

(1971) 11 P&H CK 0027
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 307 of 1970

Messrs Sohan Lal and Sons and others	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 16-11-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1971) 11 P&H CK 0027

Hon'ble Judges : A.D. Koshal, J

Bench : Single Bench

Advocate : J.N. Kaushal with Messrs Satiajit, Ashok Bhan and J.V. Gupta, for the Appellant; R.K. Chhibbar, for the Respondent

Final Decision : Dismissed

Judgement

A.D. Koshal, J.—The only question requiring determination in this petition made by the defendants for revision of the order dated the 18th of March, 1970, passed by Shri B.S. Teji, Subordinate Judge 1st Class, Jullundur, is whether the suit instituted by the Union of India, plaintiff-respondent, (hereinafter referred to as the Union) is barred by the principle of res judicata as embodied in Explanation IV to section 11 of the Code of Civil Procedure.

2. The facts giving rise to the petition may be briefly stated. Messrs Sohan Lal & Sons, defendant No. 1 (hereinafter referred to as the Firm) are a firm carrying on the business of military contractors, its partners being defendants Nos. 2 to 5. Before the partition of the country in August, 1947, the firm entered into various contracts with the Area Commander, Lahore, for supply of fresh fruits and fresh vegetables to the Military authorities at Jullundur, Ambala, Lahore, Amritsar, Ferozepore and Sialkot over a period of six months beginning with the 1st of April, 1947, and ending with the 30th of September, 1947. In each one of the contracts it was stipulated that if the firm failed to supply the commodities as agreed upon the Military authorities would be at liberty to make purchases of the same at the firm's risk (herein-after referred to as "risk purchases") and to

deduct any losses so incurred from any amounts due to the firm under any contract.

During the months of August and September, 1947, the firm failed to supply the commodities contracted for to the Military Units at Jullundur and Ambala who made risk purchases thereof through other parties. According to the Union, the losses incurred by it in making risk purchases amounted to Rs. 1,29,739/13/6. In November, 1947, Capt. T.B.S. Thapar, Officer Commanding, 27 Supply Platoon, RIASC, Ambala Cantonment, sent instructions vide letters Exhibits D-20 to D-23 to the Controller of Military Accounts, Meerut, asking the latter to delete from the supply orders issued in connection with the said risk purchases the note according to which those purchases had been made at the risk and expenses of the firm. This action, however, does not appear to have found favour with the higher authorities and on the 16th of August, 1950, one Major T.S. Gill of the Ambala Sub-Area Headquarters informed the firm (vide Exhibit D. 11) that according to an intimation received from the Controller of Military Accounts, Meerut, a sum of Rs. 40,073/1/1 (admitted by the Military authorities to be due to the firm for the goods supplied by it under the contracts in question) had "since been adjusted" and that the firm was required to "deposit the remaining sum of Rs. 89,666/12/5 in Government Treasury" and to forward the relevant treasury receipt for the same to the Ambala Sub-Area Headquarters by the 25th of August, 1950. In another letter issued by the East Punjab Area Regiment Headquarters, Jullundur Cantonment, on the 21st of July, 1951 (Exhibit D. 10) the demand was repeated and the firm was told that in view of its refusal to pay the balance of Rs. 89,666/12/5, the dispute was to be referred to arbitration. The firm did not accept the position taken in these letters and served the Union with a notice u/s 80 of the Code of Civil Procedure. The stand taken in the notice was that the Military authorities were bound in law to pay to the firm all its dues in respect of the goods actually supplied, that no risk purchases were actually made and that they could not have been made in the face of the deletion of the relevant term authorising them, as per letters Exhibits D.-20 to D. 23. The firm further claimed that the alleged adjustment mentioned in letters Exhibits D. 11 and D. 10 was un-authorized and it asked the Military authorities to pay the amounts of its bills. This demand having not been met, on the 14th of August, 1952, the firm instituted suit No. 118/377 of 1952 against the Union for recovery of Rs. 42,980/5/7 due in respect of the goods supplied by it. In paragraph 6 of the plaint in that suit the firm stated:

That the defendant thus acknowledging the liability to the plaintiff regarding the above bills, the defendant has alleged adjustment of the same towards some dues outstanding from the plaintiff. The plaintiff denies such adjustments which are illegal, arbitrary and not binding upon the plaintiff and were unauthorised and it is also denied that anything was due from the plaintiff. The claim of the plaintiff is within time for the above reasons.

To these averments the reply of the Union in paragraph 13 of its written

statement (Exhibit D. 2) was that the firm owed Rs. 1,29,465/ 12/8 on account of risk purchases made in accordance with the contracts on the failure of the firm to supply the contracted goods. The claim of the firm was resisted and it was prayed that a decree for Rs. 1, 29, 465/12/8 be passed in favour of the Union against the firm. To the written statement was appended a document purporting to be a statement of account (Exhibit D. 3) detailing in two separate columns the amounts due from the firm on account of risk purchases and the amount due to the firm on account of bills, the totals of these two columns being Rs. 1,29,465/12/8 and Rs. 41, 078/14/9 respectively. In paragraph 13 of its replication in that suit the firm reiterated the position taken by it in paragraph 6 of its plaint.

