, if that be so, Bihar suit will meet its logical conclusion. But till the Bihar suit which was admittedly filed prior in point of time meets its logical conclusion, the present suit, which is subsequent suit, must wait.

xxx xxx xxx

12, Since a suit seeking partition of the estate left, behind by Shri Brajbihari Prasad was filed earlier in' a court in Bihar on 28.02.2018, the present suit filed for the same relief cannot proceed further in view of mandate laid down by Section 10 of the Code.

13 Therefore, the application under consideration is allowed and proceedings of the present suit are stayed till decision of Bihar suit. File be consigned to records with liberty to both



sides to seek revival of this suit, if so advised at appropriate stage.”

48. This Court fails to understand the disregard by the learned Trial Court to the aspect of inclusion of properties situated in Delhi in the suit before the Bihar Court while adjudicating the application *qua* Section 10 of the CPC, filed by the respondent no. 5.

49. Upon perusal of the impugned order, it is crystal clear that the learned Court below failed to deal with the aspect of non-inclusion of the properties in the jurisdiction of the Courts situated in Delhi. The paragraph 7 of the impugned order also makes it clear that even though the Court opined on the non-inclusion of the properties situated in Delhi, however, did not adjudicate the said question with regards to the said issue.

50. Even though, the impugned order briefly talks about the non-inclusion of the said properties, it remained silent on the aspect of whether the said properties should be included or not, however, the learned Court below supplemented its decision on the reasoning that the piece-meal partition is bad and can create a situation of Hotch-pot, a situation which should be avoided by the Hon’ble Supreme Court.

51. The material on record, i.e., the suit filed by the petitioner suggests that the respondents had failed to include the properties situated in Delhi, and did not subsequently plead for said inclusion in the original partition suit before the Bihar District Court. Therefore, creating a right to file for another suit for partition of the said left properties in the competent jurisdiction.



52. It is no doubt a suit in respect to more than one property situated in jurisdiction of different Courts can be instituted in a Court within local limits of jurisdiction, where one or more properties are situated provided that the suit is based on same cause of action with respect to the properties situated in jurisdiction of different Courts, however, the principles laid down by the Hon'ble Supreme Court also provides for subsequent partition of the left out properties.

53. It is true that the general rule prohibits partial partition as it could create multiplicity of proceedings and different Courts may end up with conflicting findings. However, in certain cases, an exception is created, partial partition has been permitted. Therefore, the learned Court below ought to have analysed the facts and then only should have decided on the application filed by the respondents.

54. The hypothesis of departure from the general rule has been examined by the Hon'ble Supreme Court in ***B.R. Patil v. Tulsa Y. Sawkar***, 2022 SCC OnLine SC 240, whereby, the Hon'ble Supreme Court referred to the authority regarding the said issue and held as under:

“10. This is the state of the pleading and evidence in support of the existence of the property other than what has been scheduled by the plaintiffs and for which partition is sought. It is true that the law looks with disfavor upon properties being partitioned partially. The principle that there cannot be a partial partition is not an absolute one. It admits of exceptions. In Mayne's 'Treatise on Hindu Law & Usage' 17th Edition, Paragraph 487, reads as follows:

“487. Partition suit should embrace all property - Every suit for a partition should ordinarily embrace all joint properties. But this is not an inelastic rule which admits circumstances of a particular case or the interests of justice



so require. Such a suit, however, may be confined to a division of property which is available at the time for an actual division and not merely for a division of status. Ordinarily a suit for partial partition does not lie. But, a suit for partial partition will lie when the portion omitted is not in the possession of coparceners and may consequently be deemed not to be really available for partition, as for instance, where part of the family property is in the possession of a mortgagee or lessee, or is an impartible Zamindari, or held jointly with strangers to the family who have no interest in the family partition. So also, partial partition by suit is allowed where different portions of property lie in different jurisdictions, or are out of British India. When an item of property is not admitted by all the parties to the suit to be their joint property and it is contended by some of them that it belongs to an outsider, then a suit for partition of joint property excluding such item does not become legally incompetent of any rule against partial partition.”

