CALCUTTA HIGH COURT

Shorab Merwanji Modi

Vs.

Mansata Film Distributors

A.F.O.D. No.64 and A.F.O.O. No. 80 of 1955

(Chakravartti, C.J. and Sarkar, J.)

01.03.1957

JUDGMENT

Chakravartti, C.J.

1. There are two appeals before us from a common judgment of P.B. Mukharji, J., by which the learned Judge dismissed both of two applications which the parties had made before him against each other in a suit in which one of them is the plaintiff and the other the defendant. The applications were made in the following circumstances.

2. On the 21st December 1953, an agreement was entered into at Bombay between one Shorab Merwanji Modi, a cinema-actor and producer of films of that place, carrying on business under the name and style of Minerva Movietone and Mansata Film Distributors, a Calcutta firm carrying on the business of exhibiting and distributing films. By the agreemen Modi appointed the firm, distributors for the territories of 'C. P. and C. I. Circuits', in respect of three motion pictures going to be produced by him immediately after the production of a film called 'Jhansi-ki-Rani' had been completed. The appointment was for a period of seven years from the date of the delivery of the first censored print of each of the three pictures. Under the terms of the agreement, the distributors were to pay to the producer a certain sum in certain installments and were to receive as their remuneration commission at certain rates. Clause 22 of the agreement provided that, in addition to other remedies, the producer would have the right to terminate the agreement summarily and forfeit all sums paid to him by the distributors in the case of breach or non-performance of any of the conditions or in the case of default in making the stipulated payments or submitting statements of accounts. Clause 28 of the agreement provided for the method by which the parties were to enforce their rights, if necessary. It said inter alia that if either party proceeded in a Court of Law, it must not do so at any place other than Bombay.

3. On the same day, another agreement was entered into by and between the same parties about the distribution rights of the same films on precisely the same terms and conditions, except that the area covered by this agreement was 'the Bengal Circuit' and that the consideration to be paid to the producer was a different Sum.

4. Two days later, on the 24th December 1953, the producer wrote two letters to the distributors by which he authorised them to pay all moneys payable to him under the agreements to Messrs. Kapurchand Limited, New Queen's Road, Bombay. On some date thereafter, the installments by which the payments were to be made appear to have been varied by an agreement between the parties. On the 8th of May 1954, there was a letter from the distributors to the producer which referred to that agreement and set out the installments newly agreed to. It appears that a sum of Rs. 5,78,750 was still payable by the distributors under the two agreements and that a sum was to be paid in eleven installments of which the first three installments of Rs. 60,000 each were to be paid on the 10th May 1954, the 15th June 1954 and the 15th July 1954, respectively. The producer admitted the new arrangement by endorsing his confirmation of the letter.

5. The two installments due on the 10th May 1954 and the 15th June 1954 were duly paid. Before the date of the next installment arrived, the distributors addressed a letter to the producer on the 23rd June 1954. In the letter they stated that they had entered into the agreement on the representation made to them that one of the pictures would deal with a historical theme, another would deal with a social subject and the third would be a fantasy. They were, they said, under the impression that of the two of the coming productions of which they had come to know, 'Waris' was a social picture and 'Mirza Galib' a fantasy, but they had seen in one of the letter-heads of the producer that the third picture was going to be 'Kundan'. They therefore wanted to know if 'Kundan' would be a historical picture and if so, what historical event would be its subject-matter.

6. The producer replied on the 28th June 1954, and stated that there had been no representation by him other than that contained in the agreement. The productions, he added, were going to be exactly as stipulated for in the agreement which contained all his assurances and representations. He concluded by saying that 'Waris' was a social picture, 'Mirza Galib' a historical biography and 'Kundan' a costume picture. Thereafter, up to the 15th July 1954, some acrimonious correspondence between the parties followed, the distributors complaining of misrepresentation and seeking to avoid the agreements and the producer denying misrepresentation and complaining of default. Apparently because of that dispute, the installment of Rs. 60,000, due on the 15th July 1954, was not paid. Ultimately, by letter, dated the 19th July 1954, written through his solicitors, the producer terminated the agreements and notified forfeiture of all moneys paid by the distributors. This was done in purported exercise of the powers reserved to the producer by clause 22 of the agreements.

