

Bijendra Kumar and Others Vs. Basant Kumar

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Court : Allahabad

Decided On : Aug-11-1993

Reported in : AIR1994All81

Judge : A.K. Banerji, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 10

Appeal No. : Civil Revision No. 117 of 1993

Appellant : Bijendra Kumar and Others

Respondent : Basant Kumar

Advocate for Def. : Shri. Y. S. Vohra

Advocate for Pet/Ap. : Y.S. Bohra, Adv.

Judgement :

ORDER

1. This revision is directed against the order dt. 3rd Dec., 1992 passed by the Civil Judge, Meerut deciding issue No. 2 against the defendant applicants and holding that the trial of Suit No. 80 of 1990 is not liable to be stayed under S. 10, C.P.C.

2. Briefly stated, the facts of the case so far as relevant for the purposes of the present revision are that Suit No. 947 of 1985 was filed by Smt. Savitri Devi, widow of Ghanshyam Singh against Smt. Santosh Kumari, widow of one

Swatantra Kumar and Ved Singh (father of Smt. Santosh Kumari) for permanent injunction restraining the defendants from illegally entering upon the residential premises of the plaintiff situated at 12, Tara-puri, Harihar Khera, Lisari Road, Meerut and not to take possession of the same directly or through the police without adopting adequate legal recourse. The plaintiff claimed to be the sole owner of the said property. In the written statement Smt. Santosh Kumari, defendant in the said suit, inter alia denied that the plaintiff was the sole owner of the property in question and claimed that the property was joint family property of which her deceased husband Swatantra Kumar was a member. She claimed 1 / 5th share in the property. A specific issue was framed in the suit to the effect whether the plaintiff was the sole owner in possession of the disputed house and if so to what effect?. The trial court found that the plaintiff, Smt. Savitri Devi, had failed to prove her case regarding sole ownership and consequently dismissed the suit. Savitri Devi filed appeal No. 324 of 1988 before the lower appellate court which was allowed by the XIII Additional District Judge, Meerut by judgment and decree dt. 24-9-1990, The learned Additional District Judge held that the plaintiff, Savitri Devi, was the sole owner of the disputed house. The defendant, Smt. Santosh Kumari, filed a second appeal being Second Appeal No. 1848 of 1990 before this Court which is still pending.

3. In the meantime, the plaintiff opposite party in the present revision, namely Basant Kumar (minor) filed Suit No. 801 of 1990 through his mother and guardian Smt. Santosh Kumari, for partition of the movable and immovable properties claiming 1 / 5th share in the properties. The said suit was filed alleging that the plaintiff's father namely, Swatantra Kumar, who was the son of the Ghanshyam Singh and was dead, had 1/5th share in the joint family property along with his three brothers namely, Brijendra Kumar, Rajendra Kumar, Jitendra Kumar and their mother, Smt. Savitri Devi, who were arrayed as defendants in the said suit. The defendants of the said suit namely, the present applicants, filed written statement denying the plaintiff's allegations and, inter alia, alleging that the present suit was liable to be stayed under the provisions of S. 10, C.P.C. in view of the decision of the appellate court in appeal No. 324 of 1988 arising out of suit No. 947 of 1985. On the pleadings of the parties, apart from other issues, a specific issue being issue No. 2 was framed by the trial court to the effect whether the

present suit No. 801 of 1990 was liable to be stayed under S, 10, G.P.C. This issue was tried as preliminary issue and decided in the negative against the defendants Brijendra Kumar and others. Feeling aggrieved, the said defendants have preferred the present revision before this Court.

4. I have heard Shri Y. S. Vohra, learned counsel for the defendant-applicants and Shri B. Dayal, learned counsel appearing for the plaintiff-opposite party.

5. The main submission of the learned counsel for the defendant-applicants is that the trial court has manifestly erred in holding that the trial of the subsequent suit was not liable to be stayed under S. 10, C.P.C. It was contended that the main issue in the present case was whether Smt. Savitri Devi was the sole owner of the disputed house and whether the present plaintiff had any right, title or interest therein. The lower appellate court while deciding appeal No. 324 of 1988 which arose out of suit No. 947 of 1985 had held that Smt. Savitri Devi was the sole owner of the house in dispute. This being the main and substantial issue between the parties will have a direct bearing on the subsequent suit now filed by Basant Kumar and hence until the second appeal is decided by the High Court the proceedings of the suit was liable to be stayed.

6. To appreciate the argument of learned counsel for the applicants, it would be appropriate to notice the provisions of S. 10, C.P.C. which read 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'

7. Under this section, a Court is prohibited from proceeding with the trial of a suit where 3 conditions exist, namely (i) where there is a previously instituted suit between the same parties, (ii) where the matter in issue is directly and substantially the same in both the suits, and (iii) where a suit is pending between

the same parties, or between parties under whom they or any of them claim litigating under the same title. Taking into consideration these requirements present no difficulty. The earlier suit namely Suit No. 947 of 1985 is pending in Second Appeal No. 1848 of 1990 the proceedings of which can be treated to be in continuation of the proceedings of the said suit. For determining whether the second requirement exists in the present case, the Court has to draw its attention towards the pleadings in both the suits and determine what is the matter directly and substantially in issue in the two suits. The matter in issue 'means all the material disputed questions which arise in the suit. So far as the pleadings of the two suits are concerned it will be seen that in suit No. 947 of 1985 only three issues were framed and the main issue was whether Smt. Savitri Devi, the plaintiff of that suit, was the owner of house No. 12, Tarapuri, Harihar Khera, Lisari Road, Mee-rut, as claimed by her. Suit No. 947 of 1985 was for permanent injunction restraining the defendants of that suit from taking illegal possession of the suit property whereas from the plaint of suit No. 801 of 1990 it appears that the said suit was for partition in which the plaintiff Basant Kumar was claiming 1/5th share in both movable and immovable properties. It is true that the immovable property is the same house which is disputed in suit No. 947 of 1985 but the movable properties for which partition was sought were not the subject matter of the earlier suit. The subject matter of the two suits, therefore, cannot be said to be the same. It is well settled that where the subject matter of two suits are not the same S. 10, C.P.C. will have no application merely because the main issue in both the suits is common. It is also well settled that the working test to determine the applicability of S. 10, C.P.C. is whether the decision in the previously instituted suit non suits the subsequent suit which would fall as a whole on the principle of res judicata. In the facts of the present case it cannot be held that on account of the decision in the previously instituted suit namely Suit No. 947 of 1985 the subsequent suit for partition will fall as besides the immovable property there are other properties involved in the subsequent suit. I am, therefore, of the view that in the facts of the present case the second requirement of S. 10, as mentioned above, is not fulfilled. Apart from what has been stated above, it would be noticed that suit No. 947 of 1985 was filed by Savitri Devi alone against Santosh Kumari and her father Ved Singh. The subsequent suit was filled by Basant Kumar against his uncles, namely

Brijendra Kumar, Rajendra Kumar, Jitendra Kumar and also against Smt. Savitri Devi who were arrayed as defendants No. 1 to 4 in the said suit.

8. The third requirement of S. 10 as mentioned by me above is also not fulfilled in the present case as the previously instituted suit was not between the same parties. Assuming that Basant Kumar, the plaintiff, was litigating under the same title, the same could not be said with regards to the defendants other than Savitri Devi of the subsequent suit. I, therefore, do not find any reasons to differ from the conclusion arrived at by the court below in holding that the subsequent suit is not liable to be stayed under S. 10, C.P.C.

9. As a result, the present revision is devoid of merits and the same is dismissed, but the parties shall bear their own costs of this revision.

10. Petition dismissed.

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