

(1971) 09 CAL CK 0023

In the Calcutta High Court

Case No : Appeal No. 58 of 1969 and Suit No. 2695 of 1967

Arun General Industries Ltd.

APPELLANT

Vs

Rishabh Manufacturers Private Ltd. and Others

RESPONDENT

Date of Decision : 01-09-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : AIR 1972 Cal 128

Hon'ble Judges : S.K. Mukherjea, J;B.C. Mitra, J

Bench : Division Bench

Advocate : Sankar Ghose, for the Appellant;

Judgement

B.C. Mitra, J.—The appellant carried on a business and undertaking at Umaria, Madhya Pradesh, known as Arun Board and Paper Mills. On August 6, 1964, the respondent No. 7 entered into an agreement with the appellant under the terms of which the latter agreed to transfer its right, title and interest in the lease which the appellant had previously obtained from the Government of Madhya Pradesh on April 21, 1961. The consideration for the transfer was Rs. 1,25,000/- out of which the respondent No. 7 was to pay Rs. 25,000/- at the time of the agreement, another Rs. 25,000/- within sixty days after the issue of no objection certificate by the Government of Madhya Pradesh and the balance of Rs. 75,000/- in several stated instalments. In terms of this agreement the respondent No. 7 paid to the appellant Rs. 25,000/- on August 10, 1964, and he also nominated the respondent No. 1 as his nominee in whose name the lease was to be transferred. The respondent No. 2 agreed to guarantee the due payment of the consideration money mentioned above. The appellant made over possession of the undertaking and the establishment to the respondent No. 1. According to the appellant it received from the Madhya Pradesh Government the no objection certificate in 1964 for the transfer of the lease to the respondent No. 1. The respondent No. 1 did not pay the balance of consideration money namely Rs. 1 lac and it is contending that the no objection certificate has not been issued by

the Madhya Pradesh Government.

2. On October 9, 1967, the appellant filed a suit in the Court of the District Judge, Jabalpur against the respondents Nos. 1, 2 and 7 claiming a permanent injunction prohibiting these respondents from working the plant known as "Arun Board and Paper Mills" or any part thereof, for a decree for Rs. 1 lac with interest, a decree directing the said respondents to account for the profits received by them from the undertaking from the date of their taking possession, and in the alternative for a decree for payment of the balance consideration money with interest.

3. On December 1, 1967, the respondents Nos. 1 and 2 filed a suit in this Court against the appellant and the respondents Nos. 3, 4, 5 and 7. The claim in the Calcutta suit is that the appellant failed to fulfil its contract for transfer of the undertaking in terms of the agreement mentioned above, that the respondent No. 1 was always ready and willing to pay the balance of the consideration money, but the appellant failed to obtain the no objection certificate. It is alleged that for these reasons the consideration for the agreement for transfer wholly failed and the respondent No. 1 is entitled to refund of the sum of Rs. 25,000/- together with all benefits. There is a further claim of Rs. 3,33,690.44 by the respondent No. 1 in electrification work, purchase of modern machinery, additions and alterations to the same and also to buildings, sheds and structures. A sum of Rs. 1,00,000/- per annum is claimed on account of loss of profit and Rupees 49,500/- is claimed as representing the amount which the respondent No. 1 is liable to pay to the State Electricity Board for supply of electrical energy. There are other prayers for declaration that the guarantee is now void and cancellation of the same and other incidental reliefs. The writ of summons in this suit was served upon the appellant on or about January 17, 1968, and on February 23, 1968, the appellant made an application for stay of the Calcutta suit u/s 10 of the Civil Procedure Code, on the ground that the subject-matter in the earlier instituted Jabalpur suit is same and/or substantially the same as in the later instituted Calcutta suit, and that the matters in issue in the Jabalpur suit are directly and substantially in issue of the Calcutta suit. On this application an order was made on April 29, 1968, staying the Calcutta suit for two years from the date of the order and also directing that the stay order would not prejudice the right of the respondent as plaintiff in the Calcutta suit to take all necessary steps in the mean time and also to make interlocutory applications if so advised. The order also provided that if the Jabalpur suit was not disposed of within a period of two years, the appellant would be at liberty to apply in the Calcutta suit for renewal or continuation of the stay for a further period on proper materials. This appeal is directed against this order. Before proceeding any further it is to be noted that both the appellant and the respondents Nos. 1 and 2 who have filed cross-objections are aggrieved by the order staying the suit for a term of two years.

4. Mr. Sankar Ghose counsel for the appellant contended that the subject-matter

of the Jabalpur suit, which was the earlier instituted suit, was the same as the Calcutta suit. The addition of parties in the Calcutta suit, it was argued, who were not parties in the Jabalpur suit, would make no difference to the claim for stay of a suit u/s 10 of the Civil Procedure Code, as the matters in issue in the Jabalpur suit were the same as in the Calcutta suit. The appellant's claim in the Jabalpur suit is that an agreement was entered into for transfer of the appellant's right, title and interest of the buildings, sheds, structures, machinery, stores etc. for which Rs. 1,25,000/- was to be paid by the respondent No. 1. The consideration was to be paid in several stated instalments. It is alleged that the first instalment of Rs. 25,000/- was paid to the appellant, that the respondent No. 2 guaranteed the due payment of the amount payable to the appellant under the agreement, and that the appellant made over possession of the plant, machinery, building etc. to the respondent No. 1. It is next alleged that in 1964 the appellant obtained a "No Objection" letter from the Government of Madhya Pradesh and forwarded the same to the respondents. It is claimed that the transferee shall not be entitled to start running the plant unless sanction for the transfer was obtained from the Government of Madhya Pradesh, and since a "no objection" certificate was obtained the respondent started running and using the plant for the purpose of the business. The next allegation is that apart from the sum of Rs. 25,000/- no other sum had been paid to the appellant in terms of the agreement and that the appellant had always been ready and willing to perform its part of the contract, but the respondents had been trying to avoid fulfilment of their obligation under the same. In these facts the appellant claimed the balance of consideration namely Rs. 1,00,000/-. There is a claim for a permanent injunction restraining the defendant in the Jabalpur suit from working the plant, and a prayer for accounts of profits received from running the plant from the date of taking possession by the respondent No. 1 up to the date of making over possession to the appellant and a decree for such sum as may be found due. In the alternative it is claimed that a decree may be passed for payment of the balance with interest.

