

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CM(M) No.124/2021

ABDUL MAJID KIRMANI & ANR. ...Petitioner(s)

Through: Mr. Shafqat Nazir, Advocate.

Vs.

BILAL AHMAD KIRMANI ...Respondent(s)

Through: None.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR,JUDGE

ORDER(ORAL)
15.07.2024

1. The petitioners have challenged order dated 19.07.2021 passed by Civil Judge (Senior Division), Sopore, in the case titled "*Bilal Ahmad Kirmani vs. Abdul Majeed Kirmani and ors*" as also order dated 07.08.2021 passed by the said Court in the case titled "*Ab. Majeed Kirmani & others. vs. Bilal Ahmad Kirmani*". By virtue of order dated 19.07.2021, the learned trial court has passed an interim exparte direction restraining the defendants from causing any illegal or unwarranted obstruction in plaintiff's raising his residential house on land measuring 11 marlas in Khasra No.78 situated at Edipora Bomai Sopore. Vide order dated 07.08.2021, the learned trial court has rejected application of the petitioners filed under Section 10 of the Civil Procedure Code (CPC).

2. No one has been appearing on behalf of the respondent in this case for quite some time. Today also no one has appeared on his behalf. He is, accordingly, set exparte.

3. I have heard learned counsel for the petitioners and perused record of the case.

4. It appears that on 16.07.2021, the petitioners filed a suit for partition and permanent injunction against the respondent before the trial court. In the said suit, it was claimed by the petitioners that they along with the respondent are in joint possession of land measuring 01 kanal and 02 marlas in Khasra No.78-min situated at Edipora Tehsil Zainageer Bomai. According to the petitioners, the parties to the suit had a joint double storied residential house on the said land but the respondent is adamant to demolish this ancestral house. It has been claimed by the petitioners in the said suit that the respondent has demolished his share in the said house and he is now trying to raise construction on the said portion of the property which, according to the petitioners, is joint and unpartitioned. The petitioners have sought a decree of partition of the aforesaid land with an injunction restraining the respondents from raising any construction over the said land. In the aforesaid suit, the learned trial court passed an exparte interim order on 16.07.2021, whereby the parties were directed to maintain status quo with regard to the suit property.

5. It further appears that the respondent filed another suit before the trial court on 19.07.2021 claiming a permanent injunction against the petitioners for restraining them from interfering in his peaceful possession

of the suit land and also for restraining the petitioners from causing obstruction in raising of construction on respondent's share of the property. In the said suit it has been pleaded by the respondent that he is owner in possession of land measuring 04 kanals under Khasra No.78 situated at Edipora Bomai, Sopore, out of which he has dismantled his old house raised on 11 marlas of land. It has been claimed that the petitioners have taken their share of the ancestral property but they are obstructing the respondent from raising construction of his residential house on the land which has fallen to his share after partition. In the said suit, the learned trial court has passed impugned order dated 19.07.2021, whereby the petitioners have been temporarily restrained from causing any illegal or unwarranted obstruction to respondent in raising his residential house.

6. The record further shows that on 26.07.2021, the petitioners filed an application under Section 10 of the CPC for staying the suit filed by the respondent on the ground that subject matter of two suits is the same and the issues involved in the two suits are also identical. The said application came to be dismissed by the learned trial court in terms of impugned order dated 07.08.2021 by holding that in the previous suit, the petitioners have sought partition and permanent injunction whereas in the subsequent suit the respondent has sought only an injunction by claiming that partition has already taken place. Thus, according to the learned trial court the issues involved in the two suits are different and, as such, the provisions contained in Section 10 of the CPC are not attracted.

7. Before testing legality of order dated 19.07.2021 passed by the learned trial court, it would be apt to first determine the legality of order dated 07.08.2021 passed by the trial court whereby application of the petitioners under Section 10 of CPC has been rejected. In order to do so, it would be apt to notice the provisions contained in Section 10 of the CPC, which read as under:

“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 have 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.”

