THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED: 13th NOVEMBER, 2017

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.20 of 2017

Petitioner : Shri Pawan Kumar Todi,
S/o Late Manik Chand Todi,
R/o 1, R. N. Mukherjee Road,
1st Floor, Room No.12,
P.S. Hare Street,
Kolkata 700 001.

versus

Respondent : Shri Ankit Sarda
S/o Shri Ravindra Kumar Sarda,
Sarda Emporium,
M. G. Marg, Gangtok,
East Sikkim,Pin – 737 101.

Petition under Article 227 of the Constitution of India

Appearance

Mr. Sudesh Joshi, Mrs. Manita Pradhan and Mr. Sujan Sunwar, Advocates for the Petitioner.

Mr. Jorgay Namka, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates for the Respondent.

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and

WP(C) No.21 of 2017

Petitioner : Shri Pawan Kumar Todi (HUF),
Represented by its karta
Shri Pawan Kumar Todi,
S/o Late Manik Chand Todi,
R/o 1, R. N. Mukherjee Road,
1st Floor, Room No.12,
P.S. Hare Street,
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J U D G M E N T

Meenakshi Madan Rai, J.

1. WP(C) No.20 of 2017 and WP(C) No.21 of 2017 filed under Article 227 of the Constitution of India, are being disposed of by this common Judgment. They arise out of the impugned Orders of the learned District Judge, East Sikkim at Gangtok, dated 05-12-2016, in Money Suit No.10 of 2015 [*Mr. Ankit Sarda* vs. *Pawan Kumar Todi* and Order dated 05-12-2016 passed in Money Suit No.9 of 2015 [*Mr. Ankit Sarda* vs. *Pawan Kumar Todi (HUF)*], respectively.

2. The Petitioner's case, in WP(C) No.21 of 2017, is that, he had filed a Suit for recovery of money against the Respondent, before the Learned 7th Bench of the City Civil Court, at Kolkata, on 16-04-2015, being Money Suit No.220 of 2015. The facts

enumerated therein were that sometime in November 2012, the Respondent had approached the Petitioner to be a franchisee of the Petitioner's Company, in Siliguri, West Bengal. On the basis of the agreed terms, the Respondent advanced some money to the Petitioner, who in turn supplied some computers, servers and peripherals worth Rs.9,75,000/- (Rupees nine lakhs and seventy-five thousand) only, to the Respondent at the Respondent's Siliguri Office, which however closed down after a few months. Therefore, the Petitioner sought recovery of Rs.1,03,026/- (Rupees one lakh, three thousand and twenty six) only, being the difference in the value of goods supplied and the advance made by the Respondent. Instead, two and half months' later, the Respondent filed a Money Suit against the Petitioner, being Money Suit No.09 of 2015, in the Court of the Learned District Judge, East Sikkim, at Gangtok, on 06-07-2015 seeking recovery of a sum of Rs.10,11,044/- (Rupees ten lakhs, eleven thousand and forty-four) only, from the Petitioner.

3. In WP(C) No. 20 of 2017, it was averred that the supply of computers and peripherals by the Petitioner to the Respondent amounted to Rs.20,40,000/- (Rupees twenty lakhs and forty thousand) only, hence the Petitioner sought recovery of an amount of Rs.94,200/- (Rupees ninety-four thousand and two hundred) only, from the Respondent as the difference between the supplies and the money advanced by the Respondent. The Respondent for this part filed Money Suit No. 10/2015 in the Court of the learned District Judge, East Sikkim, on 6-7-2015, seeking recovery of an amount of Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four

thousand, nine-hundred and fourteen) only, from the Petitioner herein alleging that he had advanced loan to the Petitioner.

