

(1980) 04 GUJ CK 0026

In the Gujarat High Court

Case No : Civil Revision Application No. 1107 of 1979

Sohal Engineering Works

APPELLANT

Vs

Rustam Jehangir Vakil Mills Co. Ltd.

RESPONDENT

Date of Decision : 03-04-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 11, 151

Citation : AIR 1981 Guj 110 : (1981) GLR 491

Hon'ble Judges : A.M. Ahmadi, J

Bench : Single Bench

Advocate : S.K. Zaveri, for the Appellant; B.S. Trivedi, for the Respondent

Judgement

1. By this application the original defendant challenges the order passed by the learned Judge in the City Civil Court (Seventh Court), Ahmedabad, whereby he instead of staying the subsequently instituted suit u/s 10 of the CPC directed that the subsequently instituted suit should be tried and decided along with the previously instituted suit. The facts giving rise to the present revision application in a nutshell are as under.

2. The plaintiff, Rustorn Jehangir Vakil Mills Company Limited, placed an order with the defendant for the manufacture of three roll calender machines to be erected and installed at the defendant's cost at its factory on or before 31st March, 1974. The Sales Manager of the defendant-firm accepted the order at Ahmedabad and received a cheque for advance payment from the plaintiff-company. Under the contract the price was fixed at Rs.3,10,000/- less 5 per cent discount. The advance payment was made to the extent of 30 per cent of the price, that is, Rs.88,350/-. The order was confirmed in writing on 13th November, 1973, Thereafter, in the month of January, 1974, the plaintiff-company inquired about the progress in the manufacture of the machines. The machines were not manufactured according to the time schedule and could not be delivered to the plaintiff-company up to 31st March, 1974 and hence the defendant firm sought extension of time. The plaintiff-company agreed to the

extension of time without -prejudice to its right to claim additional discount for the defendant's failure to deliver the machines on or before the dead-line. it appears that thereafter the defendant firm by its letter dated 15th September, 1974 informed the plaintiff-company that the machines were ready for inspection and despatch and asked for payment of Rs.3,21,000/- less the advance payment of Rs.88,3501/- within eight days from the receipt of the invoice. The plaintiffs were also informed that if they failed to make payment and take delivery of the machines within eight days from the date of invoice, the machines shall be diverted to some other party and the plaintiff will have to wait for another six months for the machines and would also be required to pay according to the prevailing rates. Immediately an receipt of this letter, the Sales Manager and Accountant of the defendant-firm was contacted and was informed that it did not behove the defendant-firm to act in this high-handed manner more so after the plaintiff-company had agreed to the extension of time. The negotiations were not fruitful, and, therefore, the plaintiff-company, apprehending that the defendant-firm may divert the machines as threatened by its letter, filed Suit No. 2558 of 1974 to restrain the defendant-firm, its partners and employees from diverting the three roll calender machines manufactured for the plaintiff-company to any third party. In this suit the defendant-firm entered an appearance and filed a contesting written statement at Ext. 13. It appears that during the pendency of this suit, as the machines were not delivered to the plaintiff-company another Suit No. 3429 of 1976 was filed on the basis of the very same contract to recover an amount of Rs. 4,00,000/- by way of damages with 17 per cent per annum interest and costs from the defendant-firm. The defendant-firm has contested this suit by its written statement, Exhibit 14. While these two suits were pending in the City Civil Court at Ahmedabad, it appears that in the subsequently instituted suit, a Chamber Summons was taken out by the plaintiff-company, Exhibit 15, for an order or direction that both the suits be consolidated and evidence be recorded in either of the two suits. Initially the learned Judge in the City Civil Court passed an order of amalgamation of the two suits in the absence of the learned advocate for the defendant-firm. However, subsequently the learned advocate for the defendant-firm appeared and gave an application, Exhibit 35, to set aside the ex parte order and to dispose of the Chamber Summons on merits after giving him an opportunity to contest the same. The learned Judge in the City Civil Court heard the learned advocate for the defendant-firm and ultimately passed the very same order directing the amalgamation of the two suits which were pending before him between the same parties. It may also be mentioned that on the very same day the defendant-firm had taken out a Chamber Summons praying that the subsequently instituted suit be stayed u/s 10 of the Code of Civil Procedure. The learned trial Judge rejected that application made at a belated stage on the ground that since he had acceded to the plaintiff's request for consolidating the two suits, there was no question of staying the subsequently instituted suit. These orders passed by the learned trial Judge are the subject-matter of challenge in this Revision Application.

