

**IN THE HIGH COURT OF TRIPURA**  
**AGARTALA**

**CRP NO.70 OF 2014**

Hindustan Steelworks Construction Limited,  
Tripura Unit, having its Office at Banik Kutir,  
Sankar Chowmuhani, Krishnanagar, Agartala,  
through its authorized representative,  
Sri S.K. Thakur, Assistant General Manager,  
Hindustan Steelworks Construction Limited,  
having its office at Banik Kutir,  
Sankar Chowmuhani, Krishnanagar, Agartala.

..... Petitioner

– Vs –

Sri Dilip Kumar Kar,  
son of late Makhan Lal Kar,  
having his resident at Agartala-Assam Road,  
Math Chowmuhani, P.O. Dhaleswar,  
P.S. East Agartala, Agartala, District West Tripura.

.....Respondent

**B E F O R E**  
**THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the petitioner : Mr. S.K. Deb, Sr. Advocate  
Mr. S. Datta, Advocate

For the respondent : Mr. D.K. Biswas, Advocate

Date of hearing : 10.12.2014

Date of judgment & order: 26.02.2015

Whether fit for reporting : 

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|-----|----|
| Yes | No |
| √   |    |

### **JUDGMENT & ORDER**

This is a petition under Section 115 of the CPC for revising the order dated 26.07.2014, delivered in Title Suit No.11/2014 by the Civil Judge (Sr. Divn.), Court No.1, Agartala, West Tripura.

2. The petitioner herein, namely Hindustan Steelworks Construction Limited instituted a suit for declaration that they are entitled to a sum of ₹5,00,56,231 for the damage they suffered for deliberate and wilful negligence of the respondent in performing his part of the "contract", being the excess payment received by the respondent, the value of the balance materials issued to him, hire-charges for the use and utilisation of the steel plates and another sum of ₹65,26,265 as the excess payment made for execution of the balance work by another agency with interest from 25.06.2013 till date of payment at 18% per annum.

3. The respondent also filed another suit, being Title Suit No.01/2014 in the same court of the Civil Judge, Sr. Divn., Court No.1, West Tripura, Agartala, seeking declaration that the oral agreement with the "go ahead letters" dated 30.07.2012 and 03.08.2012 and fixing of "risk and cost" condition is not enforceable and illegal. As such, the petitioner herein (the

defendant No.1 in the suit) is liable to pay the respondent herein (the plaintiff in the suit) at the negotiated rate and also to compensate the loss suffered by the respondent for "illegal rescission" of "the contract" by payment of 20% on the balance work in the two contracts (Part-II and Part-III) on the estimated cost respectively ₹9,52,78,000 and ₹8,81,24,000 and, thus the respondent herein calculated the loss amounting to ₹5.7 crores in all.

4. It is not in dispute that the petitioner herein had been engaged for execution of the work of covering some of the big drains within the Municipal area of Agartala town as a part of the beautification scheme, under the name : "Construction of RCC cover drain in Central Zone of Agartala Municipal area". The petitioner was entrusted with the entire work, but in turn, they engaged the other contractors. According to the respondent, "under their supervision" the respondent and the petitioner entered into the agreement containing the conditions in detail. The respondent has stated that "no agreement was signed" and according to the bidding documents the work was not executable at that stage. But, the petitioner suddenly issued two "go ahead letters" in respect of two separate contractors as mentioned therein. One is dated 03.12.2012 and the other is dated 30.12.2012. By the said letters the respondent was asked to start both the works (Part-II and Part-III) immediately.

According to the respondent, he then mustered all the infrastructure, purchased valuable machineries and collected man-power for execution of those works. The respondent has further stated that the materials were collected at the site and in compliance with the requirement under clause 3.3.8 of the bidding documents, two valuable equipments, namely (i) one set Cement-Concrete Mixing Batch plant and (ii) two nos. RMC Mixer, costing about ₹1.5 crores were purchased for execution of the contract work, which was scheduled to be completed in June, 2014. But, the plaintiff could complete one-fourth of the assigned work in part-II, while for want of site the work in respect of the other contract could not be started. The respondent has further stated that for his illness he could not execute the work in the expected pace. On 03.07.2013, he received a letter of caution from the petitioner for resuming the work within 48 hours which was stopped for a pretty long time, else the contract would be rescinded in terms of clause 109 of the General Condition of Contract (GCC) and the balance work would be executed at the respondent's risk and cost.

