
(2005) 01 CAL CK 0034
In the Calcutta High Court
Case No : F.A. No. 71 of 2002

Sankar Dastidar

APPELLANT

Vs

Smt. Banjula Dastidar and Another

RESPONDENT

Date of Decision : 19-01-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A, Order 8 Rule 6B, Order 8 Rule 6D
Limitation Act, 1908 — Section 115, 120, 124, 23, 91A
Limitation Act, 1963 — Article 23, 25, 27, 22, 3

Citation : AIR 2005 Cal 121 : (2005) 2 CALLT 360 : (2005) 2 CHN 387

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Pushpendu Bikash Sahu and Supratick Saywal, for the Appellant;
Debayan Bera, for the Respondent

Judgement

This Judgment has been overruled by : Sankar Dastidar Vs. Shrimati Banjula Dastidar and Another, AIR 2007 SC 514 : (2007) 2 CTC 570 : (2007) 147 PLR 232 : (2006) 13 SCALE 598 : (2006) 13 SCC 470 : (2006) 10 SCR 101 Supp

D.K. Seth, J.—A very interesting point on the question of maintainability of the suit, emanating from a counter-claim pleaded in the written statement and out of an order dated 6th September 1994 passed by the Division Bench of this Court in CO No. 1637 of 1993, was dealt with by the learned Court below conceivably in a cryptic manner without any reasoning to support the ultimate finding on the face of the questions raised.

The questions :

2. The questions that are to be decided in this case principally are twofold. First whether the suit was barred by limitation and second whether the suit was barred by res judicata. Apart from the maintainability of the suit, the merit was also challenged. My learned brother Sinha, J. has dealt with the merit with which I do concur.

2.1 So far as the question of maintainability is concerned, the point of limitation has two aspects, one that the counter-claim was filed after the expiry of limitation and that the suit was registered on 14th of March 1995 long after the accrual of the cause of action, which, according to the defendant/appellant herein, accrued on 16th of March 1987. The other aspect is that it was based on a counter-claim, which could not have been filed on account of the expiry of the time stipulated therefore or in other words the counter-claim in the circumstances of the case could not be maintained.

Res Judicata :

3. We may first answer the question of res judicata, which, however, Mr. Sahu, in his usual fairness, though argued but did not lay much stress on it. Inasmuch as the dismissal of the money suit No. 20 of 1989 would not affect the counter-claim, if maintainable, though the question between the parties were involved in the said suit. Inasmuch as a counter-claim is maintainable even though the suit might have been dismissed. Even if the money suit No. 20 of 1989 was dismissed, by reason of Order 8, Rule 6D of the Code of Civil Procedure, the counter-claim can nevertheless be proceeded with. Therefore, the question of res judicata would not stand in the way of the counter-claim treated as a fresh suit being money suit No. 5 of 1995 so far as the facts and circumstances are concerned.

Limitation :

4. So far as the question of filing of the written statement is concerned, it appears to have been filed on 24th June 1992, whereas the suit was filed sometime in 1989 and the report of the Commissioner was filed on 31st May 1989. Nothing has been brought before us to show that the counterclaim was set up before the plaintiff as defendant in money suit No. 20 of 1989 had delivered her defence or before the time limited for delivery of the defence had expired. Admittedly, the counter-claim was set up in the written statement itself and that the written statement, was not rejected and was accepted. Thus, it appears that the written statement was filed or the defence was delivered before the time limited for delivering the defence had expired. At the same time, it also appears that the counter-claim was set up when the defence was delivered by the defendant No. 3 in money suit No. 20 of 1989. Thus, the counter-claim appears to have been filed within time and cannot be said to be not maintainable for the purpose of registering the same as a fresh or cross-suit within the scope and ambit of Order 8, Rule 6-A of the CPC (CPC). From a plain reading of the written statement treated as plaint in this money suit No. 5 of 1995, it appears that the counter-claim had since been stated specifically in the written statement as required under Order 8, Rule 6-B, CPC.

