# Aspi Jal And Anr vs Khushroo Rustom Dadyburjor on 5 April, 2013

## Equivalent citations: AIR 2013 SUPREME COURT 1712, 2013 (4) SCC 333, 2013 AIR SCW 2128, 2013 (3) ABR 767, (2013) 3 MPLJ 585, (2013) 119 REVDEC 688, (2013) 3 MAD LW 290, (2013) 2 RECCIVR 976, (2013) 3 ICC 245, (2013) 2 WLC(SC)CVL 105, (2013) 3 JCR 488 (SC), (2013) 1 CLR 1043 (SC), (2013) 3 CIVLJ 831, (2013) 4 ANDHLD 62, (2013) 5 SCALE 366, (2013) 125 ALLINDCAS 13 (SC), (2013) 2 ALL RENTCAS 211, (2013) 2 CURCC 117, (2013) 3 ALLMR 444 (SC), (2013) 2 CAL LJ 65, (2013) 5 MAH LJ 147, AIR 2013 SC (CIV) 1273, (2013) 98 ALL LR 235, 2013 (2) KLT SN 46 (SC), 2013 (3) KCCR SN 284 (SC), (2013) 4 BOM CR 298

## Bench: V. Gopala Gowda, Chandramauli Kr. Prasad

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2908 OF 2013
(Arising out of S.L.P. (C) No. 14808 of 2012)

Aspi Jal & Anr. … Appellants

VERSUS

Khushroo Rustom Dadyburjor …Respondent

J U D G M E N T

The plaintiffs-petitioners, aggrieved by the order dated 9th February, 2012 passed by the Bombay High Court in Writ Petition No.7653 of 2011, affirming the order dated 6th July, 2011 passed by the Court of Small Causes at Mumbai, in R.A.E Suit No.173/256 of 2010 whereby it has stayed the proceedings in R.A.E. No.173/256 of 2010 till the decision in R.A.E. Suit No.1103/1976 of 2004 and R.A.E. Suit No.1104/1977 of 2004, have preferred this Special Leave Petition under Article 136 of

the Constitution of India.

Leave granted.

The plaintiffs claim to be the owner of the building known as " Hanoo Manor" situate at Dadyseth 2nd Cross Lane in Chawpatty area of the city of Mumbai. According to the plaintiffs, in one of the flats of the said building admeasuring 1856.75 sq.ft. situate on the second floor, defendant's father, Rustom Dady Burjor (since deceased)was inducted as a tenant on a monthly rent of Rs.355/-. The plaintiffs filed a suit for eviction from the tenanted premises against the defendant being R.A.E. Suit No.1103/1976 of 2004(hereinafter to be referred to as the "First Suit") before the Small Causes Court on 6th November, 2004 on the ground of bona fide requirement for self occupation and acquisition of alternate accommodation by the defendant. The plaintiffs thereafter filed another suit being R.A.E. Suit No.1104/1977 of 2004 (hereinafter to be referred to as the "Second Suit") on the same day in the Small Causes Court for eviction of the defendant on the ground of non-user for several years before the institution of the suit. The plaintiffs during the pendency of the aforesaid two suits, chose to file yet another suit bearing R.A.E. Suit No. 173/256 of 2010 (hereinafter to be referred to as the "Third Suit") on 22nd February, 2010 for eviction of the defendant on the ground of non-user for a continuous period of not less than six months immediately prior to the institution of the suit.

The defendant filed an application on 29th September, 2010 for stay of hearing of the third suit till final disposal of the first and second suits. The defendant made the aforesaid prayer inter alia stating that the parties in all the three suits are same as also the issues. It was further averred that the subject matter of all these suits are one and the same. According to the defendant, since the matter in issue in the third suit is substantially in issue in the earlier two suits, the trial of the third suit is liable to be stayed until the hearing and final disposal of the previously instituted first and second suits. The plaintiffs filed reply objecting to the defendant's prayer for stay of the third suit inter alia on the ground that the causes of action being different, the application filed by the defendant for stay of the third suit is fit to be rejected. The Court of Small Causes by its order dated 6th July, 2011, acceded to the prayer of the defendant and stayed the third suit till final decision in the earlier two suits. While doing so, the trial court observed as follows:

> " 13. On bare reading of the pleading in both suits, it clearly appears that both suits are filed on the same ground i.e. non user. As, I discussed earlier 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. The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. Complete identity of the subject-matter is not necessary to attract the application of S.10 and if a matter directly and substantially in issue in a previously instituted suit is also directly and substantially in issue in a later suit, then under S.10 the later suit shall be stayed." Ultimately, the trial court came to the following conclusion and while staying the suit proceeded to observe as follows:

"15. .. .. But, in the present case, it is crystal clear from pleading that matter in issue in both suits is directly and substantially identical. Therefore, this is a fit case to invoke Section 10 of the Code of Civil Procedure." The plaintiffs assailed the aforesaid order by way of a petition under Article 227 of the Constitution of India before the Bombay High Court. The High Court concurred with the findings and the conclusion of the trial court and dismissed the writ petition inter alia, observing as follows:

" 9. ... Admittedly, the Petitioner has filed R.A.E. Suit No.1104/1977 of 2004 and R.A.E. Suit No. 173/256 of 2010 on the ground of nonuser, though the period is different. But, after perusing the plaints, it is crystal clear that issue involved in both the suits are similar. Therefore, in view of Section 10 of the Civil Procedure Code and judgment in the matter of Challapalli Sugar Pvt. Ltd. (Supra), it is necessary, in the interest of justice, subsequent suit filed by the Petitioner, i.e. R.A.E. Suit No.173/256 of 2010 to be stayed and the same is done by the Trial Court by giving detailed reasons. Therefore, I do not find any substance in the present Petition to interfere in the well reasoned order passed by the Trial Court dated 6th July, 2011." Mr.Shyam Divan, Senior counsel appearing on behalf of the appellants submits that in the second suit, the plaintiffs have sought eviction on the ground of non-user of the suit premises for several years prior to the filing of the suits but in the third suit it has specifically been averred that "the defendant and his family has not been in use and occupation of the suit premises for a continuous period of more than six months immediately prior to the institution of this suit without reasonable cause". Thus, according to Mr. Divan, the matter in issue in the third suit is non-user of the suit premises prior to six months from the date of institution of the said suit. He points out that the plaintiffs may fail in the earlier two suits by not establishing the non-user of the tenanted premises for a period of six months prior to the institution of those suits, yet, they can succeed in the third suit by proving the non-user of the suit premises by the defendants for six months prior to the institution of that suit. According to him, the matter in issue in the third suit being substantially different than the first two suits, the provisions of Section 10 of the Code of Civil Procedure, 1908 (hereinafter to be referred to as the "Code") is not attracted and hence, the trial court erred in staying the third suit till the disposal of the first two suits.

Mr. Harish N. Salve, Senior counsel appearing on behalf of the defendant, however, submits that the matter in issue in both the suits being non-user of the tenanted premises by the defendant, the trial court rightly held that the provisions of Section 10 of the Code is attracted and on that premise, stayed the third suit.

We have given our thoughtful consideration to the rival submissions and we find substance in the submission of Mr. Divan.

Section 10 of the Code which is relevant for the purpose reads as follows:

" 10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action." From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding. The view which we have taken finds support from a decision of this Court in National Institute of Mental Health & Neuro Sciences vrs. C.Parameshwara, (2005) 2 SCC 256 in which it has been held as follows:

" 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 contradistinction 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 the subject-matter in both the proceedings is identical." In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case. Reference in this connection can be made to a decision of this Court in Dunlop India Limited vrs. A.A.Rahna & Anr. (2011) 5 SCC 778 in which it has been held as follows:

"35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June 1998, in the second set of petitions, the period of non-occupation commenced from September 2001 and continued till the

filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the appellate authority because till 2-8- 1999, the premises were found kept open and alive for operation, The appellate authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K.Agarwal on 1-10-2001 that the Company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1-10-2001; that no activity had been done in the premises with effect from 1- 10-2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the appellate authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause." (Underlining ours) In view of what we have observed earlier, the orders passed by the trial court as affirmed by the High Court are vulnerable and therefore, cannot be allowed to stand.

Mr. Divan prays that direction may be issued to the trial court to hear all the suits together. We restrain ourselves from issuing such direction but give liberty to the parties if they so choose to make such a prayer before the trial court. Needless to state that in case such a prayer is made, the trial court shall consider the same in accordance with law.

In the result, the appeal is allowed and the impugned order of the trial court as affirmed by the High Court is set aside but without any order as to costs.

……J. [CHANDRAMAULI KR. PRASAD]
.....J. [V. GOPALA GOWDA] NEW DELHI APRIL 05, 2013.

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