5. On 06.07.2013, the petitioner asked the respondents to be present for a joint measurement of the executed work, failing which the ex parte measurement would be taken, which would be again binding on the respondent. But, the respondent did not bother to attend the said joint measurement nor did he

send any authorised representative to take part in the joint measurement. Thereafter, on floating a new tender for the balance work, another agency, namely M/S Pobi Technologies and Construction Pvt. Ltd. was entrusted with the balance work and they were given "go ahead letter" on 14.08.2013. The tender value of the balance work has been estimated at ₹9,26,69,302. Similarly, the other works had been entrusted to the same agency i.e. M/S Pobi Technologies and Construction Pvt. Ltd. with the estimated value of ₹9,13,88,275. Thus the excess payment that has to be made by the respondent has been calculated at ₹4,45,56,231. The petitioner has claimed to be entitled to the payments on other accounts, such as, return of the excess money received by the respondent and return of the balance of the steel materials, concrete gauge for which advance payment was received by the respondent and for returning of all the shuttering plates issued to the respondent for expeditious completion of work under the contract, value of which comes to ₹55,00,000. If the materials are not returned, the value of those materials would be calculated. Thus the total value that has been claimed from the respondent by the petitioner is ₹5,65,82,496.

6. In view of the fact that between the same parties, Title Suit No.1/2014 filed by the respondent herein and the Title

Suit No.11/2014 filed by the petitioner herein, are pending for adjudication, the respondent filed an application under Section 10 of the CPC for staying the proceeding of the suit being Title Suit No.11/2014, as the suit filed by him, being Title Suit No.1/2014 is a former suit between the same parties where the matter in issue are also directly and substantially in issue in the former suit pending in the same court having jurisdiction to grant the relief claimed. The said petition filed by the respondent has been stayed till disposal of the former suit, being Title Suit No.01/2014 filed by the respondent, by the impugned order dated 26.07.2014. Nature of dispute has been broadly outlined. On consideration of the matter in issue, the trial court passed the impugned order on observing as under :

**“Therefore, the material question which have to be looked into in Section 10 of CPC is that –**

- 1. Two suits are instituted at a different times between the same parties.**
- 2. The matter in issue in the later suit should be directly and substantially in issue in the earlier suit.**
- 3. 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 and the earlier suit is still pending but not before the Foreign Court.**

**In the present suit the parties are same and the defendant of the instant suit filed a Case bearing No.T.S.01 of 2014 on 06.01.2014 and the instant suit i.e., T.S.11 of 2014 was filed by the plaintiff against the same defendant on**

**07.02.2014. Therefore, admittedly the suit filed by the defendant is the earlier suit and both the suits are pending in the same Court and between the same parties. Now the question is whether both the parties are litigating under the same issues or not. In the instant suit the plaintiff-Company sought for recovery of Rs.5,00,00,000/- for the breach of contract and also the cost of goods lawfully entrusted to the contractor i.e. the defendant herein under a contract, while in the former suit the defendant-contractor sought for compensation for breach of a contract and also for recovery of the alleged dues said to be payable by the plaintiff company for performance of the part of the work done by the defendant contractor. Therefore, in my considered opinion there is a common issues arising out of same NITs which are directly and substantially in issue in the earlier suit filed by the defendant. Therefore, to decide the matter in controversy in both the suits one main issue has to be framed, whether the contract executed between the parties are valid and enforceable against the parties which allegedly breach the terms of the contract. Therefore, it appears that the matter in issue in the instant suit is also directly and substantially in issue of the previously instituted suit between the same parties and as such the petition filed by the defendant is found to be reasonable. Accordingly the same is hereby allowed. The further proceeding of the instant suit is hereby stayed till disposal of the suit filed by the defendant vide., T.S.01 OF 2014.”**

7. Thus it is apparent from the impugned order that the trial court has *prima facie* held that there are common issues arising out of the same NITs which are directly and substantially in issue in the earlier suit filed by the defendant, the respondent herein. Therefore, it has been observed that to decide the matter in controversy in both the suits, one main issue has to be

framed, “whether the contract executed between the parties are valid and enforceable against the parties which allegedly breach the terms of the contract?” Having observed thus, the trial court has held that the matter in issue in the former suit is directly and substantially in issue of the subsequent suit between the same parties.

