

(2003) 03 MAD CK 0169

In the Madras High Court

Case No : Appeal Suit No's. 873/88 and 466/89

Southern Ancillaries Private Limited

APPELLANT

Vs

Southern Alloy Foundaries Private Limited

RESPONDENT

Date of Decision : 28-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 18, Order 8 Rule 1, Order 8 Rule 6, Order 8 Rule 6A, Order 8 Rule 6B

Citation : AIR 2003 Mad 416 : (2003) 2 LW 295 : (2003) 2 MLJ 56

Hon'ble Judges : M. Chockalingam, J; A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : T.K.Seshadri, in A.S. 873/88 and S.V. Jayaraman for N. Maninarayanan, in A.S. 466/89, for the Appellant;

Final Decision : Partly Allowed

Judgement

A.S. Venkatachalamoorthy, J.—The appellant viz., Southern Ancillaries Private Limited, represented by its Managing Director, filed a suit in O.S. No.47 of 1983 before the learned Subordinate Judge, Tiruvallore, against the respondent herein, praying the Court to pass a decree for a sum of Rs.1,45,790.99 with interest on Rs.1,28,450.24 at 6% per annum from the date of suit till realisation.

The respondent-defendant in A.S. No.873 of 1988 made a counter claim contending that the plaintiff is liable to pay to it a total sum of Rs.3,61,329.35 along with interest at 19% p.a. from 3.4.1981 for the delay in making payments.

2. The learned Subordinate Judge, after trial, held that,

{a} the defendant is liable to pay a sum of Rs.1,45,790.99 and interest at 6% p.a. on Rs.1,28,450.24 from the date of suit till realisation;

{b} the plaintiff, out of the amounts due to the defendant viz., Rs.3,61,329.35, to deduct Rs.17,340/- and pay the balance; and

{c} on the principal sum of Rs.71,111.30, the plaintiff is liable to pay interest at

the rate of 6% p.a.

3. The plaintiff, being aggrieved by the judgment and decree of the learned Subordinate Judge, Tiruvallore, has filed Appeal Suit No.873 of 1988.

The defendant has filed A.S. No.466 of 1989, claiming enhanced rate of interest as against the rate awarded viz., 6% p.a. by the trial court.

4. In view of the fact that the appellant in A.S. No.873 of 1988 has made only legal submissions, it is unnecessary to set out in detail the basis of the claims made and suffice to narrate the nature of the claims broadly. The plaintiff would claim that the defendant is liable to pay the sums as mentioned in the plaint, being arrears due to it in respect of various machining jobs done for over several years.

On the other hand, the defendant would contend that,

(i) 1104 Nos. of bearing shell castings have been spoiled by the plaintiff due to wrong machining, resulting in a loss of Rs.1,98,720/-;

(ii) there is failure on the part of the plaintiff to return 672 Nos. of bearing shell castings which were sent by the defendant for machining by the plaintiff; and

(iii) the plaintiff has failed to return other miscellaneous items entrusted to them on various dates for machining. Thus, the defendant would claim that, in all, the plaintiff is liable to pay the defendant a total sum of Rs.3,61,329.35 with further interest at 19% per annum from the date of counter claim till realisation.

5. For the purpose of considering the various submissions made by the appellant-plaintiff and for better appreciation, it is necessary to set out certain factual details as to what happened during pendency of the suit.

The learned Subordinate Judge framed issues on 9.9.1983. After a number of adjournments, the trial commenced on 7.12.1984 when PW-1 was examined in chief in part. Further examination-in-chief of PW-1 was done on 06.03.1985, 14.3.1985 and 29.3.1985. On 1.7.1985 and again on 2.7.1985 PW-1 was cross examined and documents viz., Exs.B-1 to B-7 were marked. On 10.7.1985, 1st witness on behalf of the defendant was examined-in-chief. The request for adjournment by the plaintiff's counsel to cross examine the defendant's witness was opposed by the defendant's counsel and the court also declined to adjourn it. An application was filed by the plaintiff, seeking permission to recall and cross examine the witness for the defendant. The same was allowed and the defendant's witness was cross examined on 30.7.1985 and 31.7.1985. On 6.8.1985. the defendant examined its 2nd witness. On 7.8.1985, the defendant examined its 3rd witness and documents were marked. On 8.8.1985, D.W.3 was cross examined and the matter was adjourned to 19.8.1985 for arguments. Thereafter, the case was adjourned twice and on 26.8.1985, the defendant filed I.A. No.464 of 1985, praying the Court to re-open the suit for the purpose of payment of Court Fee on the counter claim made by it (defendant). The trial

court dismissed the same by its order dated 9.8.1985. Questioning the correctness of the same, the defendant filed C.R.P. No.2748 of 1986 on the file of the High Court, u/s 151 CPC. By an order dated 22nd December, 1986, the Civil Revision Petition was dismissed by a learned single Judge, holding that the trial court was right in its conclusion that the petitioner had not projected the counter claim within the meaning of Order VIII Rule 6-A and 6-B of CPC. The defendant thereafter filed I.A. No.50 of 1987, seeking leave of the Court to amend the written statement, to include paragraphs 6-B and 6-C. The trial court allowed the said application. From the original records, this Court is not able to find out as to when the said amendment was allowed since the Order in I.A. No.50 of 1987 is not available in the records.