5. The plaint in the Calcutta suit starts with a statement regarding representations made by two of the Directors of the appellant that the appellant was anxious to transfer its interest in the undertaking. It is next alleged that the respondent No. 2 intimated to the appellant that he was interested in acquiring the leasehold interest on behalf of a limited company which would be promoted. It is then stated that the representations were made on behalf of the appellant that the properties were free from encumbrances, that the appellant had full power and authority to enter into an agreement for transfer of the lease and that all provisions of law have been complied with in connection with the said agreement. The next statement in the plaint is about the written offer by the appellant dated August 6, 1964, for transfer of the leasehold interest. The terms of the offer are also set out in the plaint. It is thereafter stated that Rs. 25,000/- was paid to the appellant by cheque, and possession of a portion of the premises was given to the respondent No. 7 on August 14, 1964, on which date the

respondent No. 1 was incorporated and intimation was given by the respondent No. 7 that the respondent No. 1 was the nominee and the appellant was requested to transfer the lease to the respondent No. 1 as such nominee. The next allegation in the plaint is that on August 27, 1964, the respondent No. 2 gave to the appellant a letter of irrevocable guarantee for Rs. 1,00,000/-. It is alleged that the respondent No. 1 electrified the factory and equipped the same with modern, machinery, made additions, alterations and repairs to the machinery and buildings in order to be ready to run the factory as soon as the "No Objection" letter was received by the appellant from the Government of Madhya Pradesh. The next material allegation in the plaint is that the respondent No. 1 came to know that the representations mentioned above were false and frivolous and were made with intent to deceive respondents Nos. 2 and 7. Thereafter particulars of the falsity of the representations have been set out in the plaint. It is next alleged that the respondents Nos. 3, 5 and 6 represented to the respondents Nos. 1 and 2 that securing of a "No Objection" letter from the Government was a mere formality, that the same would be secured in a short time and that the respondent No. 1 could go ahead with the working of the factory. It is alleged that the respondent No. 1 proceeded to work the plant and invested large sums of money. It is then alleged that the appellants were unable to secure the "No Objection" letter at all and that the respondents Nos. 1 and 2 would not have entered into the transaction nor paid Rs. 25,000 and would not have incurred various expenditure and the respondent No. 2 would not have furnished the guarantee but for the representations and assurances made to respondent No. 1. It is next alleged that by a letter dated November 30, 1966, the respondent No. 1 requested the appellant to fulfil the latter's part of the contract by December 15, 1966, and gave notice that time was to be treated as the essence of the contract. It is thereafter stated that the respondents Nos. 1 and 2 were ready and willing to perform their part of the contract and in part performance of the same payment was made to the appellant and partial possession of the lease-hold properties was obtained by the respondent No. 1. It is next alleged that the respondents Nos. 1 and 2 were ready and willing to pay the balance of the amount and to fulfil the guarantee, and the terms of the contract but the appellant failed to perform its part and comply with the terms of the agreement. It is next alleged that the consideration of the agreement wholly failed and that the respondent No. 1 was entitled to refund of the sum of Rs. 25,000/-. The respondent No. 1 thereafter claims to be entitled to amounts it spent in electrifying, equipping with modern machinery and making additions and alterations to the factory. A claim is also made for Rs. 1,00,000/- per annum from December 16, 1966, till the end of the optional period of the lease. The respondent No. 2 claims return of the letter of guarantee and a declaration that the same is not binding on him.

6. From the averment In the two plaints it is to be seen firstly if it can be said that the matter in issue ha the Calcutta suit is directly and substantially in issue in the Jabbalpur suit Secondly it is to be seen if the two suits are between the

same parties or between the parties under whom they or any of them claim.

7. There can hardly be any doubt that the dispute between the parties arises out of the agreement for transfer of a leasehold interest. There is no dispute about the contract itself or its terms. The dispute, such as it is, arises out of alleged performance or alleged failure to perform the obligations under the bargain. In the Calcutta suit not only the appellant but its Directors also have been impleaded as defendants. The charge against these Directors, as laid in the plaint, is that they made certain false representations. Can it be said that such a charge against these defendants is a subject-matter in issue in the suit ? That is the first question which arises in this appeal. The representation made by respondent Nos. 3, 5 and 6 who are Directors of the appellant is alleged to have been made on behalf of the Directors themselves and on behalf of the appellant. How the Directors could make any representation on their own behalf when they were acting as Directors of a company is by no means clear. No part of the leasehold interest vested in the Directors themselves, and the agreement for transfer was made between the appellant-company and the respondent No. 1. No case has been made out in plaint that the Directors of the appellant company had any interest in the leasehold properties other than as Directors of the company. When Directors acting as Directors make a representation on behalf of a company, and the party to whom the representation is made understands it to be such, such a representation cannot but be held to be a representation made by the Company. The rights and liabilities arising out of such representations are the rights and liabilities of the company and not of the Directors who made the representation. This is subject to one reservation that the Directors acted or purported to act within the powers conferred upon them by the Articles of Association of the company. No case has been made out in the plaint in the Calcutta suit that the Directors acted beyond the power conferred upon them by the Articles of the Company so as to make them personally liable for the representations made by them.

