
(2014) 04 BOM CK 0229
In the Bombay High Court
Case No : Writ Petition No. 117 of 2014

Reliance Enterprises

APPELLANT

Vs

Wonder World

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Constitution of India, 1950 — Article 227

Citation : (2014) 4 ALLMR 663 : (2014) 5 BomCR 169 : (2014) 5 MhLj 377

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : Y.V. Nadkarni and D. Shirgam, Advocate for the Appellant; C.A. Coutinho and S. Redkar, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—Heard. Rule, returnable forthwith.

2. Heard finally by consent.

3. This petition challenges the order passed on 30.11.2013 in Special Civil Suit No. 137/2006 by Civil Judge, Senior Division, Margao, thereby allowing the application filed by the respondents for amendment of their written statement.

4. The case of the petitioner is that the amendment application filed by the respondents on 19.3.2013 seeking to set up a plea of set-off against the demand of the plaintiff in a suit filed by the plaintiff for recovery of the money against the respondents was grossly belated and did not at all satisfy the requirements of Order 8, Rule 6 of the CPC. It is also the case of the petitioner that the amendment of the written statement was only another method of getting over order of rejection of counter claim passed earlier by same Court whereby the counter claim made by the respondents was not accepted by the trial Court on the ground that it was barred by limitation.

5. The application was, however, allowed by the learned Civil Judge by his order

passed on 30.11.2013. The only reasons stated in the impugned order are that amendment of the written statement cannot be equated with the amendment of the plaint and amendment sought for by the respondents is necessary for deciding the real controversy in the suit.

6. Learned counsel for the petitioner has submitted that the amendment application could not have been allowed by the trial Court as the respondents did not even explain the delay occurred in preferring the plea of set-off which, as per Order 8 Rule 6, ought to have been raised at the time of filing of the written statement and if for some reason, it was not possible for the respondents to have raised it, at least some explanation for delay should have been given and it was not given. Learned counsel for the petitioner submits that this is fit case for interference with the impugned order in writ jurisdiction under Article 227 of the Constitution of India.

7. Learned counsel for the respondents submits that the application filed by the respondents seeking amendment of the written statement by raising a plea of set-off was not filed strictly under the provisions of Order 8 Rule 6 of CPC and what was sought to be raised by the respondents was a plea of equitable set-off. He submits that now it is well settled that there is a distinction between the plea of legal set-off and the plea of equitable set-off and in the latter case, provisions of Limitation Act as well as Order 8, Rule 6 of CPC are not applicable. He has placed reliance upon the judgment in the case of Jitendra Kumar Khan and Others Vs. The Peerless General Finance and Investment Company Limited and Others,

8. In the light of the rival arguments, the short question that arises in this Writ Petition is:--

Whether the impugned order allowing the amendment of written statement is arbitrary and unreasonable?

9. It is seen from the law laid down by the Hon''ble Apex Court in the case of Jitendra Kumar Khan and Others Vs. The Peerless General Finance and Investment Company Limited and Others, that the Hon''ble Apex Court has, after considering several decisions of Supreme Court as well as High Courts, as mentioned in paragraphs 11 to 15 of the judgment, held that now it is established that there is a distinction between what is called as equitable set-off and what is considered to be legal set-off. The Hon''ble Apex Court has held that the plea of equitable set-off is independent of provisions of CPC and is sought when there are mutual debits or credits or cross demands arising out of the same transaction; that such a plea cannot be raised as matter of right and that it should be left to the discretion of the Court to entertain and allow such a plea or reject it. It is further held that the doctrine of equitable set-off is founded on the fundamental principles of equity, justice and good conscience and, therefore, discretion to be exercised in this regard by the Court must be sound based upon legally recognizable rules.

10. The relevant observations of the Hon"ble Apex Court in this regard appearing in paragraph 16 are reproduced thus:--

"From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debits and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in *Dobson & Barlow v. Bengal Spinning & Weaving Co.*[15] and AIR 1940 177 (Nagpur)

11. Having considered the law laid down by the Apex Court in the said case of *Jitendra Kumar Khan and Others Vs. The Peerless General Finance and Investment Company Limited and Others*, and also having gone through the application for amendment of written statement, I find that the application has been so worded as to create an impression that it invokes equitable jurisdiction of the trial Court in considering the grant or otherwise of the application. The application does not appear to be filed strictly under the provisions of Order 8, Rule 6 of CPC and therefore, it is an application which could have been considered as attracting the doctrine of equitable set-off to it.

12. It must be stated here that the impugned order is a very cryptic order and it does not say anything about the application of principle of equitable set-off. Even then, considering the law applicable to the facts of the present case and discussed earlier, in my view, the impugned order has to be read as invoking the doctrine of equitable set-off and, therefore, cannot be held to be arbitrary or unreasonable in these circumstances.

13. Learned counsel for the petitioner has also referred to me some cases on the aspects of legal set-off as governed by Order 8 Rule 6 CPC and the limitation applicable to the plea of legal set-off. But, I do not think it necessary to consider them in view of the observations made earlier. Application filed by respondents for amendment of written statement has been examined in the light of principle of equitable set-off and not of legal set-off and, therefore, it would not be necessary to consider the cases relied upon by learned counsel for the petitioner.

14. Learned counsel for the petitioner has submitted that while deciding this writ petition, the question of applicability of bar of limitation to the claim of set-off should be kept open to be decided appropriately by the trial Court. In this regard he has invited my attention to the observations of the Division Bench of Calcutta High Court made in the case of *Mackinnon Mackenzie and Company Pvt. Ltd. Vs. Anil Kumar Sen and Another*, and reproduced in paragraph 5 of the judgment in

the case of Jitendra Kumar Khan (supra).

15. For the sake of convenience, I find it necessary to reproduce the said observations of the Division Bench of Calcutta High Court as follows:--

"It is clarified that though the amendments are allowed, if the appellant's set-off are found to be barred by limitation at trial, then and in that event, they would never be entitled to a decree on their own but only to a wiping off pro tanto of the plaintiff's claim. The amendment by way of para 20-G of the written statement is particularly to be read in this light at trial."

16. In the light of the facts and circumstances of the case, it would be just and proper to direct the trial Court to bear in mind the above referred observations while deciding the claim of set-off of the respondents made against demand of the petitioner. Needless to mention that allowing or rejecting the claim of set-off eventually would entirely depend upon the evidence to be adduced before the Court by the parties. Therefore, it would be appropriate to also make it clear that the trial court shall not be influenced by the observations made by this Court while deciding the sustainability of the plea as regards claim of equitable set-off in accordance with law.

17. Accordingly, the point is answered as in the negative. Writ Petition is liable to be dismissed and is hereby dismissed. The petitioner/plaintiff will be entitled to file his written statement/counter reply to the pleadings introduced by way of amendments. Parties to bear their own costs. Rule is discharged.