

**(2001) 02 BOM CK 0106**

**Bombay High Court**

**Case No:** Appeal No. 697 of 2000 in Notice of Motion No. 1819 of 2000 in Suit No. 3699 of 1995

Manilal Premji Gala

APPELLANT

Vs

Boman P. Irani and Others

RESPONDENT

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**Date of Decision:** Feb. 22, 2001

**Acts Referred:**

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

**Citation:** (2001) 2 ALLMR 634 : (2001) 3 BOMLR 15

**Hon'ble Judges:** Pratibha Upasani, J; B.N. Srikrishna, J

**Bench:** Division Bench

**Advocate:** Mr. Janak Dwarkadas, Mr. Parimal Shroff and Mr. Subodh Joshi, instructed by M/s. P.K. Shroff and Co, for the Appellant; Mr. Nitin Thakkar, instructed by Mr. K.A. Sampat and Mr. Jose George, instructed by Mr. Raj Bais, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

B. H. Srikrishna. J.

1. This Appeal is directed against an order of the learned Single Judge dismissing the Notice of Motion taken out by the first and the second Respondents for stay of Suit No. 3699 of 1995 u/s 10 of the Civil Procedure Code, pending hearing and final disposal of Suit No. 1750 of 1994 filed in the Small Causes Court, Mumbai. The learned Single Judge by his order dated 4th August 2000 dismissed Notice of Motion No. 1819 of 2000 with costs. Hence, this Appeal.

2. The Appellant (Original Defendant No. 1) had filed a declaratory suit No. 1750 of 1994 in the Court of Small Causes, Mumbai. The case pleaded therein is that the first and third Respondents are landlords of the premises being Shop No. 7 situated on the ground floor of the building known as Zaveri Gallery, situated at 63. Bhulabhai Desai Road, Bombay 400026 and that the Appellant is a tenant of the premises. That suit seeks declaration of the status and rights of tenancy of the Appellant in respect

of the said suit premises.

3. The present suit is filed by the first and the second Respondents (Original Plaintiffs) against the Appellant and the third Respondent (Original Defendants) for a declaration that the suit partnership styled as "Roopsons" Stood dissolved with effect from 31st March, 1994 or within a period of one month from the date of receipt of dissolution notice dated 26th May, 1994 or from the date of the suit and in the alternative for dissolution of the said partnership firm by an order of the Court and for consequential reliefs.

4. The first and the second Respondents (Original Plaintiffs) in the suit took out Notice of Motion No. 2737 of 1995 for certain interim reliefs. The Appellant (Original first Defendants) raised an objection to the jurisdiction of this Court contending that the Appellant is a tenant of the first and second Respondents and the third Respondent in respect of the aforesaid premises and, therefore, the suit was exclusively triable by the Small Causes Court and that this Court had no jurisdiction to entertain the suit. An application was made to frame a preliminary issue and accordingly a preliminary issue was framed for which evidence was to be recorded. At that stage, the present Notice of Motion No. 1819 of 2000 was taken out by the Appellant contending that the issue of his tenancy in respect of suit being exclusively triable by the Court of Small Causes. and as the suit No. 1750 of 1994 had already been filed in the Small Causes Court for a declaratory and consequential reliefs by the said Defendant, any decision given by this Court on the issue of partnership was likely to have adverse effect on the decision of the suit pending before the Small Causes Court. It was contended that the issue of partnership versus tenancy was directly and substantially in issue in a previously filed suit before the Small Causes Court. An application was made u/s 10 of the CPC for staying the proceedings In this Suit. We may mention here that certain ad-interim reliefs had already been granted in the Plaintiffs' Notice of Motion. The learned Single Judge heard both the Notices of Motion and disposed them of by the common order under Appeal. The learned Single Judge took the view that as the Small Causes Court did not have jurisdiction to grant the reliefs prayed for in the suit filed before this Court and, as the material issue in the present suit is whether a partnership exists or existed, and whether it was dissolved or had to be dissolved, and as those were issues beyond the jurisdiction of the Small Causes Court, the present suit could not be stayed.

5. Learned Counsel for the Appellant contends that the view taken by the learned Single Judge is erroneous in law and contrary to decisions of the Supreme Court. It would be necessary to advert to the relevant provisions of the CPC (hereinafter referred to as "Code").

