

B.K.PATEL, J.

W.P.(C) NO.11143 OF 2010 (Decided on 30.3.2011)

KANAKA SAHU

.....Petitioner.

.Vrs.

KRUSHNA CHANDRA SAHU & ORS.

..... Opp.Parties.

(A) CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.10.

(B) CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – Ss.10, 151.

For Petitioner - M/s. Biswanath Rath, B.B.Barik &
S.K.Mishra.

For Opp.Parties - M/s. D.K.Mohapatra, B.B.Routray,
D.Routray, S.Jena & S.K.Samal(for O.P.No.1)

B.K.PATEL, J. In this writ application, petitioner has assailed legality of the order dated 19.4.2010 passed by the learned Civil Judge (Junior Division), Berhampur in C.S.No.172 of 2006 (for short 'present suit') passed on the application under section 10 read with section 151 of the C.P.C. filed by the opposite parties to stay further proceeding in the present suit in the ground of pending of T.S. No.75 of 1980 (for short 'earlier suit') in the aforesaid Court.

2. Present suit is a suit for permanent injunction in which petitioner is the plaintiff and opposite parties are defendants. Earlier suit is a suit for partition. Suit property in present suit is included in B-schedule property in earlier suit. Plaintiff in present suit is defendant no.22 and defendants in present suit are defendant Nos.15 to 17 in earlier suit. Plaintiff in present suit has purchased the suit land on the strength of two registered sale deeds dated 20.9.2006 executed by Khirod Kumari Devi who is defendant no.2 in earlier suit. Earlier suit has been instituted by the plaintive against her co-sharers and their transferees. Plaintiff and defendants in the present suit have been impleaded in earlier suit as pendent lite transferees of some of the property therein

3. In the application under section 10 read with section 151 of the C.P.C. defendants made prayer to stay further proceeding in the present suit till disposal of earlier suit or, alternatively, to take up both the suits for hearing analogously. It is contended, inter alia, that right, title, interest and possession of the plaintiff in respect of the suit property in present suit may arise for consideration in the earlier suit also as the plaintiff in the earlier suit has denied execution of sale deeds in favour of the plaintiff in the present suit.

4. In the written objection filed against application under section 10 read with section 151 of the C.P.C. it is averred by the plaintiff that subject-matter in the present suit is different from earlier suit. In the earlier suit entire joint family property is the

subject matter of dispute. By way of adjustments members of the joint family held and possessed different shares and accordingly mutation has been effected. Recorded owners have sold some of their respective share lands to different persons. Plaintiff in the present suit being a *bona fide* purchaser of the suit property, without notice of the earlier suit, result of earlier suit shall have no effect on the rights of the parties of the present suit. In the meanwhile, members of joint family have relinquished their right over the suit property in the present suit as a result of which suit property in the present suit no longer forms part of the suit property in the earlier suit. It is specifically averred that causes of action, reliefs claimed as well as parties and issues in both the suits are different. Result of the present suit shall not be governed by the result of the earlier suit inasmuch as in the suit for partition the present suit property shall be adjusted against the shares of plaintiffs vendor.

5. While considering the application learned Civil Judge (Senior Division) appears to have taken note of the fact that in the earlier suit some of the defendants including the plaintiff in the present suit have filed applications to strike out their names in view of relinquishment deeds executed by successors of their vendors in respect of different parcels of land sold to them. In such circumstances, learned trial court in exercise of power under section 151 of the C.P.C. appears to have passed the order impugned in this writ petition to stay the suit till disposal of petitions filed by the above said defendants in the earlier suit, including present plaintiff, to strike out their names.

6. In assailing the impugned order learned counsel for the petitioner would strenuously contend that facts and circumstances in the present case do not at all justify exercise of discretion to stay the present suit by invoking provision under section 10 of the C.P.C. It is submitted that earlier suit is a suit for partition whereas present suit is a suit for injunction simpliciter. Earlier suit is not a suit between plaintiff and defendants in the present suit. Both plaintiff and defendants in the present suit figure as defendants in the earlier suit. Nor the earlier suit is a suit between the parties under whom plaintiff and defendants in present suit claim title over the suit property in the present suit. Parties to the present suit have been impleaded in the earlier suit as *pendent lite* purchasers. Present suit has been instituted by the plaintiff to maintain and protect enjoyment over the suit property which she has purchased from one of the co-sharers of the joint family property involved in the earlier suit. In such circumstances, learned trial court has rightly refrained from exercising jurisdiction under section 10 of the C.P.C. to stay the present suit. However, present suit has been stayed in purported exercise of jurisdiction under section 151 of the C.P.C. without jurisdiction. In the absence of any of the ingredients to satisfy requirements under section 10 of the C.P.C., court has no jurisdiction to stay suit in exercise of inherent power under section 151 of the C.P.C. It is well settled that when the C.P.C. deals expressly with any particular matter, inherent jurisdiction cannot be exercised so as to nullify the said provision. In support of his contention, learned counsel for the petitioner relied upon a number of decisions of the Hon'ble Supreme Court and some of the High Courts.