4.1 In Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, , relied upon by Mr. Sahu, it was held that Order 8, Rule 6-A of the CPC does not, on the face of it, bar the filing of a counter-claim by the defendant after filing of

the written statement. But the filing of the written statement within time stipulated, as was held in the said decision, would not save limitation if on the date of setting up of the counter-claim, the limitation had already set in. The question is still open to be decided as to whether the matter is barred by limitation or not. Admittedly, the counter-claim would not have been barred by limitation if it was filed after three years from the date when the cause of action arose. It was so held in the said decision. True it is, the decision dated 6th September 1994 could not decide the question of limitation and it was to be decided in the suit itself.

4.2 He next relied on the decision in *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, wherein it was held that in exercise of Section 115, the High Court has jurisdiction only to correct the illegalities and material irregularities within the scope of revisional jurisdiction and as such the order dated 6th September 1994 could not have decided any issue between the parties as it appears from the said order. This proposition also does, not seem to bear any doubt. We have already observed that the said order did not decide any issue and all issues were open to be examined and decided in the suit itself.

4.3 The learned counsel below did not deal with those questions simply on the ground that the suit was registered pursuant to the order dated 6th of September 1994 passed by the Division Bench of this Court in CO No. 1637 of 1993. But the said order simply directed the Trial Court to proceed with the counter statement treating the same as a fresh suit. Such order cannot be treated to be an order deciding the question of limitation or otherwise. It was only a direction with regard to the procedure to be followed. It did not decide any questions or issues involved between the parties in the counterclaim. Section 3 of the Limitation Act prescribes that whether the question of limitation has been raised or not, it is the duty of the Court to dismiss the suit/claim if barred by limitation. The Court has no alternative but to dismiss the suit if barred by limitation, although the question of limitation has not been set up as a defence. Therefore, the Court below could not rest its order simply on the foundation of the order dated 6th of September 1994 passed by the Division Bench, but ought to have gone into all the questions at issue between the parties in the counter-claim/suit.

4.4 Mr. Sahu relied on the decision in AIR 1935 85 (Privy Council) , which lays down that Section 3 of the Limitation Act is peremptory and the duty of the Court is to notice the Act and give effect to it even though does not referred to in the pleadings. This is a settled proposition of law by reason of Section 3 of the Limitation Act and there is no second opinion with regard thereto.

4.5 The question of limitation, therefore, is also to be looked into as to whether the counter-claim was barred by limitation on the date when the written statement was filed or the counter-claim was set up, namely on 24th of June 1992. It was argued by Mr. Sahu that the counter-claim should be treated to have been filed on 14th of March 1995 when it was registered as a suit on 14th

of March 1995. However, in his usual fairness, Mr. Sahu did not lay much stress on this contention. In our view the registration of the counter-claim as a suit, pursuant to the order dated 6th of September 1994 passed by the Division Bench, on 14th of March 1995 is wholly immaterial since the counter-claim was supposed to be proceeded with in View of Order 8, Rule 6D, CPC, which was recognized in the order dated 6th September 1994 by treating the counter-claim filed on 24th of June 1992 as a plaint for a cross-suit, since procedurally registered on 14th of March 1995 without affecting the date of filing of the counter-claim set up in the written statement on 24th of June 1992, which, in law, remained pending till it was registered on 14th of March 1995 as a plaint of a cross-suit.

4.6 But then, in the facts and circumstances of the case, it appears that the cause of action arose when the defendant No. 3, plaintiff herein, was denied access to or prevented from entering into the said room and opening the almirah in order to obtain release of the articles inside the same. However, the cause of action did not end with the locking of the room and the almirah, but it continued from day-to-day. It was not the continuance of the damage but of the injury or the cause of action.

Continuing wrong :

5. Therefore, it is necessary to examine whether the counter-claim was barred by limitation when the defence was delivered in which the counter-claim was set up on 24th of June 1992. Admittedly, the entire foundation of the counter-claim is based on the cause of action that arose for the first time on 16th of March 1987 by the locking of the room and the almirah inside, which was a subject-matter of the earlier suit being title suit No. 22 of 1987 in which the defendant No. 3 in money suit No. 20 of 1989/plaintiff in money suit No. 5 of 1995, was not a party; and an attempt by the plaintiff therein to obtain release of the claim of the defendant No. 3/plaintiff herein had failed by reason of order dated 30th of April 1991 passed in the said title suit No. 22 of 1987 on the ground that she was not a party in that suit. Thus, it can very well be said that the ultimate cause of action arose on 30th of April 1991 and the injury that continued thereafter was not the continuation of the cause of action, but the continuation of the sufferance or the damage resulting from the cause of action. If it is so, in that event, it is clear that the cause of action continued till 30th of April 1991, which is admittedly within three years of filing the written statement setting up the counter-claim.