7. Thereafter, on the 23rd July 1954, the producer instituted a suit against the distributors in the Bombay High Court in his own name for the recovery of Rs. 60,000 with interest thereon or, in the alternative, damages of the same amount or any other amount that the Court might adjudge, as also for a return of all publicity materials relating to the picture 'Waris' already supplied to the distributors. By a letter of the same date, the solicitors for the producer gave intimation of the institution of his suit to the solicitors for the distributors which they received in Calcutta on the 26th July 1954. The writ of summons issued was served upon a partner of the firm on the 11th August 1954.

8. The reaction of the distributors was immediate. On the 12th August 1954, they, in their turn, instituted a suit on the Original Side of this Court against the producer and Kapurchand Limited, in which they claimed a decree for Rs. 4,71,250 of which a sum of Rs. 2,91,250 was claimed as refund of money paid under the agreements and a sum of Rs. 1,80,000 as damages for loss of

profits. An enquiry into damages and a decree for such sum as might be found due were also prayed for.

9. It will be convenient now to call the producer by his name 'Modi' and the distributor by the first term of their firm name, 'Mansata'.

10. In his suit filed at Bombay, Modi referred to the agreements, complained of breaches of their terms, pleaded his termination of them and asked for the amount which had already accrued due or, in the alternative, damages. He referred to the allegations of misrepresentation which had been made by Mansata in their letters and denied the same. In their suit filed in Calcutta, Mansata alleged false and fraudulent misrepresentation vitiating the agreements and rendering them void and on that basis asked for a refund of the moneys paid and also damages. No reference was made in their plaint to the purported termination of agreements by Modi or to the suit instituted by him earlier at Bombay.

11. On the 31st August 1954, Modi made an application in the Bombay High Court for an injunction, restraining Mansata from proceeding with their suit in Calcutta so long as the Bombay suit was not disposed of. An interim injunction was granted by Coyajee, J., on the same day and it was made absolute on the 10th September 1954. Mansata preferred an appeal against that order, but pending disposal of the appeal, filed their written statement in the Bombay suit on the 12th November 1954.

12. The written statement of Mansata pleaded fraudulent misrepresentation by which, it was alleged, the agreements had been brought about. The agreements were therefore impugned as void and it was said that they had already been repudiated. It was pleaded further that Mansata themselves had become entitled to recover from Modi the sum of Rs. 2,91,250 advanced to him, as on a failure of consideration or, in any event, as moneys had and received. It was also said that the purported termination of the contracts on the 19th July 1954, had been wrongful, because the time for the payment of the third installment had been extended up to that date.

13. The appeal from the final order of injunction made by Coyajee, J., of the Bombay High Court was disposed of by the Court of Appeal on the 16th November 1954, when it was allowed and the injunction dissolved. The trial Judge had held that Mansata's suit in Calcutta had been brought in violation of clause 28 of the agreements and therefore they were liable to be restrained from proceeding with that suit. The Appeal Court held that clause 28 would apply only when the parties wanted to litigate their rights under the agreements. The Calcutta suit had been brought, not to enforce any such rights, but on the other hand, to avoid the agreements altogether. The learned Chief Justice added that the Court could not exercise its inherent jurisdiction by way of restraining a party to a suit before it from proceeding with a subsequent suit instituted by him in another Court. If the two suits were based on the same cause of action, the defendant in the subsequently instituted suit might seek his remedy under Section 10 of the Civil Procedure Code, but if the causes of action were different and consequently Section 10 did not apply, there would be no reason for the Court to restrain the prosecution of a different and subsequent suit, brought on a different cause of action.

14. It was after the dissolution of the injunction issued by the Bombay High Court that the two applications out of which the present appeals arise were made in the suit filed in this Court. On the 29th November 1954, Mansata made an application for an injunction, restraining Modi from

proceeding with the Bombay suit. Modi replied on the 17th December 1954 by making an application of his own for revocation of the leave granted under clause 12 of the Letters Patent and, alternatively, for a stay of further proceedings in the suit under Section 10 of the Civil Procedure Code. By an order passed on the 28th March 1955, P.B. Mukharji, J., dismissed both the applications.

15. Appeal No. 64 of 1955 has been preferred by Modi against the dismissal of his application directed at the Calcutta suit. Appeal No. 80 of 1955 has been preferred by Mansata against the dismissal of their application for an injunction restraining further prosecution of the suit in the Bombay High Court.

