

(2015) 04 BOM CK 0032
In the Bombay High Court
Case No : Writ Petition No. 9339 of 2005

Texmaco Limited

APPELLANT

Vs

Daulat Shetkari Sahakari Sakhar Karkhana Limited

RESPONDENT

Date of Decision : 07-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2015) 04 BOM CK 0032

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : Surel S. Shah i/b, Mulla and Mulla and CBC, for the Appellant

Final Decision : Dismissed

Judgement

M.S. Sonak, J.—This petition challenges the order dated 14 October 1998 made by the Civil Judge, Senior Division, Gadhinglaj, rejecting the petitioner's application under Section 10 of the Code of Civil Procedure, 1908 (CPC) seeking stay upon proceedings in Special Civil Suit No. 16 of 1997 (Gadhinglaj suit) on the grounds pendency of Civil Suit No. 246 of 1996 in the Calcutta High Court (Calcutta suit).

2. The petitioner and the respondent entered into an agreement dated 9 July 1991, under which the petitioner agreed to design, manufacture, process, supply of machinery and boilers to the respondent company, located in a rural district of Maharashtra. The contract price specified was Rs. 11.90 Crores It is the case of the petitioner that the petitioner performed its part of the contract and in pursuance thereof received an amount of Rs. 3.39 Crores (approximately) towards partial payment from the respondent. Over the issue of escalation in price, some disputes arose between the parties, which according to the petitioner were sorted out at the joint meeting held on 25 February 1994. At the said joint meeting, it is the case of the petitioner that the escalation amount was fixed at 14% of the contract price and it was further agreed that all payments on the said basis would be effected by 31 March 1994. Thereafter, the respondents on 23

March 1994 and on 15 July 1995 made payments of Rs. 50 Lacs and Rs. 28.50 Lacs (approximately) to the petitioner towards originally agreed consideration as well as escalation price. However, as the balance amount was not paid, the petitioner instituted Civil Suit No. 246 of 1996 (Calcutta suit), which is stated as pending.

3. The respondent, on 14 February 1997, instituted Special Civil Suit No. 16 of 1997 in the Court of Civil Judge Senior Division at Gadhinglaj (Gadhinglaj suit) seeking inter alia damages in an amount of Rs. 785.27 Lacs alleging breach of agreement dated 9 July 1991, on account of delayed and defective supplies of plant and machinery by the petitioner to the respondent.

4. The petitioner, instituted a Transfer Petition (Civil) No. 2047 of 1997 before the Hon"ble Supreme Court seeking transfer of Gadhinglaj suit to the Calcutta High Court, so that the said Civil Suit would be tried alongwith Calcutta suit instituted by the petitioner in the said High Court. The Hon"ble Supreme Court by its order dated 22 September 1997 dismissed the transfer petition, by observing thus:

"We have perused the transfer petition as well as complaints of both the suits. We find that both the suits arise out of agreements for the supply of machinery and boilers by the Petitioner to the Respondent. The suit of the Petitioner is for the recovery of the price of the goods and the suit of the Respondent is for damages on account of defective supply. Since both the suits arise from the same agreements, we are of the view that instead of seeking transfer of Special Civil Suit No. 16 of 1997 to this Court the appropriate course for the Petitioner would be to move under Section 10 CPC before the Civil Court where the suit filed by the Respondent is pending because that was a subsequent suit. The transfer petition is, therefore, dismissed."

5. In pursuance of the aforesaid, the petitioner by application dated 8 January 1998 applied for the stay upon further proceedings in Gadhinglaj suit until final disposal of Calcutta suit. The respondent filed its reply on 18 February 1998 opposing the grant of stay, inter alia, by urging that the stay applied, was in order to delay the progress in the suit.

6. The learned Civil Judge, Senior Division at Gadhinglaj, by the impugned order dated 14 October 1998, rejected the petitioner's application seeking stay of further proceedings in Gadhinglaj suit. Hence, the present petition.

7. Section 10 of the CPC 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, 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.

8. In the present case, the learned Civil Judge has taken the view that the Calcutta High Court does not appear to have jurisdiction to entertain and decide the Calcutta suit, because the defendant therein (respondent herein) carries on business within local limits of the Gadhinglaj Court and further, the entire cause of action has arisen within local limits of the Gadhinglaj Court. This finding, of the learned Civil Judge cannot be sustained. This is because in paragraph 18 of the plaint in the Calcutta suit, the petitioner, after acknowledging that part of cause of action has arisen outside the jurisdiction of the Calcutta High Court, as applied for leave under Clause 12 of the Letters Patent Act, 1865. Mr. Shah, learned counsel for the petitioner, submitted that such leave was in fact granted by the Calcutta High Court. In such circumstances, at least prima-facie, it cannot be said that the Calcutta High Court no jurisdiction to entertain and decide the petitioner's Calcutta suit.

9. There is no dispute that the Calcutta suit and the Gadhinglaj suit is between the same parties. However, the crucial issue which arises is whether the matter in issue in Gadhinglaj suit is also directly and substantially in issue in the previously instituted Calcutta suit between the same parties.

10. In case of *Jai Hind Iron Mart Vs. Tulsiram Bhagwandas*, AIR 1953 Bom 117 : (1952) 54 BOMLR 844 : (1953) ILR (Bom) 416 , the Division Bench of this Court has held that Section 10 does not contemplate an identity between the issues, 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. One of the tests of applicability of Section 10 to a particular case is whether on the final decision reached in the previous suit would operate as *res judicata* in the subsequent suit.

