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**(2009) 03 CAL CK 0027**

**In the Calcutta High Court**

**Case No :** A.P.O. No. 245 of 2008, G.A. No. 3461 of 2008, A.P.O.T. No. 354 of 2008, G.A. No. 1975 of 2006, C.S. No. 84 of 2006

Greenacre Holdings Ltd. and Another

APPELLANT

Vs

M.K.G. Developers Limited and Others

RESPONDENT

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**Date of Decision :** 16-03-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 10, 112

**Citation :** (2010) 8 RCR(Civil) 733

**Hon'ble Judges :** Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

**Bench :** Division Bench

**Advocate :** Jayanta Mitra, Pratap Chatterjee, Ranjan Bachawat, Ritobrata Mitra, S.N. Pyne and Anirban Roy, for the Appellant; Anindya Kr. Mitra, Utpal Majumdar, Abrajit Mitra, Sanjoy Bose, Sarbopriya Mukherjee for the Respondents No. 1 and 2, Sayantan Bose, Kaushik Choudhury and Pranav Sharma for the Respondent No. 3, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Sankar Prasad Mitra, J.—This appeal has been preferred by the appellants against the respondents challenging the judgment and order dated 25th July, 2008 passed by Hon'ble Justice Sanjib Banerjee in G.A. No. 1975 of 2006 arising out of C.S. No. 84 of 2006 (M.K.G. Developers Limited & Anr. v. Greenacre Holding Limited & Ors.) asserting that the learned Judge should have sustained the applicants' claim u/s 10 of C.P.C. and instead of passing such an order, the learned Judge erroneously imposed cost of Rs. 3,000/- GMs. upon the appellants upon dismissal application being G.A. No. 1975 of 2006 arising out of C.S. No. 84 of 2006. According to the appellants the Hon'ble Judge should have held that the suit was not maintainable because it was mala fide, vexatious and harassing and liable to be dismissed. According to the appellants the order so passed by the learned Judge should be set aside with the observation that it was wrong in law as well as in facts.

2. It appears from the order dated 25th July, 2008 that the learned Judge was pleased to dispose of five applications filed by the parties by a common judgment. G.A. No. 1726 of 2006 is the plaintiffs principal interlocutory application in aid of reliefs claimed in the suit. G.A. No. 1975 of 2006 is the application by the 1st and 4th defendants for disposal of the suit by directing the plaint to be taken off the file with an alternative prayer for stay of all proceedings in the suit. G.A. No. 2305 of 2006 is the second defendant's application for similar purpose. G.A. No. 1983 of 2007 is the plaintiffs' application for amendment which the plaintiffs seek to abandon with leave to pursue the subsequent amendment application being G.A. No. 553 of 2008. The principal relief claimed in the suit is for specific performance of an agreement for sale of a land at No.3 Barapulia Road, Nizamuddin East, New Delhi together with other reliefs. On the plaintiffs' application being G.A. No. 1726 of 2006 an ad interim order was made on June 16, 2006 requiring the parties to seek prior leave of Court before selling their respective shares in the suit property and such order was passed without prejudice, the rights and contentions of the parties in the proceeding pending before the Delhi High Court. The first defendant instituted C.S (O.S.) No. 719 of 2006 in the Delhi High Court on 16th March, 2006 seeking a decree for partition of the New Delhi property in two equal shares between the parties to that suit. In that suit the first plaintiff took out an application in the Delhi suit for stay of trial thereof on the ground that the Calcutta suit was the earlier suit and that the matter directly and substantially in issue in the subsequent Delhi suit were also directly and substantially in issue in the previous Calcutta suit. The applying defendants by filing an affidavit stated that:-

"2(v) The issues Involved in the applicant's suit before the Calcutta High Court being CS(OS) No. 84/2006 have no bearing on the plaintiff's present suit. It is submitted that the scope of the present suit is limited to the partition of the property bearing No.3 Barapulia Road, Nizamuddin East, New Delhi ("the property") which issue is not in dispute in the defendant's suit inasmuch as it is the applicant's own case in CS(OS) No. 84/2006 that the plaintiff herein is the joint owner of the property"

3. The application u/s 10 of the Code was dismissed by the Single Judge of the Delhi High Court on the ground that there was a previous application u/s 10 of the Code that the defendant in the Delhi suit had filed and withdrawn without any leave to apply afresh, which precluded the defendant from subsequently re-agitating the substance of the application that had been withdrawn and seeking a stay of the suit. The order was passed on 18th July, 2007.

4. The defendant in the Delhi suit carried the order of dismissal made in its second application u/s 10 of the Code in appeal. The appellate Court dismissed the appeal with cost by an order dated 20th December, 2001. The learned Appellate Court found that the Delhi suit had been filed earlier than the Calcutta suit. The Division Bench upheld the decision of the appellate Court. The learned Single Judge found that the Delhi suit was filed prior in point of time.