Admittedly, the defendant failed to carry out the amendment in the written statement and in fact the position is same even to-day.

6. We intend to decide the merits of the contentions raised by the appellant in A.S. No.873 of 1988 first, since if the appellant-plaintiff succeeds, the other appeal viz., A.S. No.466 of 1989 filed by the defendant automatically has to be dismissed.

7. Learned counsel for the appellant/plaintiff made the following submissions:-

{i} The defendant cannot make a counter claim after filing the written statement in view of Order VIII Rule 6-A of the Civil Procedure Code.

{ii} As per Order VIII Rule 6-A (4), the counter claim shall be treated as a plaint and governed by the rules applicable to plaints and inasmuch as the defendant failed to give the required details, the counter claim has to fail.

(iii) The defendant had made the counter claim belatedly by amending the written statement pursuant to the order in I.A. No.50 of 1987. The claim, even if has been made as required under Order VIII Rule 6-A and 6-B of CPC, is barred by limitation.

(iv) In any event, inasmuch as the defendant failed to carry out amendment in the written statement, the trial court should have considered the claims of the defendant only on the basis of the unamended written statement of the defendant.

8. To examine the first contention viz., that the plaintiff cannot make a counter claim after filing the written statement, it is necessary to refer to the relevant provisions and rulings of the various courts.

9. Order VIII Rule 6-A of CPC. reads as under:-

"6-A. 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 damages or not.

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

10. A careful perusal of the said provision would show that the CPC has not laid down that in case if the counter claim is not made in the written statement, the defendant cannot, thereafter, make the counter claim by amending the written statement.

In fact, the Supreme Court considered this question in the decision reported *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, , wherein it has been observed as under:-

" The next point that remains to be considered is whether R.6A(1) of O.VIII, Civil P.C. bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for R.6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under R.6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had 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 damages or not. The High Court, in our opinion, has misread and misunderstood the provision of R.6A(1) in holding that as the appellants had filed the counter claim after the filing of the written statement, the counter claim was not maintainable."

A learned single Judge of the Karnataka High Court had an occasion to deal with that issue in *Parvathamma v. K.R.Lokanath* AIR 1991 Karn 283 . After referring to the ruling of the Supreme Court referred supra, the Court ruled that a reading of Rules 6-A and 6-G of Order VIII of the CPC makes it clear that the counter claim has to be treated as a cross-suit and it has to be tried along with the original claim made in the suit. Since the counter claim, for all practical purposes, becomes a plaint in the cross suit and the plaintiff is entitled to file a written statement by way of answer to the counter claim of the defendant, it necessarily follows that a counter claim, if not set up in the written statement, it has to be set up at any rate before recording of the evidence commences. The Court further observed as under:-

" If a counter claim is permitted to be set up after the evidence is adduced, it would cause great prejudice to the plaintiff in the suit because at the time of adducing evidence, he will not be aware of the counter-claim, as it will not be on record. Therefore, he cannot be expected to, and he is not required to, adduce evidence having a bearing on the counter-claim. Further allowing the counter-claim to be set up after the evidence is recorded would be doing nothing but ignoring Rules 6A to 6C of Order VIII of the C.P.C. Therefore, even though the Rules do not specifically lay down that a counter claim should be filed within a particular date but, reading of Rules 6A and 6G together, would make it clear

that the counter claim cannot be permitted to be filed when once recording of evidence commences."

11. We are in respectful agreement with the view taken by the learned single Judge of the Karnataka High Court that the counter claim cannot be permitted to be filed when once recording of evidence commences. This would automatically mean that an appellate authority has no power to entertain counter-claim made for the first time at the appellate stage (Refer: Suglabai Ravayya Janjam and others v. Gurusidhya Basayya Jangam

[ALSO REFER:- I) Datta Bandu Sadale and others Vs. Sridhar Payagonda Patil and others,];

II) 2001 AIHC 2956 [Aninda Saha v. Amal Saha]; and

III] (1998) 6 Karn.L.J. 409 (D.B.) : 1999 A.I.H.C.2103 [Sahtesh Gureddi v. Thayamma)]

12. Coming to the present case, after ordering amendment, the Court straight away heard the arguments on 28.10.1987 and on subsequent days, and the judgment was ultimately delivered on 03.02.1988. Thus, we do not accept the submission of the learned counsel for the appellant that the counter claim cannot be filed subsequent to the filing of the written statement. But inasmuch as the amendment application was filed by the defendant purporting to include the prayer for counter claim after recording the evidence of both sides, this Court shall not consider the "counter claim" made by the defendant. We answer the point in favour of the plaintiff.

13. The second submission is that even the amended written statement had not projected a counter claim within the meaning of Order VIII Rules 6-A and 6-B of the Civil Procedure Code.