8. Mr. D.K. Biswas, learned counsel appearing for the respondent, at the outset has raised a jurisprudential objection as to the maintainability of this petition, holding that this petition is barred by the proviso to Section 115(1) of the CPC, which stipulates that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where – (i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings; or (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. Mr. Biswas, learned counsel has submitted that even if the objection as raised by the petitioner herein before the trial court against the prayer for staying the proceeding of the subsequent suit as filed by the petitioner had been entirely allowed, the order could have not finally disposed the suit or any other proceeding. According to Mr. Biswas, learned counsel, adjudicatory process of a petition under Section 10 of the CPC cannot for any purpose called “the

proceeding". Then there cannot be any event of disposal of the proceeding as contemplated by the said proviso.

9. In response to such preliminary objection raised by Mr. Biswas, learned counsel appearing for the respondent, Mr. S. Deb, learned senior counsel appearing for the petitioner, has placed reliance on a few decisions of the apex court on the meaning of "proceeding".

10. In **Ram Chandra Aggarwal & Anr. Vs. The State of Uttar Pradesh & Anr.**, reported in **AIR 1966 SC 1888**, the apex court has held that :

**6. The next contention - and it was the one pressed strenuously by him - was that a proceeding upon a reference under S. 146(1) entertained by a civil court not being an original proceeding the provisions of s. 141, C.P.C. are not attracted and that, therefore, those provisions of the Civil Procedure Code which relate to suits are not applicable to a proceeding undertaken by a civil court upon a reference to it under S. 146(1) of the Code of Criminal Procedure. A number of cases dealing with this point were brought to out notice either by him or by Mr. Goyal. It seems to us, however, that those cases are not relevant for deciding the point which is before us. In passing, however, we may mention the fact that a full bench of the Allahabad High Court has held in **Maha Ram v. Harbans**, ILR (1941) All 193 : (AIR 1941 All 101) (FB), that the civil court to which an issue on the question of proprietary rights has been submitted by a revenue court under S. 271 of the Agra Tenancy Act, 1926 has jurisdiction to refer the issue to arbitration under paragraph 1 of Schedule II of the C.P.C. This decision is based upon the view that by virtue of S. 141, C.P.C. the provisions relating to arbitration contained in the second schedule to the Code of Civil Procedure**

before the repeal of that schedule applied to a proceeding of this kind. Similarly recently this Court has held in *Munshi Ram v. Banwarilal*, AIR 1962 SC 903 that under S. 41 of the Arbitration Act and also under S. 141, C.P.C. it was competent to the court before which an award made by an arbitration tribunal is filed for passing a decree in terms thereof to permit parties to compromise their dispute under O. XXIII, R. 3, C.P.C. Though there is no discussion, this Court has acted upon the view that the expression "civil proceeding" in S. 141 is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian etc., but that it applies also to a proceeding which is not an original proceeding. Thus, though we say that it is not necessary to consider in this case whether the proceeding before the civil court is a civil proceeding as contemplated by S. 141 or not there is good authority for saying that it is a civil proceeding. All that we are concerned with in this case is whether the provisions of S. 24(1)(b) of the Code of Civil Procedure are available with respect to a proceeding arising out of a reference under S. 146(1), Cr.P.C. The relevant portion of S. 24 may, therefore, be set out. It reads thus :

"On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

- (a) ....
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
  - (i) ....
  - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
  - (iii) ....

