
(1975) 04 CAL CK 0016
In the Calcutta High Court
Case No : A.F.O.O. No. 235 of 1971

Shaw Wallace and Co. Ltd.

APPELLANT

Vs

Bholanath Mandanlal Sherawala and Others

RESPONDENT

Date of Decision : 08-04-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : AIR 1975 Cal 411 : 79 CWN 830

Hon'ble Judges : Dipak Kumar Sen, J; Deb, J

Bench : Division Bench

Advocate : Somenath Chatterjee, Aninda Mitter and Indrani Chatterjee, for the Appellant; B.K. Bachawat and S.C. Ukil, for the Respondent

Final Decision : Allowed

Judgement

Deb, J.—This is an appeal from an order dated November 9, 1970, staying the suit filed in this Court u/s 10 of the CPC in view of an earlier suit filed by the respondents against the appellant in the Court of Civil Judge, Ferrukhabad, being Civil Suit No. 61 of 1969.

2. The respondent firm was appointed by the appellant as its dealer to sell certain goods in the district of Ferrukhabad. The respondents' case in the Ferrukhabad suit is that the said dealership agreement was cancelled by mutual agreement and thereafter certain transactions were entered into between the parties and in respect of those post contract transactions the respondents became entitled to certain sums of money from the appellant, which sums the respondent is seeking to recover in that suit.

3. The defence of the appellant in that suit is that, though some new arrangements were entered into between the parties, the respondents are not entitled to receive any money from the appellant. It has also been denied in that written statement that the dealership agreement was terminated by mutual consent as alleged by the respondents in, that plaint. It has further been pleaded

by the appellant in that suit that the respondents have wrongfully repudiated the said dealership agreement and the said wrongful repudiation was accepted by the appellant.

4. During the pendency of the Ferrukhabad suit, the appellant has filed this suit No. 3661 of 1969 in this Court claiming damages for wrongful repudiation of the dealership agreement by the respondents and the acceptance of such wrongful repudiation by the appellant resulting in the damages suffered by the appellant with an additional claim arising out of the new arrangements pleaded by the respondents in the Ferrukhabad suit.

5. In these circumstances, the respondents have made the application u/s 10 of the Code and it was allowed by the learned Judge, who has, inter alia, said as follows :

"The main issue in both the suits are common, namely, what the terms of the contract of dealership between the parties are and who has committed the breach of the said dealership agreement, and though apart from that issue the subject-matters in both the suits are different, and yet the result in both the suits will depend mainly on the decision of the issue as to who committed default of the dealership contract between the parties."

6. In staying the suit the learned Judge followed a decision of the Division Bench of this Court in the case of Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another, to which reference will be made later on.

7. In support of this appeal it has been contended by Mr. Somenath Chatterjee, the learned counsel for the appellant, that the field of controversy in both the suits are entirely different, because the Ferrukhabad suit is founded upon a new arrangement entered into between the parties after the dealership agreement came to an end; whereas the Calcutta suit is based on the breach of contract.

8. The contention of Mr. Bachawat, the learned counsel for the respondents, on the other hand, is that the field of controversy between the parties is substantially the same in both the suits. He has argued that it does not matter whether Ferrukhabad suit is on the new arrangement or Calcutta suit is on the dealership agreement, in view of the decision of Chakaravarti, C. J. in the case already cited. He has also drawn our attention to another Division Bench decision of this Court in the case of Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. and Others, , in support of his contention that if the principal issue in both the suits is the same, it must be held that the matters in issue in both the suits are primarily and substantially the same.

9. We have already stated the nature of pleadings in the Ferrukhabad suit. In the Calcutta suit the respondents have not yet filed any written statement, but we may assume that their defence would not be contrary to what has been stated in the plaint in the Ferrukhabad suit.

10. Question now is whether the matter in issue in both the suits is directly and

substantially the same so as to satisfy one of the most essential requirements of Section 10 of the Code. It is true that the learned Chief Justice has said that the "fact that one is a suit under the agreements entered into by the parties and the other is a suit de hors the agreements does not make a substantial identity of the subject-matter per se impossible" in the case of *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, , at page 734 of the report, but his Lordship has qualified his own statement by using the expression "per se impossible." The question as to whether the entire field of controversy in both the suits is the same must be determined on the construction of the pleadings in both the suits and, therefore, no new principle has been laid down in that case by the learned Chief Justice.

