

(2014) 12 SHI CK 0034

In the High Court Of Himachal Pradesh

Case No : OMP No. 58 of 2014 in Civil Suit No. 76 of 2012

Italian Thai Development Public Company Ltd.

APPELLANT

Vs

Jala Ram, Engineering Enterprises

RESPONDENT

Date of Decision : 16-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2014) 12 SHI CK 0034

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : C.N. Singh, Advocate for the Appellant; Karan Singh Kanwar, Godawari and Vijay Arora, Advocate for the Respondent

Judgement

Tarlok Singh Chauhan, J.—This application under Section 10 of the Code of Civil Procedure has been filed by the defendant for staying the present proceedings on the ground that the defendant has already instituted a suit for recovery of Rs. 27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara, which suit was presented on 3.8.2009 and was registered as special summary suit No. 451/2009. It is further submitted that on receipt of summons by the plaintiff, it filed an application for grant of leave to defend the suit and therefore, the plaintiff cannot feign ignorance regarding the said suit. It is lastly submitted that the matter in issue in the present suit is directly and substantially in issue in the aforesaid suit, because the controversy involved in both the suits is same, as ultimately what is to be judged is the genuineness of the spare parts.

2. The plaintiff/non-applicant has filed reply raising therein preliminary objections that the suit under adjudication before this Court and the summary suit pending trial at Vadodara is not identical and therefore, the application is not maintainable. It is also pleaded that the plaintiff has initiated the present proceedings for recovery of money for unused substandard spare parts lying in stock, for which parts, the entire sale consideration had been paid, whereas, the

lis at Vadodara is for the spare parts received by the plaintiff, for which the sale consideration has not been paid. It is further pleaded that there is no identity of matter in issue and whole of the subject matter in both these proceedings are not identical and therefore, the application deserves to be dismissed. On merits, it is claimed that the initiation of recovery suit at Vadodara by the applicant/defendant is for an ulterior and malafide motive simply in order to harass, humiliate and blackmail the plaintiff, who has no dealing with the applicant in the State of Gujrat. The suit is abuse of process of law and an act to pressurize and illegally extract money from the non-applicant. The applicant/defendant despite knowing fully well that the Courts at Gujarat have no jurisdiction to deal with the issue in hand has still opted to file a suit at Gujarat.

I have heard the learned counsel for the parties and have gone through the records of the case.

3. The essential ingredients of Section 10 of the Code of Civil Procedure are as follows:--

"Firstly, the matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

Secondly, the previously instituted suit is pending-

- i) in the same Court in which the subsequent suit is brought; or
- ii) in any other Court in India (whether superior, inferior or co-ordinate); or
- iii) in any Court beyond the limits of India established or continued by the Central Government; or
- iv) before the Supreme Court; and

Thirdly, where previously instituted suit is pending in any of the Courts mentioned in clause (b) or clause (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit."

4. Section 10 of the Code of Civil Procedure envisages that no Court will 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 the parties under whom they or any one 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.

5. The parties are not at variance that in so far as the suit pending in the Court at Vadodara is concerned, the same relates to the spare parts supplied by the defendant to the plaintiff, for which sale consideration has not been paid. Whereas, the suit pending before this Court has been filed on the premise that the spare parts supplied by the defendant were not genuine, therefore, it can be safely concluded that the cause of action in both the suits is entirely distinct and different, though there is some common issue directly or substantially in issue in

both the suits. But, then the mere fact that only some common issue arises for consideration would not be sufficient because the entire subject matter of the two suits must be the same, in view of the judgment of Hon'ble Supreme Court in *Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor*, wherein the Hon'ble Supreme Court has observed as under:--

"9. Section 10 of the Code which is relevant for the purpose reads as follows:

"10. 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.

Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

10. The view which we have taken finds support from a decision of this Court in *National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara*, in which it has been held as follows:

"8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any

other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical."

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 instituted 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.

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.

13. Reference in this connection can be made to a decision of this Court in *Dunlop India Limited Vs. A.A. Rahna and Another*, 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."

(emphasis supplied)

There is yet another reason why the present suit cannot be stayed.

6. It is the specific contention of the plaintiff that the suit at Vadodara has been filed simply to harass the plaintiff, who otherwise has no business dealings at Gujarat. The defendant on the other hand, has moved this application for stay of the proceedings. The mere filing of an application under Section 10 CPC, does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of this Section is only to prevent the Courts concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The Section in acts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to

dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. It was always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side. In taking this view, I am supported by the judgment of the Hon'ble Supreme Court in Pukhraj D. Jain and Others Vs. G. Gopalakrishna, :--

"4. We have heard learned counsel for the parties and have perused the records. In our opinion, the view taken by the High Court is wholly erroneous in law and must be set aside. The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that 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. However, mere filing of an application under Section 10 CPC does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side."

7. In view of the aforesaid discussion, there is no merit in this application and accordingly the same is dismissed, leaving the parties to bear their costs.