8. There is another averment in the plaint in the Calcutta suit that the defendants Nos. 2 and 3 gave certain assurances, namely, that the properties were free from encumbrances, that the defendant company had full power and authority to enter into an agreement for transfer, and that all provisions of law had been complied with. These assurances were plainly given by them as Directors of and on behalf of the Company. For the assurances and representations given and made by the Directors of the appellant as its Directors, the respondent No. 1 can have no claim to any relief, even assuming. It had suffered injury by reason of such assurances and representations. In my view the cause of action pleaded against the defendants Nos. 2, 3, 4 and 5, in the Calcutta suit such as it is, cannot be said to be any part of the subject-matter in issue in the suit. I make it clear that I should not be understood to say that these defendants have been impleaded in the suit mala fide or with an ulterior motive. We are not called upon to express any view on that question and we accordingly refrain from doing so. But in order to determine what is the subject-matter in

issue in the Calcutta suit, it is necessary to examine the claim of the respondent No. 1 as laid in the Calcutta plaint. Shorn of verbiage and all other trappings and embellishments the matter in issue in the Calcutta suit is that the plaintiffs were ready and willing to perform their part of the contract, and to pay the balance of the amount and also to fulfil the terms of the agreement of transfer, but the defendant company failed and neglected to perform its part and comply with the terms of the agreement. It is by reason of this alleged failure on the part of the defendant No. 1 in the Calcutta suit that various reliefs have been claimed in that suit. I shall examine the matter in issue in the Jabalpur suit later. The plaint in the Calcutta suit appears to me to be somewhat curious. The allegations against the defendants Nos. 2, 3, 4 and 5 who are Directors of the defendant No. 1 (appellant in this appeal) is that they made false and fraudulent representations, and also gave false assurances with intent to deceive and induce the plaintiff No. 1 and the defendant No. 6 into the agreement. This is the charge made against the Directors in Paragraph 15 of the plaint. In paragraph 16 of the plaint it is alleged that three of the Directors namely defendants Nos. 2, 4 and 5 made certain representations to the plaintiffs in the Calcutta Suit. In paragraph 19 of the plaint it is alleged that the defendants fraudulently and intentionally misled the plaintiffs, and in paragraph 20 it is alleged that but for the false and fraudulent representations the plaintiffs would not have entered in the transaction nor paid Rs. 25,000/- and further that the plaintiffs would not have incurred various expenditures mentioned in paragraphs 14 and 17 of the plaint. Briefly speaking these are the charges against the Directors of the appellant and the basis of the claim as laid in the plaint. But what follows these averments relating to fraud, deceit and untrue representations seems to me to be extremely curious. In spite of the allegations that the respondent No. 1 was induced to enter into the agreement by fraudulent misrepresentation and deceitful intent, the respondent No. 1 did not repudiate the contract. But it is alleged in paragraph 21 of the plaint that on November 30, 1966, the respondent No. 1 requested the appellant to fulfil its part of the contract by December 15, 1966, and in paragraphs 23 and 24 of the plaint it is alleged that the respondents Nos. 1 and 2 (plaintiffs in the Calcutta suit) were at all material times ready and willing to perform their part of the contract and pay the balance of the amount due under the contract and fulfil all other terms in the agreement. While on the one hand the charge is that but for the fraudulent and deceitful misrepresentations of the Directors of the appellant, the respondents Nos. 1 and 2 would not have entered into the contract, the contract itself is being affirmed and readiness and willingness to perform the same is pleaded.

9. A scrutiny of the plaint in the Calcutta suit became necessary because of the contention of Mr. A. C. Bhabra, counsel for the respondents that Section 10 of the CPC has no application as the Calcutta suit is not between the same parties, who are parties in the Jabalpur suit. It was argued that the Directors of the appellant who are defendants Nos. 2, 3, 4 and 5 in the Calcutta suit are not parties in the Jabalpur suit, and therefore Section 10 of the Code had no

application. To the extent that defendants Nos. 2, 3, 4 and 5 in the Calcutta suit are not parties in the Jabbalpur suit this contention of counsel for the appellant is right. But the inquiry should not stop there. It has to be seen who are the parties between whom the matters in issue arise. The matter in issue in the Calcutta suit is the alleged failure or omission on the part of the appellant to perform its part of the contract. The matter in issue in the Jabalpur suit is also the failure or omission on the part of the respondent No. 1 (defendant No. 1 in the Jabalpur Suit) to perform its part of the contract. Leaving aside the question of guarantee, the parties on whom obligations have been imposed under the agreement are the appellant and the respondent No. 1. The matter in issue in the Jabalpur suit is also the failure or omission on the part of the respondent No. 1 to perform its obligations under the contract. The questions as to who are to be treated as parties to a suit, or parties under whom they or any of them claim, have been the subject-matter of a number of decisions to which I now turn. The first case to be referred to is a Bench decision of this Court *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, . In that case an agreement for distribution of film was made in Bombay between a film producer of Bombay and a Calcutta distributor. The producer wrote a letter to the Distributor directing the latter to pay moneys payable to the producer to Kapurchand Ltd. Bombay. Disputes thereafter arose between the parties with regard to the pictures to be produced and distributed in consequence whereof one instalment due by the distributor to the producer was not paid. This was followed by termination of the agreement by the producer and forfeiture of moneys already paid by the distributor. Thereafter the producer filed a suit in the Bombay High Court on July 23, 1954, for recovery of an instalment of Rupees 60,000/- and various other reliefs. On August 12, 1954, the distributor instituted a suit on the Original Side of this Court against the producer adding Kapur Chand Ltd. as a party defendant. In this suit the distributor claimed a decree for Rs. 4,71,250/- of which Rs. 2,91,250/- was claimed as refund of money paid and Rs. 1,80,00/- as damages for loss of profit. In the Bombay suit the producer complained of breach of the terms of the agreement, pleaded termination of the same and prayed for a decree for the amount due or in the alternative damages. There was a denial of the allegation of misrepresentation made by the distributor in its letter. In the Calcutta suit the distributor alleged false and fraudulent representation vitiating the agreement and rendering it void and asked for refund of the moneys paid and also damages. The institution of the two suits was followed by an application by the producer in the Bombay suit for an injunction restraining the distributor from proceeding with the suit in Calcutta so long as the Bombay suit was not disposed of. On this application the injunction prayed for was granted, but on appeal the injunction was dissolved. This again was followed by an application by the distributor who was the plaintiff in the Calcutta suit, for an injunction restraining the producer from proceeding with the Bombay suit, and the producer on his turn filed an application also in the Calcutta suit for revocation of the leave under Clause 12 of the Letters Patent, and alternatively for a stay of the Calcutta suit u/s 10 of the Civil Procedure Code. Both these applications in the Calcutta