5.1 Section 22 of the Limitation Act prescribes that "In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run on every moment of the time during which the breach or the tort, as the case may be, continues". In the present case, the locking of the room and the almirah inside denied the access of defendant No. 3, plaintiff herein, to the room and the almirah. Denial of such access resulting from the locking of the room is a tort. So long the room remains under lock, the tort continues attracting

the principle of Section 22 of the Limitation Act and as such the locking of the room that started on 16th of March 1987 continued till 24th of June 1992 when the counter-claim was set up and at the latest till 30th of April 1991 and as such it could not be contended that the counterclaim was barred by limitation.

5.2 In *Sarat Chandra Mukherjee Vs. Nerode Chandra Mukherjee and Others*, , cited by Mr. Bera, Counsel for the plaintiff/respondent, it was held that obstruction of the passage by erection of a shed is a continuing wrong so long the obstruction continues in terms of Section 23 of the Limitation Act, 1908, now Section 22 of the Limitation Act, 1963. The existence of the obstruction interfering with the right of the plaintiff was a continuing nuisance the cause of action whereof is renewed de die in diem so long the obstruction continues to interfere with the right of the plaintiff. Applying the said principle in the present case, it is apparent that the obstruction by reason of the lock put on the room interfering with the access of the plaintiff herein is a continuing nuisance or tort for which the cause of action is renewed de die in diem so long the access to the room continues to be denied or until the same is unlocked.

5.3 In *Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (dead) by LRs.*, , relied on by Mr. Sahu, the same principle was enunciated that the counter-claim could be filed till the cause of action continues or till the extended date of filing of written statement. If on the date of filing of the written statement setting up counter-claim, the claim stands ex facie barred by limitation, then such counter-claim cannot be maintained. There cannot be any doubt with regard to the proposition with which we are in agreement.

5.4 In *Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and Others*, relied upon by Mr. Sahu, the distinction between a continuation of the cause of action and the continuation of the damage was elaborated. In the said case, the cause of action was alleged to have been complete in 1911, but the suit was filed in 1922 after a decree was passed, denying their ownership pursuant to which they were ousted, which was alleged to complete the cause of action with the passing of the decree in 1922 and as such the cause of action was alleged to continue till the date the decree was passed. In the said case, the Guravs claimed ownership of the temple, which was denied by the decree. Guravs were ousted in 1911 and did not serve the temple except for three and half months in 1922 when they had wrongfully obtained possession of the temple. Therefore, it was held that Section 23 of the 1908 Act could not be applied in respect of the suit filed in 1922 in order to establish the claim of hereditary servants, which was denied since 1911 and it was only the damage that was continuing not the cause of action.

5.5 The damage may continue even after the cause of action is complete. This is dependent on facts of each case. The question is to be decided on facts as to whether the cause of action is complete and it is the damage out of the injury or the cause of action that is continuing or the cause of action is not complete but is continuing and it is not the damage that was continuing. In fact, the damage

may also continue along with the cause of action, but the continuation of the damage would not have the effect of cessation of the continuation of the cause of action. Locking of the room in the present case may be complete at the time when the lock is put. But it is not the locking of the room that is the cause of action. Cause of action is a bundle of facts. The locking of the room is one amongst the bundle. The cause of action is not the putting of the lock alone. It is the denial of access, which is the cause of action. So long the denial of access continues, the cause of action continues. In the facts and circumstances of the present case, examined in the light of the decision *Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and Others*, , it appears that the continuation of denial of access is the continuation of the injury or the cause of action, though it might combine with it the damage arising thereout.