16. The decision of Mukharji, J., comprises three orders: an order refusing to issue an injunction against Modi, restraining him from prosecuting the Bombay suit; an order refusing to revoke the leave granted under Clause 12 of the Letters Patent; and an order refusing to stay the Calcutta suit under Section 10 of the Civil Procedure Code. A preliminary objection was taken in Appeal No. 64 of 1955 that no appeal lay under Clause 15 of the Letters Patent from either of the last two orders. In Appeal No. 80 of 1955, it was contended that no appeal lay from the first order either.

17. I do not consider it necessary to de cide whether an appeal lies against the order refusing to issue an injunction against Modi, restraining him from proceeding with the Bombay suit. It was alleged that the suit was not a *bona fide* Suit, but had been brought maliciously in order to forestall Mansata who, it must have been known, were bound to institute the Calcutta suit and that the object was also to cause harassment to them. I agree entirely with the learned Judge that there is no ground whatsoever for treating the earlier suit of Modi as a mala fide suit. He has pleaded two business agreements which are not denied, set out the letters passed between the parties which are also not denied and asked the Court to decide whether or not, on the facts pleaded by him, he is entitled to the reliefs claimed. The allegation of misrepresentation on which Mansata have founded their own suit was not concealed in Modi's plaint, but was expressly referred to and thus an opportunity was openly extended to them to prove their allegation, if they could, and defeat the suit. Like the learned trial Judge, I see no trace whatsoever of any mala fides in Modi's suit in Bombay and no reason to restrain its further prosecution by an injunction. Appeal No. 80 of 1955 must fail on the merits and therefore it is not necessary to consider whether it is maintainable in law or not.

18. As to Appeal No. 64 of 1955, it is really directed, as I have already said, against two orders. Unfortunately, there is even no mention of the prayer for revocation of leave in the learned Judge's judgment, although it was the first prayer in the Notice of Motion. It was not contended by the respondents that the prayer had been abandoned. Since the relief prayed for was not granted, it must be deemed to have been refused. There is no similar difficulty about the prayer for a stay of the suit which was dealt with by the learned Judge at length and refused.

19. To take the order under Section 10 of the Civil Procedure Code first, it is not an order granting a stay of a suit, but an order refusing to Stay it. Such an order was held to be appealable under the Letters Patent by the Bombay High Court in *Jivanlal Narsi v. Piroj Shaw Vakharia and Co*[1]*.,* and the decision was followed by Panckridge, J., in *Durga Prasad v. Kanti Chandra Mukherji*[2]*,* Costello, J., expressed no opinion on the point, as the contention that no appeal lay

had ultimately not been pressed. In *Jai Hind Iron Mart v. Tulsiram Bhagwandas*[3], the Bombay High Court again held that an order refusing stay of a suit under Section 10 of the Code was appealable. On the other hand, in *Madan Gopal Bagla v. The Chettyar Firm of S.P.K.A.A.M*[4], the Rangoon High Court held that an order under Section 10 of the Code, staying the hearing of a suit, was not appealable, but it preferred to reserve its opinion as to whether an appeal would lie from an order refusing stay. In *Central Brokers v. Ram Narayana Poddar and Co*[5]., a Full Bench of the Madras High Court held that an order under Section 10 or any other provision of law for the stay of the trial of a suit was not appealable under the Letters Patent.

20. Whether or not an appeal lies under Clause 15 of the Letters Patent from any particular order depends upon whether the order is a 'judgment' within the meaning of Clause 15. The term 'Judgment' has been defined in the Civil Procedure Code, but that definition does not apply to the word, as occurring in the Letters Patent. The language of the Letters Patent which were issued in 1865 is not the language of the Indian Legislature, but the language of English lawyers as it was in use amongst them before the words 'judgment', 'decree' and 'order' came to be clearly differentiated after the passing of the Judicature Acts. If one wanted to ascertain what the framers of the Letters Patent had really in mind when they used the word judgment', one would perhaps have to make a search in the vocabulary of old English lawyers, as appearing in contemporary rules and judicial decisions. But such search is no longer necessary because, by reason of judicial interpretation, the term, as used in the Letters Patents, Indian High Courts, has now acquired an Indian meaning. The two leading decisions are The Justices of the *Peace for Calcutta v. The Oriental Gas Co*[6]., a decision of this Court, given in 1872 and *Tuljaram Row v. Alagappa Chettiar*[7], a decision of the Madras High Court, given in 1910. To that must now be added the decision of the Supreme Court in *Asrumati Debi v. Rupendra Deb*[8], which is itself an interpretation of the two leading High Court decisions in their application to a particular type of order. All other decisions that can be found in the books justify themselves by referring to one or other of the above decisions or some part or other of them.