5. The applying defendants having found that the Delhi suit was a prior suit and on the basis of assertion of the first plaintiff in the Delhi application the matter directly and substantially in issue in the Delhi suit were also directly and substantially in issue in the present suit, the defendants here do not have to demonstrate anything else in this Court to stay the trial of this suit at the defendant's asking. The learned Single Judge, after analyzing Section 10 of the CPC and its application in the context of the cases filed by the parties one at Calcutta High Court and the other at Delhi High Court came to a finding that the subject matter of Calcutta suit is different from the subject matter in dispute in Delhi suit and the parties are not same and the issues involved in both the suits are not identical. The learned Judge also found that the Delhi High Court did not enter upon the substance of the first plaintiff's application u/s 10 of the Code, but, however, he found that the defendant in those proceedings were no longer eligible to urge the substance of the application upon having unconditionally withdrawn its previous application on the same substance. The order of the learned Single Judge of the Delhi High Court did throw any light on the merits of the substance of the defendant's challenge in those proceedings for the suit to progress to trial. It was found that the defendant in the Delhi suit could no longer raise the contention in view of the principle recognized in Order XXIII Rule 1 of the Code. That apart, the Division Bench found that the Delhi suit was the prior suit and thus, there was no question of the principle of Section 10 of the Code being involved to arrest the trial. Neither the Single Judge nor appellate Court found that the defendant in those proceedings had crossed the threshold to urge the substance of the ground for stay of the trial of the Delhi suit. Neither judgment can be read to be a pronouncement on either that the matters directly and substantially in issue in the Delhi suit were covered by the matters directly and substantially in issue in the Calcutta suit or that there was identity of the matters directly and substantially in issue in the two suits. However, the learned Judge considering the framing of both the suits, relief claimed therein and the parties involved, came to a finding that Section 10 of the C.P.C. cannot be invoked to arrest the trial of another suit and according he was pleased to dismiss the application with costs. Therefore, the impugned order dated 25th July, 2008 passed by the learned Judge dismissing the application being G.A. No. 1975 of 2006 arising out of C.S. No. 84 of 2006 filed by the appellants (plaintiff of CS(OS) 719 of 2006) should be set aside because according to the appellant the order was arbitrary and without any basis.

6. Learned senior Advocate, Mr. Jayanta Mitra, appearing for the appellant drawn our attention to the order so passed by the learned Judge submitted that the appellants' application for stay u/s 10 of the C.P.C. should be allowed by the Hon'ble Single Judge because the parties in both the suits are practically same and the subject matter involved in both the suits are almost same and issues involved in both the suits are practically identical. He therefore submits that it is a settled principle of law that even if the points are not raised in the trial Court it can be raised in the appellate Court if the points involved legal question and the

determination of such legal question does not require appreciation of facts. In this connection Mr. Mitra cited an unreported decision of the Division Bench of this Court in W.P. No. 1735 of 2002 where the learned Judges of the Division Bench relied upon the principle settled by the Apex Court in the case of Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, , which came to a conclusion that "when a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below". The Court, therefore, concluded that the point sought to be raised for the first time is really a pure question of law requiring investigation of no new or disputed fact and even if it is so, whether the defect, if any, vitiates the proceedings. Otherwise the appellate Court will not entertain any additional point sought to be raised in the appeal which was not raised earlier in the trial Court. Mr. Mitra submitted that the points not raised in the trial Court can be raised in the appellate Court if the subject matter relates to question of law and the appeal cannot be decided without taking such fact necessary for the purpose in absence of which the trial would be vitiated. Mr. Mitra further canvassed that the learned Court should have stayed the further proceeding u/s 10 of the C.P.C. as prayed by the appellant.

7. On the other hand, Mr. Anindya Kumar Mitra, senior Advocate, appearing for the respondents drawn our attention to a decision reported in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, . submitted that in view of Section 112 of C.P.C. (1908) points conceded in appeal before High Court the same points cannot be raised before the Supreme Court. Mr. Mitra further submits that where the contentions do not specifically urged in the High Court or in the statement of case filed by the appellant in the Supreme Court, will be allowed by the Supreme Court to urge if there are necessarily involved in the question which is the subject matter of the appeal. He therefore submits that before raising a new point in appeal without urging the same in the trial Court the appellate Court cannot entertained such points unless it relates to a question of law. He further submits that the question might arise in connection with the order passed by the Delhi High Court and an appeal is pending before the Supreme Court the fate of which is not known to the parties. Therefore, we are not interested to find out intricate question involved in that suit. Mr. Mitra drawing our attention to Section 10 of the C.P.C. submits that the principle of that Section is not applicable in this case. The said Section 10 of the C.P.C. relates to stay of suit which runs as follows:-

"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".

8. It is submitted by Mr. Mitra that the Delhi Suit was instituted prior to institution of Calcutta suit and the parties are "not same in both the suits and moreover the subject matter involved are different and issues to be decided in both the cases are not same or identical so as to invoke the provision of Section 10 of the C.P.C. In this connection Mr. Mitra relied upon the following decisions;

1. 88 Cal WN 949 (Adhish Chandra Sinha v. Hindusthan Gas & Industries Ltd. & Anr.)

