

(2000) 10 P&H CK 0093
In the Punjab And Haryana At Chandigarh
Case No : C.R. 943 OF 1999

M/s. Sehgal Knitwears

APPELLANT

Vs

M/s. Shreshth International

RESPONDENT

Date of Decision : 11-10-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2001) 1 RCR(Civil) 373

Hon'ble Judges : M.L. Singhal, J

Bench : Single Bench

Advocate : Mr. Amit Rawal, for the Appellant; Mr. O.P. Goyal Mr. Sumeet Mahajan, Mr. Sham Lal and Mr. N.P. Sinha, for the Respondent

Judgement

M.L. Singhal, J.—This is a civil revision directed by M/s Sehgal Knitwears, Ludhiana against the order dated 26.11.1998 of Civil Judge (Junior Division), Ludhiana whereby he has allowed the stay of the suit titled M/s Sehgal Knitwears Vs. Shreshth International for the recovery of Rs. 15,61,000/-, on an application moved by the defendant for stay of the suit pending before him at Ludhiana, during the pendency of the suit titled Smt. Karnini Sadh sole proprietor of M/s Shreshth International and M/s Shreshth International Vs. M/s Sehgal Knitwears, Ludhiana for the recovery of Rs. 14,39,610/- before the High Court of Delhi. This revision has arisen in the following circumstances :-

2. M/s Sehgal Knitwears filed suit on 1.8.91 against M/s Shreshth International and Indian Overseas Bank for the recovery of Rs. 15,61,000/- as principal on account of the balance price of the goods manufactured by the plaintiff as per order Nos. 484, 485, 486, 487 and interest for June and July 1991 @ 24% per annum amounting to Rs. 59,600/- plus Rs. 12,000/- as price of the cartons purchased for packing goods to be supplied to M/s Shreshth International, D-815, New Friends Colony, New Delhi at Ludhiana and also for mandatory injunction directing the defendant to lift the goods lying with the plaintiff and mandatory injunction directing the defendant to supply CSD forms or in the

alternative to pay equivalent Central sales tax to the plaintiff. It was alleged in the plaint that M/s Shreshth International D-1815, New Friends Colony, New Delhi (defendant No. 1) placed four orders upon the plaintiff for the supply of 21,000 pieces of knitwears/fashion items. Tentative dates for the supply of knitwears were mentioned in the respective contracts as 15.4.91 and 30.4.91. These dates were not inflexible but subject to further negotiations. Initially price per piece was fixed at Rs. 85/- and the payment was to be made at Ludhiana. Goods were to be supplied at Ludhiana. Defendant No. 1 paid a sum of Rs. 2 lacs as advance against the orders vide draft/cheque. Plaintiffs were to manufacture samples and get them approved from the defendant and the defendants were to supply labels to be fixed on the knitwears. Plaintiff prepared the samples and handed over to the defendant for approval. Manufacturing of the goods could not be started without approval of the sample. Defendant No. 1 delayed the approval of the samples and the order thus could not be executed within the initial agreed period i.e. 15.4.91 and 30.4.91 @ Rs. 85/- per piece. There was overall increase in the price of the manufacturing of the goods and the plaintiff urged the defendants under UPC vide their letter dated 4.8.91 that the goods could not be supplied upto 15.4.91 or 30.4.91 and since the price of raw material and manufacturing costs has gone up, therefore, new rates per piece would be Rs. 105/-. Delivery period was suggested as 15.6.91 in respect of all the four orders and the defendants were required to remit another sum of Rs. 2 lacs in case they accepted all these conditions. There was telephonic talk between the plaintiff and the defendant. New rates were accepted by the defendant but they reduced the quantity of supply ordered earlier to 18,000 pieces in token of their acceptance of the new terms and conditions. Defendant sent a sum of Rs. 2 lacs in the first week of May 1991 and the delivery period was extended mutually upto 15.6.91. It was made clear to the defendant on telephone and also in writing that the delivery of goods would be made at Ludhiana against the balance payment. Matter was also mutually discussed and settled personally between the plaintiff and the representative of defendant at Ludhiana. Since all the terms were settled, the plaintiffs went on to manufacture 18,000 pieces. Defendant No. 1 delayed the supply of the labels till the last week of May 1991, it was only thereafter that goods could be finished and packed. Plaintiff had already manufactured 18,000 pieces prior to the end of May 1991 and thereafter this fact was conveyed to them and they were asked to make the balance payment and lift the goods as agreed. In utter disregard of the mutual agreement, defendant opened an LOC dated 29.5.91 at Indian Overseas Bank in favour of the plaintiff but some undesirable and not agreed upon conditions were introduced in the LOC. Plaintiff did not know any Kamini Sadh nor there was any understanding for getting the goods inspected from any such person before delivery. There was no agreement to get the goods insured from warehouse to warehouse, when the goods were to be lifted by the defendant at Ludhiana. LOC showed the last date as 5.6.91 while the LOC was delivered to the plaintiff on 7.6.1991 by their bankers UCO Bank, Givil Linics, Ludhiana. There were some cuttings and additions in the LOC. LOC was most likely to be dishonoured. There was a clumsy