7. In reply, learned counsel for the opposite parties contended that plaintiff as well as defendants in the present suit are parties to the earlier suit. Suit property in present suit is part of suit property in earlier suit. It is admitted by the plaintiff that despite execution of relinquishment deed in respect of suit property in the present suit executed in her favour by the plaintiff and defendant no.2 in the earlier suit, and application filed by her to strike out her name, plaintiff's name is yet to be struck out from the earlier suit. In

such circumstances, learned trial court has rightly passed order staying the present suit till disposal of petition filed by the plaintiff to strike out her name in the earlier suit.

8. In order to appreciate the rival contentions it is necessary to reproduce provision under section 10 of the C.P.C. which reads:

“Stay of suit – 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.”

9. In order to attract applicability of the provision under section 10 of the C.P.C. (1) the matter in issue in both suits must be substantially the same, (2) the previously instituted suit must be pending in the same Court in which the subsequent suit is brought, or in a different Court in India having jurisdiction to grant the relief claimed, or in a Court established or continued by the Central Government and having like jurisdiction, or before the Supreme Court, (3) both the suits must be between the same parties or their representatives, or such parties must be litigating in both the suits under the same title.

10. Earlier suit is a suit for partition among the co-sharers of the entire family property involved in that suit. Present suit is a suit for injunction in respect of part of the suit property in the earlier suit. Plaintiff in the present suit has been impleaded in the earlier suit as a *pendent lite* purchaser. Issue in the earlier suit is the claim of plaintiff therein that she has share over to the joint family property. Issue in the present suit is plaintiff's right to enjoy the suit property against alleged interference by the defendants. Therefore, matter in issue in both the suits are different. Also, earlier suit is not a suit between the plaintiff on the one hand and defendants on the other in the present suit. Both plaintiff and defendants in the present suit are defendants in the earlier suit. Parties to the present suit are not litigating against one another in the earlier suit. Therefore, provision under section 10 of the C.P.C. has no application to the facts and circumstances of the present case. Presumably, for the said reason learned trial court has not passed the order staying the present suit in exercise of jurisdiction under section 10 of the C.P.C.

11. Nonetheless, learned trial court passed the impugned order staying present suit in exercise of power under section 151 of the C.P.C. till disposal of petitions filed in the earlier suit to strike out the names of plaintiff consequent upon execution of relinquishment deeds in favour of the plaintiff in respect of the suit property in the present suit.

12. It has been held in **National Institute of M.H. & N.S. –vrs.- C. Parameshwara** : AIR 2005 SC 242:

“In the present case of Manohar Lal Chopra –v- Rai Bahadur Rao Raja Seth Hiralal reported in (AIR 1962 SC 527), it has been held that inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by section

151,CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, section 10,CPC has no application and consequently, it was not open to the High Court to bye-pass section 10, CPC by invoking section 151,CPC.”

13. This Court also held in **Smt.Suryamani Sarangi –v- Pravakar @Prava Shankar Sarangi**: 104(2007)CLT 692:

“The provisions of Section 10 C.P.C. are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code for dealing with the contingencies of two such suits being instituted exercise of inherent power under Section 151 C.P.C. is not justified. When there is specific provision in the statute, the Court should not exercise inherent power vested in it...”

14. Thus, not only facts and circumstances of the present case do not satisfy requirements for exercise jurisdiction under section 10 of the C.P.C. staying the present suit till disposal of the earlier suit but also the impugned order staying the suit till disposal of the petitions filed in the earlier suit strike out names of some defendants under section 151 of the C.P.C. is without jurisdiction. Therefore, the impugned order is liable to be set aside.

15. Accordingly, order dated 19.4.2010 passed by the learned Civil Judge (Junior Division), Berhampur in C.S.No.172 of 2006 is quashed.

The writ petition is allowed.