APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Gajendragadkar.

1952 *July 21*

JAI HIND IRON MART (ORIGINAL PLAINTIFFS) APPELLANTS *v.* TULSIRAM BHAGWANDAS (ORIGINAL DEFENDANTS) RESPONDENTS.*

AND

TULSIRAM BHAGWANDAS (ORIGINAL DEFENDANTS) APPELLANTS *v.* JAI HIND IRON MART (ORIGINAL PLAINTIFFS) RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 151—Letters Patent clause 15—Order refusing injunction to restrain prosecution of suit in another Court not a judgment within the meaning of cl. 15—No appeal lies against such order—Application under s. 10 for stay of Bombay suit—Previously instituted Calcutta suit—Requisites for the applicability of s. 10—Identity of issues not contemplated—Matter in issue in the two suits should be directly and substantially the same—Order refusing stay of suit, whether appealable.

An order made under s. 151 of the Code of Civil Procedure Code, 1908, refusing to grant an injunction to restrain the defendants from proceeding with their suit in the High Court at Calcutta is not a judgment within the meaning of clause 15 of the Letters Patent and no appeal lies against that order.

Venechand Rajpal v. *Lakhmichand Manekchand*[1] followed.

Mulchand Raichand v. *Gill and Co.*,[2] explained.

Section 10 of the Code of Civil Procedure, 1908, 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 s. 10 requires is that there must be an identity of the subject-matter and the field of controversy between the parties in the two suits should also be the same; but such identity and sameness need not be in every particular; the identity and the field of controversy must be substantially the same.

Sankalchand Shah and Co. v. *J. Prakash and Co.*,[3] *Trikamdas Jethabhai* v. *Jivraj Kalyanji*[4] and *Dinshaw* v. *Galstaun*,[5] referred to.

Nurul Alam Chowdhary v. *Ambica Navigation Steam Co., Ltd.*,[6] referred to and explained.

An order under s. 10 of the Code of Civil Procedure, 1908, is not an order dealing with procedure; it is an order dealing with the jurisdiction of the Court. It is a mandatory provision. The suit therefore cannot go on if it is stayed and such an order must therefore affect the jurisdiction

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* O. C. J. Appeal No. 58 of 1952 (with O. C. J. Appeal No. 59 of 1952), Suit No. 157 of 1952.

(1) (1919) 44 Bom. 272.

(2) (1919) 44 Bom. 283.

(3) (1945) 48 Bom. L. R. 633.

(4) (1942) 44 Bom. L. R. 699.

(5) (1926) 29 Bom. L. R. 382.

(6) (1952) O. C. J. Appeal No. 89 of 1951 decided by Chagla C. J. and Bhagwati J., on March 11, 1952 (unrep.).

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of the Court one way or the other and is a decision which affects the rights of parties. Such an order is therefore appealable.

Jivanlal Narsi v. *Pirojshaw Vakharia and Co.*,[1] followed.

Durgaprasad v. *Kantichandra Mukherji*,[2] referred to.

On February 4, 1952, Tulsiram Bhagwandas, a firm carrying on business in Calcutta filed a suit in the High Court of Calcutta against Jai Hind Iron Mart, a Bombay firm. The suit was in respect of a contract for the sale tyres of particular sizes. According to the plaintiff in the said suit the defendants agreed to purchase 1898 tyres of the specified sizes separated by them from a large stock of tyres of varying sizes lying with the plaintiffs, at the uniform rate of Rs. 127-8-0 per tyre. The plaintiffs further contended that in accordance with the terms of their contract the defendants separated and took delivery of the said 1898 tyres and made various payments amounting to Rs. 2,06,500. Towards purchase price, leaving a balance of Rs. 35,495 which the defendants failed to pay in spite of repeated demands. The plaintiff, therefore, filed a suit to claim Rs. 35,495 as the balance of price of the said 1898 tyres.