effort on the part of the defendant to obtain the delivery of the goods against nominal amount of Rs. 4 lacs. This LOC was not negotiable on the face of it and it was for a part of the amount while agreement was to make the entire balance payment at the time of lifting the goods. It is defendant No. 1 who committed breach of the terms of the agreement. Plaintiff has been writing to the defendant time and again. Defendant No. 1 is under an obligation to lift the goods i.e. 18,000 pieces which are lying ready with the plaintiff since the last week of May 1991 against balance payment at Ludhiana. Plaintiffs were expecting that defendant No. 1 would honour their commitment but they felt shocked to receive a notice from their counsel Shri Dinesh Kumar Garg, Advocate Delhi High Court in which wrong allegations had been made. New facts were put forward claiming that the orders were placed upon the plaintiff in response to some export orders obtained by defendant No. 1 from some foreign buyers. The notice is dated 2.7.91 and the plaintiff sent reply dated 13.7.91. Plaintiffs were never informed by the defendant No. 1 that the goods to be manufactured by the plaintiffs were to be exported by the defendants. It appears to be an after- thought. Plaintiff would not have undertaken this huge project had the defendant not promised to lift the entire goods against balance payment. Plaintiff had already invested a sum of Rs. 18 lacs and it was a marginal profit that the plaintiff were going to make in this deal. Annexure P1 is the copy of the plaint filed by M/s Sehgal Knitwears against M/s Shreshth International at Ludhiana.

3. Smt. Kamini Sadh sole proprietor of M/s Shreshth International filed suit in July 1991 against M/s Sehgal Knitwears for the recovery of Rs. 14,39,610/- before Delhi High Court on the allegations that the plaintiff i.e. M/s Shreshth International received orders for supply of 21,000 pieces of children pullovers/knitwears from their buyers as per the details given in the plaint. Defendant (M/s Sehgal Knitwears) is the manufacturer of pullovers/knitwears at Ludhiana. Defendant approached the plaintiff and placed orders with them for the supply of such pullovers/knitwears to the plaintiff. Specification of the knitwears/pullovers were given in the order received by the plaintiff from their buyers abroad. Specifications were understood by the defendant and thereafter he quoted Rs. 85/- as the price of one pullover/knitwear of the said specifications. At that time, the defendant had assured, promised and represented that they are the manufacturers of repute and that for supply of children pullovers/knitwears requisite specifications will be given within the time specified. Acting on the aforementioned promise, assurance and representation of the defendant, the plaintiff placed order for the supply of 20,000 pieces of children knitwears/pullovers vide different orders. Specifications and the terms and conditions of the supply including the date of delivery was mentioned in the said orders. As orders were placed on the defendant against orders received by the plaintiffs from the buyers abroad, time was made essence of the contract. Payment was agreed to be made on delivery of goods after adjusting advance payment. Though there was no agreement between the parties regarding making any advance payment, the plaintiff paid a sum of Rs. 2 lacs to the defendants as