5.8 A Full Bench of the Lahore High Court in *Khair Mohd. Khan v. Mt. Jannat* AIR 1940 Lah 359, dealing with the question of continuing wrong arising de die in diem u/s 23 of the 1908 Act, laid down the distinction between an injury and the effects of that injury. Where the injury complained of is complete on a certain date, there is no continuing wrong even though the damage caused by that injury might continue and in such a case the cause of action arose when the injury is inflicted and the fact that the effect of the injury was continuing, that would not make the injury a continuing wrong so as to attract the principles of Section 23 of the 1908 Act. Relying on this distinction, in this case, we may safely hold that it was the cause of action or the injury was a continuing wrong so long the tort continued namely the access was denied. The decision in *Banshi Vs. Goverdhan*, by a learned single Judge, relied upon by Mr. Sahu, supports the view we have taken. In the said case the detention of the goods, which the defendant was supposed to return, was held to be a continuing wrong. In the present case, the goods were wrongfully detained by reason of putting the lock in the room and the denial of access and as such the wrong/tort in the present case continued, attracting the principle of Section 22 of the 1963 Act.

5.7 Mr. Sahu had stressed much on the ground that the Commissioner's report was filed on 31st of March 1989 when the materials were disclosed to be inside the almirah and the room; and that was the date when the cause of action was complete and it was only the damage that continued thereafter. This proposition does not seem to be sound. Inasmuch as the cause of action/the injury was the denial of access to the room by reason of its being locked. Even without the Commissioner's report the plaintiff had the knowledge of the contents inside the almirah. Therefore, the Commissioner's report would not have any effect of completing the cause of action nor the putting of the lock would amount to completion of the cause of action/the injury. So long the lock continues, the case comes within the purview of Section 22 of the Limitation Act, namely, a tort that continues.

Conclusion :

6. Thus, I am of the view that the suit arising out of the counter-claim was

neither barred by the principles of res judicata nor by limitation on any of the aspects urged by Mr. Sahu, as discussed above.

6.1 So far as the question on the merit of the suit is concerned, I fully concur with the view taken by my learned brother Sinha, J. and which I need not elaborate.

Order :

7. The appeal, therefore, is disposed to accordingly. The judgment and decree, appealed against, is modified as indicated hereafter in the judgment of brother Sinha, J.

R.N. Sinha, J.

8. The Dastidar siblings are in the fray of litigation and counter litigations for quite a long time (since 1987).

9. Now the facts :

The Dastidar family consisted of two brothers namely, Kamakha, Sankar, Banjula together with parents and two other sisters (one has since been married and the other a primary school teacher, since deceased). The eldest Kamakha filed a suit (Title Suit No. 22 of 1987) impleading Sankar as a defendant/appellant (herein before) seeking inter alia for a declaration with the suit property. Their residence at 824 Block No. B New Alipore belonged to him alone. The suit was resisted.

10. After the suit (T.S. 22/87) filed by the elder brother Kamakha, the appellant Sankar Dastidar, then working as Head Assistant in the office of Calcutta Police put a lock in the room where the plaintiff/respondent Banjula used to stay on 16-3-1987.

11. As Banjula Dastidar, the respondent was not a party to the suit (T.S. 22/87) she could not get herself added as party but tried to get her belonging after inventory made by advocate Commissioner through her elder brother the plaintiff who filed an application for release of those goods belonging to her. That application was, however, was rejected by the learned Court by an order dated 30-4-91.

12. Thereafter Sankar Dastidar filed a money suit No. MS. 20 of 1989 wherein Banjula filed a counter-claim in her written statement claiming damages for wrongful detention on 24-6-1992. The Counter-claim is based on an allegation of failure of renewal of the certificate (NSC certificate) on account of blocking of the south-east corner room which was inhabited by Banjula Dastidar. It is stated that the said NSC on renewal from time to time could have accrued to an amount of Rs. 88,000/- and the damages for the personal effects to the tune of Rs. 50,000/- which was mainly of garments and other personal effects which is revealed as per Inventory Commissioner's report and Rs. 7,000/- in each which was kept in her almirah. The total compensation claimed to the extent of Rs. 2,00,000/-.

13. Learned counsel below by the impugned judgment has decreed the suit on contest against the defendant/appellant without costs and decree is of Rs. 2,00,000/- as has been claimed by the plaintiff.