On February 8, 1952, Jai Hind Iron Mart filed a suit in the High Court of Bombay against Tulsiram Bhagwandas, the Calcutta firm on the same contract contending that they had agreed to purchase 1618 tyres of certain specifications for the price of Rs. 2,06,500 calculated at the rate of Rs. 127-8-0 per tyre which they had paid to the said Tulsiram Bhagwandas. They further contended that it was agreed that the said Tulsiram Bhagwandas were to consign the said 1618 tyres to Bombay by railway waggons and that the said Tulsiram Bhagwandas had committed a breach of the contract by failing to give delivery of 501 tyres. The plaintiffs in the Bombay suit therefore claimed a refund of the price of the said 501 tyres amounting to Rs. 63,877-8-0 and also damages for the breach of the contract.

On March 7, 1952, Jai Hind Iron Mart, the plaintiffs in the Bombay suit took out a notice of Motion to restrain the defendants in that suit from proceeding with their Calcutta suit. On March 8, 1952, the said defendants took out a notice of Motion for a stay of the Bombay suit under s. 10 of the Civil Procedure Code.

Both these notices of Motions were dismissed with costs by Coyajee J. In the judgment on the notice of Motion for a stay

[1] (1933) 57 Bom. 364. [2] (1934) 61 Cal. 670.

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of the Bombay suit, Coyajee J. observed "The disposal of one suit will not necessarily dispose of all the issues in the other suit," and held that the case did not fall within the provisions of s. 10 of the Code of Civil Procedure.

From the said two orders of the learned Judges separate appeals were preferred which were heard together.

M. P. Amin, Advocate General for the appellants in Appeal No. 58 of 1952 and the respondents in Appeal No. 59 of 1952.

K. H. Bhabha, for the respondents in Appeal No. 58 of 1952 and the appellants in Appeal No. 59 of 1952.

CHAGLA C. J. The respondents in Appeal No. 58 of 1952 filed a suit in the Calcutta High Court on February 4, 1952, and the appellants filed a suit in this Court on February 8, 1952. The appellants took out a notice of motion to restrain the respondents from proceeding with the suit which they had filed in Calcutta. The respondents took out a notice of motion to stay the suit filed by the appellants under s. 10. The learned Judge refused to issue an injunction restraining the respondents from proceeding with the Calcutta suit and he also dismissed the motion taken out by the respondents to stay the Bombay suit under s. 10. And these two appeals are preferred from the two orders passed by the learned Judge.

Now, with regard to Appeal No. 58 of 1952, which is from an order of the learned Judge refusing to issue an injunction against the respondents restraining them from proceeding with the Calcutta suit, a preliminary objection is taken by Mr. Bhabha. It is clear that that order is made under s. 151 of the Civil Procedure Code. A party cannot be restrained from proceeding with an earlier instituted suit under s. 10. He can only be restrained under the inherent powers of the Court and those powers are exercised when the Court is of the opinion that the suit constitutes an abuse of the process of the Court or has been filed *mala fide* or in order to forestall the suit which the defendant would have filed in another Court. Now, Mr. Bhabha says that the decision of the learned Judge does not constitute 'judgment' within the meaning of cl. 15 of the Letters Patent and Mr. Bhabha is supported by the authority of a divisional bench of this Court reported in *Venechand* v. *Lakhmichand Manekchand.*[1] The very point came up for decision before Sir Norman Macleod, Chief Justice, and Mr. Justice Heaton and

(1) (1919) 44 Bom. 272.

