

Arvind Kumar Vs. Smt. Umapati Devi and ors.

Arvind Kumar Vs. Smt. Umapati Devi and ors.

SooperKanoon Citation : sooperkanoon.com/132230

Court : Patna

Decided On : Jan-02-1997

Judge : S.N. Jha, J.

Appeal No. : Civil Revision No. 1957 of 1996

Appellant : Arvind Kumar

Respondent : Smt. Umapati Devi and ors.

Disposition : Application Dismissed.

Judgement :

S.N. Jha, J.

1. This Civil Revision is directed against the order by which the court below has refused to stay further proceeding in Title Partition Suit No. 57/95 Relevant facts are as follows.

2. Opposite party No. 1 has filed Title Partition Suit No. 57/95 seeking partition of her share in the properties left behind by one Ram Sewak Rai @ Bhola Rai. The petitioner claims the property on the basis of Will dated 10.11.94 which is said to have been executed by the said Ram Sewak @ Rai Bhola Rai in his favour. He filed a petition for being added as a party, having come to learn about the suit, on 5.2.96 which was allowed; It maybe stated that his mother had been impleaded as

sole defendant in the suit. After being added as defendant No. 2, the petitioner filed written statement stating about the aforesaid Will. He also stated that he has filed a Letters of Administration case (L.A. Case No. 111/95) seeking grant of letters of administration with respect to the said Will, which is pending in the court of District Judge, Patna. The plaintiff of the present suit has already appeared and filed objection in that case. An application was filed for stay of the present suit, i.e. TPS No. 57/95 under Section 10 read with Section 151, Code of Civil Procedure. The petition having been rejected by the impugned order he has come in Civil Revision to this Court.

3. It is admitted position that TPS No. 57/95 was filed earlier in point of time on 4.2.95. The Letters of Administration case was filed later on 7.9.95. Section 10 of the Civil Procedure Code contemplates trial of any suit if the matter in issue in that suit is also directly and substantially in issue in a 'previously instituted suit'. The partition suit having been instituted earlier, Section 10 in terms cannot be said to be applicable. In other words, under the adjudicated.

8. Another test to decide the applicability of Section 10 is whether the decision in the former suit would operate as *res judicata* or not in the plaintiff of subsequently instituted suit. Now if the partition suit is stayed, and the probate /letters of administration case is allowed to be disposed of, can said provision the trial of the said suit cannot be stayed till disposal of the L.A. case. The court has nevertheless the power to stay the suit under Section 151 of the Code.

4. Counsel for the petitioner submitted that the issues in the two suits are the appeals by the State Commission. Similarly, the National Commission under Section 21, has been given, in addition to original jurisdiction power to entertain an appeal against the order of the State Commission or to call for the records and pass appropriate orders, in circumstances enumerated under clause (b) thereof, in any consumer dispute pending before or decided by any State Commission. By operation of Section 22, the power of a civil court as specified in Sub-sections (4), (5) and (6) of Section 13 of the Act are vested in the National Commission for disposal of any complaint or proceedings before it; the procedure to be followed by it shall be such as may be prescribed by the Central Government. Under Section

23 of the Act, remedy of appeal to this Court is made available to any person aggrieved by an order of the National Commission. Section 24 attaches finality to every order of the District Forum. State Commission or the National Commission if no appeal is preferred within specified time. However, that is subject to any judicial review under Article 226 or 32 of the Constitution. Section 25 gives teeth to the orders passed by the District Forum, State Commission and National Commission, every order can be enforced in the same manner as if it were a decree or an order made by a Court in a Civil suit pending therein; it shall be lawful for the District Forum, State Commission or National Commission to send its orders, in case of its inability to execute it, for execution to the appropriate executing court. It is obligatory for the executing court to execute the order treating it to be a decree or order of a Court sent to it for execution. For specific enforcement of the Act, Section 27 gives sanction of the State for imposing penalties against the traders or persons against whom a complaint is made if fails to comply the order passed by the aforesaid District Forums, National Commission or State Commission, as the case may be.