14. The impugned judgment has been challenged before us on the grounds amongst others that the learned Court below erred in construing the order of this Hon''ble Court dated 6-9-1994 wherein the said Written Statement containing the counter-claim was directed to be taken up as a separate suit and all the points left open.

15. That the same is barred by the doctrine of res judicata, as no appeal was preferred against the order dated 30-4-91. That the counter-claim, i.e. the suit is barred by the law of limitation as the same was filed on 24-6-1992 long after 16-3-1987.

16. Sri Sahu besides the above point of law has urged that by the impugned judgment learned Court below has decreed the suit to the extent of Rs. 2,00,000/- as has been claimed by the defendant/respondent. There is no assessment as to the extent of damages under different heads.

17. Mr. Sahu, learned advocate for the appellant has urged that as the Hon''ble Courts direction in C.O. 1637/1993 dated 6-12-1994 the counter-claim of respondent Banjula Dastidar is to be treated as a plaint and as a separate suit and no observation made about the merit of the case and all points left open, it was incumbent on the learned Court below to come to a positive finding as to the point of limitation, more so in view of the provisions of Order 8, Rule 6-A of the Code of Civil Procedure.

18. In this connection Section 3 and Article 91-A of the Limitation Act has been relied on.

19. Sri Sahu in support of his contention has relied on reported decision in Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (dead) by LR., wherein it was held that "the application for counter-claim vis-a-vis limitation --right to file counter-claim being referable to date of accrual of cause of action, if the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing of the Written Statement or extended date of filing Written Statement, such counter-claim can be filed even after filing the Written Statement -- suit instituted on 15-7-1982 and an application under Order 8, Rule 6-A filed by the defendant/respondent therein was filed on 22-6-1985 which was held to be ex facie not barred by limitation. Contention that cause of action has arisen long before institution of the suit and therefore, the suit and the counter-claim were barred under the Limitation Act which was raised first before the Apex Court was not gone into but left open."

20. Shri Sahu has further relied on a reported decision in Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and Others, . This decision is in respect of interpretation of Article 124, 120 and Section 23 of the

Limitation Act where it was held that in the event of wrongful dispossession of the plaintiff and the adverse possession by the defendant to the office in question (herein the priesthood) claims for possession of hereditary offices which attract the application of this article are usually made by holders of the offices against persons who claim adverse possession of said offices. It was further held that a continuing wrong or any wrongful act amounting to ouster do not come within the purview of Article 23 within the meaning "continuing wrong". It further appears that in such an event where the right even though subsists but the remedy is lost by virtue of Article 25/27 of the Limitation Act.

21. Sri Sahu has further relied on decision reported in *Banshi Vs. Goverdhan*, wherein he has drawn the attention of this Court that in respect of the observations in para 9 of the aforesaid decision wherein it has been held amongst others that detention of properties even by a bailee the plaintiff is entitled to recover the movable property or its value besides damages for detention which is a continuing wrong. The damages accrue from day to day and therefore, the claim for damages for a period of three years before the date of the suit would be within time but in assessing damages which must be borne into mind that the object of awarding damages is to place the plaintiff in the same possession, as far as possible, in which he would have been if the wrongful act had not been committed. Thus, in other words the claim of damages must not exceed the value of the property itself.

22. Shri Sahu has also relied on another case reported in *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, ., which need not be elaborately discussed as this case has already been referred and relied on in *Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (dead) by LRs.*, Shri Sahoo has further relied on a decision reported in AIR 1935 85 (Privy Council) . In this case besides others, Section 3 of the Limitation Act has been explained and it has been held that the said Section is peremptory and the duty of the Court is to notice the act and give into effect to it even though it has not referred in the pleadings.

23. Shri Bera has relied on two decisions wherein the term continuing wrong as in Section 23 and Article 120 provides it has been held that test for determination is the encroachment by joint owner by building chabutra on common land claiming it as his own is not a continuing wrong and suit for injunction is governed by Section 120 and not by Section 23. That is not three years but 12 years for recovery of possession (reported in AIR 1940 Lahore 359 *Khair Mohd. Khan v. Mt. Jannat*).

