

(2001) 10 BOM CK 0025

In the Bombay High Court

Case No : Writ Petition No. 1763 of 2000

Sairabi Sayyad Abdul Aziz deceased through her L.Rs. and
Others

APPELLANT

Vs

Abdul Rashid Abdul Majid

RESPONDENT

Date of Decision : 08-10-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 11

Citation : (2002) 3 BomCR 139

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : V.S. Bedre, for the Appellant; L.B. Pallod, for the Respondent

Final Decision : Allowed

Judgement

Pratibha Upasani, J.—Heard. Rule. By consent, Rule is made returnable forthwith and taken up for final hearing.

2. This writ petition is filed by Sairabi Sayyad Abdul Aziz, being aggrieved by the judgment and order, dated 29-6-1999, passed by the IInd Additional District Judge, Ahmednagar, in Civil Revision Application No. 10 of 1993 whereby the revision filed by the petitioner came to be dismissed. The said revision was filed by the petitioner, being aggrieved by the judgment and order, dated 24-6-1993, passed by the IIIRD Joint Civil Judge, Junior Division, Ahmednagar, in Regular Civil Suit No. 880 of 1991 whereby the learned Civil Judge allowed the application of the defendant/the respondent herein, filed u/s 10 of the Code of Civil Procedure, 1908.

3. The factual matrix of the matter is as follows :

The plaintiff/the petitioner herein had filed Regular Civil Suit No. 579 of 1991 simpliciter for injunction against the defendant/the respondent herein, praying that he be restrained from making any construction on the suit property.

The plaintiff also filed another suit being Regular Civil Suit No. 880 of 1991 under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, claiming possession on different grounds against the very same defendant.

In Regular Civil Suit No. 579 of 1991 the plaintiff also filed an application for injunction and the said application was granted. Thereafter, the defendant preferred miscellaneous appeal against the said interim order which was pending before the Court.

Regular Civil Suit No. 880 of 1991 was ready for hearing and in the said suit issues were framed and it was kept for recording evidence. In the meantime, the defendant filed an application u/s 10 of the CPC and prayed that the proceedings of Regular Civil Suit No. 880 of 1991, be stayed. The plaintiff filed her say to the said application and after hearing both the sides, the application made by the defendant, was allowed and the proceedings of Regular Civil Suit No. 880 of 1991, was stayed.

Being aggrieved, the plaintiff approached the revisional Court by filing Civil Revision Application No. 10 of 1993, which also came to be dismissed by the impugned order, dated 29-6-1999, passed by the IInd Additional District Judge, Ahmednagar. Being aggrieved, the petitioner/original plaintiff has now approached this Court by filing the present writ petition.

4. I have heard Mr. V.S. Bedre, appearing for the petitioners and Mr. L.B. Pallod, appearing for the respondent. The contention of Mr. Bedre is that though both the suits were filed by the plaintiff against the very same defendant and even though the subject-matter of both the suits was same, namely the disputed premises with respect to which the litigation was going on between the parties, the reliefs sought in both the suits were different and the issues involved were also different. He, therefore, prayed that the impugned order be set aside and both the suits be directed to proceed separately, in accordance with law.

5. I have gone through both the judgments of the lower courts and, in my opinion, both the lower courts have erred in interpreting section 10 of the Code of Civil Procedure. For the sake of convenience, section 10 of the Code of Civil Procedure, is reproduced below :

"10. 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."

If one carefully reads section 10, it will be obvious that the key words while interpreting section 10 would be, ".....having jurisdiction to grant the relief claimed.....". Thus it is not sufficient that the parties are same or the subject-

matter of the suits is same but the issues involved therein also should be same or substantially same and the relief which has been sought by the plaintiff in both the suits also should be substantially same. In fact 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 should 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 the 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.

One test of the applicability of section 10 of the CPC to a particular case is whether on the final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. What is essential is that there must be substantial identity between the matters in dispute and parties in the earlier and latter suits.

6. In the present case at hand, the first suit filed by the plaintiff/petitioner i.e., Regular Civil Suit No. 579 of 1991 was simpliciter for injunction and the second suit, i.e., Regular Civil Suit No. 880 of 1991, filed by the plaintiff, was for recovery of possession. Thus section 10 here has got no application and it will be sheer injustice if the second suit, in which a totally different relief has been sought, is stayed just because the first suit, which is earlier in point of time between the same parties relating to the same subject-matter, is pending.

7. Reference can be usefully made to the decision of the Madras High Court, rendered in the case of *R. Srinivasan v. Southern Petrochemical Industries Corporation Limited*, reported in . In that case, there was an earlier suit filed by the employee who had sought a declaration that the notice of termination of his service was illegal. In the suit subsequently filed by the employer, the employer had sought recovery of the housing loan given to the employee. In that case, it was held that as the issues involved in both the suits could not be said to be substantially the same, and as the final decision reached in the earlier suit regarding the validity of termination of service would not operate as *res judicata* in the subsequent suit to recover the housing loan, there was no scope for invoking either section 10 or even section 151 of the CPC and stay the proceedings in the later suit.

I am in respectful agreement with the above mentioned decision (*supra*). In the present case at hand also the Court has to do justice by interpreting section 10 of the Code of Civil Procedure, 1908, correctly. It will be atrocious to stay the proceedings of the suit being Regular Civil Suit No. 880 of 1991, filed by the plaintiff, in which a totally different issue is involved and a totally different relief has been sought. Thus for aforementioned reasons, it has to be said that taking

recourse to section 10 of the Code of Civil Procedure, 1908, was improper. Obviously, both the lower courts were in error in staying that suit. This error cannot be perpetrated and those orders have to be set aside. In view of this, following order is passed :

ORDER

Writ petition is allowed.

The impugned orders, dated 24-6-1993, passed by the IIIrd Joint Civil Judge, Junior Division, Ahmednagar, in Regular Civil Suit No. 880 of 1991 and 29-6-1999, passed by the IInd Additional District Judge, Ahmednagar, in Civil Revision Application No. 10 of 1993, are hereby quashed and set aside.