suit, however, were dismissed by the trial Court. Dealing with the question of the additional party in the Calcutta suit namely Kapurchand Ltd., Chakravarti C.J. held that the existence of an additional party by itself did not make Section 10 inapplicable, and that although the section spoke of "same parties" it had been held that "same parties" meant the parties between whom the matter substantially in issue had arisen and had to be decided. He further held that complete identity of either the subject-matter or the parties was not required. With regard to the additional party in the Calcutta suit namely Kapur Chand Ltd., it was held that a joinder of this additional party raised no separate and substantial issue as between this additional party and the plaintiff, so as to make Section 10 inapplicable. I respectfully agree with the views of the Division Bench on the question of the additional party in the Calcutta suit. In the instant case now before us the addition of the Director-defendants of the appellant namely the defendants Nos. 2, 3, 4 and 5 does not raise any separate and substantial issue as between them and the respondents Nos. 1 and 2 who are the plaintiffs in the Calcutta suit. All in all it is clear to me that the addition of the Director-defendants in the Calcutta suit does not necessitate an investigation or inquiry into new matters for the purpose of granting relief to the plaintiffs in the Calcutta suit, assuming they are entitled to such.

10. Mr. Sankar Ghose learned counsel for the appellant contended and we think rightly, that the observations of Chakravarti C. J. clinched the matter and that in spite of the allegations of fraud, misrepresentation and false assurances against the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit, the matter in issue in that suit is nothing other than the alleged breach of contract by the appellant. In these facts we are unable to hold that the addition of the Director-defendants in the Calcutta suit takes it out of the ambit of Section 10 of the Civil Procedure Code. Mr. Ghose relied on the observations of Denning L. J. in *Ward v. Lewis*, (1955) 1 All ER 55, that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit tort adds nothing and the prior agreement merges in the tort. That was however an application for an amendment of statement of claim giving particulars of special damages. The question before the Court was if the amendment should be allowed to enable the plaintiff to claim special damages. The dictum of Denning L. J. has no application to the question with which we are concerned in this appeal. The question before us is whether the matter in issue in the Calcutta suit as framed, is also directly and substantially in issue in the Jabbalpur suit. As I have said earlier there is no pleading either in the Calcutta plaint or in the written statement in the Jabbalpur suit of repudiation of the contract by the respondents Nos. 1 and 2 on the ground of fraudulent misrepresentations and false assurances given by the Directors of the appellant and intent to deceive the respondents Nos. 1 and 2. Far from any pleading of repudiation of the contract on these grounds, the plaint in the Calcutta suit and the written statement in the Jabbalpur suit make it clear that the respondents Nos. 1 and 2 were affirming and accepting the contract and were charging the appellant and its Directors with breach of the contract. That in

my view is the essence of the matter in issue in the Calcutta suit and also in the Jabbalpur suit. On the question of identity of a party reliance was placed by Mr. Ghose on a Bench decision of the Bombay High Court reported in ILR 44 Bom 283 = (AIR 1920 Bom 296) in which it was held that Section 10 of the CPC required a substantial identity in the matter of parties. Reference was also made to a Bench decision of the Lower Burma Chief Court reported in AIR 1919 Low Bur 10 in which it was held that the addition of a new party in a suit did not prevent the application of Section 10 of the CPC which required that the same party should be litigating in both the suits.

11. The next case relied upon by Mr. Ghose was a Bench decision of the Allahabad High Court reported in AIR 1920 All 70 in which it was held that addition of one party in a later suit was immaterial for the purpose of Section 10 of the Civil Procedure Code, and that if the hearing of a suit had to be postponed u/s 10, it should be postponed against all the parties including the added new party. Counsel for the appellant also relied upon a Bench decision of the Nagpur High Court reported in AIR 1948 Nag 297. In that case it was held that for the purpose of application of Section 10 it was enough if there was substantial identity of parties and that complete identity of parties was not necessary.

12. Mr A.C. Bhabra Counsel for the respondents sought to repel the contentions of the appellant's counsel firstly by referring to the word "same" used in Section 10. He said that the same word used more than once in the same section must be given the same meaning. He argued that the word "same" must be given its plain English meaning which it must be held to indicate the identical object. In support of this contention he relied on two decisions reported in K.N. Guruswamy Vs. The State of Mysore and Others, . Relying on the decision reported in AIR 1950 FC 83 counsel for the respondents argued that effect should be given to the language of the section. It was next argued that so far as parties were concerned, for the purpose of application of Section 10, there must be complete identity of parties and also of subject matter. In support of this contention counsel for the respondents relied on the decision reported in Radhe Shyam Agarwal Vs. Kashinath Vaish and Another, . Reliance was also placed by counsel for the respondents on a Bench decision of this Court reported in AIR 1935 Cal 1. In that case the question of who are the same parties was considered. A partnership action was filed in Delhi by one of the partners of a Delhi firm and thereafter, a Receiver appointed in another partnership action in this Court filed a suit for dissolution of a partnership in which he made all the partners, including those of the Delhi firm, party-defendants. Dealing with the question whether the two suits were between the same parties u/s 10 of the Civil Procedure Code, it was held that although the Calcutta suit was by a Receiver, to all intents and purposes, the parties in the two suits were the same. To our mind this decision is against the contention of counsel for the respondents, because in so far as one of the suits was by a Receiver appointed by the Court, it could not be said to be a suit between the same parties, in the sense in which the word "same" should be construed according to counsel for the respondents.

13. In our view the addition of the defendants Nos. 2, 3, 4 and 5 who are all Directors of the appellant (defendant No. 1 in the Calcutta suit) does not make the Calcutta suit, any the less a suit between the same parties as in the Jabbalpur suit, for the purpose of Section 10 of the Civil Procedure Code.