24. The other case being *Sarat Chandra Mukherjee Vs. Nerode Chandra Mukherjee and Others*, .

25. The other case referred in *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, . We do not propose to discuss this case as it concerns altogether a different question.

26. Sri Bera, learned advocate for the respondent has urged that the term "continuing wrong" as in Section 23 of the Limitation Act is clear and the test laid down in the case of *Khair Mohd. Khan v. Mt. Jannat* (supra) in (AIR 1940 Lah 359) wherein it has been held inter alia :

"As observed by Mookerjee, J. in (1915) 31 Ind Cas 242 : AIR 1916 Cal 751), the essence of a continuing wrong is that :

the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance; in such case a fresh cause of action arises de die in diem. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh cause of action for the continuance lies.

The question in each case therefore is whether the "injury", which is the basis of the grievance of the aggrieved party is itself "continuing", or whether the injury was complete when it was committed but the damage flowing from it has continued or is continuing. If the former, the case falls within the purview of Section 23, Limitation Act, and the cause of action arises de die in diem; if the latter, the terminus a quo is the date on which the wrongful act was done."

27. Mr. Sahoo has urged that no reason and/or discussion has been made by the learned trial Court as to how it saves limitation.

28. We now propose to give reasons for the aforesaid.

29. Prior to that it must be borne in mind that it is not a suit for recovery of possession for the room where the respondent resided. It is a suit for compensation for wrongful detention of her goods moveables and valuables, which were drawn out of the said almirah by the Advocate Commissioner appointed by the Court in T.S. 22(87) sometime in 1989, and admitted the keys were produced by the respondent Banjula. Keeping in view of the nature of the suit the cited decisions as above (supra) do not help Mr. Sahoo's client.

Now, the reasoning :

"the word "wrong" in the former Section 23 was used in a restricted sense to imply something in the nature of a tort. The present Section 22 uses the word "tort". A "tort" is a wrong independent of contract. Torts are of three kinds, viz., non-feasance, or the omission of some act which a man is bound to do; misfeasance, being the improper performance of some act which he may lawfully do; and malfeasance or the commission of some act which is unlawful. A completed tort is not a continuing wrong. It is of the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the injury. If the wrongful act causes an injury which is complete, there is no continuing wrong through the damage resulting from the act may continue."

30. Mr. Sahu has cited a case, Banshi Vs. Goverdhan, and urged that plaintiff cannot claim damages exceeding the value of the property itself, (we have mentioned the case beforehand). If the decision is relied on, then it comes to that detention of movables is a continuing wrong, thus, comes within the purview of Section 23 of the Limitation Act.

31. On perusal of the evidence on record as has been laid by both the parties, we do not find that there is no denial of the factum about the residing in the south-east corner room by Banjula Dastidar, the contesting respondent. It further transpires that both the brothers are at loggerhead with the sister Banjula. Sankar Dastidar, the appellant hereinbefore, has thrust upon as many as five criminal cases against her (she has since been acquitted from all the cases) and the other brother Kamakha has also thrust upon some money suit on her. Be that as it may it has nowhere been stated on behalf of the appellants as to whether the garments are valued at Rs. 50,000/- or not. There is not even any suggestion to P.W. 1 i.e., Banjula (contesting respondent) that the valuation of the aforesaid garments may be less than 50,000/-.

32. In view of the above facts and circumstances of the case as apparent from the record we hold, accordingly, that the suit is not barred by limitation as it is.

33. Accordingly, we hold that the suit is not barred by limitation, plea of res judicata not pressed and we hold that it does not suffer from the same.

34. Now the relief :

The NSCs would have fetched Rs. 88,000/- by September 1992, Cash Rs. 7000/-, detained since then, garments Rs. 50,000/- comes to Rs. 1,45,000/-.

35. Thus, the impugned decree is modified to the extent that plaintiff/respondent do get a decree for Rs. 1,45,000/- with proportionate costs and with 12% interest from the date of 26-6-1992 till date of realisation. Appellant/respondent however, do get proportionate set off in connection with interest for 3 months on Rs. 88,000/- (as the suit filed earlier).

36. Thus, the appeal succeeds in part as indicated above without any costs whatsoever.

37. Urgent xerox certified copy of this judgment if applies for, be given to the parties at the earliest.