21. The test, according to the Calcutta decision, is that in order to be a 'judgment', a decision must affect 'the merits of the question between the parties by determining some right or liability', although it may be either a final judgment, determining the whole cause or suit or a preliminary or interlocutory judgment, determining only a part of it, leaving other matters to be determined. The Madras test is not wholly different but is a variant of the Calcutta test. According to it, the effect of the order on the relevant suit or proceeding must be seen and if the effect is to put an end to the suit or proceeding, so far as the Court making the order is concerned, or if the effect be such that in case the order is not complied with, the suit or proceeding will end, it will be a 'judgment'. To that test there is

[1] ILR 57 Bom 364 : AIR 1933 Bom 85

[2] ILR 61 Cal 670 : AIR 1935 Cal1

5 AIR 1954 Mad 1057

[6]8 Beng LR 433

[3] ILR (1953) Bom 416 : AIR 1953 Bom 117

[4] ILR 12 Rang 687 : (AIR 1935 Ran 73 (1))

[7] ILR 35 Mad 1

[8](1953) SCR 1159

a corollary. If the order is made on an independent proceeding which is ancillary to the suit and aims at rendering the judgment effective in case a judgment is obtained, such as an application for an interim injunction or for the appointment of a Receiver, then such an order also will be a 'judgment'. It will be seen that the second type of order admitted by the Madras test into the category of 'judgments' will not terminate the suit or proceeding, nor can it strictly be said that it will affect the merits of the question between the parties by determining some right or liability, as

required by the Calcutta test. On a strict construction of the Calcutta test, the right or liability must mean some right or liability which is a subject-matter of controversy in the suit or proceeding, but in its application to individual cases, that strict construction has not been adhered to and was indeed often departed from by Couch, C.J., himself who was the author of the test. Orders concerning the jurisdiction of the Court to entertain a suit, as distinguished from matters of the actual dispute between the parties, were held by him to come within the category of judgments.

22. The Supreme Court had before it an order, made under Clause 13 of the Letters Patent, by which this High Court had transferred to itself a suit pending in a subordinate Court for trial in its Extraordinary Original Jurisdiction. The Court refrained from giving an exhaustive definition of the word 'judgment' as used in Clause 15 of the Letters Patent. They dealt only with the order before them and held that no appeal lay from it for three reasons. The order did not affect the merits of the controversy between the parties in the suit itself, nor did it terminate or dispose of the suit on any ground, nor was it at all an order made by the Court in which the suit was pending. It was only an order made by a superior Court, by which a live suit was transferred from one forum to another. It appears to me that since the Supreme Court did not frame an exhaustive definition of the word 'judgment' which would be applicable in all cases, it would not be correct to hold that no order can be a 'judgment', if any of the negative reasons given by the Supreme Court for holding the order before them to be not appealable, applies.

23. In view of the somewhat indeterminate terms in which the tests 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 tried 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. To refuse to stay a suit under Section 10 is to uphold the right of the plaintiff to have his suit tried without interruption in the forum of his choice and to negative the defendant's claim to have the Subject-matter tried by the other Court where he has brought his own suit. I think where a Court makes an order for stay, the position is clear, because although the suit does not terminate by reason of such an order, it is suspended all the same and the suspension may be termination for all practical purposes, unless the other suit fails for non-prosecution or the matter is not decided in it. In any event, such an order affects the jurisdiction of the Court to try the suit, although the bar created may be temporary. But an order refusing a stay also involves assumption of jurisdiction and in so far as it negatives the defendant's contention that the suit cannot be proceeded with and upholds the plaintiff's claim that the suit must proceed, it seems to me that it affects the merits of a part of the controversy between the parties, the particular controversy being a controversy in the suit as to where the subject-matter should be tried. I have already pointed out that the test laid down by the Calcutta decision has always been regarded as flexible, at least to this extent that, besides orders affecting merits of the disputes between the parties, orders concerning the jurisdiction of a Court to entertain or try a

dispute has always been held to be judgments. In ILR 57 Bom 364 : AIR 1933 Bombay 85, Beaumont, C.J., observed as follows :-

> "It appears to me that a decision of the Judge, either to allow or to refuse a stay under that section is a decision which in fact goes to the jurisdiction of the Court. If the case is brought within Section 10, then the Court has no jurisdiction to proceed with the trial of this suit, so long as the earlier suit is pending; and when the earlier suit is determined, the matter in issue in this suit will probably be res judicata. Therefore, the decision of the Judge under Section 10 really determines the rights of the plaintiffs to sue in this Court; and it seems to me that such a decision is a 'judgment' within Clause 15 of the Letters Patent and the authorities under that clause and that such a decision is not a mere order relating to procedure in the suit."