advance along with orders vide cheque No. 357365 dated 15.2.91 for Rs. 1 lac and pay order No. 617997 dated 16.2.91 for Rs. 1 lac. These cheques/pay orders were encashed and realised by the defendant. Defendant was under contractual obligation to supply the goods on or before 30.4.91 but defendant failed to do so. On 30.4.91, when the plaintiff approached the defendant to know the fate of the supply, plaintiff was told by the defendant that they were running short of funds and could not fulfil the commitment for supply of goods by the agreed date. At the same time, defendant requested the plaintiff to make further advance payment of Rs. 2 lacs. Plaintiff was not at all willing to extend the delivery date or to make any further advance payment nor the plaintiff was under any contractual obligation to do so. Plaintiff paid a further sum of Rs. 2 lacs by pay order No. 616522 dated 1.5.91 as a matter of favour to the defendant and also extended the delivery date to 5.6.91 on a clear understanding that no further extension would be given and no further payment would be made. The plaintiff also opened a letter of credit for some of the goods again as a favour to the defendant to enable the defendant to raise finances from their bankers. Despite the favour shown by the plaintiff to the defendant, the defendant failed to supply the goods by the due date i.e. 5.6.91. As the buyer abroad was not agreeable to extend the shipment date any further, the plaintiffs were also not in a position to extend the delivery date and consequently, the orders placed by the plaintiffs on the defendant lapsed. Defendant No. 1 committed breach of the contract and failed to perform their part of the contractual obligation. Defendant, without any just cause or reason failed to supply the goods within the agreed date of 30.4.91 and even within the extended date of 5.6.91. Time was the essence of the contract. After the expiry of the delivery date, the plaintiff was under no obligation to accept the delivery. It was also pleaded that the delivery was never offered by the defendant till the date of issuance of legal notice dated 2.7.91. Orders placed by the foreign buyer on plaintiffs expired because of non-execution within the period allowed and the foreign buyer was also threatening the plaintiff to recover the damages for non-execution of the orders. It was further alleged in the plaint that due to aforesaid act, conduct, lapses, inactions and the breaches committed by the defendant, the plaintiff suffered heavy loss on account of the loss of profit, CCs entitlement, Draw-back entitlement, REP licence entitlement and quota entitlement. Plaintiff is entitled to recover all such losses from the defendant besides the recovery of the advance amount of Rs. 4 lacs paid by the plaintiff to the defendant and interest accrued thereon. Plaintiff claims a sum of Rs. 14,39,610/- as damages (with interest) on different heads. This suit was instituted at Delhi in July 1991. Copy of the plaint of the suit instituted at Delhi in Annexure P2.

4. M/s Sehgal Knitwears filed written statement Annexure R-I contesting this suit filed in the Delhi High Court by M/s Shreshth International. It may be recapitulated that the suit at Delhi was filed in July 1991 while the suit at Ludhiana was filed in August 1991 i.e. later in point of time.

5. Learned counsel for the petitioner (M/s Sehgal Knitwears) submitted that the

suit filed at Ludhiana could not have been stayed as all the issues in both the suits are not common and if all the issues in both the suits are not common, trial of both these suits can proceed separately. In support of this submission, he drew my attentions to British Indian Corporation Ltd. Vs. Rashtaco Freight Carriers, , where the Hon"ble Supreme Court has observed 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. Claim of the respondent in suit No. 612/94 was for recovery of the alleged dues payable by the appellant-Corporation while the suit of the appellant was for recovery of the goods lawfully entrusted to and unlawfully detained by the respondent. Causes of action being entirely different and there was no common issue directly or substantially in issue in both the suits, the High Court committed gross error of law in staying the later suit.

6. Learned counsel for the respondent No. 1 on the other hand, submitted that in both the suits, the parties are the same. Cause of action is the same and on the analogy of Section 10 CPC, later suit is to be stayed. If the later suit is not stayed and the trial of both the suits continues to proceed simultaneously in different courts, no wonder, there is conflict of finding between the two courts. It was submitted that so that the possibility of conflict of finding in such a situation is completely obviated, the Parliament inserted Section 10 in the Code of Civil Procedure. He submitted that in every case before Section 10 is applied, one has to see what is the substratum of the dispute i.e. the substance of the matter has to be seen and not its form. In support of this submission, he drew my attention to M/s C. Roman & Co., Bombay & others v. M/s. Modern Motor Works, Ludhiana, 1973 PLR 529, where it was held that in every case before Section 10 is applied, one has to see what is the substratum of the dispute i.e., the substance of the matter has to be seen and not its form. It is, however, well settled that additional reliefs will not take out the case from the ambit of Section 10 but if the two matters are sodivergently opposed to one another that it cannot be said that the matter in dispute is substantially the same, Section 10 will not apply. He drew my attention to M/s Jagan Nath Jagdish Lal v. M/s Piara Mal Govind Ram Sachdev 1979 PU 231, where it was held that before Section 10 can be said to be applicable, matter in issue in two suits should be directly and substantially the same. Identity of subject matter and field of controversy between parties must be substantially the same. What is to be seen is not the form but substratum of dispute i.e. substance of matter is to be seen and not its form. Additional reliefs will not take out the case from the ambit of Section 10. Test to judge whether subject matter in two suits is substantially the same, decision in prior suit should operate as res judicaia in the suit instituted later and shut out its trial. It was held by their Lordships of the Hon"ble Bombay High Court in Jai Hind Iron Marl v. Tul-siram Bhagwandas, AIR 1953 Bombay 117, that Section 10 does not contemplate an identity of issues between the two suits nor does it require that the matter in issue in the two suits should be entirely the same or identical. What the section requires is that the matter in issue in the two suits should be

directly and substantially the same, and proper effect must be given to the language used by the Legislature in Section 10 that the identity required is a substantial identity. There must be an identity of the subject matter, the field of controversy between the Parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the identity and the field of controversy must be substantially the same."