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they took the view, following the well-known case of *The Justices of Peace for Calcutta* v. *The Oriental Gas Company*,[1] that the decision did not affect the merits of the question between the parties by determining some right or liability and, therefore, they held that no appeal lay. The Advocate General has relied on a decision in the same volume reported at p. 283 (*Mulchand Raichand* v. *Gill and Co.*,[2]) and the Advocate General says that another divisional bench of this Court, Mr. Justice Heaton and Mr. Justice Marten, did entertain an appeal on the Original Side from a similar decision. Now, that is not quite correct. What had happened in this case was that an application was made to the learned Judge below under s. 10 to stay the suit. The learned Judge dismissed that application and it was from that order that an appeal was preferred and the appellate Court held that although s. 10 might not apply, the Court had jurisdiction under s. 151 to restrain a party from proceeding with the suit. And Mr. Justice Heaton is at pains to point out at p. 293 that their attention was drawn to the earlier judgment in *Venechand* v. *Lakhmichand Manekchand*, and the learned Judge states that it was not argued before them that the appeal did not lie in the case before them and as they were dismissing the appeal it did not greatly matter whether it did or did not lie. Therefore, the decision on which the Advocate General relies cannot be looked upon as a decision in conflict with the decision given by Sir Norman Macleod, Chief Justice, and Mr. Justice Heaton. Therefore, we accept the contention of Mr. Bhabha and hold that the Appeal No. 58 of 1952 does not lie and it must be dismissed with costs.

Attorneys for appellants: *Ramanlal and Himatlal.*

Attorneys for respondents: *Payne and Co.*

APPEAL No. 59 of 1952.

K. H. Bhabha, for the appellants.

M. P. Amin, Advocate General, for the respondents.

July 22. Turning now to Appeal No. 59 of 1952, the question that we have to consider is whether the matter in issue in the Bombay suit is directly and substantially in issue in the previously instituted Calcutta suit. The learned Judge below has taken the view that it is not so and therefore has refused to stay the suit. Now, a few facts may be stated. The Calcutta suit

[1] (1872) 8 Beng. L. R. 433.
[2] (1919) 44 Bom. 283.

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was filed by the appellants on a contract dated November 4, 1951, and their case was that the contract was for a sale by them of 1898 tyres to the respondents. Their further contention was that these tyres were according to certain specifications and they contended that the plaintiffs failed to take delivery of these tyres and therefore they filed a suit for damages for non-acceptance. In the Bombay suit the respondents sued on the same contract of November 4, 1951, but their contention was that under this contract they had contracted to purchase only 1,600 tyres and not 1,898 tyres. Further the contention was that these 1,600 tyres were not according to specifications but they were according to certain contract quality, and their grievance in the Bombay suit was that the tyres that were delivered were not according to contract quality. They, therefore, filed a suit for refund of a certain amount in respect of the price they had paid for tyres which were not according to contract quality and also for damages for non-delivery. This is the nature of the two suits and the question arises whether looking to the nature of these two suits it could be stated that the matter in issue in the Bombay suit is directly and substantially in issue in the Calcutta suit. Apart from any authority, turning to the section itself, it will be clear that s. 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 s. 10 that the identity required is a substantial identity. It is true, as the authorities have laid down, that there must be an identity of the subject-matter, it is equally true that 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.

Turning to the authorities, there are three decisions of this Court to which reference might be made, and the decision relied upon by the Advocate General is the latest decision of this Court in *Sankalchand v. J. Prakash.*[1] That is a decision of Mr. Justice Blagden. In that case the learned Judge laid down that what is required under s. 10 is that all the issues

[1] (1945) 48 Bom. L. R. 633.

in the second suit must be determined by the decision in the first suit, in other words, the learned Judge postulated for the purpose of s. 10 a complete identity of issues in both the suits. With great respect, that is obviously a wrong test to lay down for the application of s. 10. The learned Judge relied on a decision of Mr. Justice Blackwell in coming to this conclusion which is reported in *Trikamdas Jethabhai* v. *Jivraj Kalyanji.*[1] In that case one suit was a suit in which a certain mortgage was challenged. The other suit was a suit in which the mortgage was challenged, but it also dealt with the question of partnership, and yet the learned Judge held that as the substantial subject-matter was the mortgage the two suits were identical for the purpose of s. 10, and the test that the learned Judge laid down is, to quote his own words, (p. 702):

"... If in the earlier suit that issue is decided against the plaintiffs to the Bombay suit it will operate as *res judicata* and the Bombay suit if not earlier determined will necessarily fail. In my opinion it is immaterial that the relief claimed in the earlier suit is of a different character from the relief claimed in the present suit. The real question is whether the matter in issue in the Bombay suit is directly and substantially in issue in the earlier suit."

