**(2016) ILRHP 313 : (2016) LatestHLJ(HP) 171**

**High Court of Himachal Pradesh**

**Case No:** CMPMO No. 108 of 2013

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| Om Prakash Mehta | | APPELLANT |
| | Vs | |
| Rajesh Kumar Kaushal and others | | RESPONDENT |

**Date of Decision:** Jan. 7, 2016

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 10

**Citation:** (2016) ILRHP 313 : (2016) LatestHLJ(HP) 171

**Hon'ble Judges:** Mr. Rajiv Sharma, J.

**Bench:** Single Bench

**Advocate:** Mr. Ajay Kumar Sr. Advocate with Mr. Dheeraj K. Vashishta, Advocate, for the Appellant; Mr. Mukesh Thakur, Advocate, Mr. R.K.Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate, for the Respondent

**Final Decision:** Dismissed

**Judgement**

1. Rajiv Sharma, J. - This petition is directed against the order rendered by the learned Civil Judge (Sr. Divn.), Distt. Una, H.P., in CMA No. 10-VI/2013 in Civil Suit No. RBT 94 of 2009 dated 2.1.2013.

2. Key facts, necessary for the adjudication of this petition are that respondent No. 1 Sh. Rajesh Kumar Kaushal has instituted civil suit No. RBT 94 of 2009 titled as Rajesh Kumar Kaushal v. Surjeet Singh and another for possession by way of specific performance of contract by execution of the sale deed of the land measuring 0-49-92 hectares, being 4992/21353 share out of the land measuring 2-13-53 hectares, comprised in Khewat No. 20 min, Khatoni No. 28, Kh. No. 2024/792, 887, 889 and 890, as entered in the nakal jamabandi for the year 2003-04, situated in Up-Mohal Rakkar Colony, Tehsil and Distt. Una, H.P. for the sum of Rs. 70,000/- per kanal as sale consideration on the basis of agreement to sell dated 11.1.2008 by defendants, namely, Surjeet Singh and Om Parkash, in favour of plaintiff and in the alternative suit for recovery for the sum of Rs.

8,42,000/-.

3. The petitioner, Om Parkash has also instituted Civil Suit No. 60 of 2008 in this Court against Sh. Surjeet Singh and Deepika Vashisht for specific performance of the agreement of sale dated 26.4.2006. This Court vide order dated 8.3.2011 in OMPs No. 269 of 2008 and 602 of 2010 has restrained the defendants from alienating and transferring the suit property in any manner, during the pendency of the suit. The petitioner filed an application under Section 10 of the CPC read with Sections 94 and 151 CPC to stay the proceedings in Civil Suit No. 94 of 2009. The application was contested by filing a detailed reply. It was submitted that plaintiff i.e. Rajesh Kumar Kaushal has not been arrayed as party in suit filed before this Court and both the suits are not between the same parties and the cause of action is also distinct. Civil Suit No. 94 of 2009 was instituted in the month of August, 2008 and Civil Suit No. 60 of 2008 was instituted in the month of September, 2008 in this Court. It is also averred that the judgment passed in Civil Suit No. 60 of 2008 will not operate res judicata qua the plaintiff. The learned Civil Judge (Sr. Divn.), Distt. Una dismissed the application vide order dated 2.1.2013. Hence, this petition.

4. Mr. Ajay Kumar, Sr. Advocate has vehemently argued that the suit pending before this Court pertains to the entire suit land. On the other hand, Mr. R.K. Gautam, Sr. Advocate, has vehemently argued that both the suits are founded on totally different and independent causes of action.

According to him, Section 10 CPC is not attracted in this case. He lastly contended that the suit pending before the learned Civil Judge (Sr. Divn.), Distt. Una and before this Court are not inter se the same parties.

5. I have heard counsel for both the sides and have also gone through the impugned order and Civil Suit No. 94 of 2009 and Civil Suit No. 60 of 2008, carefully.

6. Civil Suit No. 94 of 2009 has been instituted by Rajesh Kumar against the petitioner Om Parkash and Surjeet Singh for specific performance of agreement dated 11.1.2008 of land as detailed in the plaint. The suit instituted by the petitioner being Civil Suit No. 60 of 2008 is for specific performance of the agreement of sale dated 26.4.2006 with respect to the land detailed in the plaint.