7. Here the defence taken up by M/s Sehgal Knitwears in the suit titled Mrs. Kamini Sadh sole proprietor of M/s Shreshth International is virtually what they have pleaded at Ludhiana in support of their claim for the recovery of Rs. 15,61,000/- against M/s Shreshth International. In para 13 of the written statement, it has been pleaded by M/s Sehgal Knitwears that it is denied that a sum of Rs. 14,39,610/- or any amount is payable to the plaintiff from the defendant. Rather, the defendant has to recover huge amount from the plaintiff for which the defendant has filed suit in the court at Ludhiana. Plaintiff has filed this suit with a view to create a false defence in the suit at Ludhiana and harass the defendant so that the defendant has to come to Delhi to contest the suit. Plaintiff placed orders upon the defendants for supply of 21,000 pieces of knitwears/fashion items. Tentative value for the supply of the knitted knitwears is mentioned in the respective orders dated 11.4.91 and 30.4.91 but these dates were not inflexible but were subject to negotiations. Initial price per piece was fixed at Rs. 85/- and the payment was to be made at Ludhiana. Plaintiff paid a sum of Rs. 2 lacs along with the order. Defendant manufactured samples and got them approved from the plaintiff who was also to supply labels to be fixed on the knitwears. Defendant duly, prepared the samples and handed them over to the plaintiff for approval. Manufacture of the goods could not be started without the approval of the samples. Plaintiff delayed the approval of the samples and the order could not be executed within the agreed period i.e. 15.4.91 and 30.4.91 @ Rs. 55/- per piece. There was an overall increase in the prices of the goods and as such the defendant wrote to plaintiff vide letter dated 8.4.91 that the goods could not be supplied upto 15.4.91 and 30.4.91 and that since the prices of raw material and the manufacturing costs had gone up, the new rates per piece would be Rs. 105/- and the delivery period was suggested as 15.6.91 in respect of the four orders. Plaintiff was further required to remit another sum of Rs. 2 lacs in case they accepted all these conditions. Parties had also telephonic talks. Rates was accepted by the plaintiff but they reduced the quantity from 21,000 pieces to 18,000 pieces. Plaintiff No. 2 also sent a sum of Rs. 2 lacs in the first week of May 1991 accepting the new terms and conditions and thus the delivery period was mutually extended to 15.6.91. It was further made clear to the plaintiff on telephone and also in writing that the delivery of the goods would be made at Ludhiana against balance payment. Matter was mutually discussed and settled. Since all the terms were settled, the defendants manufactured 18,000 pieces as per specifications. Plaintiff, however, delayed the supply of the labels to the defendant and the same were supplied only in the last week of May 1991

vide their challan and it was only thereafter that the goods could be finished and packed. Defendant had already manufactured 18,000 pieces prior to the end of May 1991 and thereafter it was conveyed to the plaintiff that they could make the entire balance payment and lift the goods as agreed to. Plaintiff, however, in utter disregard of the agreement, opened a letter of credit in which some conditions were introduced which had not been agreed upon.

8. It is, thus, clear that the suit at Ludhiana filed by the plaintiff is later in point of time vis-a-vis suit filed by the defendant at Delhi. In both the suits the matter in issue is directly and substantially the same and the parties are also the same namely M/s Sehgal Knitwears and M/s Shreshth International. Substratum of the relief claimed in the Ludhiana suit will impinge upon the relief claimed in the Delhi suit. Similarly relief claimed in Delhi suit will impinge upon the relief claimed at Ludhiana suit. In this case, the foundation for the cause of action for M/s Sehgal Knitwears and M/s Shreshth International is substantially the same so far as the substratum of the case of each party is concerned and therefore Ludhiana suit which was filed later in point of time was rightly stayed by the learned trial Court. Finding to be recorded by the Delhi Court in the Delhi suit will operate as res judicata as far as the substantive/core issues are concerned which will be decisive of the genuineness of the claim of one party or the other party.

9. For the reasons recorded above, this revision fails and is dismissed.

10. Revision dismissed.