

(1991) 12 MAD CK 0048
In the Madras High Court
Case No : O.S.A. 103 of 1984

Giovanola Binny Ltd.

APPELLANT

Vs

Indian Institute of Technology, Madras
Messrs. Indian
Institute of Technology, Madras Vs Giovanola Binny Limited,
Cochin-6

RESPONDENT

Date of Decision : 11-12-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6, Order 8 Rule 6A
Sales of Goods Act, 1930 — Section 61

Citation : (1991) 12 MAD CK 0048

Hon'ble Judges : Swamidurai, J; Mishra, J

Bench : Division Bench

Advocate : King and Patridge, for the Appellant; Jacob and Raju K. Lukose, for the Respondent

Judgement

Mishra, J.—This appeal on behalf of the appellant (sic) directed against a preliminary decree in a sum of Rs. 1,84,500/- in C.S. No. 141 of 1976. The Indian Institute of Technology, a statutory body created by the Institute of Technology Act, 1961 invited tenders for the supply and installation of (sic) vessel spherical/cylindrical shape conforming to the specification given in the schedule to the tender on certain conditions as to the procurement of materials etc. The defendant/appellant responded to the tender and finally the Plaintiff placed a purchase order and paid as per the contract a sum of Rs. 1,84,500/- to the defendant representing 30% of the value of the purchase order in advance. Alleging, inter alia, however that the defendant failed to supply the goods and thus violated the terms and conditions of the contract the plaintiff sued for the refund of the advance paid with interest thereon at 6% per annum under S. 61 of the Sale of Goods Act and the damages to the extent of the difference between the marked price and the contract price of the goods values at Rs. 4,23,000/- with interest at 6% per annum from the date of the plaint to the date of the decree and from the date of the decree to the date of realisation.

Defendant filed its written statement controverting the allegations as to the breach of contract by it but acknowledging the payment of the advance aforementioned and alleging that cancellation was done mala fide only because the plaintiff wanted to wriggle out of the contract, get back the advance paid and make wrongful gain styling it as damages. The defendant further alleged.

The defendants are entitled to retain Rs. 77,522.25 being;

1. Cast of 6 numbers of dished ends ..Rs.64,272(sic)
 2. Freight charges for the transportation of dished ends from Madras in Cochin. .. Rs. 2,500-25
 3. Charges of inspection of dished ends. Rs. 750,00
 4. Charges for the design work including overhead charges Rs. 10,000,00
2. Learned Judge, has however, granted an interim decree for the sum of advance paid to the defendant stating, inter alia.

Admittedly, the plaintiff has paid an advance, of Rs. 1,84,500/- to the defendant. In the written statement the contention raised on behalf of the defendant is that the defendant did not commit breach of contract, that time was not of the essence and that the plaintiff was not justified in cancelling the contract.

Assuming the stand taken by defendant is correct, even then, the defendant is bound to refund the advance paid by the plaintiff. Regarding this aspect the contention raised in the written statement is that the defendant had spent a sum of Rs. 77,522.25 in the process of manufacturing the vacuum vessels and that, therefore, that amount should be deducted out of the advance of Rs. 1,84,500/-. But the defendant has not paid Court-fee on his claim for the sum of Rs. 77,522.25 mentioned above. Therefore, that cannot be pressed either as a counter-claim or as set off. Under such circumstances, the plaintiff would undoubtedly be entitled to refund of the entire advance of Rs. 1,84,500/-.

3. Learned Counsel for the appellant has contended that the learned Trial Judge has committed an error of law in saying that the adjustment claimed by the defendant/appellant will not be entertained unless Court-fee was paid. He placed reliance upon a Bench decision of the Madhya Pradesh High Court (Gwalior Bench) in State of Madhya Pradesh Vs. Raja Balbhadra Singh, in which it is stated as follows:

When two persons have certain accounts and monies are payable by each to the other, they are both entitled to mutual adjustments of the monies provided they are really due and recoverable. The distinction between payment and adjustment is that payment is made to the creditor while the adjustment is made by the debtor himself. Although it is not called "payment" in common parlance yet it undoubtedly partakes the character of payment. At all events, it cannot be called a claim for set off, nor can it be said to be a counterclaim as the defendant does not seek enforcement of his claim, and therefore, court-fee is not due. We are

supported in this view by the decisions reported in Ramanuj Das Vs. Ram Samukh Das and Another, AIR 1937 62 (Lahore) , D. Konda v. Chenchu (S) AIR 1955 Hvd. 176 and Balchand v. Nandlal Madh. B.L.J. 1955 HCR 1442

4. We, however, need not labour to find out the consensus of the juridical opinion on the subject as a Bench of this Court in Uthandarama Pillai Vs. M. Arumugham Pillai, has clarified, in a short but effective way, what is the essence of a counter-claim, of a set-off or adjustment claimed in a written statement. In the said decision it is stated as follows:-