3. Both the suits have been instituted by the opponent herein and they are against the petitioner-firm. They arise out of the very same contract for the manufacture and supply of three roll calender machines by the defendant-firm. The first suit was instituted by the plaintiff-company as it was apprehended that the defendant-firm was likely to divert the three roll calender machines manufactured in pursuance of the contract between the parties to a third party instead of delivering and installing them at the premises of the plaintiff-company as per the contract. The three roll calender machines, it appears, are not easily available in the market and as the plaintiff apprehended that they will have to wait for a considerably long time if the machines are diverted as threatened by the defendant-firm, the plaintiff-company instituted Suit No. 2558 of 1974 with a view to preventing or restraining the defendant-firm from carrying out the threat. By instituting the said suit the plaintiff-company desired to prevent the defendant-firm from committing the threatened breach of the contract. The subsequent Suit No. 3429 of 1976 was instituted when it was realised that notwithstanding the injunction granted by the Court in the previously instituted suit, the defendant-firm was not ready and willing to perform its part of the contract and hence there was no option for the plaintiff-company but to claim damages for non-performance of the contract from the defendant-firm. The amount of damages worked out by the plaintiff-company came to Rs. 5,75,258/- but the claim was restricted to Rupees 4,00,000/- in the relief clause of the suit. It is, therefore, clear from the aforesaid facts that both the suits arose out of the very same contract. In the first suit the plaintiff came to Court contending that there was a subsisting contract and that it was apprehended that the defendant-firm, a party to the contract, was likely to commit a breach of the contract. To restrain the defendant-firm from so doing, the plaintiff-company instituted the suit for an injunction not to divert the machines to a third party. The subsequently instituted suit is based on the allegation that the defendant-firm has failed to honour its commitments under the contract and as the plaintiff-company cannot wait indefinitely for the due performance of the contract by the defendant-firm, it is entitled to damages from the latter for non-performance of the contract. According to the plaintiff-company the estimated damages work out to Rs. 5,75,258/- but they have chosen to restrict the claim to Rs.4,00,000/- only. It is, therefore, clear that the reliefs claimed in the two suits by the plaintiff-company arise out of the contract reached by the parties as pleaded in the respective plaints. In both the suits, therefore, the plaintiff-company will have to prove the contract as pleaded in the plaints if the same becomes necessary having regard to the contentions taken in the respective written statements filed by the defendant-firm. In the previously instituted suit the question to be considered by the Court will be whether in the facts and circumstances of the case there was a reasonable apprehension of the defendants committing a breach of the contract and if yes, whether the plaintiff-company was entitled to restrain it from so doing. In the subsequently instituted suit the question which will arise for consideration will be whether the defendant has been guilty of non-performance of the contract and if yes, whether the plaintiff-company is entitled

to claim damages for failure of the defendant-firm to perform the contract. In the subsequently instituted suit evidence regarding the quantum of damages will also have to be led by the plaintiff-company.

4. Mr. Zaveri, the learned advocate for the defendant-firm, however, invited my attention to the averments made in paragraph 10 of the plaint of Suit No. 2558 of 1974. In the said paragraph the plaintiff-company has averred as under:

"The plaintiff further states that there exists no standard for ascertaining the actual damage that would be caused by non-performance of the contract by the defendant-firm and that the breach of the contract cannot be adequately relieved by compensation in money."

