
(1991) 02 CAL CK 0025
In the Calcutta High Court
Case No : C.O. No. 2249 of 1990

Kassem Gharami and Others

APPELLANT

Vs

Niamat Gharami and Others

RESPONDENT

Date of Decision : 11-02-1991

Acts Referred:

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

Citation : (1991) 2 CALLT 118

Hon'ble Judges : Monoranjan Mallick, J; Manabendra Nath Roy, J

Bench : Division Bench

Advocate : Soumya Chakraborty, for the Appellant; Taimur Hossain and Sibani Bhagat, for the Respondent

Final Decision : Allowed

Judgement

Monoranjan Mallick, J.—The petitioner-defendants are aggrieved by the order passed by the learned Assistant District Judge, 10th Court, Alipore in Title Suit No. 19/86 rejecting the petitioners' additional written statement and counter-claim on the ground that the counter-claim is barred by limitation and that the petitioners have not paid the requisite court fee for the said counter-claim.

2. Being aggrieved, the defendants-petitioners have moved this Court in revision contending inter alia that the additional written statement and the counter-claim filed by the petitioners have given the date on which the cause of action arose as 24.12.87 and when admittedly this additional written statement and the counter-claim were filed within three years thereof, the counter-claim could not be rejected by the learned Judge on the ground that when the petitioners appeared in this Court on 24.4.86 and prayed for time to file written statement, they can be said to be well acquainted with the facts of the suit at least since that date and consequently, this additional written-statement and counter-claim having been filed more than three years thereafter, are barred by limitation.

3. The Id. Advocate for the petitioners submits that a counter-claim is to be

treated as a cross-stilt and when in the said counter-claim the cause of action for filing the said counter-claim has been given as 24.12.87, at this stage the counter-claim has to be accepted on its face value and until and unless the present opposite parties contend by filing additional written statement that the counter-claim is barred by limitation and on taking evidence the learned Judge finds in favour of the opposite parties, the counter-claim cannot be rejected on the ground on which the learned Judge rejected it.

4. The revision petition is opposed by the opposite parties contending inter alia that the petitioners were not entitled to file counter-claim subsequent to the filing of the written-statement and in support a decision of the Orissa High Court reported in *Kashi Biswanath Dev Vs. Paramananda Routrai and Others*, has been referred to.

5. On behalf of the petitioners the Supreme Court decision reported in *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, has been referred to and it has been submitted that in that decision the Supreme Court has observed that a counter-claim under Order 8 Rule 6A of the CPC could be filed even after the original written statement has been filed, that cause of action for filing such counter-claim, however, must arise at any time prior to the filing of the written statement and if within three years thereof such counter-claim is filed, then the Court cannot reject the counter-claim on the ground that it is barred by limitation.

6. We have carefully considered the above Supreme Court decision. The Supreme Court in the decision has, in interpreting the words "time limited for delivering defence" has observed that a counter-claim, which is treated as a plaint in cross suit, can be filed before time limited by limitation for filing the suit on the same cause of action expires and that such cause of action must arise at any time prior to the filing of the written statement.

7. In this particular case also the counter-claim has been filed after the written-statement has been filed on 12.1.1988. But only because it is filed after the original written-statement is filed, it cannot be rejected on that ground alone in view of the above Supreme Court decision. The decision of the Orissa High Court referred to above on behalf of the opposite parties must be held to have been overruled by the above Supreme Court decision. Moreover, in *Mangulu Pirai Vs. Prafulla Kumar Singh and Others*, , the Division Bench of the Orissa High Court relying on the Supreme Court decision in *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, , has overruled that decision of the Orissa High Court. Therefore, that decision having been overruled, cannot be treated to be good law and cannot be relied upon by this Court. In this particular case in the counter-claim and the additional written statement filed the date of cause of action has been given as 24.12.87. Admittedly, within three years thereof the additional written statement and the counter-claim have been filed. Therefore, relying on the above Supreme Court decision we are unable to hold that the counter-claim is barred by limitation. We are further of the view that the counter-

claim is to be treated as a cross-suit and before the opposite parties file additional written statement against the said counter-claim and challenge the said counter-claim as barred by limitation the question as to whether the claim is barred by limitation would not arise. Thereafter the learned Judge on taking proper evidence has to decide whether that the claim is barred by limitation or not. But at the stage when the additional written-statement and counter-claim are filed, such additional written-statement and counter-claim cannot be rejected on the ground that the claim is barred by limitation when in the statement of allegation of such claim it cannot be said that it is so barred.

8. The other ground for rejecting the counter-claim is that the court-fee have not been paid. But the learned Judge should not have rejected it without giving the petitioners an opportunity to file the necessary court-fees. If after giving such opportunity, no court fee is paid, the counter-claim may be rejected on the ground of non-payment of necessary court-fee.

9. In view of the above, we are unable to uphold the order passed by the learned Judge. The revision petition is allowed. The order passed by the learned Judge is set aside. The additional written statement and counter-claim be accepted.

10. The opposite parties be paid Rs. 100/- (one hundred) as costs which has to be paid by the petitioners within four weeks and the opposite parties may file additional written statement against the counter-claim within four weeks from the date on which full Court fees on the counter-claim are paid. The additional court-fee for the counter-claim shall, have to be paid within four weeks from the date of communication of this order failing Which the learned Judge may pass appropriate order rejecting the counter-claim.

Manabendra Nath Roy, J.

11. I agree.