The false and fraudulent representations alleged to have been made, and the assurance alleged to have been given by the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit were all made and given by them as Directors of the appellant. There is nothing in the Calcutta plaint to suggest that there was an independent contractual relationship between these defendants and the plaintiffs in the Calcutta suit (respondents Nos. 1 and 2) in this appeal. The allegation of joint and several liability of the defendants in paragraph 26 of the plaint in the Calcutta suit cannot make us ignore the allegation in paragraph 24 of the plaint that the defendant No. 1 (appellant) is charged with a breach of contract and also of repudiation of the same. On the plaint as framed, and without anything more, there could hardly be any doubt that in order to give relief to the plaintiffs in the Calcutta suit the Court has to come to a conclusion whether there has been a breach and a repudiation of the contract by the defendant No. 1 in the Calcutta suit. In the written statement of the Jabbalpur suit it is alleged that the plaintiff in that suit (the appellant in this appeal) broke the contract and therefore the defendants in that suit were justified in not making payment to the plaintiff. If the Jabbalpur suit is decreed the issue of breach of contract and of repudiation of the same in the Calcutta suit will be barred by *res judicata*. If on the other hand the Jabbalpur suit is dismissed there will be little left in the appellant's defence in the Calcutta suit. Thus the main question resolves itself to this: Whether the contract has been broken and repudiated by the appellant and whether the appellant is entitled to the balance of the consideration money. The addition of the defendants Nos. 2, 3, 4 and 5 in the Calcutta suit, in our view, makes no difference to the determination of the principal matter in issue in the Calcutta suit. We must therefore hold that in effect and in substance, if not in form, the Calcutta suit is between the same parties as the Jabbalpur suit. There is therefore sufficient compliance with the requirement of Section 10 of the CPC that in order to attract the provisions of that section the two suits should be between the same parties or between parties under whom they or any of them claimed. This disposes of the question of parties in two suits one of which is sought to be stayed u/s 10 of the Code, I now proceed to deal with the question of the matters directly and substantially in issue in the two suits.

14. Earlier in this judgment I have analysed the plaint in the Calcutta suit and I now proceed to look into the scope of the Jabbalpur suit with reference to the allegations in the plaint and the written statement in that suit. That plaint starts with the agreement entered into between the parties on August 6, 1964, and then proceeds to record payment of Rs. 25,000/- by the appellant and nomination of the respondent No. 1 by the respondent No. 2 as the nominee in whose name the lease was to be transferred. Thereafter it is alleged that possession of the establishment was made over by the appellant to the

respondent No. 1. The next material allegation is that the appellant received from the Madhya Pradesh Government the "No Objection" letter for transfer of the lease by the appellant to the respondent No. 1. The appellant then contends that besides the sum of Rs. 25,000/- the respondent No. 1 made no other payment though the time for such payment expired. After pleading readiness and willingness to perform its part of the contract, the appellant claims the balance of Rs. 1,00,000/- with interest. There is a further claim for compensation for the structures. There are averments of false allegation by the respondents about the acceptance of an alleged surrender by the Madhya Pradesh Government of 99.36 acres of land. The reliefs claimed in the plaint are an Injunction restraining the defendants in that suit from working the plaint, a decree for Rs. 1,00,000/- with interest, accounts of profits received and in the alternative a decree for payment of the balance money with interest. This in substance is the nature of the claim in the Jabbalpur suit. In the written statement in that suit filed jointly by the respondents Nos. 1, 7 and 2 (defendants Nos. 1, 2 and 3 in that suit) it is firstly alleged that the agreement was obtained on misrepresentation of facts. It is next alleged that the appellant failed and neglected to procure a "No Objection" letter from the Government of Madhya Pradesh. The next material allegation is that the appellant falsely and fraudulently represented to the defendants that "No Objection" letter would be procured in terms of the agreement. The next allegation is about the concealment of the surrender of 99.36 acres of land and fraudulent inducement of respondent No. 1 to start running the plant and incur large expenses and that but for the fraudulent and false representation the respondent No. 1 would not have run the factory. These averments are followed by an allegation of breach of the contract by the appellant. In paragraph 11 of the written statement it is again alleged that the respondent No. 1 would not have done construction, additions, alterations and improvements but for the fraudulent representations made by the appellant that it would obtain a "No Objection" letter from the Madhya Pradesh Government. It is alleged that the defendants believed such fraudulent representations to be true. In paragraph 13 of the written statement it is alleged that the procurement of the "No Objection" letter was a condition precedent and by reason of the appellant's failure to procure the same; the agreement was void or voidable at the option of the defendants, and that they had duly avoided the same. In paragraph 18 of the written statement the allegation is that the plaintiff has committed a breach of agreement and has failed to obtain the "No Objection" letter, has broken the contract and the defendants have been discharged from completing the transaction. This in brief is the defence to the appellant's claim in the Jabbalpur suit.

15. It is clear to us that the substantial issue in the Jabbalpur suit is if the respondents Nos. 1, 2 and 7 are liable to the appellant for the balance of the consideration money, and secondly whether the alleged false and fraudulent representations were made by the appellant and thirdly if by virtue of such false and fraudulent representations the respondents Nos. 1, 2 and 7 have been

exonerated from their liability for the balance of the consideration. As I noticed earlier these are substantially the issues in the Calcutta suit as well. It is true that the reliefs claimed in the two suits are different, as indeed they must be, but the issues in the two suits in our view are substantially the same. The alleged false and fraudulent representations made by the plaintiff in the Jabbalpur suit and its Directors in the Calcutta suit is the main plank on which the respondent No. 1 rests its claim to avoid liability for payment of the balance of consideration and also of its other obligations under the agreement. The next substantial issue in both the suits is the alleged surrender of a certain portion of land namely 99.36 acres and the third issue relates to the procurement of a "No Objection" certificate from the Madhya Pradesh Government. To our mind these questions are common in both the suits and a decision on these questions in the Jabbalpur suit would certainly bar a determination of these questions in the Calcutta suit by virtue of *res judicata*.

