

(1986) 08 AHC CK 0047
In the Allahabad High Court
Case No : Civil Revision No. 295 of 1986

Mohd. Yusuf

APPELLANT

Vs

Ahmad Miya and Others

RESPONDENT

Date of Decision : 18-08-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : AIR 1987 All 335 : (1986) AWC 1037

Hon'ble Judges : V.K. Mehrotra, J

Bench : Single Bench

Advocate : Tarun Varma, for the Appellant;

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—Having heard learned counsel for the parties, I am of opinion that the impugned order dated April, 1986 deserves to be set aside. By this order, the trial Judge has directed stay of the subsequent suit of the applicant (O.S. No. 119 of 1985) till the disposal of suit No. 68 of 1977 filed by the first two opposite parties Ahmad Miya and Idu Miya. He has also rejected the prayer made by the present applicant for consolidation of the two suits under Rule 1 of Order IV-A, C.P.C.

2. An ex parte decree had been passed against the present applicant in suit No. 68 of 1977. The relief claimed in that suit is that the two plaintiffs, who are admittedly elder brothers of applicant Mohd Yusuf, were the exclusive owners of the property in suit That decree was later set aside by the trial Court The order was affirmed by this Court and, thereafter, by the Supreme Court in Nov., 1985. Ultimately, the suit was directed to be tried on merits. The relief sought in suit No. 68 of 1977 is one of declaration.

3. In suit No. 119 of 1985 the claim of applicant Mohd Yusuf is that he has 1/3rd share in the same property which is involved in suit No. 68 of 1977. On the basis of that claim, applicant Mohd Yusuf has sought a decree for accounting. He has

also claimed a decree restraining the defendants in his suit, namely, the plaintiffs of suit No. 68 of 1977, from letting out certain property and appropriating the rent thereof exclusively. An application for appointment of a Receiver has also been made by Mohd Yusuf in his suit No. 119 of 1985.

4. The trial Judge has taken the view that from the plaint of the two suits it was clear that the property involved in both the suits was the same and that the appropriate course would be to proceed with the trial of earlier suit No. 68 of 1977 in which the rights of the parties may be determined and the trial of suit No. 119 of 1985 should remain stayed till then.

5. It is common ground that written statements have not been filed by the defendants in any of the two suits. The trial Judge has proceeded to take the view that the controversy in issue between the parties in both the suits is substantially the same on the basis of the plaint allegations in the two suits. He has, without giving any reasons, in effect, taken the view that it would be inexpedient to consolidate the suits.

6. Normally the question whether the matter in issue in a previously instituted suit between the same parties is also directly and substantially in issue in a subsequent suit, is to be determined after the parties have disclosed their defence in the two suits. In exceptional circumstances it might be open to the Court, where both the suits are pending, to take into account the Allegations made in the plaint of the two suits. What is, however, usually insisted upon is that the question whether the issues in the two suits are substantially, the same, should be determined after disclosure of defence of the defendants in the two suits. Learned counsel for the contesting opposite parties (who are plaintiffs in Suit No. 68 of 1977) has not been able to bring to my notice any decision of this Court in which the Court may have approved the determination of the question in absence of written statements of the defendants in the two suits. He has drawn my attention to a decision of the Delhi Court in *C.L. Tandon v. Prem Pal Singh Rawat*, AIR 1978 Del 221 and to some observations in the decision of the Calcutta High Court in *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, to the effect that it might be possible that by looking at the plaint allegations of the two suits the Court comes to the conclusion that the matter in issue between the parties in the two suits is substantially the same. These two judgments have not laid down any principle of law which may support the practice approved by these Courts. In fact, in Delhi decision the learned Judge has himself observed that (in paragraph 5 of the report) "an application u/s 10 cannot be disposed of without the Court being clear as to what was the matter in issue in the two suits and the filing of the written statement with that end in view is usually insisted upon". To me it appears to be a preferable course that before a conclusion is arrived at on the question whether the matter in issue in the two suits is directly or substantially the same, the defendants should be required to put in their written statement. This course would bring out with precision the matter in issue in a suit and it would then be proper for the Court

to apply its mind to the question whether the later suit deserves to be stayed.

7. The question of consolidation of two suits would largely depend upon the identity of the subject matter, the parties and convenience in proceeding with the trial having regard to the nature of the evidence which is to be led in the suits and the precise controversy which arises for trial in the two suits. For such determination as well it is necessary that the parties to the two suits should disclose their cases in each of them to enable the trial Judge to come to a conclusion whether it would be expedient to try the two suits together.

8. In the instant case, the trial Judge did not await the stage of the filing of the written statement by the defendants in the two suits before considering the question whether the earlier of the two suits should be stayed u/s 10, C.P.C. Likewise, without going into the actual controversy arising between the parties on their pleadings in the two suits, the learned Judge, in effect, took the view that it is not expedient to consolidate the two suits. In both respects, the trial Judge committed an error of jurisdiction and his order cannot, therefore, be permitted to stand.

9. One of the factors, in addition to what has been said earlier, which the trial Judge failed to notice, was that the present applicant, in the suit filed by him had sought a decree for accounting and had made a separate application and prayer for appointment of a Receiver over the property on the basis that he was a co-owner of the property to an extent of 1/3rd thereof. Prima facie, the relief of accounting cannot be asked for by the present applicant in the earlier suit. He will have to wait for the ultimate disposal of the earlier Suit No. 68 of 1977 before he can, if his claim of being co-owner in the property is upheld, seek the relief of accounting. He will, obviously, have to wait for a very long time to be able to do so. This might result in irreparable injury to him. Viewed from this aspect as well, it is clear that the trial Judge should have required the parties to come out with their cases in the two suits and to have considered the desirability either of staying the suit filed by the present applicant till the disposal of the earlier suit or of trying the two suits together by consolidating them.

10. The revision is allowed and the order impugned in it is set aside. The trial Judge is directed to proceed in the matter in accordance with law in the light of the observations made above. In the peculiar circumstance of the case, I leave the parties to bear their own costs.