4. In both matters, the Petitioner filed an Application each under Section 10 of the Code of Civil Procedure, 1908 (for short "CPC"), on 04-11-2015 before the learned Court at Gangtok, seeking stay of both the above proceedings, as according to him the Civil Suits filed by him in Kolkata were prior in time to those filed by the Respondent in Gangtok. That, the subject matters in the City Civil Court, at Kolkata and the issues in the suits filed by the Respondent before the Gangtok Court are directly and substantially the same. That, the Learned Trial Court had directed the Petitioner to furnish a certified copy of the Plaint filed by him in Kolkata and fixed 05-12-2016 for orders. However, the required documents were delayed, prompting the Court to reject the Petitioner's Applications, *inter alia*, with the reasoning that if the parties in the instant case and the case before the VIIth Bench of the City Civil Court, at Kolkata were the same, it did not tantamount to the claim of the parties being in respect of the same transaction. It is contended herein that the provisions of Section 10 of the CPC are mandatory and that if the matter in issue is directly and substantially the same in the previous and latter suit, between the same parties, then the later suit must be stayed. Learned Counsel garnered succour from the decisions in ***National Institute of Mental Health and Neuro Sciences v. C. Parameshwara***[1] and ***Manohar Lal Chopra v. Rai Bahadur Rao Raja***

[1] (2005) 2 SCC 256

Seth Hiralal[2] . Being thus aggrieved, the Petitioner is before this Court.

5. Rebutting the arguments of the Petitioner, Learned Counsel for the Respondent, contended that merely on the allegation of the Petitioner that he has filed civil suits in the Court in Kolkata, the proceedings in the Court at Gangtok cannot be stayed as the Respondent is yet to receive the summons and to know the cause of action. That, there have to be cogent grounds for such an order which the learned Trial Court can issue after analysing the material before it. That, the Petitioner was unable to furnish any documents before the Learned Trial Court within the time stipulated and should not now be heard to cry foul. Moreover, the amount claimed by the Respondent, as the Plaintiffs in Money Suit No.09 of 2015, is Rs.10,11,044/- (Rupees ten lakhs, eleven thousand and forty four), only, whereas the recovery sought by the Petitioner in his Money Suit, is Rs.1,03,026/- (Rupees one lakh and three thousand and twenty-six) only, and in Money Suit No. 10 of 2015, it is Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four thousand, nine hundred and fourteen) only, as against the claim of Rs.94,200/- (Rupees ninety-four thousand and two hundred) only, of the Plaintiff. The disparity in the amounts would adequately indicate that it does not pertain to the same transaction.

In order to buttress his submissions, strength was drawn from the decisions in ***Indian Bank vs. Maharashtra State Co-operative***

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[2] AIR 1962 SC 527

Marketing Federation Ltd.[3], ***Aspi Jal and Anr. vs. Khushroo Rustom Dadyburjor***[4], ***National Institute of Mental Health and Neuro Sciences v. C. Parameshwara***[5]. It was further advanced that Orders of a Civil Court are not amenable to a Writ Jurisdiction as clearly held in ***Radhey Shyam and Another vs. Chhabi Nath and Others***[6], hence the instant Petition deserves dismissal on this count alone. That, no illegality arises in the Order of the Learned District Judge and hence, the instant Petition be dismissed.

6. Careful and anxious consideration has been given to the submissions made at the Bar, the documents which Learned Counsel have walked this Court through during the hearing have also been carefully perused and considered, so also the citations relied on and the impugned Order.

7. Prior to embarking on a discussion on Section 10 of the CPC, I deem it fit to address the argument of learned Counsel for the Respondent, who while relying on the exposition in ***Radhey Shyam*** (supra), contended that orders of the Civil Court are not amenable to Writ Jurisdiction. I am afraid reliance on this Judgment is entirely misplaced for the reasons enumerated herein. In ***Umaji Keshao Meshram and Others*** vs. ***Smt. Radhikabai and Another***[7]**,** while discussing the scope and ambit of Article 226 and Article 227 of the

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[3] AIR 1998 SC 1952

[4] AIR 2003 SC 1712

[5] AIR 2005 SC 242

[6] AIR 2015 SC 3269

[7] AIR 1986 SC 1272

Constitution of India, referring to the decision in ***Jagannath Ganbaji Chikkale*** vs. ***Gulabrao Raghobaji Bobde***[8]***,*** the Hon'ble Supreme Court observed as follows;

> **"99.** ..... Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see State of Gujarat v. Vakhatsinghji Vajesinghji Veghela, AIR. 1968 SC 1481, 1487, 1488 and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand, (AIR 1972 SC 1598)). The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these processes are the same.
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> (Emphasis supplied)

