
(1999) 10 GAU CK 0017

In the Gauhati High Court

Case No : First Appeal No. 29 of 1998 and Civil Revision No. 82 of 1998

Gauhati Indore Roadways

APPELLANT

Vs

Assam Forest Product Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 08-10-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6, Order 8 Rule 6A, Order 8 Rule 6A(1)

Limitation Act, 1963 — Article 113, 3(2)

Citation : (1999) 3 GLT 621

Hon'ble Judges : Brijesh Kumar, C.J.; D. Biswas, J

Bench : Division Bench

Advocate : B.P. Katakya, for the Appellant; C.K.S. Baruah, S.K. Kejriwal and S. Kejriwal, for the Respondent

Final Decision : Allowed

Judgement

Brijesh Kumar, C.J.—Since the same order dated 10.3.98 passed by the learned Civil Judge, Sr. Division, Tinsukia, in Money Suit No. 54 of 1988, has been challenged in both the above noted two cases, namely, First Appeal No. 29 of 1998 and the Civil Revision No. 82 of 1998, this Court passed an order on 7.9.98 while admitting the First Appeal, that the appeal be listed along with the Civil Revision. Hence, both these matters have come up for hearing together and they are being disposed of by a common order.

2. The matter pertains to the rejection of the application for accepting the counter claim as well as the rejection of the counter claim preferred by the Defendant/Appellant in Title Suit No. 54 of 1988.

We have heard Shri B.R Katakya, learned Counsel for the Appellant and Shri C.K. Sarma Baruah, learned Counsel appearing for the Plaintiff/Respondent.

3. The Plaintiff/Respondent filed a Money Suit in the Court of the Civil Judge, Sr. Division, Tinsukia, being Money Suit No. 54 of 1988, for recovery of Rs.

3,30,563.00, with interest, etc., against the Defendant/Appellant. The suit was filed in the year 1988. However, during the pendency of the suit, the Defendant/Appellant filed a counter claim under Order 8, Rule 6-A of the CPC (Code of Civil Procedure), claiming a decree for a sum of Rs. 6,89,850.00 against the Plaintiff/Respondent, being the charge of demurrage calculated from 29.4.94 to 28.4.97, at the rate of Rs. 5.00 per quintal per day of the total 126 quintals. Apart from the above, some other reliefs were also claimed in the counter claim. An application for acceptance of the counter claim was moved, which was numbered as Petition No. 955 of 1997, dated 29.4.97, in Money Suit No. 54 of 1988. The Plaintiff/Respondent also filed objections to the claim, by means of a petition, numbered as Petition No. 1000 of 1997. A copy of the application moved for counter claim by the Defendant is on the record. In paragraph 16 of the same, details about the pleadings on the basis of which the Defendant claimed the amount on account of demurrage has been indicated. It may be beneficial to quote paragraph 16 of the application, which reads as under:

That since 18.04.87 the 1207 pieces of Commercial Plywood (originally booked through Consignment Note No. 25-1362) lying and stored at Defendant's Godown at Bombay accumulated the demurrage charges for which the Defendant is legally entitled to make claim and recover the same from the Plaintiff, hence the present counter claim for recovery of demurrage charge of Rs. 6,89,850.00 calculated from 29.04.94 to 28.04.97 @ Rs. 5.00 per quintal of per day of the total 126 quintal, future demurrage @ Rs. 5.00 per quintal of per day till realisation has been made against the Plaintiff, and the claim of freight and demurrage since the period of 26.06.85 to 28.04.94 being barred by limitation not claimed by the Defendant.

4. A perusal of the paragraph quoted above makes it clear that claim for the period with effect from 26.6.85 to 28.4.94 was not being claimed by the Defendant, having become barred by time. The claim is, however, confined to the period with effect from 29.4.94 to 28.4.97, that is, three years preceding the moving of the application for counter claim. A few objections, seem to have been raised by the Plaintiff/Respondent for disallowing the application,--that the claim was delayed and the object of moving of such an application was only to prolong the proceedings. It was also the case of the Plaintiff that is was barred by principles of waiver, estoppel and acquiescence and that it could be filed along with the written statement since the entire facts were within the knowledge of the Defendant. It may be pertinent to mention here that the Defendant/ Appellant had filed the written statement on 2.9.91, and the application in question, namely, petition No. 955 of 1997 was filed on 29.4.97 and was moved on 3.5.97.