It plainly speaks of "other proceeding pending in any court sub-ordinate to it" and not only to the civil proceeding pending before a subordinate Court. The decisions of the Privy Council and one decision of this Court which we have earlier quoted would warrant the application of the provisions of the Code of Civil Procedure generally to a proceeding before a civil court arising out of a reference to it by a Magistrate under S. 146(1) of the Code of Criminal Procedure. The expression "proceeding" used in this section is not a term of art which has acquired a definite meaning. What its meaning is when it occurs in a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Looking to the context in which the word has been used in s. 24(1)(b) of the Code of Civil Procedure it would appear to us to be something going on in a court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term "proceeding" indicates something in which business is conducted according to a prescribed mode it would be only right to give it, as used in the aforesaid provision, a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. In a recent case Kochadai Naidu v. Nagavasami Naidu, ILR (1961) Mad. 413 : (AIR 1961 Mad 247), Ramachandra Iyer J., (as he then was) was called upon to consider the very question which arises before us. The learned Judge held that a proceeding before a civil court arising out of a reference to it under S. 146(1), Cr.P.C. can be transferred by the High Court or District Court under S. 24, C.P.C. because it is in any case a "proceeding". He has also considered this question from the angle of the nature of the proceeding and expressed the view that the proceeding was a civil proceeding to which the procedure for suits could, with the aid of S. 141, C.P.C. be applied. If indeed the term "proceeding" in S. 24 is not confined to a civil proceeding there is no need whatsoever of taking the aid of S. 141, C.P.C. Upon this view we dismiss the appeal.

[Emphasis supplied]

11. In **Babu Lal Vs. M/s Hazari Lal Kishori Lal & Ors.**, reported in **(1982) 1 SCC 525**, the apex court has held that :

**"The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as "carrying on of an action at law, a legal action or process, any act done by authority of a court of law; any step taken in a cause by either party". The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in Section 22 includes execution proceedings also. In Rameshwar Nath v. U.P. Union Bank Ltd. : AIR 1956 All 586 such a view was taken. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case. Execution is a stage in the legal proceedings. It is a step in the judicial process. It makes a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. One of them is execution."** [Emphasis supplied]

12. In **Sri Vishnu Awatar etc. etc. Vs. Shiv Autar & Ors.**, reported in **AIR 1980 SC 1575**, the apex court has observed that :

**3. The crucial provision, Section 3 of the Act, reads thus :**

**115. The High Court, in cases arising out of original suits or other proceedings of the value of twenty thousand rupees and above, including such suits or other proceedings instituted before Aug. 1, 1973 and the District Court in any other case, including a case arising out of an original suit or other**

proceedings instituted before such date, may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears –

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity;

the High Court or the District Court, as the case may be, may make such order in the case as it thinks fit.

Provided that in respect of cases arising out of original suits or other proceedings of any valuation, decided by the District Court, the High Court alone shall be competent to make an order under this section.

Provided further that the High Court or the District Court shall not under this section, vary or reverse any order including an order deciding an issue, made in the course of a suit or other proceeding, except where, -

(i) the order, if so varied or reversed, would finally dispose of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

**(Explanation)-** In this section, the expression 'any case which has been decided' includes any other deciding an issue in the course of a suit or other proceeding.

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6. The High Court, in the last Full Bench decision traced the story of the race between the legislature and judicial interpretation and summed up the result rightly thus : Jupiter Chit Fund (Pvt) Ltd. v. Dwarka Diesh : AIR 1979 All 218 at p.225(FB).

The High Court was confined to cases arising out of original suits or other proceedings of the value of Rupees 20,000 or above, including such suits or other proceedings instituted before 1st August, 1978. The jurisdiction of the District Court was in respect of any other case including a case arising out of an appeal suit or other proceeding instituted before such date. The legislature has continued to use the phrase "cases arising out of original suits". The interpretation placed upon this phrase by the Full Bench in Har Prasad Singh's case (AIR 1973 All 390) will apply. The revisional jurisdiction would hence not extend to cases arising out of the disposal of appeals or revisions by the District Court. The proviso is also in the same terms as the proviso added in 1973 namely, it uses the phrase cases arising out of original suits or other proceedings". As already seen, it will not cover cases arising out of disposal of appeals or revisions.

