

(2010) 09 KL CK 0322
In the High Court Of Kerala
Case No : OP (C) No. 101 of 2010 (O)

N.X. Joseph

APPELLANT

Vs

Ancy Mini, Mrs. Reena Roy and N.X. Thomas

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2010) 09 KL CK 0322

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Shiju Vargheese, for the Appellant; No Appearance, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Petitioner filed O.S. No. 71 of 2005 against respondent Nos. 1 and 2 in the court of learned Sub Judge for specific performance of an agreement for sale in respect of 12 cents (shown as plaint A schedule in O.S. No. 365 of 2007). That suit was dismissed against which petitioner filed R.F.A. No. 45 of 2008 which is pending consideration in this Court. In the meantime respondent Nos. 1 and 2 filed O.S. No. 365 of 2007 against petitioner and respondent No.3 seeking a mandatory injunction to demolish the compound wall allegedly constructed by petitioner in the property admittedly belonging to him and which according to respondent Nos. 1 and 2 prevented their access to plaint A schedule (which is the subject matter of O.S. No. 71 of 2005). Petitioner filed I.A. No. 1532 of 2008 for stay u/s 10 of the CPC (for short, "the Code") in view of the pendency of R.F.A. No. 45 of 2008 against dismissal of O.S. No. 71 of 2005. That application was dismissed by learned Munsiff vide Ext.P7, order for various reasons including that reliefs prayed for in the suits are entirely different and circumstances do not warrant stay of O.S. No. 365 of 2007. Thereafter O.S. No. 365 of 2007 was decreed against which petitioner filed appeal. Appellate court allowed the appeal and remanded the case for trial. It is then that

petitioner filed Ext.P8, application (I.A. No. 2365 of 2009) again u/s 10 of the Code for stay of trial of O.S. No. 365 of 2007. That application was dismissed vide Ext.P9, order for the reason that I.A. No. 1532 of 2008 seeking same relief was dismissed by Ext.P7, order and so far as that order remained in force a second application for the same relief cannot be entertained. Petitioner challenges Ext.P9 order as erroneous. According to the learned counsel after Ext.P7, order the suit was decreed and the appellate court set aside the decree and remanded the case for trial. Learned counsel contends that when the appeal was allowed and suit was remanded for fresh trial Ext.P7, order passed on I.A. No. 1532 of 2008 has no binding force. It is contended that if ultimately O.S. No. 71 of 2005 is decreed in favour of petitioner, relief prayed for in the present suit would become infructuous.

2. It is not disputed that I.A. No. 1532 of 2008 filed by petitioner for the same relief was dismissed by the learned Munsiff on merit as per Ext.P7, order and that order was not challenged. It is true that decree in O.S. No. 365 of 2007 was set aside by the appellate court and the suit was remanded for fresh trial. I am unable to understand that decision of appellate court remanding the case amounted to setting aside Ext.P7, order on I.A. No. 1532 of 2008 or making it inoperative. On the other hand remand for the purpose of fresh trial of the suit itself mean that there was no necessity to stay the trial. Hence so far as Ext.P7, order on I.A. No. 1532 of 2008 stood there is no question of considering a second application for the same relief.

3. Nor am I impressed by the contention I that if O.S. No. 365 of 2007 is decreed there is possibility of conflicting decision on identical issues. Section 10 of the Code primarily is intended to prevent trial of subsequent suit so that the decisions will not operate as res judicata. In other words for application of Section 10 of the Code issues directly and substantially involved in the suits must be same so that principle of res judicata could apply. Though learned counsel for petitioner placed reliance on the decision in M.S. Balasubramanian Vs. Sakthivel I do not find anything in that decision going against the principle which I have stated above. In O.S. No. 71 of 2005 issue involved is whether the alleged agreement for sale is specifically enforced while O.S. No. 365 of 2007 involves the issue regarding right of access of respondent Nos. 1 and 2 through property of petitioner for access to their property which ofcourse is the subject matter of R.F.A. No. 45 of 2008. The maximum that could be said is that the decision in O.S. No. 365 of 2007 will be subject to the decision in R.F.A. No. 45 of 2008 so that there could be no confusion in the matter of execution of the decree that may be passed in O.S. No. 365 of 2007. There is no reason to interfere with the order under challenge.

Original Petition is dismissed.