6. Section 10 of the Code provides that a Court shall not 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, in the same or any other Court

in India having jurisdiction to grant the relief claimed. Section 11 of the Code deals with *res judicata*, and provides that if such a suit has already been tried earlier and decided by a competent Court, it is not open to a Court to decide the said matter once again. By the Amendment Act, 1976 (with effect from 1st February, 1977), Explanations (VII) and (VIII) were inserted in Section 11 of the Code. They are to the following effect :

."Explanation VII : The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit. Issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII : An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res-judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

7. Section 10 of the Code has been the subject matter of interpretation in a series of judgments and the uniform view taken was that Section 10 would be attracted if the following requirements were fulfilled:

- (1) The matter in issue is directly and substantially the same in both the suits.
- (2) The suits are between same parties or parties claiming under the same title.
- (3) The Court in which the previously instituted suit is pending is competent to grant the relief claimed in the subsequent suit.

(See in this connection *Bepin Behary Mozumdar and others v. Chandra Ghosh and another*, *Kalipada Banerji v. Charubala Dasee*, *Somasundaram Chettiar v. A. Venkata Subbaya*. *M/s Karnal Distillery Co. Ltd. v. L. P. Jaswal*, *Nunu Singh v. Muni Nath Singh*, *Nirmal Singh v. Om Prakash*, *Manta Subbaramayya and others v. Batchu Narasimha Swamy and another*, *Channabasappa Kamadal and Sons v. Kishan Chand & Co. and others*, *Mirta Lina P.Ltd. v. The Finlay Mills Ltd. and another*, and *Minochar Behramji Damania v. Hema N. Dadachanji and others*.)

8. In *Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd.*, the Supreme Court pointed out that the course of action which the Court has to follow u/s 10 is not to proceed with the "trial" of the subsequent suit. That, however, does not mean that it cannot deal with the subsequent suit any more or for any other purpose. The Supreme Court pointed out that the word "trial" used in Section 10 is not used in its widest sense and, in view of the object and nature of the provision of the fairly settled legal position with respect to passing of interlocutory orders, wider interpretation of the word "trial" was not called for. The Supreme Court indicated the reason for the prohibition contained in Section 10 against trial of the

subsequent suit in the following words (vide paragraph 8):-

"..... The object of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not effect the jurisdiction of the Court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of the suit. It has been construed by the Court as not a bar of the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier suitor appointment of a Receiver or an injunction or attachment before judgment."

9. To similar effect are the observations of this Court in *Senaji Kapurchand and others v. Pannaji Devichand*.

10. Against this consistently held view, the learned Counsel for the Appellant contends that the situation in law has changed a result of the insertion of Explanations (VII) and (VIII) in Section 11 of the Code. The decision of the Supreme Court in *Sulochana Amma v. Narayanan Nair*, was pressed into service. The following observations in paragraphs 4 and 5 of the said judgment are relied upon :

"4. Section 11 of C-P.C. embodies the rule of conclusiveness as evidence or bars as a plea of an Issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a competent Court to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as *res judicata*. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue which directly and substantially had arisen in the former suit between the same parties or their privies, decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the Court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all Judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the Tribunals other than the Civil Courts,

5. The words "competent to try such subsequent suit" have been interpreted that it must refer to the pecuniary jurisdiction of the earlier Court to try the subsequent suit at the time when the first suit was brought. Mere competency to try the issue raised in the subsequent suit is not enough. A decree in a previous suit will not operate as *res judicata*, unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised. This interpretation had consistently been adopted before the introduction of Explanation VIII. So the earlier decree of the Court of a

limited pecuniary jurisdiction would not operate as *res judicata* when the same issue is directly and substantially in issue in a later suit filed in a Court of unlimited jurisdiction, vide *P. M. Kavade v. A. B. Bokil*. It had, therefore, become necessary to bring in the statute Explanation VIII. To cull out its scope and ambit, it must be read along with Section 11, to find the purpose it seeks to serve. The Law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like Insolvency Court, Probate Court, Land Acquisition Court. Rent Controller, Revenue Tribunal, etc. No doubt main body of Section 11 was not amended, yet the expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose Jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read In combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or Tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. . . ."

11. Placing reliance on the above observations in *Sulochana Amma* (supra), it is contended that the result of addition of Explanation VIII in Section 11 of the Code is that an order on an issue which had arisen earlier and substantially between the parties and their privies and decided finally by a competent Court or Tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as *res-judicata* in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit.

12. The judgment of the Calcutta High Court in *Life Pharmaceuticals (Private) Ltd. v. Bengal Medical Hall*, is also pressed into service wherein the learned Judge wide paragraph 12 held that the test to be applied in deciding an application u/s 10 of the Code is " . . . whether the matter in the later suit will be *resjudicata* if the prior suit is taken to have been decreed in the manner as prayed in the plaint." We may point out that this judgment appears to have been made pertaining to the suit prior to the amendment of Section 11 by addition of Explanation VIII.