8. On the same point of Law, in ***Surya Dev Rai*** vs. ***Ram Chander Rai and Others***[9]***,*** the Hon'ble Supreme Court, contrary to the

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[8] (1965) 67 Bom LR 609 : 1965 Mh LJ 426

[9] (2003) 6 SCC 675

observation in ***Umaji Keshao Meshram***, went on to observe at Paragraph 25, that the distinction between Article 226 and Article 227 of the Constitution of India, stands almost "obliterated" in practice and allowed the Appeal setting aside the order of the High Court which had summarily rejected the Appeal with the observation that the petition was not maintainable under Article 226 of the Constitution as the appellant was seeking interim injunction against private respondents. Following this, in ***Radhey Shyam*** (supra), a three Judge Bench had to consider the correctness of the Law laid down in ***Surya Dev Rai*** (supra) in pursuance of an order of a two Judge Bench, that an order of a Civil Court was amenable to Writ Jurisdiction under Article 226 of the Constitution. Ruling to the contrary, in ***Radhey Shyam*** (supra), it was held that the challenge to judicial orders could lie by way of appeal or revision or under Article 227 of the Constitution but not by way of a Writ under Article 226 and Article 32 of the Constitution. It also discussed the Judgment dated 06-12-1989 in Civil Appeal No. 815 of 1989 : *Qamaruddin* vs. *Rasul Baksh and Another* which had been cited in the Allahabad High Court Judgment in ***Ganga Saran*** vs. ***Civil Judge, Hapur, Ghaziabad and Others***[10], which considered the issue of writ of certiorari and mandamus against interim order of civil court and held;

> "If the order of injunction is passed by a competent court having jurisdiction in the matter, it is not permissible for the High Court Under Article 226 of the Constitution to quash the same by issuing a writ of certiorari. In the instant case, the Learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to

[10] AIR 1991 Allahabad 114

perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus Under Article 226 of the Constitution. The Learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus. The High Court committed serious error of jurisdiction in interfering with the order of the District Judge."

(Emphasis supplied)

9. It was further observed as herein below;

"22. The Bench in Surya Dev Rai also observed in Para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction Under Section 115 Code of Civil Procedure by Act 46 of 1999, jurisdiction of the High Court Under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and Anr. v. Amarnath and Anr.: AIR 1954 SC 215 : Ouseph Mathai v. M. Abdul Khadir: 2002 (1) SCC 319, Shalini Shyam Shetty v. Rajendra Shankar Patil: 2010 (8) SCC 329 and Sameer Suresh Gupta v. Rahul Kumar Agarwal: 2013 (9) SCC 374.

.....

23. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

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25. Accordingly, we answer the question referred as follows:

"(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution;

> (ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226. Contrary view in Surya Dev Rai is overruled." **"**

Thus, it was for the reasons elucidated, supra that the Judgment of ***Radhey Shyam*** (supra), held that judgments of Civil Court are not amenable to Writ Jurisdiction under Article 226 of the Constitution. But a party can therefore approach this Court under Article 227 of the Constitution to invoke its supervisory jurisdiction and the Petitions have indeed correctly been filed under this provision.

10. I now proceed to address the issue at hand, for which for the sake of convenience Section 10 of the CPC is reproduced below.

> **"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.
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> *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.**"**

11. Both parties have referred to ***National Institute of Mental Health*** (supra). The said Judgment lays down that the fundamental test to attract Section 10 is, whether on a final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. That, Section 10 of the CPC applies

only in cases where the whole or the subject-matter in both the suits is identical. The key words in Section 10 are **"***the matter in issue is also directly or substantially in issue in a previous instituted suit***"**. The words 'directly' or 'substantially' in issue are used in contradiction to the words 'instantly' or 'collaterally' in issue. Therefore, Section 10 would apply only after 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.

12. In ***Pukhraj D. Jain & Ors. Vs. G. Gopalakrishna***[11], relied on by learned Counsel for the Respondent, while discussing the parameters of Section 10, the Hon'ble Supreme Court opined that it is not for a litigant to dictate to the Court as to how the proceedings should be conducted and that it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. That, in a given case, the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassments of parties. In ***Aspi Jal and Anr.*** (supra), the Plaintiffs and defendants were identical in three civil suits filed thus;

> (1) For eviction of the defendants on grounds of *bona fide* occupation, (2) Suit between the same parties for eviction on grounds of non user for civil orders before institution of suits and (3) For eviction on grounds of non user for a continuous period of not less than 6 months.