During the trial of that suit, no court-fee having been paid by the Union on its claim of Rs. 1,29,465/12/8 the trial Court passed the following order (Exhibit P. 1) on the 31st of July, 1953:

As the claim for Rs. 1,29,465/12/8 which the Union of India pleads that it has got against the plaintiff does not fully relate to the contracts on the basis of which the plaintiff has brought this suit the defendant has an independent right to file a separate suit for the recovery of that amount. Since the defendant does not insist on getting adjudication of that claim in this suit, he is at liberty to bring a separate suit for the recovery of that amount. The defendant has not paid the court-fee on that alleged claim of set off.

Thereafter the suit proceeded only in relation to the claim of the firm which was decreed to the extent of Rs. 41,287/13/3 along with proportionate costs on the 9th of February, 1954 (Exhibit D. 7). While deciding issue No. 2 which was to the following effect:

Whether the sum of Rs. 42, 980/5/7 is due to the plaintiff per details given in paragraph 4 of the plaint from the defendant?

the trial Court held;

Thus it is proved from the documents Exhibits C 15 and C 20 that the bills No. L 5, L 7, L 8 and L 9 have been passed in full but the amount has been adjusted to yards the demands outstanding against the plaintiff in the books of account of C.M.A. (W.C.) Meerut. No claim for set off for these outstanding demands has been made in this case and so the C.M.A. (W.C.) Meerut had no right to adjust the amount of the bills No. L 5, L 7, L 8, and L 9 which had been passed in full towards any alleged outstanding demands which are not admitted by the plaintiff. I hold that the plaintiffs are entitled to recover Rs. 32, 705/13/9 from the defendant as the amount of the bills No. L 5, L 7, L 8 and L 9 which had been passed in full.

An appeal instituted by the Union against the decree passed by the trial Court was dismissed with costs by a Division Bench of this Court on the 20th of May, 1960 (Exhibit D. 8).

On the 7th of December, 1955, the firm filed another suit being suit No. 455 of 1955 against the Union for recovery from the latter of the amounts deposited by the former as security for the performance of the said contracts. This suit was also decreed on the 26th of December, 1957 (vide judgment D. 16).

The suit out of which the present petition has arisen was instituted by the Union on the 29th of December, 1968, for the recovery of Rs. 1,27,556.40 on account of damages for breach of two of the contracts which related to the supply of fresh fruits and fresh Vegetables at Jullundur and Ambala Cantonments. According to the Union, the amount claimed by it represented the losses incurred on risk purchases made by it on account of the failure of the firm to supply the said commodities in time during the months of August and September, 1947. The suit was resisted by the firm on the ground, amongst others, that the judgments in the two suits decreed in its favour operated as res judicata. The trial Court has turned down the plea of res judicata with the finding that the present suit embraces a counter-claim which the Union need not have put forward during the previous litigation.

3. Mr. Kaushal, Learned Counsel for the firm, did not set up the decision in suit No. 455 of 1955 (judgment Exhibit D. 16) in support of the plea of res judicata for the simple reason that that judgment was given by a Subordinate Judge of the second class who was not competent to entertain the present suit. Mr. Kaushal, however, vehemently contended that the provisions of Explanation IV to section 11 of the CPC were fully attracted to the facts with which we are here concerned, by reason of the judgment in suit No. 118/377 of 1952 (Exhibits D. 7 and D. 8). That Explanation runs thus:-

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Mr. Kaushal's argument was that the Union was entitled under the terms of the contracts in question to a just the losses incurred by it on account, of risk purchases against any amounts due to the firm under any contract, that the Military authorities had actually adjusted part of such losses in their account-books, that the adjustment, if pleaded, would have been a complete answer to suit No. 118/377 of 1952 and that, therefore, the question of any losses arising from risk purchases which would be covered by a plea of adjustment must be deemed to have been raised in the former suit and to have been decided against the firm. The argument is fallacious. It is true that under the terms of the contracts entered into by the firm with the Military authorities the Union was entitled to adjust the losses incurred on account of risk purchases against any amounts due to the firm under any contract. It is further true that the Military authorities had actually adjusted part of such losses in their account-books as is clear not only from Exhibit D. 3 which, as already mentioned, is a statement of account appended by the Union to its written statement, but also from letters Exhibits D. 11 and D. 10 addressed by the Military authorities on the 16th of