24. These reasons were adopted or similar reasons were given in the other decisions to which I have referred where it was held that an order under Section 10 of the Code was a 'judgment'.

25. Proceeding from what I have so far said, I think I can reasonably go a little further. An order staying a suit under Section 10 of the Code can be said to affect even the actual dispute between the parties on the merits, because it compels the plaintiff to take the decision of the other Court on the questions in controversy, however they may be decided, instead of the decision of the Court of his choice which might well have been different. The merits of a controversy are, till they are decided only claims and it is the decision of the Court which determines the merits and thus affects them.

26. Relegation to the sole decision of another Court of the questions in controversy in a suit, which a stay order under Section 10 means and involves, does therefore affect the merits. The decision of the other Court will operate as res judicata and by so operating, affect the merits of the controversy in the suit that is stayed. Similarly, an order, refusing a stay, consigns the parties to the possibility of having conflicting declarations as to their rights and liabilities from two different Courts and thereby affects the merits of questions in controversy by making it probable that the merits will be differently adjudged. This however will happen only when an order refusing a stay is wrongly made in spite of the other suit being earlier and involving the same subject-matter. But it must be remembered that an appeal is always on the ground that the order sought to be appealed from is erroneous. In Asrumati Debi's case, the jurisdiction of the Court of institution was certainly affected by the order of transfer, but there was no question of the decision of one Court operating as res judicata as to the questions in controversy before another Court, nor any question of conflicting decisions on the merits.

27. For the foregoing reasons I hold that the order of P.B. Mukharji, J., in so far as it is an order refusing a stay of Mansata's suit, is appealable.

28. The other order is an order refusing revocation of the leave granted under Clause 12 of the Letters Patent. As to whether such an order is appealable, there is a direct authority in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*[9], where it was held that an order, refusing to rescind a leave granted under Clause 12 of the Letters Patent, was appealable. The head-note stating that the order appealed from was an order granting leave is wrong, as will

appear from pp. 93 and 94 of the report. In holding that an appeal lay from the order, Couch, C.J., with whom Pontifex, J., agreed, observed as follows :-

> "It is not a mere formal order merely regulating the procedure in a suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have and it may fairly be said to determine some right between them, viz., the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction, to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence."

29. In Asrumati Debi's case, the Supreme Court had occasion to refer to orders of leave granted under Clause 12 of the Letters Patent and orders refusing to revoke such leave and in that context they referred to this decision. It is true that they disapproved of its application to orders passed under Clause 13 of the Letters Patent, but they did not say that even as regards orders under Clause 12, it was wrong. As to the general question regarding orders under Clause 12 of the Letters Patent, Mukherjea, J., observed as follows :-

> "Leave granted under Clause 12 of the Letters Patent constitutes the very foundation of the suit which is instituted on its basis. If such leave is rescinded, the suit automatically comes to an end and there is no doubt that such an order would be a judgment. If, on the other hand, an order is made, dismissing the Judge's summons to show cause why the leave should not be rescinded, the result is as Sir Lawrence Jenkins pointed out, *Vaghoji v. Camaji*[10], that a decision on a vital point adverse to the defendant which goes to the very root of the suit becomes final and decisive against him, so far as the Court making the order is concerned. This brings the order within the category of a judgment as laid down in the Calcutta cases."

