

**Bablusing @ Jabeersingh Vs. Darbarsingh**

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**Court :** Mumbai Aurangabad

**Decided On :** Mar-05-2014

**Judge :** T.V. Nalawade

**Appeal No. :** Civil Revision Application No. 106 of 2012

**Appellant :** Bablusing @ Jabeersingh

**Respondent :** Darbarsingh

**Judgement :**

1) The revision is admitted. By consent, notice after admission made returnable forthwith. Both sides heard for final disposal.

2) The proceeding is filed against the order made by the learned 8th Joint Civil Judge, Junior Division, Nanded on Exhibit 65 in Regular Civil Suit No.515 of 2007. The suit is filed by present respondent against the applicants for relief of injunction. Present applicants filed Written Statement and then filed application at Exhibit 65 for dismissal of the suit or alternatively for staying the suit. It is the case of the applicants that in the past, present respondent, plaintiff, had filed Regular Civil Suit No.449 of 2001 in respect of the same subject matter for relief of injunction against Smt. Kusumtai Kagne. This suit came to be dismissed on 22-1-2009. Against this decision respondent preferred Regular Civil Appeal No.35 of 2009 in District Court and the appeal is still pending. It is the case of the applicants that in view of these circumstances, Regular Civil Suit No.515 of 2007 either

needs to be dismissed or needs to be stayed.

3) Present respondent filed say to the application. He has contended that though previous suit was filed against Kusumtai, cause of action against present applicants is different. It is contended that during pendency of the previous litigation Kusumtai prepared a bogus document in favour of present applicants and on the basis of that document present applicants are obstructing the possession of the respondent.

4) The learned Civil Judge has observed that the matter in issue in both the suits is different, the suits are between different parties and so the suit cannot be stayed. It is observed that as the decision given in the previous suit has not attained finality, present suit, RCS No.515 of 2007, cannot be dismissed.

5) It was mainly submitted by the learned counsel of respondent that revision against the aforesaid order is not tenable. He submitted that the order made by the learned Civil Judge Junior Division is not of the nature mentioned in Section 115 of the Code of Civil Procedure (for short, 'CPC'). He submitted that, as the order disposing of that application could not have disposed of Regular Civil Suit No.515 of 2007, the order does not fall under section 115 CPC. He has placed reliance on following reported cases.

6) In the case reported as **(2003) 6 SCC 659 (Shiv Shakti Cooperative Housing Society v. Swaraj Developers)** the Apex Court has discussed the provision of Section 115, CPC and the effect of amendment made to the said section in the year 1999. This Court has carefully gone through the ratio laid down by the Apex Court in the reported case. Only brief reference to the facts of the proceeding is made by the Honble Apex Court and it appears that revisions were filed in the High Court against orders made on applications filed for injunction and similar matters. Submission was made that the words 'other proceedings' mentioned in Section 115 CPC include such proceedings. In that context the Apex Court has made some observations. The decision given by the High Court that revision was not maintainable as even if the order was made in favour of the revision applicants on that application the same would not have finally disposed of the suit or other proceedings is upheld by the Apex Court.

7) Another case reported as **2009 (1) Bom. C.R. (Cri) 872 Panhala Hill Station Municipal Council v. Grand Hotel Pvt. Ltd. Mumbai** was cited. It is totally in different context.

8) One case reported as **2006 (2) Mh.L.J. 794 (Sadguru Constructions v. Smt. Jaimeet Kaur)** was cited. The facts show that there is discussion about section 10 of the CPC. Two suits were filed by different parties and the cause of action and also the reliefs claimed were not identical. It was a writ petition.

9) Another case reported as **AIR 1981 Delhi 332 (Grindlays Bank Ltd. vs. Hindustan Embroidery Mills)** was cited. The facts show that the parties in two suits were different and there it was held that subsequent suit cannot be stayed. It is further held that when section 10 CPC is not applicable, the Court should not use section 151 of the CPC.

10) As the question of tenability of revision is involved in the proceeding, the relevant provision of the CPC needs to be considered. Section 115 of the CPC reads as under:-

**115. Revision:-** (1) 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 things fit:

Provided that the High Court shall not, under this section vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation:- In this section, the expression 'any case which has been decided?' includes any order made, or any order deciding an issue in the course of a suit or other proceedings.?

11) No appeal is available against the order made by the learned Civil Judge and so there is no need to discuss the law developed on Section 115(2) of the CPC. The other part of provision shows that when there is question of jurisdiction, the High Court may make use of Section 115 provided that the order made or if had been made in favour of a party applying for revision would finally dispose of such suit or proceedings.