16. Counsel for the respondents contended that in order to attract Section 10 of the CPC all the issues involved in the two suits must be identical. In support of this proposition he relied on a Bench decision of this Court reported in 24 Cal LJ 514 = (AIR 1917 Cal 248). In that case a suit was filed for recovery of rent. This suit was resisted by the defendants on the ground that the defendants were already evicted from part of the land of which rent was claimed. This suit was decreed but the question whether the disputed plot of land was in the occupation of the plaintiff or the defendant was left open. An appeal was preferred against the decree and while the appeal was pending, another suit was filed for recovery of arrears of rent for a subsequent period. The defendants, in the second suit again raised the plea that they were unlawfully kept out of possession of a certain plot of land. Thus the title to the plot of land was in question in both the suits in the pending appeal and also in the subsequently instituted suit. The defendant applied for stay of the second suit u/s 10. It was held that the subject-matter in the second suit and the issues involved therein was the plaintiff's claim for rent for a different period and it was therefore held that the "matter in issue" did not cover the entire subject-matter in controversy between the parties and clearly the matter in issue in the second suit was the plaintiff's claim of rent for a period subsequent to that which was a subject-matter in the first suit and thereafter in the appeal therefrom. The question of title to the disputed plot of land did indeed arise in both suits but the substantial matter in issue was the plaintiff's right to rent for a different period. It was in these facts that it was held that the second suit could not be stayed u/s 10 of the Code. This decision, to our mind, is not of any assistance in the facts of this appeal. Reliance was next placed on another decision of this Court reported in AIR 1941 Cal 434. In that case a suit was filed in Calcutta for failure of the defendant to take delivery of certain hessian cloth and the claim was for difference between the contract price and market price. The defendant filed a suit at Arrah. The plaintiff in the Calcutta suit applied for an injunction restraining the defendant from proceeding with the Arrah suit, and the defendant in the Arrah suit applied for stay of the Calcutta

suit on the ground that the matters in issue in the two suits were the same. It was found, that the matter in issue in the Calcutta suit was not directly and substantially in issue in the Arrah suit and the parties were also not the same. In the Arrah suit it was claimed that the contract was void and that the plaintiff in that suit was induced to agree to enter into a gaming and wagering contract for the purpose of sale of hessian cloth. It was further alleged that performance of such contract would not be demanded by either party, that no delivery would be given or asked for and the contract would be settled by payment of difference. It was in these facts that it was held that the matter in issue in the Calcutta suit was different from, that in the Arrah suit, which was a suit for recovery of difference between the contract price and market price. The facts in this case are entirely different from the facts involved in the appeal now before us. Reliance was also placed on a decision Of the Madras High Court reported in AIR 1925 Mad 574 (1) in which it was held that the object of Section 10 of the Code was to prevent a later suit relating to the same subject-matter, being tried before an earlier suit relating to the same subject-matter being tried and disposed of. It was also held that under that section it was necessary that the matter in issue must be directly and substantially in issue in both the suits. This decision, does not advance matters In any way as the learned Judge has merely stated what the section itself provides. The next case relied upon by counsel for the respondents was also a decision of the Madras High Court reported in AIR 1922 Mad 304. In that case the subject-matter of the two suits were entirely different inasmuch as one suit related to property situated at Secundrabad and in the other suit the properties involved were properties in British India. Secondly one of the suits had reference to properties belonging to one person and in another suit the properties belonged to two different persons. Thus not only the properties were different, but the title to those properties belonged to two different persons. It was in these facts that it was held that where some of the issues were common in two suits between the same parties Section 10 did not apply and there could be no stay of the subsequently instituted suit and that Section 10 had reference to the entire subject-matter in controversy between the parties. The judgment in that case must be taken to be confined to the facts involved in that case. Reliance was next placed on a Bench decision of the Lahore High Court reported in AIR 1935 Lah 816. In that case also it was found as a fact that the matter in issue in the two suits as also the parties were not the same. It was in fact found that the matter in issue before the Rawalpindi Court was not directly and substantially in issue In the previously instituted suit in the Betul Court. The next case relied upon by counsel for the respondents was a decision of the Madras High Court reported in AIR 1940 Mad 7. In that case the two suits were for rent for entirely different periods, the later suit being a suit for rent for a subsequent period and it was for that reason that it was held that the matter in issue in the two suits was not the same.

17. The scope and extent of identity or similarity of the subject-matter in issue in two suits has received very careful judicial notice in two Bench decisions of the

Bombay High Court and of this Court to which I will now refer. The Bombay decision is reported in *Jai Hind Iron Mart Vs. Tulsiram Bhagwandas*, . In that case the earlier suit was filed in this Court and the later suit was filed in the Bombay High Court. The plaintiff in the Bombay suit filed an application for injunction restraining the defendants in the Bombay suit from proceeding with the Calcutta suit. The defendants in the Bombay suit in their turn filed an application for stay of the Bombay suit. The Calcutta suit was filed on a contract for sale of 1898 tyres. It was held that the tyres were according to certain specifications and that the defendants in the Calcutta suit (plaintiffs in the Bombay suit) failed to take delivery of the tyres and therefore damages were claimed for non-acceptance. The defendants in the Calcutta suit thereafter filed the Bombay suit and contended that they had a contract to purchase only 1600 tyres and not 1898 tyres. The further contention of the Bombay plaintiffs was that the tyres were not according to specifications and that the tyres that were delivered were not according to contract quality. The Bombay plaintiff therefore claimed refund of the amount paid in respect of the price and also for damages for nondelivery. The question was whether the matter in issue in the Bombay suit was directly and substantially in issue in the Calcutta suit. It was held that Section 10 did not contemplate identity of issues in the two suits nor that the matter in issue in the two suits should be entirely the same or identical and that all that the section required was that the matter in issue in the two suits should be directly and substantially the same. It was also held that there should be identity of the subject-matter, and the field of controversy between the parties in the two suits must be the same, but the identity and the field of controversy contemplated need not be identical and same in every particular, but the identity and the field of controversy must be substantially the same. We respectfully agree with the views of the Division Bench of the Bombay High Court and we think Chagla C. J. has correctly and appropriately laid down the extent of the identity of the subject-matter in the two suits. In the facts of this case we have no doubt that the field of controversy between the parties in the Jabbalpur suit and the suit in this Court is substantially the same and, there is substantial identity in the subject-matter in the two suits.