From this averment made in paragraph 10 of the plaint of that suit, it was urged by Mr. Zaveri that according to the plaintiff-company itself, having regard to the very nature of the contract it was not possible to ascertain the quantum of damages in the event of non-performance of the contract by the defendant-firm. He submitted that in the subsequently instituted suit the plaintiff-company has claimed a substantial amount of Rs.4,00,000/- by way of damages which, in other words, argued Mr. Zaveri, means that it is possible to determine the amount of compensation or damages for non-performance of the contract, a statement which is quite contrary to and inconsistent with the averments in paragraph 10 of the plaint of the earlier suit. It was, therefore, submitted by the learned counsel for the defendant-firm that if both the suits are amalgamated and evidence is led in one suit, the result would be that the defendant-firm would have to deal with these two inconsistent pleas which cannot stand together and that may cause considerable embarrassment and prejudice to the counsel for the defendant-firm while cross-examining the witnesses for the plaintiff-company. He, therefore, submitted that in a situation like this, the Court should put the plaintiff-company to election and if it elects to proceed with the former suit, the subsequent suit would fail and vice versa. There is two fold objection to this line of reasoning.

5. If it is the contention of Mr. Zaveri that the plaintiff-company should be put to election, that can be done only at the time when both the suits are taken up for trial. That would not be possible unless the two suits are consolidated and evidence is sought to be adduced in one of them. The second objection is that even in the case of non-performance of the contract by the defendant-firm, the plaintiff-company can ask for the relief of specific performance and in the alternative for damages. So far as the previously instituted suit is concerned, only a limited relief to restrain the defendant-firm from committing a breach of the contract by diverting the machines to a third party was sought and no more. Therefore, the submission of Mr. Zaveri that the suits ought not to have been consolidated as it was likely to cause prejudice and embarrassment to the defendant-firm does not appeal to me.

6. It was next submitted by Mr. Zaveri that the provisions of Section 10 of the

CPC are mandatory and once the defendant-firm has brought the case within the four corners of that section, the Court has no alternative but to stay the subsequently instituted suit between same two parties. Section 10 provides 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 where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. According to Mr. Zaveri the parties to both the suits are identical. Both the suits arise out of the very same contract whereunder the defendant-firm is required to deliver three roll calendar machines to the plaintiff-company. He, therefore, submitted that the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit and, therefore, it was imperative on the learned trial Judge to stay the subsequently instituted suit.

7. In support of this contention Mr. Zaveri invited my attention to the decision of the Bombay High Court in *Trikamdas Jethabhai Vs. Jivraj Kalianji*, . In that case Blackwell, J., observed that the words of Section 10 are mandatory and require 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. He pointed out that it was immaterial that the relief claimed in the earlier suit was of a different character from the one claimed in the subsequently instituted suit. The test, according to the learned Judge, was whether the previously instituted suit and the subsequently instituted suit were "parallel", that is to say that if the first was determined, the questions raised in the subsequent suit would be res judicata by reason of the decision in the prior suit.

8. In *Jai Hind Iron Mart Vs. Tulsiram Bhagwandas*, , the Division Bench of the Bombay High Court pointed out that an order u/s 10 is not adjectival; it is an order dealing with the jurisdiction of the Court, because whatever order is passed u/s 10 affects the jurisdiction of the Court. It was observed 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. Their Lordships pointed out that there must be an identity of the subject-matter and 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. In that decision also it was reiterated that Section 10 was mandatory in nature.

9. The Madras High Court in *Munuswami v. Raghupathi* AIR 1940 Mad 7, while observing that Section 10 is mandatory in character, pointed out that the expression "the matter in issue" referred the entire subject-matter in dispute and not to one of the issues.

10. Soni, J., of the Punjab High Court in *Raj Spinning Mills, Amritsar Vs. A.G. King Ltd., Excelsior Mills*, , observed that where Section 10 applies the Court has no option but to stay the proceedings. In other words, it means that Section 10

is mandatory in character.

