(1966) 02 CAL CK 0023

Calcutta High Court

Case No: Appeal from Original Order No. 103 of 1965

Central Bank of India Limited		APPELLANT
	Vs	
Shree Bhagawati Hosiery Mills Ltd. and another		RESPONDENT

Date of Decision: Feb. 17, 1966

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 10, 11, 115, 9

Citation: 70 CWN 670

Hon'ble Judges: Sinha, J; Masud, J

Bench: Division Bench

Advocate: R.C. Deb and R.M. Dutta, for the Appellant;Dipankar Ghosh, for the Respondent

Judgement

Sinha, J.

The facts in this case are briefly as follows : The respondent No. 1 in this appeal, namely, Shree Bhagawati Hosiery Mills Limited (hereinafter referred to as the "Mills") had a cash credit account with the appellant, the Central Bank of India Limited (hereinafter referred to as the "Bank"). In the said account, the appellant Bank lent and advanced various sums of money from time to time to the Mills and granted overdraft facilities, against inter alia hypothecation of goods. By a policy of Fire Insurance issued by the respondent No. 2 the General Assurance Society Limited, the stock of the Mills'' goods stored in a godown at Bhagalpur were insured for a sum which was ultimately increased to Rs. 2,75,000/-. It is stated that sometime in June, 1963, there was a big fire in the godown of the Mill at Bhagalpur as a result of which there was an explosion and the goods were damaged. It is stated that at that time the Bank''s claim against the Mill on the overdraft account amounted to a sum of Rs. 1,47,971-13-3. It is next stated that the Mill, in spite of demand, did not pay the amount and so the Bank filed a suit, being money suit No. 116 of 1964 (The Central Bank of India v. The General Assurance Society Ltd.), in the First Court of the Subordinate Judge at Patna claiming inter alia a decree for Rs. 2,75,000/- with

interest and costs. This suit was compromised and the Insurance Company agreed to make an ex gratia payment to the Bank for a sum of Rs. 1,47,931-13-3 which was accepted by the Bank and was credited in the overdraft account of the Mill. Even after crediting the said amount in the overdraft account, there was a sum still due to the Bank from the Mill. As this was not paid, the Bank filed a suit being money suit No. 248 of 1955 (The Central Bank of India Limited v. Shree Bhagwati Hosiery Mills Limited and others) before the Subordinate Judge, Bhagalpore for recovery of the balance due on the overdraft account. The Mill contested the suit and filed a written statement. Issues were settled in that suit sometime on the 31st day of July, 1956 and I shall have occasion to refer to it presently. This money suit was decree in favour of the Bank on the December, 1961. Against that, an appeal has been taken before the Patna High Court and the appeal is still pending. In the meanwhile, on the June, 1957, the suit in respect of which this appeal arises was filed in this Court by the Mills against the Bank and the Insurance Company, being suit No. 1105 of 1957 (Shree Bhagwati Hosiery Mills Limited v. The Central Bank of India Limited and another). Subsequently the Insurance Company has been dismissed from the suit. It appears that the suit came up for hearing in the court below, when the plaintiff asked for an amendment of the plaint. The amendment was allowed on the 1st September, 1964. An appeal has been preferred against that order but we are not concerned here with that appeal. On the 5th May, 1965 an application was made in the Court below by the Bank for amendment of the written statement. In that application two reliefs were claimed. The first was that the written statement should be amended by taking a plea of res judicata ; in other words it was contended that the Bhagalpur suit and the present suit covered the same ground and as the Bhagalpur suit had been decreed the matter was res judicata between the parties. The second prayer was that, inasmuch as the decree in the Bhagalpur suit was subject to appeal in the Patna High Court the hearing of the suit in this Court should be postponed till after the disposal of that appeal, namely, appeal No. F.A. 75 of 1962 pending in the Patna High Court. In fact, the argument in this Court has been confined to these points and we are not concerned with any other point. On the 17th May, 1955 the learned Judge in the Court below has dismissed this application but has not given any judgment. Against this order of dismissal this appeal is directed. The first point taken by Mr. Ghose, appearing on behalf of the Mills, is that no appeal lies against the order of the Court below. He has argued that an order refusing an amendment in a pleading does not decide any right between the parties and therefore is not a judgment within the meaning of clause 15 of the Letters Patent and therefore no appeal lies. He has however conceded that if the amendment relates to a question of the Court''s jurisdiction then in that event an appeal will lie, but he has further argued that the question of jurisdiction must be one of "inherent" jurisdiction, meaning thereby either territorial or pecuniary jurisdiction or relating to the subject-matter. He argues that the question of "res judicata" is not a matter relating to the jurisdiction of the Court. He has cited several cases, to support his argument that "res judicata" does not involve a point of