5. Thus, it would be seen that the District Forums, State Commission and National Commission have all the trappings of a civil court and judicial authority. The proceedings before them are legal proceedings. Similar controversy was considered by this Court in *The Bharat Bank Ltd. Delhi. The Employees of the Bharat Bank* : (1950) NULLLLJ921SC , and in *Associated Cement Companies Ltd. v. P.N. Sharma and Anr.* : (1965) ILLJ433SC . In *Sarojini Ramaswami v. Union of India* (1992) 4 SCC 501 : 1992 AIR SCW 2683; one of us, K. Ramaswamy, J. had dealt with this aspect of the matter and held thus:

The Parliament while considering the motion for removal of the Judge for deciding whether to adopt the motion or not takes into consideration the report as well as the dissenting opinion, if any, of the third member of the Inquiry Committee in case the majority opinion is that the Judge is guilty, along with the entire evidence received by the Inquiry Committee on which the finding of guilt of the Inquiry Committee is based. No doubt, the Parliament does not substitute its finding for that of the Inquiry Committee or supersede it in case it decides not to adopt the motion by the requisite majority so that the motion for removal of the Judges fails

and the proceedings terminate but in doing so it does take the decision to not adopt the motion because it declines to accept and act on the finding of guilty" appropriate that the probate case be disposed of first and so long as that is not disposed of, the proceeding of the partition suit should be stayed.

6. In *Dr. N.P. Tripathi v. Dayamanti Devi* 1987 BLJ 590 : 1987 PLJR 724, a Division Bench of this Court had the occasion to consider the question of stay of suit for eviction pending disposal of a suit for specific performance of contract. The defendant of the eviction suit had filed a suit for specific performance of contract making out a case that the landlord had entered into an agreement with him for sale of the property. He thus took the defence that by virtue of the aforesaid agreement, in the event his suit for specific performance contract is decreed he cannot be called a tenant and no decree for his eviction can be passed. On these premises, he filed application for stay of the eviction suit under Sections 10/151 the Code. This Court held that the matters directly and substantially in issue in the two suits are not the same and therefore Section 10 of the Code is not attracted. While in the eviction suit the landlord has to prove the ground of eviction, such as default, personal necessity, and ownership of the property is not to be decided either indirectly or directly and even substantially, in suit for specific performance of contract the plaintiff has to prove the existence of enforceable contract. The issues in the two suits are therefore different and are not substantially the same. In coming to the aforesaid conclusion their Lordships relied upon judgment of the Bombay High Court in *Jai Hind Iron Mart v. Tulsiram Bhagwandas* : AIR1953 Bom117 wherein the Bench consisting of Chagla, C.J. and Gajendragadkar, J. had observed as follows:

Section 10 does not contemplate an identity of issues between the two suits, nor does it require that the matter in issue in the two suits should be entirely the same or identical,. What the Section requires is that the matter in issue in the two suits be directly and substantially the same, and proper effect must be given to the language used by the Legislature in Section 10 that the identity required is a substantial identity. There must be an identity of the subject-matter, the field of controversy between the parties in the two suits must also be same, but the identity contemplated and the field of controversy contemplated should not be

identical and the same in every particular but the identity and the field of controversy must be substantially the same.

7. In the above background of legal position the question to be considered is whether partition suit should be stayed pending disposal of probate/letters of administration case. There cannot be any doubt that the issues which directly and substantially arise for decision in the two suits are not the same or even similar. While in the partition suit, the plaintiff has to prove unity of title and possession the probate/letters of administration case the propounder of the Will has to prove that the Will is genuine and that the testator has executed the same in sound state of mind. Questions relating to title are not to be adjudicated.

8. Another test to decide the applicability of Section 10 is whether the decision in the former suit would operate as *res judicata* or non-suit the plaintiff of subsequently instituted suit. Now if the partition suit is stayed, and the probate/letters of administration case is allowed to be disposed of, can it be said that the grant of probate/letters of administration will non-suit the plaintiff and/or the findings recorded therein will operate as *res judicata*? The plaintiffs of the partition suit can still show that there was unity of title and possession between the parties. In fact, it may well be that a testator might execute a Will in respect of property beyond his share or a property which does not at all belong to him. The Will may not even contain the details of the property. The testator might execute a Will in respect of his entire undefined share in the joint-family property. It therefore cannot be said that grant of probate/letters of administration will non-suit the plaintiff of a partition suit. In fact, as a proposition of law, the grant of probate/letters of administration will abide by the result of the partition suit, the only matter of consequence being that the legatee, i.e. the propounder of the Will will be entitled to claim whatever belonged to the testator and has been given to him under the Will.

9. The thrust of the argument of the Counsel for the petitioner was that field of controversy, that is, the subject matter of the two suits/proceedings being the same the partition suit should be stayed. I am afraid it is not possible to accept this submission. The test for deciding the applicability of Section 10, *inter alia*, is

whether issues directly and substantially arising in the two suits/proceedings are substantially the same and not whether they relate to the same field/subject matter of dispute.

10. Following, thus, the law laid down by this Court in Dr. N.P. Tripathi's case (supra) the impugned order refusing to stay the proceedings in the partition suit cannot be said to be erroneous.

11. The revision application, in the circumstances, is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com