# IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

**BEFORE**

**HON'BLE SHRI JUSTICE VIVEK RUSIA**

**ON THE 12th OF MARCH, 2024**

**MISC. PETITION No. 2480 of 2021**

**BETWEEN:-**

**ARVIND KUMAR**

**.....PETITIONER**

***(BY SHRI JITENDRA BHARAT MEHTA, ADVOCATE.)***

**AND**

**TRILOK KUMAR**

**.....RESPONDENTS**

***(BY SHRI VINAY PURANIK, ADVOCATE.)***

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*This petition coming on for orders this day, the court passed the following:*

**ORDER**

The petitioner has filed the present petition being aggrieved by order dated 07.01.2021 passed by Civil Judge, Class-II whereby proceeding of the suit has been stayed under the provision of Section 10 of Civil Procedure Code, 1908.

**Facts of the case in short are as under:**

02. The petitioner (plaintiff) and respondent (defendant) are real brother. According to the plaintiff, he is an owner and occupier of the land bearing survey No.1181 area 0.670 hectare situated at Malharganj, District Mandsaur. On 10.01.2018 plaintiff reached to his agricultural

field and found that the defendant has illegally encroached over the land. Initially, the plaintiff filed the suit for permanent injunction but later on amended to the extent of relief of possession, means profit and compensation. The suit is pending since 23.01.2018.

03. The defendant filed an application under Section 151 of CPC seeking dismissal of the suit on the ground that this suit property is a subject matter of First Appeal No.710/2016 (Kesharbai and others V/s Arvind Kumar and others) before this Court in which the order of *status quo* dated 29.06.2016 has already been granted. The plaintiff opposed the said application by submitting that, that suit was filed by Kesharbai, Santosh Kumar and Sanjay Kumar against this present plaintiff and defendant for declaration and permanent injunction in respect of all the Joint Hindu Family Property / land. The entire suit has been dismissed vide judgment dated 27.04.2016, therefore, the present suit is not liable to be dismissed.

04. Learned trial Court however, considered the application not under Section 151 of CPC but under Section 10 of CPC and stayed the suit because the present suit property is also included in the previous suit i.e. now first appeal. Hence, this petition before this Court.

05. Shri Jitendra Bharat Mehta, learned counsel for the plaintiff submits that so far as the present suit property is concerned, the plaintiff is claiming exclusive right and title of the suit land that came into his share by way of partition and now the defendant is trying to take away the said land, therefore, for protection of his land he has filed this suit as he cannot claim this relief against the defendant in the previous suit / first appeal in which he is a co-defendant along with him. Therefore, this present suit is maintainable and order of stay has wrongly been passed by the learned Civil Judge.

06. Shri Vinay Puranik, learned counsel for the defendant submits

that the suit property of this suit is admittedly subject matter in the previous suit / first appeal and if, any decree of declaration is passed in the first appeal that would naturally affect the final outcome of this suit and to some extent shall apply *res judicata* also. Therefore, the learned trial Court has rightly exercised the power under Section 10 of CPC and stayed the suit.

07. The previous suit was filed by mother and two brothers i.e. Santosh Kumar and Sanjay Kumar against remaining 2 brothers i.e. Arvind Kumar and Trilok Kumar (plaintiff and defendant in the present suit) in respect of the whole Joint Hindu Family Property. The plaintiffs are seeking declaration of title of a joint owner of the suit property and the injunction that defendants be restrained not to sale the same to anyone. In the said suit, the present plaintiff filed separate written statement as defendant No.1 and in which by way of special pleading he pleaded that the Tehsildar Malharganj in case No.45-A of 27/1989-1990 vide order dated 10.07.1990 recorded his name as owner of the suit land bearing survey No.1181 area 0.670 hectare. The defendant is separately contesting the earlier suit (now first appeal) as defendant No.2. The present suit is filed by plaintiff Arvind Kumar in order to protect his suit land from the defendant by seeking permanent injunction and now the possession because during pendency of the possession the defendant said to have dispossessed him.

08. Therefore, the dispute between plaintiff and defendant is altogether different dispute in which plaintiff is seeking decree for possession and protection of his suit land. Plaintiff and defendant both are codefendants in the previous suit and it is a settled law that the codefendants cannot fight against each other as they cannot file a counter claim against each other. Hence, any *inter se* dispute between plaintiff and defendant in respect of survey No.1181 area 0.670 hectare

cannot be decided in pending first appeal before this Court.