The words "or other proceedings" in the phrase "cases arising out of original suits or other proceedings" refer to proceedings of final nature. These words have been added in order to bring within the purview of the revisional jurisdiction orders passed in proceedings of an original nature, which are not of the nature of suits, like arbitration proceedings. This phrase cannot include decisions of appeals or revisions, because then the legislature will be deemed to have contradicted itself. The words "or other proceedings" have to be read ejusdem generis with the words "original suits". They will not include appeals or revisions.

**The phrase "in any other case" used with reference to the District Court will refer to cases arising out of original suits of the value of less than Rs.20,000 and also cases arising out of other proceedings of an original nature of a valuation below Rs.20,000.**

[Emphasis supplied]

13. This court does not have any hesitation to hold that within the broader meaning of the word "proceeding", consideration of a petition filed under Section 10 of the CPC can be treated as the proceeding for meeting the requirement of proviso to Section 115(1) of the CPC and if finally that proceeding is terminated, either by allowing or rejecting the prayer that would amount to disposal of the said proceeding. That apart, the second situation as illustrated requires a keen reading. It has been vehemently argued that, the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it has been made. Thus the first illustration (a) below the proviso is not solitary, but it is alternated by the provision at illustration (b) below the proviso. These two illustrations are not conjunctive, but mutually disjunctive, but there cannot be any inhibition to be governed by both the illustrations in some cases.

14. In the present case, Mr. Deb, learned senior counsel appearing for the petitioner, has submitted that if the impugned order is allowed to stay, that would not resolve the dispute

rather it would allow the dispute to be protracted to the irreparable injury of the petitioner and hence in the circumstances, this court would turn down the jurisprudential objection as raised by Mr. Biswas, learned counsel appearing for the respondent. Mr. Deb, learned senior counsel appearing for the petitioner has further submitted that the said finding is grossly erroneous, illegal and unsustainable.

15. Having held so, it is incumbent on this court to examine :

- (i) Whether the impugned order so passed, staying the further proceeding of the subsequent suit has been passed within the legal parameters or not?
- (ii) Whether the observation as made that "one of the main issue" is substantially involved in both the suits, would survive the test of the statute?
- (iii) Whether the contract between the parties is valid and enforceable against the parties in the event of breach of the terms or otherwise? and
- (iv) Whether the matter in issue in the former suit is directly and substantially in issue in the subsequent suit?

16. Mr. Deb, learned senior counsel appearing for the petitioner has further submitted that Section 10 of the CPC provides that the matter in issue is "directly and substantially in issue in a previously instituted suit between the same parties", has fallen for consideration on numerous occasions to lay the legal principles to be followed for exercising the power by the civil court under Section 10 of the CPC for staying the subsequent suit pending in the same court or in the court of the competent jurisdiction between the same parties.

17. In **Brijlal & Co. Vs. Madhya Pradesh Electricity Board**, reported in **AIR 1975 CALCUTTA 69**, the Calcutta High Court has held as under :

**4. The short point to be decided in this application is whether the issues in the Calcutta High Court are directly and substantially an issue in the Jabalpur suit between the same parties. Admittedly, the petitioner's suit was instituted earlier than the Calcutta High Court Suit and the parties are the same. The legal principles underlying Section 10 of the Code of Civil Procedure are well established and it is not necessary to reiterate the large number of decisions on the point. In order that the petitioner succeeds it is not necessary that the issues in the two suits must be identical or that the subject-matter of the controversy in both these suits must have to be the same in all its particulars. Apart from the disputes and differences between the parties in the two suits, the Court should find out whether the suit which is to be stayed would be disposed of on the basis of the decision in the other suit on the principles of actual or constructive res judicata. The entire object of the said section is to avoid multiplicity of the proceedings on the controversy between**

the parties and also conflict of judgments between two Courts on the same issues. The counsel for both the parties have relied upon the observations of the Appeal Court in **Arun General Industries Ltd. v. Rishabh Manufacturers Pvt. Ltd.**: AIR 1972 Cal 128 at p.138 which read as follows:

"It was held that Section 10 did not contemplate identity of decisions in the two suits nor that the matter in issue in the two suits should be entirely the same or identical and that all that the section requires was the matter in issue in the two suits should be directly and substantially the same. It was also held that there should be identity of the subject-matter and field of controversy between the parties in the two suits must be same but the identity and controversy contemplated need not be identical and same in every particular, but the identity and the field of controversy must be substantially the same. We respectfully agree that the views of the Division Bench of the Bombay High Court and we think Chagla, C. J. has correctly and appropriately laid down the extent of the identity of the subject-matter in the two suits."