5. The trial Court recorded a finding that from the pleadings of the parties, it appeared that the cause of action arose on 31.5.85, 6.6.85, 15.6.86, 21.6.85, 28.2.86, in respect of which petition for counter claim was moved on 3.5.97. It was also observed that it appeared that the Defendant had knowledge about the claim in the year 1985-86 itself, but the same was not raised in the written

statement; nor did they do so within the period of limitation as prescribed under the law. It is observed that according to the counsel for the Plaintiff, Article 113 of the Limitation Act, 1963 would be applicable, that is to say, the period of limitation would be three years from the date of accrual of the cause of action. The learned Civil Judge also concluded that u/s 3(2)(b) of the Limitation Act, a counter claim is to be treated as a suit; hence the period of limitation as prescribed under the Limitation Act will be applicable. After making a reference to the decision of the Hon'ble Supreme Court reported in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, in which it has been held that claims only within a period of three years from the date of accrual of the cause of action could alone be entertained under Article 113 of the Limitation Act; held that since the cause of action arose in the year 1985-86, apparently, the claim was beyond limitation. Hence, such a prayer could not be entertained, being barred by time. The claim was therefore rejected.

6. Learned Counsel for the Appellant submits that on the face of it the order of the learned Civil Judge suffers from an error apparent on the face of the record itself. He has made a reference to paragraph 16 of the petition moved for entertaining the counter claim in which it is very clearly stated that the claims relating to the period from 26.6.85 to 28.4.94, being barred by limitation, were not being claimed by the Defendant. It was also mentioned that demurrage charge as claimed by way of counter claim was calculated for the period with effect from 29.4.94 to 28.4.97, which was within a period of three years of the application, which was moved on 3.5.97.

We also find that para 19 of the application contains the relief clause, and the relief No. (i) is as follows:

(i) A decree and judgment against the Plaintiff for recovery of Rs. 6,89,850.00 being the charge of demurrage calculated from 29.4.94 to 28.4.97 @ Rs. 5.00 per quintal of per day of total 12600 Kg., i.e. 126 quintal.

It is surprising indeed as to how the trial Court could ignore such an obvious fact stated in the application as well as in the relief clause. The claim pertaining to the period with effect from 26.6.85 to 28.4.94 was given up, still the petition had been rejected on the ground that the claim forwarded by the Defendant was barred by time. The claim was moved on 3.5.97. So the claims accruing three years next before the aforesaid date could not be said to be barred by time. On this ground, the order of the learned Civil Judge would not be sustainable.

7. Learned Counsel for the Plaintiff/ Respondent submits that the suit was filed in the year 1988. The Defendant/Appellant filed the written statement on 2.9.91, whereas the counter claim was raised for the first time on 3.5.97, that is to say, near about six years of filing of the written statement and nine years of the filing of the suit.

8. Shri C.K. SarmaBaruah, learned Counsel appearing for the Plaintiff/ Respondent has vehemently argued that the counter claim could be filed even

after filing of the written statement, but it must pertain to a claim in respect of which cause of action must have arisen prior to the filing of the written statement.

Order 8 Rule 6A, Code of Civil Procedure, reads as under:

6A. Counter-claim by Defendant.--

(1) A Defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up; by way of counter-claim against the claim of the Plaintiff, any right or claim in respect of a cause of action accruing to the Defendant against the Plaintiff either before or after the filing of the suit but before the Defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damage or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The Plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the Defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

9. There is no doubt the legal position that counter-claim is like a cross suit and in effect in one proceeding claims extended in two suits by the parties to the proceedings are decided. Since it is treated as a plaint, all such rules applicable to the plaints are applied to a counter-claim. Hence, the provisions regarding limitation as well. In such matters, it would be a period of three years, as provided under Article 113 of the Limitation Act.