55. In ***Pradeep Chand Sharma v. Budhi Devi***, 2017 SCC OnLine HP 1911, the Co-ordinate Bench of the Himachal Pradesh High Court dealt with the said aspect and held as follows:

“20. However, even suits praying for partial partition have also been recognized under some of the following circumstances, namely:

- (i) where different portions of family property are situated in different districts, separate suits for partition for lands of each district may be brought;*
- (ii) it may be allowed when portion of joint property at the time of the suit for partition is incapable of partition;*
- (iii) where the property left out from its very nature impartible;*



- (iv) where the property is held jointly with strangers who cannot be joined as parties to a general suit for partition the same may be left out; or
- (v) where the co-owners by mutual agreement decide to make partition of the joint family property leaving some portion in common. (Refer : *Harey Harey Singha Chowdhury v. Hari Chaitanya Singha Chowdhury* 40 CWN 1237; *Mansharam v. Ganesh* 17 CWN 521; *Panchanan Mallick v. Shiv Chandra* ILR 14 Cal 805; *Balaram v. Ramchandra* ILR 22 Bom 922; *Abdul Karim v. Badruddin* ILR 28 Mad 216).

21. Therefore, it is not in all events that partial partition is impermissible.

22. The purpose and object for insisting in a suit for partition that the entire joint property owned by the co-owners whether as joint tenants or tenants-in-common, must be brought into hotchpot in division is to ensure that much inconvenience is not caused to the opposite parties who are also co-heirs, because such suits lead to multiplicity of litigation and consequent harassment, inconvenience and endless litigation.

23. The rule against partial partition is only one of equity and convenience. Therefore, it is better to limit the rule in its application to properties over which the parties have community of interest and unity of possession. If partial partition can be had without inconvenience to the other sharers and if it will not stand in the way of equities being adjusted, it is not necessary to insist that all properties will have to be scheduled.

24. Thus, what can be taken to be settled is that there is no legal inhibition if there are justifying features in allowing a suit for partial partition. However, normally a distinction has to be made between partition of joint family property (joint tenants) and partition among tenants-in-common. The reason for the distinction is that in the former case, unlike in

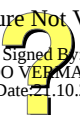


the latter case, there is unity of title, interest and possession over each and every item of property and hence the normal rule is that partition should be of entire properties of the joint family. In the case of partition between co-parceners (in respect of joint family properties) the entire property must be thrown into hotchpot except for certain well recognized exceptions.”

56. On perusal of the aforesaid, it is crystal clear that the partial partition of the properties is not strictly prohibited, rather has been advised and considered useful for convenience of the parties to the partition sometimes. The abovesaid judicial *dicta* also makes it clear that the suit filed for partition should embrace the properties left by a deceased, however, the non-inclusion of certain properties grants right to the aggrieved party to file for a subsequent suit of partition for the left-out properties.

57. Now, advertent to the impugned order again, this Court appreciates the principles cited by the learned Trial Court which talks about prevention of a hotchpot situation during the partition of properties situated in multiple jurisdictions, however, this Court fails to understand the non-referral to the settled position regarding departure from the said rule when the same is deemed necessary such as in the instant case.

58. From the available records, it is also clear that the respondents have claimed the Delhi properties to be owned by the respondent no.1, i.e, wife of the deceased. Even though the said contention raises questions about the maintainability of the suit filed by the petitioner, the revisional powers conferred to this Court does not permit this Court to get into the fact-finding exercise. Therefore, the same can only be dealt with by the learned Court below at an appropriate stage during the course of the trial.





CONCLUSION

59. The present case raises the question of whether a suit filed for partition of properties not included in the previous partition suit can be kept in abeyance under Section 10 of the CPC.

60. In the foregoing paragraphs, it is made out that even though the parties to the suit are the same, the other necessary conditions also need to be met for applicability of the said section in the subsequent suit.

61. It is no doubt that the Hon'ble Supreme Court, in several judgments has opined for partition of the entire estate in one suit, and has provided jurisdiction to the competent Courts if the property is situated in more than one state, however, the non-inclusion of some of the properties in the original partition suit filed before any Court of a competent jurisdiction will not automatically include all the properties left by the deceased in the original partition suit.

62. Therefore, in light of the aforesaid discussions of facts and law, it is hereby, held that the suit filed by the petitioner for partition of the properties situated in Delhi can continue, without creating an impact on the previous suit filed for partition of the estate left by the deceased in the state of Bihar and there is no need to stay the said suit.

63. Hence, the instant petition stand allowed and the impugned order dated 31st August, 2019, passed by the learned District Sessions Court (HQs), Tis Hazari, in Civil Suit bearing No. 876/2018 is set aside. Accordingly, the stay granted by the learned Court below under Section 10 of the CPC is vacated and the learned Trial Court is directed to



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continue with the hearing/trial of the above said Civil Suit, thereby, deciding the same.

64. In view of the aforesaid terms, the present revision petition stands disposed of along with pending applications, if any.

65. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

OCTOBER 20, 2023
DY/AV/RYP