8. From a perusal of aforesaid provision, it appears that Section 10 of CPC prohibits the trial of any suit when the matter in issue in that suit is also directly and substantially in issue in a previously instituted suit between the same parties. In the instant case, the suit filed by the petitioners is, admittedly, a previously instituted suit whereas the suit filed by the respondents is a subsequent suit. It is also not in dispute that the parties to both the suits are the same. The only question that is required to be determined is as to whether the matter in issue in the suit filed by the respondent is directly and substantially in issue in the suit filed by the petitioners.

9. So far as the subject matter of the two suits is concerned, it is the ancestral land belonging to the parties comprised in Khasra No.78-min situated at Edipora Tehsil Zaingeer Bomai. The petitioners in their suit claim that the suit property is unpartitioned and that the respondent has

demolished a portion of the ancestral house and is trying to raise construction on the said demolished portion of the ancestral home. As per case of the respondent, the ancestral property stands already partitioned and he is only trying to raise construction on 11 marlas of the land which has fallen to his share.

10. From a perusal of the plaints filed by the parties in the two suits, it is clear that the plaint filed by the petitioners forms a defence to the suit filed by the respondent whereas the plaint filed by the respondent forms the defence to the suit filed by the petitioners. The issue which falls for determination in the two suits would be as to whether the suit property has been partitioned and if it is established that the suit property has not been partitioned, then, of course, the petitioners would be entitled to a decree of partition with a permanent injunction but in case it is established that partition of the suit property has already taken place, then the petitioners cannot obstruct the respondent from raising construction on his share of the partitioned property. The issues involved in the two suits are, therefore, identical in nature and it can safely be stated that the matter in issue in the previously instituted suit by the petitioners is directly and substantially in issue in the subsequent suit filed by the respondent. The conditions for applicability of Section 10 of the CPC are, therefore, clearly attracted to the case at hand.

11. The learned trial court has fallen into a grave error by testing applicability of Section 10 of the CPC on the touchstone of the nature of relief sought in the two suits. It is not the nature of reliefs sought in the

previous and subsequent suit which is determinative of the applicability of Section 10 of the CPC but it is the nature of issues which are involved in the two suits which is crucial to the applicability or otherwise of Section 10 of the CPC. If the matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suit, Section 10 of the CPC has to be invoked, because the same is mandatory in nature. As already discussed, the matter in issue in the suit filed by the respondent is directly and substantially in issue in the suit filed by the petitioner. Therefore, trial of the suit filed by the respondent which is a subsequent suit is liable to be stayed. Thus, impugned order dated 07.08.2021 passed by the trial court is not sustainable in law.

12. That takes us to the legality and validity of impugned order dated 19.07.2021 passed by the learned trial court in the suit filed by the respondent. By virtue of the said order, the learned trial court has restrained the petitioners from causing any obstruction to respondent's raising of construction of his residential house. The said order has been passed in exparte and is subject to objections. However, this order runs contrary to order dated 16.07.2021 passed by the trial court in the suit filed by the petitioners whereby the parties have been directed to maintain status quo with regard to the suit property. Both these orders cannot stand together, inasmuch once status quo has been directed to be maintained with regard to the suit property, which is common in the two suits, it was not open to the learned trial court to allow the respondent to alter this status quo by permitting him to raise construction and restraining the

petitioners from causing any obstruction. Therefore, impugned order dated 19.07.2021, which runs contrary to order dated 16.07.2021 passed in the suit filed by the petitioners, is not sustainable in law.

13. For the foregoing reasons, the petition is allowed and impugned orders dated 19.07.2021 and 07.08.2021 passed by the trial court are set aside and it is directed that trial of the suit filed by the respondent titled “Bilal Ahmad Kirmani vs. Abdul Majeed Kirmani and others” shall remain stayed.

14. A copy of this order be sent to the learned trial court for information and compliance.

Srinagar
15.07.2024
“Bhat Altaf-Secy”

(Sanjay Dhar)
Judge

Whether the order is reportable: Yes/No