10. The question which falls for consideration is as to whether it is permissible to file a counter-claim after the filing of the written statement or not; and in case it is permissible, within what period of time it can be filed after filing of the written statement. So far the stand of the Respondent is concerned, which also seems to be correct, there is no bar to file a counter-claim after filing of the written statement; but, it should be in respect of a cause of action which has arisen before the filing of the written statement; as also held by the Hon'ble Supreme Court in the case reported in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, It has been held that Rule 6A(1) does not on the face of it bar the filing of a counter-claim after filing of the written statement; but it can be filed provided the cause of action had accrued before the Defendant had delivered his defence, or before the time limited for delivery of defence had expired. In Anr. case reported in AIR 1981 Patna 68, it was held that no

additional written statement raising a counter-claim could be filed where the cause of action had arisen after the filing of the written statement. In *Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (dead) by LRs.*, the case of *Mahendra Kumar (supra)* has been followed and the same position has been reiterated that right to file counter-claim being referable to the accrual of cause of action, the counter-claim could be allowed to be made even after filing of the written statement, if the cause of action had arisen before filing of the written statement.

11. In our view, the trial Court has dealt with the question of limitation and held the claim to be time barred, in a cursory manner. It has only observed about the cause of action as follows:

From the pleadings of the parties i.e. plaint and written statement, it appears that the cause of action arises on 31.5.85, 6.6.85, 15.6.86, 21.6.85, 28.2.86 and the Defendant M/s Guwahati Indore Roadways prayed before this Court to accept the counter claim of the Defendant on 3.5.97 by Petition No. 355/97.

The counter-claim was, therefore, rejected being barred by time totally ignoring the relief clause as quoted in the earlier part of the judgment and paragraph 18 of the application for entertaining the counter-claim which speaks about the cause of action. The Defendant himself had not prayed for a decree for any amount for the period commencing from 26.6.85 to 28.4.94 being barred by time as is evident from the averments made in paragraph 16 of the application. Paragraph 18 containing averments about the cause of action may be reproduced below:

18) That the cause of action of this counter-claim arises on and from 26.06.85, being the date of delivery of Consignment on 28.04.87, being the date of re-booking of Consignment from Raxaul to Bombay, on 14.04.87 being the date of demand of the payment of demurrage, on 18.04.87 being the date of delivery of goods at Bombay, and on other dates being the date of request, remainders and demand, and on and from each day commencing from 26.06.85 to 27.04.94; and from 29.04.94 and every day thereafter even on 28.04.97 within the jurisdiction of this Court.

12. From perusal of paragraphs 16 and 18 of the petition for counter-claim, prima facie it appears that cause of action is said to have arisen from 26.6.85 and pleaded as continuous cause of action every day even on 28.4.97. In this view of the matter, it appears that the claim for a period of 3 years next before 28.4.97 has been made that is from 29.4.94. The claim for rest of the period from 26.6.85 to 27.4.94 has not been prayed to be decreed and left being barred by time.

13. In our view, the trial Court should have considered the question of limitation in the light of the averments made in the application as indicated above. It is no doubt, the legal position, as indicated by the trial Court, as laid down in the case of *Mahendra Kumar (supra)* is correct, but the facts relating to claim and

limitation has not been properly considered As a matter of fact, there has not been proper reading of the averments made in the petition and the relevant part of it where cause of action is said to be accrued every day and the claim for a period preceding 3 years next before 28.4.97 alone has been made by the Defendant-Respondent. We would like to clarify that it is for the trial Court to go into that question afresh. It would not be for us to decide this question on merit. Proper appraisal of the cause of action and the relief prayed, which was totally ignored in the earlier order, should only be made by the trial Court. The trial Court would be free to record its own finding on merit as to whether the claim of demurrage from 29.4.94 to 28.4.97 on the basis of cause of action, pleaded in paragraph 18 of the petition, is made out or not. Since the appeal and the revision arise out of the same order and involve the same points, we dispose of the same by this common order.

14. In the result, the First Appeal No. 29/98 and the Civil Revision No. 82 of 1998 are allowed and the impugned order dated 10.3.98 passed by the Civil Judge (Senior Division), Tinsukia rejecting the petition of the Defendant for counter-claim is set aside. The trial Court shall consider the question afresh on merits in the light of the observations made above.