Then the learned Judge accepts the test laid down in *Durgaprasad* v. *Kantichandra Mukherji*[2] and describes the test as,

"whether a previously instituted suit and a subsequently instituted suit are parallel is that if the first was determined, the matters raised in the second suit would be *res judicata* by reason of the decision of the prior suit."

The other decision is the earlier decision of Mr. Justice Madgavkar in *Dinshaw* v. *Galstaun.*[3] At p. 384 the learned Judge points out:

"... the object of the section still remains what it was (he is referring to the amendment), viz., to avoid a conflict of judicial decision. In the view which I take, the cause of action as disclosed in the pleadings, the matter directly and substantially in issue, and the relief claimed, are three connected parts of the same legal structure and must be viewed both singly and as a whole. And I propose to consider the question in this light and to ask myself, firstly, what the matter directly and substantially in issue in each of the two suits here and in the suit in Bengal is, and to test it by also considering the causes of action and the reliefs, and, finally, whether a conflict of decisions here and in Bengal is possible."

Therefore, the principle underlying s. 10 seems to be that the policy of the Legislature is opposed to two Courts with parallel

[1] (1942) 44 Bom. L. R. 699. [2] (1934) 61 Cal. 670.
[3] (1926) 29 Bom. L. R. 382.

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jurisdiction proceeding simultaneously with two suits when there is a possibility of the two Courts coming to different conclusions and thereby resulting in conflict of decisions. If that policy underlying s. 10 is kept in mind, then it would be easier to come to a decision with regard to different cases that arise for decision.

Now, what is the position in the case before us. The plaintiffs in the Calcutta suit rely on one version of the contract. The respondents as the plaintiffs in the Bombay suit rely on a different version of the same contract, and the real subject-matter of the suit and the field of controversy between the parties is, what is the contract which was entered into between the parties and what are the terms of that contract. Whatever reliefs the plaintiffs may seek in the Calcutta suit and whatever may be the reliefs which the respondents may seek in the Bombay suit, these reliefs are incidental to the decision which the Court must come to as to what was the contract between the parties. Therefore, if the Calcutta High Court in the previously instituted suit were to decide that the contract was either as the appellants pleaded or as the respondents pleaded, that decision must operate as *res judicata* in the Bombay suit.

Now, the Advocate General has relied on a decision of a divisional bench consisting of myself and my brother Bhagwati J. in *Nurul Alam Chowdhary* v. *Ambica Steam Nagigation Co., Ltd.*,[1] and the Advocate General has strongly relied on the language used in that judgment, viz.

"the test that must always be applied under s. 10 is whether the decision of the Calcutta suit would put an end to the Bombay suit, or, in other words, whether the decision of the Calcutta suit will constitute *res judicata* as far as the plaintiff's Bombay suit is concerned".

and the Advocate General says that if that be the right test that we laid down, we must apply it to the present case, and if we do apply it, we will find that the decision of the Calcutta suit will not put an end to the Bombay suit. Now, it is clear that what we meant in that judgment was not that the Bombay suit must be completely and entirely put an end to by the decision of the Calcutta suit. That can never be. What we meant was that effectively and substantially the decision of the Calcutta suit must put an end to the Bombay suit, and we made it clear what we meant by "putting an end to the

[1] (1952) O. C. J. Appeal No. 89 of 1951, decided by Chagla C. J., and Bhagwati J., on March 11, 1952 (Unrep.).