jurisdiction. For example, he has cited a Bench decision of this Court Rajani Kumar Mitra v. Ajmaddin. Bhuiya, (1928) 48 C.L.J. 577, where it was held there that the bar of res judicata is one which does not affect the jurisdiction of the Court but is a plea in bar. It is quite true that there are a number of authorities to this effect, some of which are conflicting. In Sarkar''s Commentaries on the Civil Procedure Code, Fourth Edition, page 11, it is pointed out that the distinction between "res judicate" and "estoppel" is that res judicata ousts the jurisdiction of the court while estoppel is not a rule of substantive law, in the sense that it does not declare any immediate relief or claim. Several cases are cited there of this court and of the Bombay and Allahabad High Courts. In our opinion it is unnecessary to go into all these cases because the point is covered by a recent decision of the Supreme Court Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, . In that case, the Supreme Court was dealing with the question as to the meaning of the word "jurisdiction" in section 115 of the Code of Civil Procedure. Gajendragadkar, C.J. said as follows :

It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction * *

Although this puts the matter beyond controvesy, I am tempted to refer to a Bench decision of this Court, presided over by Chakravarti, Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another, . That was a case u/s 10 of the Civil Procedure Code. Sections 9, 10 and 11 appear in part 1 of the Code of Civil Procedure, and are inter alia under the head "Jurisdiction of the Courts and res judicata". Section 9 says that the Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Section 10 rates to the stay of suits, providing inter alia 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 were litigating, etc., pending in the same or any other Court in India having jurisdiction in the matter. Section 11 deals with the principle of res judicata. This also lays down a bar upon courts to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they were litigating etc., in a Court competent to try such subsequent suit. Both sections 10 and 11 are restrictions on the power of the Courts to try suits under circumstances mentioned therein. The learned Chief Justice said as follows :--

In view of the somewhat in-determinate terms in which the test laid down in the two leading High Court decisions were framed, the task of deciding whether a particular order is or is not a judgment is not easy. But it appears to me that at least where a question of the jurisdiction of the Court to entertain or proceed with a suit or

proceeding is involved and a decision on that question is given, such decision affects the merits of the controversy between the parties. It is true that it does not touch the actual dispute regarding the respective rights and liabilities which is the subject-matter of the suit or proceeding but whether those rights and liabilities can be adjudicated on by a particular court at all or adjudicated on at the time, is also a matter of controversy between the parties. To be entitled to have one''s suit or proceeding decided by a particular court or to be entitled to object that a suit or proceeding brought by one''s adversary cannot be or tried for the time being by the Court in which it has been brought is, it seems to me, also a matter of right.

2. It was held that an appeal lay under clause 15 of the Letters Patent. On similar reasoning, it should be held that a plea of res judicata, which determines whether the Court of the plaintiff''s choice should or should not determine a point in issue, gives to rights both to the plaintiff and the defendant and where such rights are affected, it plainly comes within the scope of clause 15 of the Letters Patent. The defendant here wishes to take the point of "res judicata". If at the trial this point is successful, it will stop the suit from proceeding any further, and as stated in the Supreme Court judgment cited above, it relates to the jurisdiction of the Court to entertain the suit. If the defendant is not allowed to raise this point now it will lose this right for ever. Under the circumstances, the matter does come within the ambit of clause 15 of the Letters Patent and is consequently appealable.

3. We now come to the second relief, namely, that of postponing the hearing of the suit, and this also is said to be non-appealable. The mere order for adjournment of a case is certainly not a judgment within the meaning of clause 15 of the Letters Patent. But in this case, I shall presently point out that the relief is intimately connected with the plea of res judicata. Therefore, where such a plea is inter-mixed with the question of jurisdiction so that they cannot be separated, it will come within the scope of clause 15 of the Letters Patent. This has been pointed out in a case cited by Mr. Ghose himself Daulatram Agarwalla Vs. Champalal Jugraj, . Bose, C.J., held that where the question of procedure and the question of jurisdiction are so mixed up that one cannot be disassociated from the other, an order dealing with such question of procedure and jurisdiction is an appealable order, being a judgment within the meaning of clause 15 of the Letters Patent.