09. The Apex Court in case of ***Rohit Singh and other V/s State of Bihar (Now State of Jharkhand) and others*** reported in ***(2006) 12 SCC 734*** and now in case of ***Damodhar Narayan Sawale V/s Tejrao Bajirao Mhaske*** reported in ***2023 SCC OnLine SC 566*** has held that co-defendants cannot file the counter claim against each other, therefore, the *inter se* dispute between the co-defendants cannot be decided and if they have a separate dispute in respect of one of the property, they can contest separately and for which Section 10 of CPC will not apply. The relevant paragraph No.31 is reproduced below:

> **31.** Thus, a careful scanning of the impugned judgment would reveal that virtually, the High Court considered the validity of the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant under the Fragmentation Act', without directly framing an issue precisely on the same and then, decided the validity of the sale deed dated 21.04.1979 executed by the second defendant in favour of the plaintiff. We have already taken note of the decision of this Court in Rohit Singh's case (supra), wherein it is observed that a defendant could not be permitted to raise counter-claim against co- defendant because by virtue of Order VIII Rule 6A, CPC it could be raised by a defendant against the claim of the plaintiff. Be that as it may, in the instant case, no such counter-claim, which can be treated as a plaint in terms of the said provision and thereby, enabling the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim, was filed by the second defendant. That apart, indisputably, the second defendant did not dispute the execution of the registered sale deed dated 04.07.1978 by him in favour of the first defendant and in his written statement the second defendant had only stated that according to the provisions of the Fragmentation Act the plaintiff was not entitled to any relief. When that be so, legally how can the High Court hold the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant, void under the provisions of the Fragmentation Act without precisely framing an issue and then, based on it, going on to consider the validity of Ext. 128 sale deed dated 21.04.1979 executed by the second defendant in favour of the plaintiff, even-after noting the finding of the First Appellate Court that as relates the sale of one acre of land under Ext.128 sale deed the second defendant did not have any grievance and then, observing, in tune with the same, that the second defendant did not dispute that he sold one acre of land to the plaintiff as per Ext.128 sale deed for the consideration of Rs. 3000/- and had shown readiness and willingness to deliver the possession of it to the plaintiff. To make matters worse, the High Court has failed to

> consider the crucial issue whether the plaintiff is entitled to possession of the suit land on the strength of the registered Ext.128 sale deed executed by the defendants.

10. Shri Puranik, learned counsel for the defendant has placed reliance on a judgment passed by the Apex Court in case of ***Aspi Jal and another V/s Khushroo Rustom Dadyburjor*** reported in ***2013 (4) SCC 333*** in which the Apex Court has held that the test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. This judgment is not supporting the respondent as held in following paragraph Nos.11 & 12 of the aforesaid judgment and the same are reproduced below:

> **11.** In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously institüted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.
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> **12.** As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes.

The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion. the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case. Reference in this connection can be made to a decision of this Court in ***Dunlop India Limited v A.A. Rahna & Anr., 2011(1) RCR (Rent) 354: 2011(3) Recent Apex Judgments (R.A.J.) 104: (2011) 5 SCC 778*** in which it has been held as follows:

> "35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June 1998, in the second set of petitions, the period of non-occupation commenced from September 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the appellate authority because till 2-8-1999, the premises were found kept open and alive for operation, The appellate authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K. Agarwal on 1-10-2001 that the Company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1-10-2001; that no activity had been done in the premises with effect from 1-10-2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the appellate authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause."

11. Here also, the *inter se* dispute between the plaintiff and defendant is not a subject matter of earlier suit. They are co-defendants

in earlier suit / first appeal, the plaintiff / petitioner cannot file cross suit against defendant to protect his suit land in pending first appeal. Thus present suit is very much maintainable and not liable to be stayed. The provisions of Section 10 of CPC will not be attracted.

12. In view of the above, this Miscellaneous Petition is **allowed**. The order dated 07.01.2021 passed by Civil Judge, Class-II is hereby set aside.

No order as to cost.

**(VIVEK RUSIA)**
**JUDGE**

Divyansh