

1952

July 22nd

## REVISIONAL CIVIL

*Before Kapur and Soni JJ.*M/S THE RAJ SPINNING MILLS, AMRITSAR,—  
*Petitioners**versus*M/S A.G. KING, LTD, EXCELSIOR MILLS, RIPPON-  
DEN, YORKSHIRE, UNITED KINGDOM,—*Respondents.*

Civil Revision 592 of 1951.

*Civil Procedure Code (V of 1908), Section 10—Appli-  
cability and Scope of—Whether includes appeal.*

On 30th January 1947 a contract for the supply of machinery was entered into between R.S. Mills and A.G. King, Ltd. R.S. Mills sued on 28th January 1948, for recovery of certain monies alleging breach of contract. On 11th July 1950 this suit was dismissed, and R.S. Mills appealed to the High Court. Before the appeal was filed A.G. King, Ltd., sued the R.S. Mills at Amritsar for recovery of the balance of the price. R.S. Mills applied under section 10 for the stay of the suit filed by A.G. King, Ltd. This application was rejected. R.S. Mills

moved the High Court in revision against the order rejecting their application for stay of the A.G. King, Ltd. suit.

Held, that the matter in issue in both suits being directly and substantially the same the test of *res judicata* would be applicable and therefore section 10 of the Code of Civil Procedure must be held applicable, and the second suit must be stayed

*Sm. Jinnat Bibi v. The Howrah Jute Mills Co., Ltd.* (1), followed and *The Laxmi Bank Ltd., v. Harkishen and others* (2), relied upon.

Held also, that the word 'suit' in section 10 includes an appeal.

*S P. A. Annamalay Chetty v. B. A. Thornhill* (3), followed; *Chowdhury Jamini Nath v. Midnapur Zemindary Co.* (4), *Bipin Behary Mukharjee v. Jogindra Chandra Ghose* (5), relied upon.

(Case was referred by Mr. Justice Soni,—*vide* his Judgment, dated 4th December 1952, to the above Division Bench).

*Petition under section 115 of Civil Procedure Code and section 44, Punjab Courts Act, for revision of the order of Shri Hira Lal Jain, Sub-Judge, 1st Class, Amritsar, dated the 24th July, 1951, holding that the present suit is not liable to be stayed under section 10 of C. P. C. and accordingly deciding issue No. 1 against the defendant firm and leaving the parties to bear their own costs.*

BHAGIRATH DASS, for petitioners.

NEMO, for Respondents.

### JUDGMENT

KAPUR, J. This is a reference made by my learned brother Soni, J., in Civil Revision No. 592 of 1951, where rule had issued against an order of the Subordinate Judge, Mr. Hira Lal Jain, dated the 24th July 1951, refusing to stay a suit under section 10 of the Code of Civil Procedure.

Kapur, J

(1) 36 C. W. N. 667

(2) I. L. R. 1948 Nag. 403

(3) A. I. R. 1931 P. C. 263

(4) 27 C. W. N. 772

(5) 24 C. L. J. 514.

M/s The Raj  
Spinning Mills.  
Amritsar

v.

M/s A. G.  
King Limited  
Excelsior  
Mills,  
Ripponden,  
Yorkshire

Kapur, J.

The facts have been given in the reference order but they may briefly be stated as follows. A contract was entered into on the 30th January 1947, between the petitioners, Raj Spinning Mills of Amritsar, and the opposite party, A. & G King, Limited, for the supply of certain machinery of the value of £ 12,806-10-3 out of which £ 2,250 had been paid by the petitioners to the opposite party as part of the purchase price. The petitioners brought a suit for the recovery of £ 2,250 on the 28th January 1948, alleging a breach of contract on the part of the opposite party. The suit was dismissed on the 11th July 1950 and an appeal has been brought to this Court against this decree which is Regular First Appeal No. 237 of 1950.

Before the appeal was filed in this Court the opposite party brought a suit on the 26th August 1950 at Amritsar against the petitioners for the recovery of the balance of the money due to them. The petitioners applied to the trial Court for the stay of the suit which had been brought by the opposite party under section 10 of the Code of Civil Procedure. It was dismissed on the 24th July 1951 and a revision was brought to this Court which has, by an order, dated the 4th December 1951, been referred by my learned brother to a Division Bench.

Counsel for the petitioners has submitted that section 10 of the Code of Civil Procedure applies to these two suits, (1) because the matter in issue in the second suit is also directly and substantially in issue in the previously instituted suit and is between the same parties, and (2) the word 'suit' includes the word 'appeal'. The relevant issues in the two suits are as follows. In the first suit the issue was "Did the defendants commit a breach of contract?", and in the second suit brought by the opposite party the issue is "Has the plaintiff performed its part of the contract and the defendant is guilty of the breach of contract?". This shows that the matter in issue in the two suits is directly and substantially the same and therefore the test of *res judicata* which has been applied in several cases would be relevant in this case also.

This test was laid down by the Calcutta High Court in *Sm. Jinnat Bibi v. The Howrah Jute Mill Co., Ltd.* (1), where Patterson, J., said at page 668:—

“One test of the applicability of section 10 to a particular case is whether on the final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit and there can be no doubt that if this test is applied section 10 must be held to be applicable to the present case.”

The same rule was laid down by Padhya, J., in *The Laxmi Bank Ltd., v. Harkishan and others* (2) This test is, in my opinion, satisfied in the present case.

The next question is whether the word ‘suit’ in section 10 would include the word ‘appeal’. In Mulla’s Civil procedure Code at page 34 it is stated that the word ‘suit’ includes ‘appeal’. It also includes an appeal to His Majesty in Council, and reference is there made to *Chowdhury Jamini Nath v. Midnapur Zamindary Co.* (3). In this case Rankin, J., observed as follows:—

“The presence or absence of these words:— ‘whether superior or inferior’—does not, in my judgment, affect the question one way or the other. I think that the reference at the end of the section to ‘His Majesty in Council’ shows that for this purpose ‘suits’ include ‘appeals’.”

and the learned Judge referred to a judgment of a Division bench of that Court in *Bipin Behary Mukerjee v. Jogindra Chandra Ghose* (4), where the same rule was laid down. In a case decided by their Lordships of the Privy Council namely *S.P.A. Annamaly Chetty v. B.A. Thornhill* (5), it was observed:—

“Their Lordships regret that the second action was not adjourned pending the

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decision of the appeal in the first action, as that would have simplified procedure and saved expense.

Their Lordships also said—

“In their Lordships’ opinion the former view is the correct one and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties.”

What happened in this case was that another suit was brought between the same parties pending an appeal on the same cause of action and their Lordships said that the proper course was to adjourn the second action pending the decision of the appeal in the first action. The same rule was laid down in the other Calcutta case which I have mentioned, 36 C.W.N. 667, and also by Puranik, J., in *Krishnarao Namdeorao v. Shridhar Ramchandra Kale* (1).

I am, therefore, of the opinion that the learned Judge was in error by refusing to exercise jurisdiction by an erroneous interpretation of section 10, and I would therefore allow this petition and make the rule absolute.

As there is no appearance for the opposite party there would be no order as to costs in this Court.

Soni, J.

SONI, J. I agree. Where section 10 applies the Court has no option but to stay the proceedings. Whether the stay of such proceedings should be qualified or not in order to obviate dishonest litigants to take advantage of the provisions of the section, is a matter of policy which the Legislature alone can set right.

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(1) I. L. R. 1947 Nag. 141.