4. The question of appealability being out of the way, we now come to the merits of the appeal. All that the defendant has prayed for was to be given an opportunity of raising the plea of res judicata. The way that it has been argued before us by Mr. Deb is as follows : In money suit No. 248 of 1955 before the learned Subordinate Judge at Bhagalpur, the Bank claimed payment of the balance of the monies said to be due to them in the overdraft account. In answer to this, the Mill filed a written statement, a copy of which is se out in the paper book at pages 90 to 94. In paragraph 12, it has been stated that the compromise entered into by the Bank with the Insurance company is collusive and unauthorised. In paragraph 13 it was

alleged that by withdrawing the suit and accepting the sum of Rs. 1,47,931-13-3 only from the Insurance company, there was collusion, fraud and breach of faith, together with gross negligence on the part of the Bank, and so it could not be permitted to claim any monies from the Mills. Clear issues were raised on such disputes. The issues are set out at page 95 of the paper book. There is an issue as to whether the claim was barred by reasons of acceptance of the said sum and also whether there was collusion, fraud and breach of faith or gross negligence on the part of the Bank. Let us now see the nature of the action in this Court. The plaint in the suit is set out at pages 41 to 48 of the paper book. There also the substantial claim is that there was fraud, collusion and conspiracy on the part of the Bank in allowing the Patna suit to be compromised and in doing so without the knowledge and consent of the Mill. There are of course other minor allegations but these seem to be the principal allegations made in the suit. It is not necessary for us to find here conclusively as to whether the suits are identical. It is sufficient at this stage to hold that the principal issues are the same or appear to be the same. That being so, the question is whether it comes within the ambit or scope of a Privy Council decision namely, AIR 1931 263 (Privy Council) . That decision deals with a point that was also canvassed before us. It was argued that one of the reasons which swayed with the learned Judge in the court below was that the granting of this application for amendment would be futile inasmuch as the decree of the Bhagalpur Court is now under appeal and therefore the provisions of section 11 of the CPC do not apply. Strictly speaking, where a decree is under appeal it is no longer an effective decree so as to bring the matter within the scope of section 11. The Privy Council decision cited above however, holds that there is no merit in the argument that the matter is not res judicata, merely because an appeal has been preferred. Under such circumstances the proper course for the courts would be to stay the suit until the appeal is disposed of. In our opinion, this authority is applicable to the facts of the instant case. It is not to be expected that to take advantage of the applicability of section 11, the parties would not prefer an appeal. But if it has been so preferred, although technically the principle of section 11 cannot be applied, the parties affected should not be allowed to get rid of the beneficial provisions laid down by section 11, simply because an appeal has been preferred. In such a case, the proper relief would be to postpone the hearing of the suit until the appeal is heard. To this course, two objections were raised. One is that at the moment when the amendment application was refused, the appeal had not been heard and therefore there was no question of res judicata. To this point the simple answer is that it may yet be heard and disposed of before the suit in this Court comes to be determined. It is our duty to see that this in fact happens. Next, it is said that there has been delay. In our opinion, mere dtlay cannot defeat a plea of res judicata. What had happened in this case is that the suit having come up for hearing, it was the plaintiff who asked for an amendment first. The result was that the hearing of the suit has now been indefinitely postponed. Therefore, there is no merit in the plea of delay. That being so, the orders will be that the appeal is allowed and the order of the

Corut below is set aside. There will be an order in terms of prayer (a) of the petition, such amendment being effected within three weeks from the date when this order is drawn up. Order is passed in terms of prayer (c) of the aforesaid petition. There will be a further order that the hearing of the suit be adjourned till after the disposal of appeal No. F.A. 75 of 1962 pending in the High Court of Patna. If the said appeal is not disposed of within a period of one year from the date of making this order, the parties will be at liberty to apply for vacation of this part of the order. Each party will pay its own costs of this appeal and of the application in the Court below. The plaintiff in the suit will be given liberty to file additional written statement confined to the matters brought in by the amendment within one month of the amended written statement being served on them and the defendant No. 1 must pay the costs of that additional written statement.

Masud, J.

I agree.