18. I next proceed to deal with the Bench Decision of this Court, *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, . I have already referred to this case in connection with the question of parties to the suits. I shall now proceed to deal with the question of issues involved in the two suits with which that decision was concerned. In that case an agreement was entered into at Bombay between the Film Producer Modi and a Film Distributor Mansata Film Distributor of Calcutta. By this agreement the producer appointed the Distributor as distributor of films in certain territories with regard to three films. Under the agreement the distributor was to pay to the producer a sum of money in certain instalments and was to receive as its remuneration commission at certain rates. Another agreement was entered into between the parties on the same terms and conditions with regard to a different territory. Two letters were

written by the producer to the distributor, by which the former authorised the latter, to pay moneys payable to him to Kapur Chand Ltd.. Bombay. Under the two agreements a sum of money was payable by the distributor to the producer and this sum was to be paid in certain instalments. After payment of some of the instalments the distributor raised a question regarding the class of films to be produced by the producer and referred to certain representations made by the latter. The producer denied any representations having been made regarding the quality of the films and stated that the films would be according to the contract quality. The distributor did not pay one instalment of Rs. 60,000/- which had fallen due and thereupon the producer terminated the agreements and notified forfeiture of moneys paid by the distributor. All this was followed by a suit by the producer against the distributor filed at the Bombay High Court on July 23, 1954, for recovery of the instalment of Rs. 60,000/- in the alternative damages and other reliefs.

19. This suit was followed by a suit by the distributor on August 12, 1964, in the Original Side of this Court against the producer and the said Kapur Chand Ltd., in which the distributor claimed a decree for a certain sum of money including refund of all moneys paid under the agreement and a further sum for damages. Thereafter the producer applied in the Bombay Suit for an injunction restraining the distributor from proceeding with its Calcutta Suit so long as the Bombay Suit was not disposed of. This injunction was granted by the Bombay High Court and the producer preferred an appeal against that order and the appellate Court dissolved the injunction. In the written statement filed in the Bombay Suit the distributor alleged fraudulent misrepresentation on the part of the producer with regard to the agreement and the agreements were claimed to have been void and repudiated. It was also claimed that the distributor became entitled to recover from the producer all moneys advanced to him on a failure of consideration. Thereafter the distributor who was the plaintiff in the Calcutta suit applied for an injunction restraining the producer from proceeding with the Bombay suit and the producer on his part applied for a stay of the Calcutta suit u/s 10 of the Code. It was held that although the Bombay suit was a suit on the contract and the Calcutta suit was a suit in which a contract was Impugned as void on the ground of fraudulent misrepresentation by which the contract was induced, the matter in issue in the two suits were substantially the same though different reliefs were claimed by the plaintiffs in the two suits. Dealing with the question of the nature of the two suits it was held that the fact that one was a suit under the agreement and the other was a suit de hors the agreements did not make a substantial identity of the subject-matter impossible. It was found that the basis of the defence in the Bombay suit and of the claim in the Calcutta suit were both fraudulent misrepresentation and if the defence of the fraudulent misrepresentation in the Bombay suit succeeded nothing would be left in the Calcutta suit and if the case of misrepresentation succeeded in Calcutta, the Bombay suit would be practically decided, the only inquiry remaining being an inquiry as to damages claimed in addition to a refund of the money paid. It was

further held that if the defence failed in Bombay the basis of the claim in the Calcutta suit would be destroyed. Finally it was held that the principal matter in issue in the Calcutta suit was directly and substantially in issue in the Bombay suit which was a suit previously instituted and that an unnecessary duplication of proceeding with the possibility of conflicting decisions, would occur if the Calcutta suit was not stayed. We respectfully agree with the views expressed by Chakravarti C.J. and we have no hesitation in holding that the issues in the Jabbalpur suit and also in the Calcutta suit are substantially the same.

20. A good deal of emphasis was laid by counsel for the respondents on the fact that the Jabbalpur suit was a suit on a contract while the Calcutta suit was a suit on tort, in so far as the plaintiffs in the Calcutta suit have sought to avoid the contract on the ground of fraudulent misrepresentation and false assurances. In my view the question that one suit is a suit on a contract and the other is a suit on tort is a matter of no relevance at all in considering the applicability of Section 10 of the Code. The matter for determination in the case of an application for stay u/s 10 of the Code is not what the basis of the claim in the two suits is but what is the matter in issue in the two suits. The claim in a suit may very well be a claim based on a contract, but the contract may be sought to be repudiated by the defendants on the ground of a tort namely fraudulent misrepresentation, which in its turn may be the basis of a claim of a second suit. The two different bases of claim namely one based on a contract and the other on a tort would not make the matters in issue in the two suits different merely on that ground. If a claim based on a contract in one suit, is sought to be avoided and repelled on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming damages on the basis of a fraudulent misrepresentation with regard to the same contract, the issues nevertheless in the two suits would be substantially the same, even though the bases of the claim in the two suits are altogether different. Counsel for the respondents strenuously contended that the Jabbalpur suit was a suit for recovery of moneys due under a contract and the Calcutta suit was a suit based on the tort of fraudulent misrepresentation and false assurances. Therefore it was argued that the controversy and the matter in issue in the two suits were entirely different. In my view there is a clear fallacy in this contention. It is true that the plaintiff in the Jabbalpur suit has sued on a contract for recovery of the balance of consideration, and it is also true that the defendants in the Jabbalpur suit have raised as their defence in that suit the plea of fraud and false representation. But in the Calcutta suit although the plaintiffs' claim is based on fraudulent misrepresentation, false assurances and suppression of material facts, the plaintiffs have affirmed the contract between the parties and have also pleaded their readiness and willingness to perform their part of the contract including their readiness to pay the balance of the consideration and to fulfil all other terms of the agreement. The field of controversy between the parties in the two suits is in our view substantially the same, if not completely identical. The matter in issue in the two suits is the appellant's right to recover the balance of consideration and the respondents' claim to repudiate the

contract and avoid liability under the same on the ground of fraudulent misrepresentation and false assurances. In these facts it cannot but be held that the matter in issue in the Calcutta suit is substantially in issue in the Jabbalpur suit.