The Hon'ble Supreme Court held that many of the matters in issue are common in the suits including the issue as to whether the

[11] AIR 2004 SC 3504

plaintiffs are entitled to recovery of possession of the suit premises but for application of Section 10 of the CPC, the entire subject matter of the two suits must be the same. That, the said provisions will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is the same.

13. In ***Manohar Lal Chopra*** (supra), the Hon'ble Supreme Court held that where a party claims interference of the Court to stop another action between the same parties, it lies upon him to show to the Court that the multiplicity of actions is vexatious and the whole burden of proof lies upon him. It was also held that the provisions of the Section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceedings with the trial of a suit in certain specific circumstances.

14. On the cornerstone of the aforesaid judicial pronouncements, it would now be relevant for this Court to look into whether the matter in issue filed by the Petitioner and the Respondent in different periods of time are "directly" and "substantially" the same.

15. Before proceeding on the aforestated point, we may briefly surf through the provisions of Order VII Rule 14 of the CPC, which are extracted below;

> **"14. Production of document on which plaintiff sues or relies**.—(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such

> documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.
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> (2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.
>
> (3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.
>
> (4) ……**"**

Thus, this Rule makes it clear that when a suit is filed, the Plaintiff is required to furnish the list of documents on which he places reliance. It is not necessary that the documents are also to be filed at this stage, a list of such documents will suffice. The documents which are relied on by the parties are to be produced at the first hearing of the suit as required under Order XIII. It would be apposite to produce the relevant provision of Order XIII Rule 1 of the CPC.

> **"1. Original documents to be produced at or before the settlement of issues**.—(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.**"**

On reading and understanding the provisions extracted hereinabove the specific requirements of Law pertaining to documents have been made out succinctly and require no further elucidation.

16. A meticulous examination of the documents on record would reveal that, firstly no list accompanies the Plaint of the

Petitioner filed in Kolkata, nor were such documents pointed out by the Counsel for the Petitioner to establish the similarity of the issues involved in the suits at Kolkata and Gangtok. The suit filed by the Petitioner is for recovery of a sum of Rs.94,200/- (Rupees ninety-four thousand and two hundred) only, and Rs.1,03,026/- (Rupees one lakh, three thousand and twenty-six) only. To the contrary, the Money Suits of the Respondent before the Learned District Court, at Gangtok, is for recovery of a sum of Rs.10,11,044/- (Rupees ten lakhs, eleven thousand and forty-four) only, and Rs.22,74,914/- (Rupees twenty-two lakhs, seventy-four thousand, nine-hundred and fourteen) only. Thus, clearly there is a disparity in the amounts and as correctly observed by the Learned Trial Court, it does not mean that merely because the parties are the same the cause of action too is identical. Consequently, had the Petitioner filed his list of documents, it would have assisted the Courts to arrive at a finding as to whether the issues were the same in the matters before the aforementioned two Courts, directly and substantially, this is not the case.

17. Admittedly, Notice has not been received by the Respondent in connection with the suits filed by the Petitioner in the Court at Kolkata, to gauge the cause of action. In the absence of formal intimation or knowledge of the filing of the suits, can we hold the Suits of the Respondent to be harassive? In my considered opinion the response would undoubtedly be in the negative. Having said that, I reiterate that sans any document furnished for perusal of the learned Trial Court in Gangtok, it is well nigh impossible to

arrive at a finding as to whether the issues involved in the Money Suits filed by the Respondent before the District Judge at Gangtok and that filed by the Petitioner in the City Civil Court at Kolkata involve issues directly and substantially identical.

18. In conclusion therefore, I find no infirmity in the finding and Order of the Learned District Judge, East Sikkim, at Gangtok, which accordingly sustains.

19. Petitions filed by the Petitioner under Article 227 stands dismissed and disposed of.

20. Records of the Learned Trial Court be remitted forthwith along with a copy of this Judgment.

21. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
13.11.2017

Index : Yes / ~~No~~
Internet : Yes / ~~No~~

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