12) The facts of the present case show that the previous suit filed by the present respondent is decided by the trial Court against the respondent and appeal filed against said decision is still pending in District Court. Present suit is filed against the applicants and not against the defendant of the previous suit. But admittedly the applicants are claiming the right through the defendant of previous suit, Smt. Kusumtai as they have purchased the property of Kusumtai. Copies of the plaint of two suits are available. The previous suit was filed in respect of Municipal House No.3/515 (new) situated in Survey Ho.34 of village Koutha, Tahsil and District Nanded. The same property is described as suit property in Regular Civil Suit No.515 of 2007 by the present respondent. In the previous suit present respondent had contended that he had purchased the suit property under registered sale deed dated 8-2-1991 from one Mahadu Baswante and since then he has been in possession of the property. Similar contention is made in subsequently instituted suit. In the previous suit defence was taken that the area shown in the sale deed executed in favour of the plaintiff was not available with the vendor in view of the acquisition of his property and also the sale of remaining property by him. It was contended that the vendor Mahadu was owner initially of 90 R out and out of that

70 R portion was acquired for construction of road by the Government and remaining 20 R portion was sold to one Mayadevi. Copy of document of conveyance in that regard was also produced. The trial Court held in the first suit that plaintiff failed to prove his possession over suit property. The aforesaid defence raised by Smt. Kusumtai was accepted by the trial Court. That decision is challenged by the present respondent by filing appeal and the appeal is pending in District Court. Thus, the plaintiff has filed subsequent suit even though he has knowledge about the transaction between present applicants and Kusumtai. The plaintiff could have requested to add present applicant in the previous proceeding in view of transaction between Kusumtai and present applicant and provision of section 146, CPC, but in stead of doing that, he filed separate suit against present applicants. Like in the previous suit, in the present suit also, relief of injunction only is claimed by the present respondent.

13) When there are circumstances like above, the provisions of section 10 of the CPC need to applied.

Section 10 reads as under :

**œ10. 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.?

14) From this provision it can be said that for application of this provision following conditions need to be satisfied:

(i) the matter in issue is directly and substantially in issue in previously instituted suit;

(ii) both the matters are between same parties or their privies. Here it needs to be kept in mind that a person who claims interests in subject matter by succession or purchase subsequent to the previous suit makes such person privy;

(iii) the two suits are pending in the same Court or different courts from India whether superior or inferior or coordinate and the court where previously instituted suit is pending is competent to grant relief claimed, in subsequent suit; and

(iv) both the parties are litigating under the same title in the suits.

15) The purpose behind the provision of Section 10 of the CPC is to avoid recording of conflicting findings on issues which are directly and substantially in issue in two suits. Though there is no bar to file the suit, there is a bar to try the suit under this provision and bar is created for the aforesaid purpose.

16) When there is a situation like the present one, Section 11 of the CPC also needs to be considered. At present there is decision of the trial Court given in injunction suit having findings against the present respondent and the same issues are directly and substantially involved in the subsequently instituted suit. Though the decision given in previously instituted suit has not become final, the principles of section 11 of CPC needs to be kept in mind as this provision needs to be liberally used. Section 11 CPC, relevant part read as follows :-

**œ11. Res judicata** :- 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 I :- The expression œformer suit? shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II :- . . . . .

Explanation III :-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other.

Explanation IV :-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V :- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI :- . . . . .

Explanation VII :- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII :- . . . . .?

17) The aforesaid provision shows that its scope is wider than the scope of the provision of section 10. The object of this provision is to limit the law suits and to ensure that there should be end to litigation. The object is also to see that a person is not vexed twice for the same cause.

18) Both the aforesaid provisions are mandatory in nature. When stay is granted to subsequently instituted suit and when the decision of the previously instituted suit comes out, it becomes final, the provision of section 11 of the CPC come into play to create bar to the trial of subsequently instituted suit. Thus, though the principles which can be found in section 10 and 11 are different the purpose behind these two sections is the same.

19) The aforesaid discussion shows that though by staying of suit, technically the subsequently instituted suit remains in existence and it is not disposed of as

required by section 115 CPC, when the Court decides that the suit needs to be stayed under section 10 CPC, it becomes clear that the decision which would be given in the previously instituted suit will be accepted in the stayed suit and at subsequent stage the bar of provision of section 11 will come into play. Thus, though not immediately, in future, subsequently instituted suit would get disposed of after the disposal of the previously instituted suit. In view of this circumstance, it cannot be said that the order would not fall under section 115 of the CPC. For these reasons, this Court holds that the order made by the learned Civil Judge falls under section 115 of the CPC and the revision is tenable against the said order. It also needs to be presumed that as the bar created by section 10 is mandatory in nature, it bars jurisdiction to try the suit when the conditions laid down in section 10 are satisfied.

20) The discussion made above shows that the learned Civil Judge has committed error in holding that the subject matter of the subsequently instituted is different, cause of action is different, parties are different and section 10 cannot be applied.

21) In the result, Civil Revision Application is allowed. The order made by the learned 8th Joint Civil Judge, Junior Division, Nanded on Exhibit 65 in Regular Civil Suit No.515 of 2007 is quashed and set aside. The application filed at Exhibit 65 by the present applicants is allowed with no order as to cost. Regular Civil Suit No.515 of 2007 is stayed in view of provision of Section 10 of the Code of Civil Procedure till the previously instituted suit, Regular Civil Suit No.449 of 2001 is finally decided.

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