21. Reliance was placed by counsel for the appellant on a Bench decision of this Court reported in *Jugometal Trg Republike Vs. Rungta and Sons (Private) Ltd.*, . In that case there was an agreement to sell 10,000 tons of iron ore. Payment was to be made through letter of credit Shipment of a certain consignment was made per SS, Ariadah and part of the letter of credit was utilised for payment. The balance of the goods was to be shipped per S.S. Edison Mariner. The seller informed the buyer that goods had been shipped and requested the latter to raise the amount of the letter of credit to cover the increased quantity shipped. The buyer sent a cable the purport of which was that the Bank had been instructed to raise the credit There was some delay in shipment as the ship was moored midstream. From the buyer's cable the seller gathered that there was no objection to the delay in shipment of the ore. The seller later came to know that the buyer had instructed its bankers not to make payment if the documents were presented after the specified date. As the seller was not paid 95 per cent of the value of the goods in terms of the contract he filed a suit in the Admiralty Jurisdiction of this Court. This suit was filed against the owners, the master and the parties interested in S.S. Edison Mariner. After the suit was filed the ship was arrested in the port of Madras. The defendant entered appearance and deposited with the Registrar a certain sum of money as security for obtaining release of the vessel. This suit however was dismissed on amongst other grounds that the Admiralty Jurisdiction of this Court could not be invoked in the facts of that case. An appeal was preferred against the decree of dismissal. Shortly after this dismissal the seller filed another suit during the pendency of the appeal claiming the price of Roods and various other sums. The main claim of the seller against the buyer in the second suit arose in connection with the shipment per S.S. Edison Mariner and if the claim in the pending appeal was allowed, the claim left for adjudication in the second suit would have been limited only to a sum of Rs. 2,056-65 arising out of the shipment per S.S. Ariadah. The buyer applied for stay of the second suit u/s 10 of the Code. It was held that the main issue in the first suit was a claim for 95 per cent of the price of goods shipped per S.S. Edison Mariner and additional loading charges and that even if the buyer succeeded in his appeal the trial of the claim with regard to the goods shipped per S.S. Ariadah could not be avoided. It was therefore held that there was no substantial identity as regards the matter in issue in the two suits. In these facts it was held that the suit could not be staved u/s 10 of the Code but an order was made for stay of the suit u/s 151 of the Code. It will be seen that the issues in the two suits were not substantially the same inasmuch as the trial of the second suit could not be avoided by reason of the claim for shipment of the goods per S.S. Ariadah, Counsel for the appellant relied upon this decision in support of his contention that even if Section 10 of the CPC could not be invoked in the facts of

this case the suit should be stayed in exercise of the powers u/s 151 of the Civil Procedure Code. As we are of the opinion that parties in the two suits should be treated to be the same, notwithstanding the addition of the Directors of the appellant in the Calcutta suit, and as we are also of the opinion that the issues between the parties in the two suits are substantially the same, it is not necessary for us and we do not propose to go into the question of exercise of inherent power of the Court to stay a suit u/s 151 of the Code.

22. Counsel for the appellant had submitted that in any event the Court had the power to adjourn a suit to any date and that in the facts of this case an order for adjournment of the suit should be made until after the determination of the Jabbalpur suit. It appears that the Court below made an order in terms of prayer "B" of the petition, which is a prayer for adjournment or trial of the suit till the final determination of the Jabbalpur suit though the order of adjournment was limited to a period of two years. It was also argued that even if the order was an order of adjournment it would be an appealable order, as it was closely connected with the plea of res judicata. In support of this contention reliance was placed on a Bench decision of this Court reported in (1966) 70 Cal WN 670. Mr. Bhabra on the other hand contended that if it was an order for adjournment it was not an appealable order.

23. We do not think we need go into this question either. The first prayer in the petition is a prayer for stay of Suit No. 2965 of 1967 and all proceedings thereunder till the disposal of the Jabbalpur suit. Even assuming Mr. Bhabra is right that the order is an order for adjournment of the suit, it must be held to be a refusal of the order for stay of the suit in which case also the order would be an appealable order. In the view we have taken that Section 10 of the Code applies we need not go into the question of appealability of an order for adjournment.

24. It appears that although the learned Judge made an order in terms of prayer "B" which as I said earlier is a prayer for adjournment or postponement of the suit till the final determination of the Jabbalpur suit, he has added that the stay will be limited for a period of two years from the date. It is not clear to us as to what the learned Judge had in view in making an order in terms of prayer "B" of the petition and at the same time stating that the stay will be for a period of 2 years. We take it however from the observations made in the earlier portion of the judgment that although the term stay has been used in the operative part of the order, what the learned Judge meant was that the hearing of the suit should be adjourned or postponed. In the view we have taken in this appeal the opinion of the learned Judge that Section 10 of the Code does not apply cannot be sustained. For the reasons mentioned above this appeal must be allowed. The judgment and order of the Court below are set aside. There will be an order for stay of Suit No. 2965 of 1967 of this Court (Rishabh Manufacturers Private Limited v. Arun General Industries Limited) and all proceedings thereunder till the disposal of the suit pending in the Jabbalpur Court. The appellant will be entitled to the costs of this appeal.

25. Respondents Nos. 1 and 2 have preferred a cross-objection against the judgment and order on various grounds. The main ground of attack was that the learned Judge having held that Section 10 of the Code did not strictly apply should not have made the stay order at all, and that in any event an order for stay for two years should not have been made. The order is dated April 29, 1968, and therefore the two years period has already expired. The ground of objection to this part of the order namely a stay for a period of two years has therefore disappeared because at present there is no stay of the Calcutta suit. In the view however we have taken, the cross-objection must be dismissed and we order accordingly.

S.K. Mukherjea, J.

26. I agree.