

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

**CR-707-2017**

Date of Decision : July 19, 2019

M/s Him Stores and another

.....Petitioners

***VERSUS***

M/s Martin and Harris (P) Ltd.

.....Respondent

**CORAM: HON'BLE MS. JUSTICE NIRMALJIT KAUR**

Present : Mr. Aman Kashyap, Advocate  
for the petitioners.

Mr. H.L.Tikku, Senior Advocate with  
Mr. Sumeet Goel, Advocate  
for the respondent.

**NIRMALJIT KAUR, J.**

The revision petition is filed for setting aside the order dated 19.9.2016 passed by Court of learned Civil Judge (Junior Division), Chandigarh vide which the preliminary issue regarding the maintainability of the case was decided in favour of the plaintiff-respondent and against the petitioner-defendant.

The brief facts which are relevant for the purpose of adjudication and go to the root of the case are that the petitioner, who is a dealer/distributor of the respondent, is a supplier of pharmaceutical products. The petitioner had been purchasing products from the respondent. A civil suit was filed by the petitioner for recovery of Rs.21,83,633.11/- on 30.1.2004 alleging that excess payment was

received by the respondent whereas the goods of equivalent value were never supplied by the respondent. The said civil suit was dismissed. The appeal against the said order and judgment dismissing the civil suit too came to be dismissed. The petitioner, therefore, have preferred the regular second appeal i.e. RSA No.5888 of 2014 before this Court which is pending adjudication. On the other hand, a civil suit was filed on 13.9.2004 by the respondent-defendant under Order 37 CPC for recovery of Rs.1,09,72,931.11/- alleging that lesser payment had been received. The petitioner, accordingly, moved an application on 5.12.2004 under Order 7 Rule 11 read with Order 2 Rule 2 and Sections 11 and 151 of the CPC for rejection of the plaint on the ground that the civil suit was hit by res-judicata/constructive res-judicata which was dismissed. Even the revision petition against the order of dismissal was disposed of by the High Court on 21.4.2016 with liberty to the petitioner to raise all the pleas by way of defence in case any issue with regard to the res-judicata was framed. Therefore, the issues that were framed for the purpose of the present revision petition are as under:-

5. Whether present suit is barred by the principle of res-judicata?OPD.

5-A Whether the suit is barred by Order 2 Rule 2 CPC?OPD.

The said issues were taken up as preliminary issues to decide the maintainability. The said issues were decided against the petitioners-defendant vide order dated 19.9.2016 which is now challenged before this Court.

While praying for setting-aside the said order and dismissing the suit as not maintainable, learned counsel for the petitioners raised the following arguments:-

- (a) Civil suit instituted by the respondent was directly and substantially in issue in the previously instituted suit by the petitioners;
- (b) The respondent did not raise any counter claim in the suit filed by the petitioners and;
- (c) The present suit arises out of the same commercial transaction and the question was with respect to the excess payment which was the subject matter of the earlier suit filed by the petitioners and, therefore, the present civil suit cannot be tried and adjudicated by the trial Court as per the provisions of Order 7 Rule 11 read with Order 2 Rule 2 CPC. As per the explanation IV to Section 11, the respondents ought to have taken the defence in the suit of recovery filed by them and their failure to do so barred them from filing a suit qua the same issue and as per Order 2 Rule 2 CPC, the party is deemed to have relinquished that part of the claim.

Reliance was placed on the judgments rendered in the case of **Ramadhar Shrivastava Vs. Bhagwandas, (2005) 13 SCC 1** to support his arguments that the principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the

same suit. As also, the judgments rendered in the cases of **Jaswant Singh and another** Vs. **Custodian of Evacuee Property**, (1985) 3 SCC 648 and **P.K.Vijayan** Vs. **Kamalakshi Amma and others**, (1994) 4 SCC 53 which are also to the same effect.