7. The issues in Civil Suit No. 60 of 2008 were framed on 26.5.2010. The issues in Civil Suit No. 94 of 2009 were framed on 19.1.2009. The parties in both the Civil Suits i.e. No. 94 of 2009 and 60 of 2008 are not the same and the matter in controversy is also different. Civil Suit No. 94 of 2009 was filed on 4.8.2008 and Civil Suit No. 60 of 2008 was filed on 4.6.2008. In the written statement filed by defendant No. 2 Om Parkash on 28.7.2010, no specific issue was raised, being preliminary or on merits that the suit of the plaintiff is hit by principle of sub-judice.

8. The underlying principle of Section 10 CPC is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue as well as to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. Section 10 CPC applies only in those cases where the whole of the subject matter in both the suits is identical. The Court has gone through the plaints in both the civil suits i.e. Civil suit No. 94 of 2009 and Civil Suit No. 60 of 2008. Both the suits are instituted on totally different and independent causes of action. It is reiterated that Civil Suit No. 94 of 2009 has been filed for specific performance of agreement dated 11.1.2008 and Civil Suit No. 60 of 2008 for specific performance of contract dated 26.4.2006. The suit instituted by Om Parkash bearing No. 60 of 2008 involves different issues as compared to the earlier suit filed by Rajesh Kumar Kaushal bearing No. 94 of 2009. Civil Suit No. 60 of 2008 has been instituted by Om Parkash against Surjeet Singh and Deepika Vashishat. Rajesh Kumar Kaushal has not been made party in Civil Suit No. 60 of 2008.

Thus, learned Civil Judge (Sr. Divn.), Distt. Una has rightly come to the conclusion that the suit could not be stayed on the basis of subsequent suit filed by the petitioner bearing No. 60 of 2008. The purpose of Section 10 CPC is also to save time and energy of Courts and parties. In the present case, the same matter is not in issue in both the civil suits. There is no identity of the matter in issue in both the Civil Suits. The whole of the subject matter in both the Civil Suits is not identical.

9. The Division Bench of the Calcutta High Court in the case of Kalipada Banerji v. Charubala Dasee, reported in AIR 1933 Calcutta 887, has held that the three essential conditions, that are necessary for bringing in the operation of Section 10, Civil P.C., are: (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court, in which the first suit is instituted, is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit.

10. The learned Single Judge of the Gujarat High Court in the case of M/S Sohal Engineering Works, Bhandup, Bombay v. Rustam Jehangir Vakil Mills Co. Ltd., Ahmedabad, reported in AIR 1981 Gujarat 110, has explained the term "directly and substantially in issue" as under:

"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. Under Section 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 (AIR 1942 Bom 314) 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."

11. The learned Single Judge of the Madras High Court in the case of R. Srinivasan v. Southern Petrochemical Industries Corporation Ltd., reported in AIR 1992 Madras 363, has held that 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 in every particular, but the identity and the field of controversy must be substantially the same. It has been held as follows:

"8. Under Section 10 of the Code of Civil Procedure, 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 some title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. This section 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. 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. Where there are different and independent transactions between the parties, a suit qua one transaction cannot be stayed when a suit qua second transaction is filed."

12. The learned Single Judge of Delhi High Court in the case of Ajit Singh v. Sadhu Singh, reported in AIR 2004 Delhi 320, has held that the provisions of Section 10 of the Code of Civil Procedure would apply when decision in one suit would non-suit the other suit. Only in that event it could be said that the matter in issue in both the suits are directly and substantially the same. It also cannot be said that the whole of the subject matter in both the suits is identical. In case of two suits between the same parties when the facts clearly disclose and also establish that the suit property in the subsequent suit is absolutely distinct and separate from that of the earlier suit and there is no identity at all with regard to cause of action and also the reliefs that are sought in both suits, the subsequent suit between the same parties was not liable to be stayed as provisions of Section 10 of CPC are not applicable. It has been held as follows:

"7. I have heard the counsel appearing for the parties and have considered the pleadings and the records very carefully in the light of the submissions made by the counsel appearing for the parties. The earlier suit is admittedly filed by the plaintiff against the defendants in respect of the ground floor portion of the property No. L-59, Kalkaji, New Delhi. The contention in the said suit was that the plaintiff inducted the defendants, who are cousin brothers of the plaintiff, as Licensees as at that relevant point of time when they were given shelter in the said premises, they were undergoing financial distress because of the death of their father, who was the uterine brother of the father of the plaintiff. The judgment and the decree that was passed by the Additional District Judge, Delhi in the other suit, namely, suit No. 63/1992 was only in respect of the ground floor of the property bearing No. L-59, Kalkaji, New Delhi. So far the present suit is concerned, the plaintiff was compelled to file this suit as according to the plaintiff the defendant forcibly entered into possession of the first floor and the barsati floor some time in 1993. The defendants in their written statement filed in the present suit have stated in paragraph 11 that in the first week of April 1993, the plaintiff out of his own volition, voluntarily and having realised the mistake handed over the vacant possession of the first floor and the barsati floor to the defendants and had also assured the defendants to withdraw the suit pending before Tis Hazari, Delhi, but later on he resoled from the said assurance. The aforesaid facts clearly disclose and also establish that the suit property in the present suit is absolutely distinct and separate from that of the earlier suit. The issues that are also being raised in the present suit cannot be said to be identical in view of the fact that the contention that is raised in the present suit is that the defendants forcibly entered into the possession of the first floor and the barsati floor whereas according to the defendants possession of the said floors was given by the plaintiff to the defendants of his own volition with a further statement that he will withdraw the suit, which is pending in the Tis Hazari Courts, namely, suit No. 63/1992. Therefore, it cannot be said that the matters in issue in both the suits are identical.

8. Besides, the relief which is sought for by the plaintiff herein is a decree for recovery of possession of the first floor and the barsati floor of the premises in question. The said relief would not be available and could not be given to the plaintiff automatically and on the basis of the decree which is already passed even when the same is upheld by the appellate court. In the subsequent suit, the plaintiff has also claimed for mesne profits and damages, which are also not issues, which had arisen for consideration in the earlier suit. The provisions of Section 10 of the Code of Civil Procedure would apply when decision in one suit would non-suit the other suit. Only in that event it could be said that the matter in issue in both the suits are directly and substantially the same. It also cannot be said that the whole of the subject matter in both the suits is identical. It is true that some of the issues which would arise for consideration could be identical but not all the issues. There is no identity at all with regard to the cause of action and the suit property and also the reliefs that are sought for. The decision of this Court in Sagar Shamsher Jung Bahadur Rana and another v. The Union of India and others (supra) is distinguishable on facts. The ratio that is laid down in the said decision was rendered in the context of the facts of

that case. It is also clear from a reading of the said judgment that this Court while deciding the said case applied the principles of res judicata for stay of the suit. In the said proceedings the plea of res judicata was specifically raised by the defendant whereas in the present suit the defendants have not raised the plea of res judicata specifically and, therefore, in my considered opinion the ratio of the said decision is not applicable to the facts of the present case. The plaintiff in the said suit, which was stayed, claimed recovery of Rs. 18 lacs on account of principal amount and interest by sale of the mortgaged property. The present suit is, however, filed for decree for recovery of possession and for damages and mesne profits, which relief cannot be said to be identical with that of the relief sought for in the suit No. 62/1993."

13. In the case of National Institute of Mental Health and Neuro Sciences v. C. Parameshwara, reported in AIR 2005 SC 242, their lordships of the Supreme Court have explained applicability of "directly and substantially in issue". Their lordships have further held that the fundamental test for applicability of S. 10 is whether decision in previous suit operates as res judicata in subsequent suit. Their lordships have further held that Section 10 CPC only applies in cases where whole of the subject matter in both the suits is identical. It has been held as follows:

"8. The object underlying Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the - same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil Court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. 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 previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction 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 subject matter in both the proceedings is identical."

14. Their lordships of the Honï¿½ble Supreme Court in the case of Aspi Jal and another v. Khushroo Rustom Dadyburjor, reported in (2013) 4 SCC 333, have held that for Section 10 CPC to be attracted, it is essential that the entire subject matter in controversy must be the same between previous suit and the subsequent suit. Mere common grounds in previous suit and subsequent suit would not attract Section 10 CPC. Their lordships have explained the words and phrases "matter in issue" as follows:

"9. Section 10 of the Code which is relevant for the purpose reads as follows:

"10. Stay of suit.- 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.

Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

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 Section 10 of 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.

10. The view which we have taken finds support from a decision of this Court in National Institute of Mental Health and Neuro Sciences v. C.Parameshwara, (2005) 2 SCC 256 in which it has been held as follows:

"8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute.

The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision

being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. 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 previous 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 the proceedings is identical."

11. In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the 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? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

12. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are 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. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case."

15. Accordingly, there is no merit in this petition. The same is dismissed, so also the pending application(s), if any. The parties through their counsel are directed to appear before the learned trial Court on 15.2.2016.