August, 1950, and the 21st of July, 1951, respectively, to the firm. The matter, however, does not end there because at the trial in the former suit the firm actively repudiated the adjustment right from the institution of its plaint and the Union also did not claim any adjustment and on the other hand, claimed a set-off for the entire amount alleged to be due to it on account of losses on risk purchases. What was then the position of the two parties in the previous litigation? It clearly was that although the Union was at liberty under the terms of the contracts in question to adjust the losses incurred by it on risk purchase, no adjustment of such losses was actually made by it. The parties must be deemed to have agreed upon this point in the previous litigation and neither of them can be allowed to back out of it. By setting up the adjustment now the firm is taking a position entirely contrary to that taken by it in the previous suit and that is a thing which it cannot be allowed to do. The present litigation must, therefore, proceed as if no adjustment had taken place, this bring the position accepted by both parties in the previous litigation. And if that be so, there is no question of res judicata in as much as no adjustment can be deemed to have ever taken place.

4. The matter would of course have been different if in the previous suit the Union had put in a plea of adjustment and had lost the suit in spite thereof; for, in that case, the plea would have been a plea of payment of the amount in suit and would have been deemed negatived by a decree in favour of the firm and the result would have been a rejection of the right of the Union to recover losses on risk, purchases from the firm. But what happened was that when the firm pleaded in its plaint that no adjustment had been or could be made, the Union chose not to insist upon the adjustment, to throw it over board and to take instead the plea of setoff to which it considered itself in any case entitled; and that is why that when it chose to recover the amount claimed by it through a separate suit, it obtained the permission of the Court to file one (vide Exhibit P. 1). The proposition put forward by Mr. Kaushal on the authority of *Malaya Kumar Mazumdar Vs. Fakir Mohammad Sarkar and Others*, that if the judgment in the previous suit operates as res judicata by virtue of the provisions of Explanation IV to section 11 of the Code of Civil Procedure, the order contained in Exhibit P. 1 could not remove the bar of res judicata is indisputable but in the circumstances of the case that proposition is of no help to the case of the firm whose repudiation of the adjustment in the former suit debars it from raising the plea of res judicata based on theory of adjustment which stood exploded by the time the issues in the former suit were framed.

5. According to Mr. Kaushal, the adjustment having been communicated by the Union to the firm in letters Exhibit D. 11 and D. 10, it became irrevocable. He has relied upon *M.C. Chegganmull Sowcar Vs. Desur Manicka Mudaliar*, and AIR 1940 63 (Privy Council) . Neither of these authorities, in my opinion, has any application to the facts of the present case. What they lay down is that once an appropriation is made by the creditor under the provisions of sections 59, 60 and 61 of the Indian Contract Act, it is not open to alter the appropriation after the

same has been communicated to the debtor. No exception can be taken to this proposition but it is something different from saying that the appropriation cannot be altered by the consent of both the creditor and the debtor. All that it means is that the creditor cannot unilaterally alter an appropriation of which the debtor has already been informed. There is nothing in the Contract Act to prohibit the alteration of an appropriation by consent of all parties concerned and once the alteration is shown to have come about with such consent, it must be held to be binding on them. The Union having accepted as good the repudiation of the adjustment expressed by the firm in its plaint, the adjustment came to an end.

6. Mr. Kaushal also raised a contention that the adjustment, even though repudiated, was mentioned in Paragraph 6 of plaint Exhibit D. 1 presented by the firm in the former suit, that the contents of that paragraph were denied by the Union in paragraph 13 of its written statement to which was appended statement of account Exhibit D. 3 and that, therefore, the plea of adjustment must be deemed to have been in issue between the parties in the former suit. This contention is also without substance. The Union no doubt denied the allegations made by the firm in paragraph 6 of plaint Exhibit D. 1 but then no adjustment was pleaded on its behalf in spite of the contents of Exhibit D. 3 and, on the other hand, the only manner in which it claimed its dues on losses incurred on account of risk purchases was by way of a set-off. The adjustment put forward by it in letters Exhibits D. 11 and D. 10 must, therefore, be deemed to have been annulled by it in view of the stand taken by the firm and no plea based thereon could be deemed to be a matter in issue before the Court.

It is not disputed that even though under the terms of the contracts in question the Military authorities were entitled to adjust the losses incurred by them on account of risk purchases against any amounts due to the firm under any contract, they were not bound to do so and that if they did not so adjust their losses, the Union could claim them either by way of a set-off in a suit brought by the firm or by a separate suit the Union chose to claim such losses by way of a set-off in the former suit and later on by a separate suit for which it obtained the permission of the Court. Had it not made the adjustment, no exception could be taken to the remedy chosen by it. I have already held that the alleged adjustment was annulled by the time the parties came face to face with each other in the proceedings held in the former suit and must, therefore, be deemed to have become non-existent for the purpose of that suit and the present litigation.

7. For the reasons stated, the finding of the trial Court on the issues of res judicata must be and is hereby affirmed. Accordingly the petition is dismissed but with no order as to costs. Parties are directed to appear before the trial Court on 6th of December, 1971.