A counter-claim is one based on an independent cause of action which distinguished it from a set off, which will generally arise as a part of the transaction giving rise to the cause of action for the suit. As pointed out by Abdul Majid Vs. Abdul Rashid and Others, the essence of a counter-claim is that the defendant should have a cause of action against the plaintiff and not merely a defence to the plaintiff claim. Where in a suit for redemption of a mortgage and for possession of the hypotheca the mortgagee claims the value for the improvements which he had effected with the mortgagor's consent, the claim is dependent on the ground of the decree for a redemption and possession. In case, the claim for improvements is to be allowed, the payment thereof would be made a condition precedent for redemption and delivered of possession of the hypotheca. There can be no decree for the value of the improvements in such a case independent of redemption and delivery of possession. If the suit for redemption is dismissed automatically the claim for value of improvements also dropped. That would unmistakably show that the claim for improvement is not a counter-claim as is juridically understood.

5. The above being the principle of law its application on the facts may not cause much difficulty. All that the court has to see is the nature of the claim of the defendant to find out whether it is a separate cause of action for the defendant against the plaintiff or is a part of the action of the plaintiff which action, in the event of adjustment, may conclude, either wholly or in part. In V.K. Kumaraswamy Chettiar & Co v. P.L. Kannappa Chettiar Company and others 1978 T.L.N.J. 107, a learned Judge of this Court has taken notice of almost a similar plea of the alleged adjustment and stated as follows:-

The suit has been instituted by the first respondent company for the recovery of a sum of Rs. 2,741.10 being the value of the yarn supplied to the defendants. The first defendant contended inter alia that by reason of a breach of contract committed by the plaintiff he has suffered a loss of Rs. 2,920/- and that after adjusting the amount due to him and paid Court-fee on this difference of Rs. 4100/- claimed by him. The learned District Munsif held that this is not a case of adjustment and that this is a case of counter claim and directed to pay court fee on the entire sum of Rs. 2,920/- put forward on counter claim. The defendant can claim a set off under Order 8 Rule 6 C.P.C. only for an ascertained sum of money legally recoverable by him from the plaintiff. The amount claimed by the first defendant in this instant case in unliquidated damages. The amount payable

to the first defendant by way of compensation has to be ascertained in the course of the trial. Therefore Order 8 Rule 6 read with illustration (c) to the rule discredits the contention of the petitioner that what he claims is a set off. On the other hand, by reason of Order 8 Rule 6(a) this is a counter claim as it is in the nature of a claim for damages. Therefore, the first defendant has to pay court fees on the entire amount put forward as counter claim.

6. An examination of the plea of the defendant appellant with respect to the alleged adjustment of Rs. 77,522/25 shows that according to it pursuant to the contract it incurred the cost of 6 numbers of dished ends, freight charges for the transportation of dished ends from Madras to Cochin, charges for inspection of dished ends and charges for the design work including overhead charges total cost being Rs. 77,522.25. This, thus, is a claim which shall have to be examined as an issue in the suit and decided whether such sum is recovered by the defendant from the plaintiff or not. This evidently is a sort of claim that is in lieu of damages saying that the defendant incurred the cost of 6 numbers of dished ends, freight charges for the transportation of dished ends, charges for inspection of dished ends and charges for the design work including overhead charges.

7. Illustration (c) to, Rule 6 of Order 8 of the CPC reads:

A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

Thus, it is clear that the defendant/appellant's claim in its written statement in the instant case is not in the nature of "set off". It is, in our opinion, in the nature of a counter-claim, on 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 is a counter claim whether such counter claim is in the nature of a claim for damages or not. (See Order 8 Rule 6-A of the Code of Civil Procedure).

8. Learned Trial Judge is not wrong in holding that the defendant cannot claim adjustment unless it pays court-fee as all the rules that apply to a plaint have to apply to a counter-claim. While we do not find any error in the learned Judge's approach to the question of the payment of the court-fee, we do take notice of the preliminary decree that he has passed for the reason only that according to him it was not necessary to try the issue of the payment of advance by the plaintiff to the defendant and that advance being the admitted claim, the defendant was liable to refund. He may come to the same conclusion in the trial of the suit; but, to grant a preliminary decree without affording an opportunity to the defendant to pay the court-fee and then to decide whether to press its objection or not in a decree of this nature may not be justified.

9. For the reasons aforesaid, we are inclined to order that in case the defendant

desires to proceed with its counter claim, it may be granted opportunity by the trial court to pay the court fee within a reasonable time. We are informed at the bar that the suit is still pending and the preliminary decree has not yet been executed. Thus, no party will suffer any irreparable injury if a reasonable time is granted to the defendant to pay the Court-fee on the sum of the counter claim made by it.

10. With the directions and observations as above, we modify the impugned decrees to the effect that it will be open to the defendant/appellant to pay the court-fee within one month from today. In case such court-fee is paid, the preliminary decree shall not be given effect to and will be deemed not to have ever been granted. In case the court-fee is not paid, as directed above, the decree shall stand affirmed. With the modification as above, the appeal is disposed of. No costs.