11. In case of *Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor*, (2013) 3 ABR 767 : (2013) 4 AD 442 : AIR 2013 SC 1712 : (2013) 3 CTC 241 : (2013) 8 JT 369 : (2013) 171 PLR 645 : (2013) 2 RCR(Civil) 976 : (2013) 1 RCR(Rent) 577 : (2013) 5 SCALE 366 : (2013) 4 SCC 333 : (2013) AIRSCW 2128 : (2013) 3 Supreme 39 , the Hon"ble Supreme Court has, however, held that 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 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. The key words in Section 10 of the CPC are "the matter in issue is directly and substantially in issue in a 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? If the answer is in affirmative, the subsequent suit is not fit to be stayed. However, if the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

12. The Hon"ble Supreme Court, in the aforesaid case of *Aspi Jal* (supra), explained what is meant by "matter in issue". It was held that many of the matters in issue may be 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.

13. The Hon"ble Supreme Court, by adverting to its earlier decision in case of *National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara*, AIR 2005 SC 242 : (2005) 1 CTC 156 : (2009) 104 FLR 369 : (2005) 1 LLJ 566 : (2004) 10 SCALE 387 : (2005) 2 SCC 256 : (2004) AIRSCW 6900 : (2005) 1 Supreme 151 , has ruled that 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 previously 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 proceedings is identical.

14. Obviously, therefore, the impugned order shall have to be examined in light of tests propounded by the Hon"ble Supreme Court in case of *Aspi Jal* (supra) and *National Institute of Mental Health and Neuro Sciences* (supra). Accordingly, the powers under Section 10 of the CPC are not to be exercised merely because

the parties in the two suits are the same and because few matters in issue are common in the two suits. In order to exercise powers under Section 10 of the CPC, the entire subject matter in the two suits must be the same. Further, "the matter in issue" in the subsequent suit must be "directly and substantially in issue" in the previously instituted suit in contradistinction to the same being "incidentally or collaterally in issue". As has been observed by the Hon'ble Supreme Court in case of National Institute of Mental Health and Neuro Science (supra), Section 10 of the CPC, apply only if there is identity of the matter in issue both the suits, meaning thereby that whole of the subject matter in both the proceedings is identical.

15. The material produced on record by the petitioner is quite scanty. All that is produced is the plaints in the two suits. The issues that may have been framed in the two suits are not on record. Be that as it may, even on the basis of the material produced, it cannot be said that the tests for applicability of Section 10 of the CPC have been satisfied in this matter.

16. The two suits, no doubt are based upon the agreement dated 9 July 1991 for design, manufacture and supply of plant and machinery by the petitioner to the respondent. However, the Calcutta suit, relies mainly upon the agreement alleged to have been arrived at between the parties in the joint meeting dated 25 February 1994 in the matter of escalation price. The claim, apart from recovery of amounts allegedly due under the original agreement dated 9 July 1991, is mainly for the enforcement of the agreement allegedly arrived at in the joint meeting dated 25 February 1994, in the matter of escalation price. In the Gadhinglaj suit, on the other hand the issue mainly is about alleged defaults on the part of the petitioner in complying with the terms, conditions and covenants of the original agreement dated 9 July 1991. In the Gadhinglaj suit, the respondent seeks damages in the matter of non-performance, delayed performance or performance in breach of terms, conditions and covenants of the agreement dated 9 July 1991. In such circumstances, it is difficult to hold that the whole of the subject matter in both the suits is identical. It is difficult to hold that the matter in issue in Gadhinglaj suit is directly and substantially in issue in the Court of Calcutta suit, in contradistinction to such matter in issue being incidentally or collaterally in issue. This cannot be regarded as a matter where there is identity of "matter in issue" in both the suits, meaning thereby that whole of the subject matter in both the proceedings is identical. This is at the highest, a case where some matters in issue may be common. The circumstance that some matters in issue may be common, is not sufficient to attract the applicability of provisions contained in Section 10 of the CPC. Accordingly, it cannot be said that the impugned order is vitiated by any jurisdictional error.

17. Even the cause of action pleaded in the two suits is different and distinct. The cause of action, in the Calcutta suit as noticed earlier, emphasis is more upon the alleged failure on the part of the respondent to comply with the agreement allegedly arrived in the joint meeting dated 25 February 1994, in the matter of

escalation price, apart from seeking recovery of amounts under the original agreement dated 9 July 1991. In contrast, the emphasis in the Gadhinglaj suit instituted by the respondent is upon the alleged breach in complying with the terms, conditions and covenants of the original agreement dated 9 July 1991 and the disputes arising therefrom. The Gadhinglaj suit seeks damages from the petitioner.

18. Mr. Shah, learned counsel for the petitioner, however submitted that the issue of applicability of the provisions contained in Section 10 of the CPC stands settled, in view of the order dated 22 September 1997 made by the Hon''ble Supreme Court in Transfer Petitioner (Civil) No. 247 of 1997, to which reference has been made earlier. Now with respect, all that the order dated 22 September 1997 notes that the appropriate course for the petitioner would be to move under Section 10 of the CPC. Upon, such application being made, it is for the Civil Court, to examine in the context of the material on record whether "the matter in issue" in the subsequent issue is "directly and substantially in issue" in the previously instituted suits, by applying the tests laid down by the Hon''ble Supreme Court itself in such matters. The Civil Court, in the present case, by applying such tests, has come to the conclusion that the "matter in issue" in Gadhinglaj suit cannot be said to be a matter, which is directly and substantially in issue in the Calcutta suit. There is, accordingly, no jurisdictional error in the impugned order.

19. This petition is dismissed. There shall be no order as to costs.

20. At this stage, Mr. Shah, learned counsel for the petitioner seeks for continuance of the interim relief, which was in operation during the pendency of this petition for a further period of eight weeks from today. Accordingly, it is directed that the interim relief shall continue for a period of eight weeks from today.