Learned counsel for the respondent, on the other hand, while vehemently supporting the order passed by the Court below relied upon the judgments in the cases of **Cofex Exports Ltd.** Vs. **Canara Bank**, AIR 1997 Delhi 355, **Hari Shankar** Vs. **Kailasho Devi**, AIR 1987 P&H 47 (DB), **Sukhpreet Singh** Vs. **Kamaljeet Kaur**, 169(2010) DLT 249 and **Alka Gupta** Vs. **Narender Kumar Gupta**, (2010) 10 SCC 141 to contend that the defendants cannot be compelled to plead a set off nor he compelled to file a counter claim and the defendants can always maintain independent action for enforcing the claim forming subject matter of set off or counter claim.

Learned counsel for the parties were heard at length.

In order to adjudicate as to whether the issues No. 5 and 5A that whether the suit of the plaintiffs, respondents herein was barred by the principle of res-judicata, it would be appropriate to re-produced Section 11 of CPC alongwith Explanation IV which reads as under:-

“Section 11 alongwith explanation IV reads as under:-

“11. Res judicata – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in

which such issue has been subsequently raised, and has been heard and finally decided by such Court.....

Explanation IV: Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit....”

A perusal of Section 11 of CPC shows that no issue which already stands settled in the previous suit can be agitated by way of a separate suit. There is no denial of the fact that the issue as raised by the plaintiff-respondent in the present suit was not a subject matter of the earlier suit. In the suit filed by the present petitioner, the claim was for recovery of Rs.21,83,633.11/- from the respondents which was dismissed. There was no such issue as to whether the present respondents were entitled to the recovery of Rs.1,09,72,931.11/- from the present petitioner for which the present respondents have filed a separate civil suit No. 95 of 2004.

Hence, the res-judicata cannot apply as the claim of the respondents in the present suit was never a subject matter. The argument that the present suit was hit by explanation IV to Section 11 of res-judicata which required the respondents to raise this issue by way of their defence or attack and, their failure to do so shall amount to giving up the said claim in terms of Order 2 Rule 2 CPC cannot be sustained in as much as the respondents while filing their written statement in the suit filed by the petitioner reserved their right to file a separate suit qua their claim of the amount due to them. In para No.4 of the said written statement, on merits, bringing to the notice of the petitioner that they had

already filed a civil suit No.95 of 2004 for their outstanding dues. Para No.4 is reproduced below:-

“That the contents stated in para no. 4 of the plaint are denied to the extent that the answering defendant deliberately withheld the payment of outstanding dues as alleged by plaintiff in the suit, Infact, the answering defendant owe Rs.56,57,606.84 paise as principal amount to the plaintiff besides interests and other amounts totaling to Rs.1,09,72,931.11 for which the plaintiff has already filed a Civil Suit being Civil Suit No.95 of 2004 which is pending for adjudication. The contents regarding the pendency of the complaint filed by the answering defendant are admitted. Rest of the para is wrong hence denied. The answering defendant craves leave to refer to the submission made hereto before.”

In view of the above stand in the written statement before the trial Court, it cannot be said that the respondents deemed to have given up the claim. However, it would have been entirely different matter in case the suit filed by the petitioner therein was decreed. The suit filed by the petitioner having been dismissed, left the issue qua the claim of the respondents open. Further, there is no bar under the Code of Civil Procedure to file a separate suit and in the present case, the civil suit was filed by the respondents even before filing their written statement. There is another way of looking at the whole case. Admittedly, the application seeking both the cases for being heard was dismissed which is evident of the fact that they were to proceed independently. The argument that the subsequent suit was a summary suit whereas the suit filed by the petitioner was a normal civil suit does not help as the order refusing the

prayer there both the suits shall be heard together had become final. Therefore, the respondents had a right to pursue their civil suit separately and now the same suit cannot be dismissed by invoking the provisions of Order 7 Rule 11 CPC on the ground that the respondents failed to raise a counter claim in the suit filed by the petitioner especially when they reserved their right to do so vide a separate suit which in any case already stood filed even before filing of the written statement.

Dismissed accordingly.

July 19, 2019  
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( NIRMALJIT KAUR )  
JUDGE

|                            |   |        |
|----------------------------|---|--------|
| Whether speaking/reasoned. | : | Yes/No |
| Whether Reportable.        | : | Yes/No |