30. It was contended on behalf of the appellant that the Supreme Court were approving of what they set out as the view of Sir Lawrence Jenkins, because they used the expression 'the result is, as Sir Lawrence Jenkins pointed out' and, therefore, they were quoting what Sir Lawrence Jenkins had said with approval. I cannot accept that contention, because the judgment proceeds to say that the Court was not expressing any final opinion as to the propriety or otherwise of the view expressed by Sir Lawrence Jenkins. The words 'as Sir Lawrence Jenkins pointed out' merely mean 'according to Sir Lawrence Jenkins' or 'as it has been put by Sir Lawrence Jenkins'. But the fact remains that the Supreme Court did not disapprove of the decision in 13 Beng LR 91 (I). Otherwise too, I find nothing in the

[9] 13 Beng LR 91

[10] ILR 29 Bom 249

principles laid down in the Supreme Court's judgment which requires or authorizes me to dissent from the earlier decision in 13 Beng LR 91, which was also a decision of a Division Bench and with the reasoning of which I respectfully agree. I would therefore hold that the order of P.B. Mukharji, J., in so far as it impliedly refused to revoke the leave granted under Clause 12 of the Letters Patent, is also appealable.

31. In the Madras Full Bench case of AIR 1954 Madras 1057, the following observation about

the judgment of the Supreme Court occurs in the judgment of Govinda Menon, J. "It also held that an order refusing to rescind leave to sue granted under Clause 12 of the Letters Patent was not a judgment under Clause 15 of the Letters Patent." With respect, that observation does not appear to be correct.

32. I have now to proceed to consider the appeal on the merits. As regards the refusal to revoke leave, I have already pointed out that the learned Judge has not, unfortunately, mentioned the prayer for revocation and necessarily has given no reasons for not giving effect to it. He might have thought that the prayer was plainly not maintainable, but whether or not he took that view, does not appear.

33. As regards the order made under Section 10, it appears to me, if I may say so with respect, that the learned Judge was under a misapprehension. He thought that since the decision of the Bombay Court of Appeal was a decision binding on the parties and by that decision it had been held that the two suits were based on different causes of action, it was no longer open to him to apply Section 10 of the Civil Procedure Code. That view of the Bombay judgment is not correct, although I am free to confess, again with respect, that I find some confusion of language in the appellate judgment of the Bombay High Court. The scheme of the judgment, however, is clear. The learned Chief Justice first points out that Clause 28 of the agreements cannot apply, because the Calcutta suit was not a suit under the agreements, but a suit de hors them. It was also a subsequently instituted suit. If clause 28 of the agreements was not attracted, there was no reason to injunct the Calcutta plaintiff against proceeding with his suit on the ground that he had brought it in breach of the agreement. Again, since his was a subsequently instituted suit, there could be no question of his having made an attempt to forestall the Bombay plaintiff, either for the purpose of harassing him by instituting a suit in an inconvenient forum or for the purposes of acquiring the advantage of Section 10. If Section 10 applied, it would hit the Calcutta suit rather than the Bombay suit. The learned Chief Justice then proceeds to say that if the two suits had been filed 'on the same cause of action' - as to which he was expressing no opinion - then the Bombay plaintiff might proceed in Calcutta under Section 10 and try to get the defendant's Calcutta suit Stayed. I do not know why the learned Chief Justice used the expression 'cause of action', because Section 10 speaks of not 'cause of action' but of 'matter directly and substantially in issue'. It is also not clear how two persons, quarrelling over the same transaction and bringing separate suits with respect to it against each other, can have the same 'cause of action'. Be that as it may, what the learned Chief Justice means is that since the Calcutta suit was a subsequent suit, if could be stayed, if at all, by the Calcutta Court under Section 10 of the Civil Procedure Code and the Bombay plaintiff ought to seek that remedy in Calcutta. It was argued on behalf of the Bombay plaintiff that the Calcutta suit would fall under Section 10 and the Bombay plaintiff might undoubtedly invoke the aid of that section, but he might also ask for relief from the Bombay High Court by way of an injunction against the Calcutta plaintiff issued in the exercise of the Court's inherent jurisdiction. That contention was repelled. The learned Chief Justice states that however wide the powers of the Court under Section 151 may be, they do not extend to the Court granting relief under its inherent jurisdiction, when the same relief can be granted by another Court under the express provisions of the Code. It would thus appear that what the Bombay High Court said was that if Section 10 of the Civil Procedure Code applied to the two suits - about which it was expressing no opinion - the Bombay plaintiff might seek his remedy under that section in this Court. It is true that the ground for the application of Section 10 was inaccurately stated when the learned Chief Justice was referring to the hypothetical case of the