2. Shaw Wallace and Co. Ltd. Vs. Bholanath Mandanlal Sherawala and Others,

3. AIR 1917 Cal 248 (Bepin Behary Mozumdar & Ors. v. Jogendra Chandra Ghosh & Anr.)

4. Karnataka State Forest Industries Corporation Vs. Indian Rocks,

9. Mr. Mitra referring to the principles settled in the above cases submits that the subject matter involved in both the suits are not same and the issues involved are not identical and that apart, the parties are not same. Therefore, the learned Single Judge had rightly rejected the prayer for stay claimed by the appellants. He therefore submits that the learned Judge for expeditious disposal of the case had directed both the parties to take steps in accordance with law and therefore the present appeal should be dismissed with a direction upon the parties to comply with the directions given by the learned Single Judge in his order dated 25th July, 2008.

10. In view of the argument advanced by the Learned Counsel for both the parties, we are under objection to consider the fate of the appeal. It is admittedly clear that CS(OS) 719 of 2006 was instituted by Greenacre Holdings Limited & Anr. v. M.K.G. Developers Ltd. & Ors. on 16th March, 2006 in Delhi High Court whereas C.S No. 84 of 2006 was instituted on 28th April, 2006 in Calcutta, High Court by M.K.G. Developers Ltd. & Anr. v. Greenacre Holdings Limited & Ors. In Suit No. 719 of 2006 the plaintiff claimed partition of the property situated at 3 Barapulia Road, Nizamuddin East, New, Delhi whereas in Suit No. C.S, 84 of 2006 the plaintiffs claimed relief under Specific Relief Act together with prayer for mandatory injunction. In Suit No. 719 of 2006 there are two parties, the plaintiff, Greenacre Holdings Ltd. and the defendant, M.K.G. Developers Ltd. On the other hand Suit No. C.S. 84 of 2006 plaintiffs are; (1) M.K.G. Developers Ltd. (2) Ishan Housing Projects Limited, and the defendants are (1) Greenacre Holdings Ltd. (2) Belvedere Commercial Ltd. (3) ITC Classic Finance Ltd. and (4) ITC Classic Real Estate Finance Ltd. A plain reading of the plaint of Suit No. 719 of 2006 would show that that it was a suit for partition with declaration of shares of the parties, namely the plaintiff Greenacre Holdings Ltd. and the defendant M.K.G. Developers Ltd. In Suit No. C.S. 84 of 2006 the relief

claimed is for specific performance of contract together with a prayer for injunction in Which there are two plaintiffs and four defendants and some of the defendants of Suit No. C.S. 84 of 2006 are not parties to Suit No. 719 of 2006. Therefore, the subject matter involved in the suit are different so also the parties. That apart, the issues involved in both the suits are not identical and, therefore, the decision in one case in respect of an issue will not operate as res judicata in respect of any issue of the other suit. Before granting any prayer u/s 10 of the C.P.C. the Court must see that provisions of Section 10 of C.P.C., can be applied to subsequent suit wherein the issues are identical and the subject matter involved in both the suits is also identical. This principle has been enunciated in Adhish Chandra Sinha's case (supra). The Court before taking a decision in the matter must see that the subject matter involving controversy is identical and the subject matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit. In the instant case, we find that the subject matter involved in both the suits are different and the issues are not identical not to speak of the parties mentioned therein. Relying upon the decision reported in Shaw Wallace & Company's case (supra) we must say that the expression "the matter in issue" in Section 10 has reference to the entire subject matter in controversy between the parties and the mere identity of some of the issues in both the suits is not sufficient to attract Section 10 and unless the decision of the suit operates as res judicata in the other suit it cannot be said that the matter in issue is directly and substantially the same in both the suits, that is to say the decision in one suit must non suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same. It is also noted in the principles of law enunciated in Bepin Behary Mozumdar & Ors. case (supra) the Court observed in that case that the operation of Section 10 of the C.P.C. when otherwise applicable is not excluded by the fact that the previously instituted suit has reached the stage of an appeal. The term matter in issue "refers to entire subject matter and not to any particular issue" the object of Section 10 of C.P.C. is to prevent simultaneous decision of the same matter. Therefore, when the requirements of Section 10 of C.P.C. are satisfied and order is to be passed directing stay as prayed in the application by the Court and no discretion is left.

11. Thus, considering the settled principles of law enunciated by our Apex Court as well as different High Courts including our High Court, we are of the view, that the conditions required to be fulfilled to get an order u/s 10 of the C.P.C. are wanting and therefore, the learned Single Judge had rightly rejected the prayer for stay of the appellant. Therefore, in our view, the order so passed by the learned Judge does not suffer from any defect and/or irregularity calling for interference by this Court and we find no merit in the appeal and it is accordingly dismissed. The order dated 25th July, 2008 passed by the learned Single Judge is hereby affirmed.

Pinaki Chandra Ghose, J.

12. I agree.