11. The learned Chief Justice has further said at p. 734 of the report that "the principal matter in issue" in both the suits must be the same so as to attract Section 10 of the Code and this view has been followed in the case of *Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. and Others*, , and speaking for this Court, at p. 139 of the report, in that case *Mitra, J.* says this :

"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."

12. In our opinion, the expression "principal matter in issue" used by the learned Chief Justice and followed by *Mitra, J.*, should be read, understood and construed in consonance with and subject to the following statement of Sir Ashutosh Mookerjee in the case of *Bepin Behari v. Jogendra Chandra*, reported in 24 Cal LJ 514 at p. 515 : (AIR 1917 Cal 248 at p. 249) of the report :

"What then is the meaning of the expression "the matter in issue." The defendants invite us to hold that the expression is equivalent to "any of the questions in issue." The obvious answer is that if that had been the intention of the framers of the section, appropriate words might have been used to bring out such sense. We are of opinion that the expression "the matter in issue" has reference to the entire subject in controversy between the parties. 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."

13. One of the most essential conciliations of Section 10 is that the matter in issue in the later suit which is sought to be stayed must be directly and substantially in issue in the earlier suit which is pending in the same or in any other court of concurrent jurisdiction. A mere identity of some of the issues in both the suits is not sufficient to attract this section in view of the law laid down by Sir Ashutosh Mookerjee. Unless the decision of the suit operates as *res judicata* in the other suit it cannot be said that the matter in issue is "directly and substantially" the same in both the suits. In other words, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same.

14. The attention of the learned Judge was, however, not drawn to the issues framed in the Ferrukhabad suit. In that suit no issue has been settled relating to the terms and conditions of the dealership agreement between the parties nor there is any issue as to who has committed the breach of the said dealership agreement. Therefore, the finding of the learned Judge cannot be supported and we overrule the contentions of Mr. Bachawat.

15. It is well-settled that unless an issue is framed and decided by the Court it cannot operate as *res judicata* in a subsequent suit between the same parties or their privies. It is true that the written statement in the Ferrukhabad suit has raised some of the questions which are also present in the plaint of the Calcutta suit, but unless in both the suits the entire subject-matter in controversy between the parties are substantially and directly the same it cannot be said that the matter in issue in both the suits is the same. There being no issue in the Ferrukhabad suit as to the terms and conditions of the dealership agreement nor as to its breach, in my opinion, it cannot be said that the matter in issue in both the suits is substantially and directly the same. Hence, the judgment under appeal cannot be supported.

16. In this view of the matter, we allow this appeal and set aside the judgment and order under appeal. The respondents will pay the costs of this appeal to the appellant. The application for stay u/s 10 is dismissed and the costs of that application will be cost in the Calcutta suit.

17. Liberty is given to the respondent to take appropriate directions from the Interlocutory Court with regard to the filing of the written statement.

Dipak Kumar Sen, J.

Speaking for myself I respectfully agreed with the judgment just now delivered by my learned brother. I only wish to point out that in the Ferrukhabad suit, the original dealership contract and its alleged termination have been no doubt, pleaded as part of a historical narrative but both the matters in issue and the cause of action in the Ferrukhabad suit arise mainly on the subsequent transactions and/or arrangement alleged to have been entered into by and between the parties. 18-19. The Ferrukhabad Court is not necessarily called upon to determine the rights and liabilities of the parties flowing from the original dealership agreement and/or its termination. In the manner the issues have been framed and the suit is being proceeded with in Ferrukhabad it is not impossible that the rights and liabilities of the parties, *inter se*, following from the subsequent alleged transactions may be determined while keeping the earlier rights and liabilities flowing from the earlier dealership agreements undetermined. Therefore, in any event, the matters which will be in issue or in controversy in the Calcutta suit may not be matters in controversy in issue in Ferrukhabad.