13. The judgment of our High Court in *Jai Hind Iron Mart v. Tulsiram Bhagwandas*, was also relied upon by the Appellant. In this judgment, the Division Bench pointed out that the principle underlying Section 10 seems to be that the policy of the Legislature is opposed to two Courts with parallel 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. We agree with the learned Single Judge's view that the exclusive "parallel jurisdiction" would necessarily mean that the Court trying the subsequent suit should have the jurisdiction to grant the relief prayed for in the former suit. This is consistent with the uniformly held view.

14. The Appellant also relied on the judgment of the learned Single Judge of this Court in *Minquel Francis D'Costa v. Sultan Gulamali Karim Chhatrivala and others*. We are afraid that the judgment, far from supporting the Appellant, is against them for the Judge has Indicated that "In order to apply Section 10 of C.P.C. the Statute requires four points to be satisfied : The issue must be common in both the suits; the previously instituted suit should be in the same Court in which the subsequent suit is filed. If it is in different Court, the Court where earlier suit is pending must have Jurisdiction to grant reliefs claimed in the subsequent suit; both the suits must be between the same parties. Such parties must be litigating in both the suits under the same title. If so read any of the condition is lacking. Section 10 will not have any application."

15. Learned Counsel for the Appellant contends that In *Sulochana Amma (supra)*, Supreme Court notices that as a result of Explanations (VII) and (VIII) being added to Section 10 of the Code, two drastic changes have taken place. First, the principle of res-judicata would apply irrespective of the fact that the earlier Court was a Court of limited jurisdiction and, second, the principle of res judicata now applies not only to final judgment but also in respect of issues, previously adjudicated .It is urged that the Supreme Court has pointed out that Sections 10 and 11 of the Code have to be read as mutually complementary. While Section 11 deals with the situation of a suit or an issue having been decided previously by a Court, and provides for the consequence that the said issue shall not be reagitated. Section 10 provides as preventive remedy and enables the Court to stay the subsequent suit if the conditions prescribed therein are fulfilled. Hence, learned Counsel contends that whatever may have been the interpretation given to the expression "any other Court in India having Jurisdiction to grant the relief claimed", that interpretation would now have to yield to what the Supreme Court has held in *Sulochana Amma (supra)*.

16. It is not possible to accept the contention of the learned Counsel for the Appellant. We have already pointed out that, consistently and overwhelmingly, the Courts in this country have interpreted Section 10 and held that the Court entertaining the subsequent suit should have the jurisdiction to grant the relief claimed in the first suit in order to enable the stay of the second suit. It is undoubtedly true that when all these decisions were rendered. Explanations (VII) and (VIII) were not on the statute book. That, however, makes no difference to the situation, in our judgment. The fact that Parliament has now introduced Explanations (VII) and (VIII) does not and cannot detract from the interpretation consistently given to Section 10 of the Code which in no way has been amended. In

our judgment, therefore, notwithstanding the amendment made in Section 11 by addition of Explanations (VII) and (VIII), the interpretation consistently given to Section 10 of the Code must remain unaffected.

17. Learned Counsel for the Appellant contended that if Section 10 is continued to be interpreted as done previously, then the principle laid down by the Supreme Court in *Indian Bank* (supra) of treating Section 10 and Section 11 as complementary, would stand negated. If that is the result, it must be deemed to have been intended by Parliament. Parliament must be deemed to have been aware of the interpretation consistently put on Section 10 of the Code by various High Courts in this country. Knowing that full well the Legislature introduced Explanations (VII) and (VIII). True that the Supreme Court indicated in *Indian Bank* (supra) that the two Sections must be read in a complementary manner. If Parliament amends only Section 11 by Introduction of Explanations (VII) and (VIII) and introduces no such amendments in Section 10, we must ascribe to Parliament an intention to change the earlier situation. We say so. in view of the fact that, despite introduction of Explanations (VII) and (VIII) in Section 11, the Legislature made no change whatsoever in Section 10. We are, therefore, unable to accept the contention of the learned Counsel for the Appellant that despite the catena of judgments uniformly interpreting Section 10 of the Code, we must depart therefrom only for the reason that Explanations (VII) and (VIII) have been added in Section 11 of the Code.

18. The learned Single Judge was right in his view that the reliefs claimed in the Suit before the Small Causes Court and this Court are mutually exclusive; the Small Causes Court does not have jurisdiction to grant the reliefs which are claimed in the suit before this Court, and vice versa, this Court does not have jurisdiction to grant the reliefs claimed in the Small Causes Court in the previously instituted suit in the Small Causes Court. Consequently, we agree with the view, of the learned Single Judge that Section 10 of the Code has no application. The Notice of Motion has been rightly dismissed.

19. Appeal dismissed. No order as to costs.

20. Parties to act on an ordinary copy of the order duly authenticated by the Associate of this Court.

21. Issuance of certified copy expedited.