11. Lastly Mr. Zaveri relied on a decision of the Supreme Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, . In that case their Lordships of the Supreme Court held that the provisions of Section 10 are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. According to their Lordships, when there is a special provision in the CPC for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers u/s 151 is not justified.

12. It was, therefore, urged by Mr. Zaveri, relying on the aforesaid case law and particularly the last-mentioned decision that since the provisions of Section 10 of the Code are mandatory in character, the Court has no option but to stay the subsequently instituted suit if the case falls within the four corners of that provision.

13. On a plain reading of the contents of Section 10 of the Code, it is crystal clear that the object of the provision is to prevent Courts of concurrent jurisdiction from adjudicating upon parallel litigations between the same parties having the same matter in issue with a view to avoiding conflict of decisions. The policy of the law is that if the matter in issue in the two parallel suits is identical in the interest of judicial comity, the Court in which the subsequently instituted suit is pending shall stay the proceedings and allow the previously instituted suit to proceed. The key words in the Section are: "the matter in issue is directly and substantially in issue" in the previously instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". That means that the Section 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 and not merely one of the many issues which arise for determination in the two suits. That, however, does not mean that all the issues must be identical, that is, the subject matter need not be the same in every particular. To that extent, Section 10 differs from Section 11 which engrafts the doctrine of *res judicata*. u/s 11 even if one of the two issues is common to both the suits, the decision on that issue would operate as *res judicata* in any suit subsequently decided between the same parties so far as that issue is concerned. That is why the working test evolved by the Bombay High Court in the case of *Trikamdas Jethabhai Vs. Jivraj Kalianji*, is that if by the decision in the previously instituted suit the subsequent suit would fail as a whole on the principle of *res judicata*, the subsequent suit must be stayed.

14. There can, therefore, be little doubt that Section 10 of the Code is mandatory in character. If the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit, the Court is precluded from proceeding with the subsequently instituted suit. In that case it is imperative on the Court to stay the subsequently instituted suit and await the decision in the previously instituted suit. It is, however, a question of fact to be

gathered from the pleadings of the two suits as to whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit. In the present two suits the parties are the same and both the suits arise out of the very same contract. The scope of the first suit is, however, limited in that the endeavour of the plaintiff in that suit is to restrain the defendant from committing a breach of the contract. That suit, therefore, clearly arises under the contract. Once the contract is established and there is a reasonable apprehension of the contract being broken, the plaintiff is entitled to request the Court to restrain the defendant-firm from committing a breach of the contract. The subsequently instituted suit, however, proceeds on the basis that the defendant has been guilty of non-performance of the contract and, therefore, the plaintiff-company has become entitled to damages. The subsequently instituted suit also arises out of the very same contract, as its non-performance entitles the plaintiff-company to sue the defendant-firm in damages. In the first suit the question of breach of contract does not arise, but it is a suit based on an existing contract, which, it is apprehended, is about to be broken. The subsequent suit arises *ex contractu* as it proceeds on the basis that the defendant-firm has committed a breach of the contract and has, therefore, entitled the plaintiff-company to sue for damages. Therefore, the field of controversy of the two suits cannot be said to be identical because what the plaintiff will have to prove in the first suit is merely the existence of the contract and the alleged apprehension of breach thereof. In the subsequent suit the plaintiff will have to prove not only the existence of the contract but failure on the part of the defendant-firm to perform its part of the contract and to establish its right to claim damages from the defendant-firm and to prove the quantum of damages. Strictly speaking, therefore, the field of controversy of the two suits cannot be said to be so identical that the decision of the former suit would conclude the subsequent suit on the doctrine of *res judicata*. Even if the plaintiff-company fails to prove in the former suit the alleged apprehension and the suit is dismissed on that ground, the subsequent suit based on actual breach of contract will still survive. I am, therefore, of the opinion that Mr. Zaveri is not right when he contends that in the facts and circumstances of the two suits, the subsequently instituted suit ought to have been stayed by the learned trial Judge.