[Emphasis supplied]

18. Another decision as relied on, is in **Sohal Engineering Works, Bhandup, Bombay, Vs. Rustam Jehangir Vakil Mills Co. Ltd.**, reported in **AIR 1981 GUJARAT 110**, where the Gujarat High Court has held 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.**

[Emphasis supplied]

19. The controversy in the case in hand is somewhat similar to **Sohal Engineering Works, Bhandup, Bombay, Vs. Rustam Jehangir Vakil Mills Co. Ltd.** The Gujarat High Court, in no unequivocal words has held that 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. Thus according to the Gujarat High Court, even if the former suit is dismissed on that ground, the subsequent suit on actual breach of contract will still survive. As such, the subsequent suit will not be decided on the

doctrine of *res judicata*. Hence the civil court in such circumstances is precluded from exercising its power conferred by Section 10 of the CPC.

20. The Gauhati High Court in **Sri Bipul Chandra Das Vs. Sri Durga Barman & Ors.**, reported in **(1990) 1 GLR 400**, has held similarly. In **Sri Bipul Chandra Das Vs. Sri Durga Barman & Ors.**, the Gauhati High Court has held as under :

**"One of the essential conditions to attract Section 10 of the CPC is that the matter in issue in a suit is also directly and substantially in issue in a previously instituted suit between the same parties. The "matter in issue" means the subject in controversy between the parties. There must be substantial identity of matter in issue in the two suits. Different tests have been evolved by the courts to decide applicability of Section 10. One of such tests, which is often applied, is whether final decision in the previous suit would operate as res judicata in the subsequent suit. Another test is whether in the earlier suit, the Court can also grant the relief sought for in subsequent suit. There is still another test which, in my opinion, is easier to apply and more appropriate. This test is whether the decision in the previous suit would affect the decision in the subsequent suit. If the answer is 'Yest', Section 10 would apply and the Court should stay the subsequent suit. Otherwise not.**

[Emphasis supplied]

21. Even though Mr. Deb, learned senior counsel appearing for the petitioner has pressed the Gauhati High court

decision, but the third proposition as laid therein, appears to this court are little bit vague and confounding. However, the decision in **National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara**, reported in **(2005) 2 SCC 256**, the Supreme Court had the occasion to explore the applicability of Section 10 of the CPC. In **National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara**, it has been held by the apex court that :

**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.**

[Emphasis supplied]

22. The important observation as made by the Supreme Court is that the words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue", meaning thereby the suits might be set up in the same conspectus of fact, but the matter in issue or the field of the controversy may not be directly and substantially in issue. Those may be "incidentally or collaterally in issue". For the latter situation, the civil court is precluded from exercising its power as conferred by Section 10 of the CPC, inasmuch as there is no identity of the matter in issue in both the suits.

23. Mr. Biswas, learned counsel appearing for the respondent has submitted that if the former suit filed by the respondent is decreed that would operate as the *res judicata* of the suit filed the respondent and, as such, there is no infirmity in the impugned order.

24. On reading of the complaints, what appears before this court is that the field of controversies are substantially different, may be some collateral and incidental issues are there, but if the former suit is dismissed, there cannot be any amount of doubt, it would not terminate the suit filed by the petitioner on

the doctrine of *res judicata*, inasmuch as in the suit filed by the petitioner there is an allegation of breach of the contract, the recovery of the materials, damages for non-performance etc. whereas in the suit filed by the respondent it is a challenge against the alleged illegality in rescinding the contract, business loss etc.

25. Thus this court is of the considered opinion that the matter in issue in the former suit, apparently does not substantially and directly in issue in the subsequently filed suit. Hence the impugned order requires interference. Hence the impugned order is set aside. The trial court is directed to proceed with both the suits. If it is found convenient, the trial court shall be at liberty to hold the simultaneous trial of the suits.

However, there shall be no order as to costs.

**JUDGE**

ROY