section being applicable to the two suits. But he did not refuse an injunction on the finding that the Bombay plaintiff had an alternative remedy in Section 10 of the Code, as thought by the learned Judge, holding thereby that the subject-matter of the two suits or their 'causes of action' were identical, but he did so on the ground that the Calcutta suit was a subsequent suit and therefore it could not be stayed by an injunction and he added that the plaintiff might seek his relief in Calcutta under Section 10, if that section applied. The only positive opinion expressed by the learned Chief Justice, was that the Calcutta suit was not a Suit for the enforcement of rights under the contract, but it was a suit for avoiding the contract. He does not appear to have said anything about the nature of the Bombay suit. But assuming that he did say that the Bombay suit was a suit under the contract for the enforcement of rights conferred thereby, I am unable to see that the matter in issue in the two suits might not yet be substantially the same, though different reliefs might have been claimed by the two different plaintiffs on the basis of their respective cases. It is true that no written statement has yet been filed in the Calcutta suit, but what the defense in the Calcutta suit will be is fairly clear from the plaint in the Bombay suit itself as also the application made to this Court by Modi. If the Calcutta plaintiff's defense in the Bombay suit is substantially his plaint in the Calcutta suit and if the Bombay plaintiff's defense in the Calcutta suit is virtually his plaint in the Bombay suit, the matter in issue between the parties in the two suits would seem to be substantially the same. The fact that one is a suit under the agreements and the other is a suit de hors the agreements does not make a substantial identity of the subject-matter per se impossible. The basis of the defense in the Bombay suit and the basis of the claim in the Calcutta suit appear to be both fraudulent misrepresentation and if the defense succeeds in Bombay, nothing will be left of that suit and, similarly, if in consequence the case of misrepresentation succeeds in Calcutta, this suit will be practically decided, the only, enquiry remaining being an enquiry as to the damages claimed in addition to a refund of the money paid. Similarly, again, if the defense fails in the Bombay suit, the basis of the Calcutta suit will be wholly destroyed. In my view, the principal matter in issue in the Calcutta suit is directly and substantially in issue in the Bombay suit, which is a suit previously instituted and that an unnecessary duplication of proceedings with the possibility of conflicting decisions being rendered will occur, if the Calcutta suit is not stayed.

34. It remains to refer to one other matter. The learned Judge has also given it as a reason for refusing to stay the suit before him under Section 10 that there is an additional party in that suit. That, by itself, does not make Section 10 inapplicable. It is true that the section speaks of 'same parties', but it has been held that the 'same parties' mean 'the parties as between whom the matter substantially in issue has arisen and has to be decided'. Complete identity of either the subject-matter or the parties is not required. Authority for that proposition will be found in ILR 61 Cal 670 : AIR 1935 Calcutta 1 (Six parties in one Suit and five parties in another); and *Wahid-un-Nessa, Bibi v. Zamin Ali Shah*[11], and *Luxmi Bank Ltd. v. Hari Kissan*[12], The additional party impleaded in the Calcutta suit is the company Kapurchand Limited, to which the payments due to Modi under the agreements were to be made. No allegation is made against the company except that some money was paid to it and that it was a party to and knew of the misrepresentations made by Modi. I do not think that the joinder of Kapurchand Ltd., on such allegations raises any separate and substantial issue as between it and the Mansata so as to make Section 10 inapplicable.

35. As to the prayer for revocation of leave, I see no reason to grant it. The plaintiff has made a case in the plaint, according to which a part of the cause of action did arise in Calcutta. Since the

suit is being stayed and the main question will be tried at Bombay, the question of convenience hardly survives.

36. In the result, Appeal No. 64 of 1955 is allowed in part. The order of the learned Judge, dated the 28th April 1953, in so far as, by it, he refused to stay the present Suit under Section 10 of the Code is set aside and it is directed that the suit be and do remain stayed so long as the Bombay suit, viz., Suit No. 1069/X of 1954, may remain pending. The rest of the order is upheld. Costs of this appeal, which will be half-costs, will be costs in the suit. Certified for two counsel.

37. Appeal No. 30 of 1955 is dismissed with costs. The undertaking given by the Respondent No. 1 not to proceed with the Bombay suit will Stand discharged. Certified for two counsel.

Sarkar, J.

38. I agree.

Order accordingly.

[11] ILR 42 All 290 : AIR 1920 All 70; ILR (1953) Bom 416 : AIR 1953 Bom 117

[12] ILR (1948) Nag 403 : AIR 1948 Nag 297