15. It was next argued by Mr. Zaveri, the learned Advocate for the petitioner, that the Court is not empowered by virtue of Section 151 of the Code to consolidate or amalgamate the two suits in the face of objection by one of the parties to the litigation. In support of this contention strong reliance was placed on a decision of Raju, J., in *Bhopo Fakirbhai (minor) and Another Vs. Bai Mani and Others*, , where it was held that there was no provision in the Evidence Act which gave power to the Court to treat the evidence recorded in one suit as evidence in the other suit, notwithstanding that the issues are not identical and the parties are not common to both the litigations. It appears from that decision that the contentions raised in the two suits were not identical and, therefore, the issues to be decided were different and the parties to the two suits were not

common. This decision of Raju, J., came up for consideration before A. D. Desai, J., in Second Appeal No. 74 of 1961 decided on 24th October, 1968. The aforesaid distinguishing features were highlighted by the learned Judge and it was pointed out that the decision turned on the peculiar facts of that case and did not lay down any hard and fast rule that the Court had no power to order or direct consolidation of two suits even if the parties to both the proceedings are identical and the suits arise out of the very same contract. In the instant case also, as pointed out earlier, both the suits arise out of the same agreement and the parties to both the litigations are the same. The learned trial Judge presumably felt that considerable public time and expense would be saved if both the suits are consolidated and the evidence is recorded in one suit. That would also avoid inconvenience to the witnesses figuring in the two suits as they will not be required to re-appear to give evidence in the other matter. The fact that the Court has power to order consolidation of suits where common questions arise between the very same parties is settled in *Harinarain Choudhary and Others Vs. Ram Asish Singh and Others*, and *Dasari Suryanarayana Vs. Dasari Venkata Subbaiah*, . It is not necessary to multiply decisions on this question as on a plain reading of Section 151 of the Code it is obvious that in the absence of specific provision in the Code on the point, the Court has inherent power to make such orders as such orders be necessary for the ends of justice and to prevent the abuse of the process of the Court. I, therefore, do not see any merit even in the second contention urged before me by Mr. Zaveri.

16. Mr. Trivedi, the learned advocate for the opponent-plaintiff invited my attention to the observations of the Supreme Court in paragraph 39 of the judgment in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, wherein their Lordships have observed: -

"Further, Section 22 of the Code provides for the transfer of a suit to another Court when a suit which could be instituted in any one of two or more Courts is instituted in one of such Courts. In view of the provisions of this Section, it was open to the respondents to apply for the transfer of the suit at Asansol to the Indore Court and, if the suit had been transferred to the Indore Court, the two suits could have been tried together".

From these observations made by the Supreme Court it was urged by Mr. Trivedi that even in cases where the two suits are not pending in the very same Court, by invoking the provisions of Section 22 of the Code one of them could be got transferred to the other Court having concurrent jurisdiction and the two suits could thereafter be tried together. According to Mr. Trivedi, the observations of the Supreme Court reproduced earlier clearly go to show that if both the suits are pending in the same Court, it is open to the Court to direct that they be tried together. A similar submission was made before Divan, J., as he then was, in Civil Revn. Appln. No. 504 of 1963, decided on 20th August, 1963. After referring to the observations of the Supreme Court reproduced earlier, the learned Judge confirmed the order passed by the trial Court directing consolidation of the suits

instead of staying the subsequently instituted suit u/s 10 of the Code. There can be no doubt that the observations of the Supreme Court clearly indicate that the Court has the power to direct two suits between the same parties where common questions are likely to arise to be tried together. That power could only be traced to Section 151 of the Code.

17. These were the only submissions which were made at the Bar. In view of the above discussion I am unable to agree, with Mr. Zaveri that the order passed by the learned trial Judge directing consolidation of the two suits and refusing to stay the subsequently instituted suit u/s 10 of the Code is manifestly erroneous, I, therefore, do not see any merit in this Revision Application and dismiss the same. The rule is discharged with costs.

18. Application dismissed.