Bombay suit" and what we meant was that the decision in the Calcutta suit must operate as *res judicata* in the Bombay suit. Applying that test here, in our opinion the test is satisfied because if once the Calcutta High Court has held what the contract was between the parties and what the terms of the contract were, the Bombay suit would effectively be put an end to because that decision would bind the parties and all that will be required to be done would be to give the necessary reliefs to the respondents in the Bombay suit if they have succeeded and those reliefs will flow from the decision of the Calcutta High Court and will be consequential upon the decision of the Calcutta suit. Therefore, in our opinion, the learned Judge below, with respect to him, was in error when he took the view that this was not a case to which s. 10 applied.

Another point has been raised by the Advocate General and that is as to the maintainability of this appeal. The Advocate General wishes to contend that no rights of parties are affected by the decision of the learned Judge below not to stay the Bombay suit. Now, if this was a matter of first impression, we would certainly have gone deeper into the matter and considered whether the Advocate General's contention was sound. But the matter is concluded by a decision of this Court in *Jivanlal Narsi* v. *Pirojshaw Vakharia & Co.*[1] and that decision has been followed by the High Court of Calcutta in *Durgaprasad* v. *Kantichandra Mukherji*. That decision is binding on us and we see no reason why that decision should be reconsidered as the Advocate General suggests by the appointment of a full bench. With respect, there is much to be said for the reasoning used by the learned Chief Justice Sir John Beaumont and Mr. Justice Blackwell in *Jivanlal Narsi* v. *Pirojshaw Vakharia & Co.* What the bench there pointed out was that an order under s. 10 is not an order dealing with procedure, it was an order dealing with the jurisdiction of the Court, because under s. 10 whatever order is passed affects the jurisdiction of the Court. It is a mandatory provision and the suit cannot go on if it is stayed and therefore the decision under s. 10 must affect the jurisdiction of the Court one way or the other, and every decision which deals with the jurisdiction of the Court is a decision which affects the rights of parties. This is the principle on which the Bombay decision is based and we do not feel that there is anything so seriously wrong

[1] (1932) 57, Bom. 364.

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with that reasoning as would justify our reconsidering that decision in a properly constituted bench.

The result, therefore, is that we allow the appeal, set aside the order of the learned Judge below, and order that the Bombay suit should be stayed under s. 10 until the hearing and final disposal of the Calcutta suit. Appeal allowed with costs. Appellants also to get the costs of the notice of motion in the Court below.

Attorneys for appellants: *Payne & Co.*

Attorneys for respondents: *Ramanlal & Himatlal.*

Appeal allowed.

P. M. P.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice.

1952 *July*, 30

BAYAJABAI GANPAT PATIL (ORIGINAL PLAINTIFF), PETITIONER *v.* KEVAL RAMBHAU PATIL AND ANOTHER (ORIGINAL APPLICANT AND DEFENDANT), OPPONENT.*

Civil Procedure Code (Act V of 1908), O. I, r. 10—Application to be joined in suit as co-plaintiff—Plaintiff disputing applicant's right to suit property—Procedure—Applicant should be added as defendant and not as co-plaintiff.

A party may be added as a co-plaintiff, when the plaintiff does not dispute the right of the co-plaintiff to the decree which might be passed; but where his right to the property in suit is disputed by the plaintiff, the proper procedure is to join him as a defendant and not as a co-plaintiff.

Googlee v. *Premlall*,(1) followed.

Krishnaji v. *Motilal*,(2) and *Emden* v. *Carte*,(3) distinguished.

Wadia v. *Matchett*,(4) not followed.

CIVIL REVISION APPLICATION from order passed by A. S. Koranne, Esquire, Civil Judge, Junior Division, at Malegaon, district Nasik.

On February 14, 1951, Bayajabai (plaintiff) filed a suit against one Manik (defendant) for return of the furniture let

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* Civil Revision Application No. 1252 of 1951.

(1) (1881) 7 Cal. 148.

(2) (1928) 31 Bom. L. R. 476.

(3) (1881) 17 Ch. D. 169.

(4) (1870) 7 Bom. H. C. R. (A. C. J.) 10.