14. Order VIII Rule 6-A (4) CPC. reads as under:-

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

Order-VII CPC. deals with plaint. Rule-1 of Order-VII reads as under:-

"The plaint shall contain the following Particulars:-

- a) The name of the Court in which the suit is brought;
- b)
- c)
- d)
- e) the facts constituting the cause of action and when it arose;
- f)

g)

h)

i) "

15. the question is, whether even the amended written statement gives details with regard to the cause of action.

As to what paragraph 6 contains has been indicated by the learned single Judge in C.R.P. No.2748/1986. It has been clearly pointed out that the petitioner (defendant) was only putting forth what had been stated therein merely as a defence and not as a ground based on an independent cause of action for granting a decree against the plaintiff in favour of the defendant on the basis of the pleas raised as a counter claim. The decision in C.R.P. No.2748/86 has become final and is binding on both the parties. Hence, that finding cannot be canvassed in this appeal. Para-6.B of the amended written statement only mentions that the defendant had already tendered the court fee of Rs.27,100/- and that he undertakes to pay the same as per the directions of the Court. Paragraph-6.C of the written statement requests the Court to grant a decree. Thus, it could be seen that the defendant has not set out the cause of action so also as to when it arose. Once we come to such conclusion, the "counter claim" of the defendant cannot be considered, because the amended written statement had not projected a counter claim within the meaning of Order VIII Rules 6-A and 6-B of the Code of Civil Procedure. This issue is also answered in favour of the plaintiff.

16. Assuming that a counter claim has been properly made, whether the plaintiff is estopped from raising a plea of limitation, since once the amendment is allowed, it will relate back to the date of filing of the written statement.

Learned counsel for the appellant would contend that if the amendment is allowed, the same would work great injustice to the appellant because on the date when the defendant sought for an amendment to include the prayer of counter claim, the claim was admittedly barred by limitation.

On the contrary, learned counsel for the defendant would contend that an amendment once incorporated relates back to the date of the suit. He would place reliance on the ruling of the Supreme Court reported in AIR 2002 SCW 3925 (Sampath Kumar v. Ayyakannu) in support of his submission.

17. True, the general proposition of law is that once an amendment is allowed, it will relate back to the date of filing of the written statement. But, what is to be remembered is, it is not of universal application. For the purpose of formulating the legal position, we intend to proceed to consider certain rulings of the Supreme Court.

18. In the decision reported in 2001 AIR SCW 342 (Ragu Thilak D. John v. S.Rayappan), a Bench of two Judges of the Supreme Court allowed an

amendment observing that issue of limitation can be raised after allowing the amendment, that is, at the final hearing of the suit.

In a subsequent Ruling, a three Judges Bench of the Supreme Court, in *Siddalingamma v. Mamtha Shenoy* AIR 2001 SCW 4345 while considering a case arising under the Karnataka Rent Control Act, had an occasion to consider the doctrine of relation back and observed thus:-

" On the doctrine of relation back, which generally governs amendment of pleadings unless for reasons the Court excludes the applicability of the doctrine in a given case the petition for eviction as amended would be deemed to have been filed originally as such and the evidence shall have to be appreciated in the light of the averments made in the amended petition. " .

This decision of the Supreme Court has been followed by another Bench of two Judges and on which, learned counsel for the defendant has placed reliance. The said ruling is reported in AIR 2002 SCW 3925 (*Sampath Kumar v. Ayyakannu*). Learned counsel for the defendant would point out para No.10 of the Judgment, which reads as under:-

" An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases, the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma and Another Vs. Mamtha Shenoy*,

and submit that it is not open to the plaintiff to raise the plea of limitation since while allowing the application I.A. No.50/87, the Court has not granted permission to the plaintiff to raise the plea of limitation at the final disposal.

19. If we peruse the above judgments, it could be noticed that the Supreme Court has not ruled that whenever Court allows an amendment, in all cases, it relates back to the date of filing of the original statement, unless it is positively made clear in the said order itself that such amendment would not relate back. If the order is silent as to whether it would relate back or not, then the affected party can raise the question even at the trial of the suit.

20. The next submission by the learned counsel for the appellant is that since necessary amendment has not been carried out in the written statement, the Court has to proceed to consider only the averments as found in the written statement.

21. Order 6 Rule 18 CPC. reads as under:-

" Failure to amend after order,-- If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by

the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court. "

In this case, as already mentioned, the order passed in I.A. No.50 of 1987 is not available in the bundle. Whether time was granted in the said order or no time was granted to carry out the amendment, the position is same, that is to say, till date, the amendment has not been carried out in the original written statement.

22. The decision reported in *Dilbagh Rai Jarry Vs. Union of India (UOI) and Others*, was a case where plaint was amended, but however, the amended plaint was not filed within the time fixed. The defendant also did not file the additional written statement since the amended plaint was not filed within time. The lower court proceeded to consider the amended plaint. The Division Bench of the Karnataka High Court ruled that the lower court was in error in treating the amended plaint as one filed in compliance with Order VI Rule 18. In the above decision, the Court was considering a case arising under Payment of Wages Act. In that case, an amendment petition was filed and that was allowed, but however, the amendment was not carried out. The Court ruled thus:-

" The Authority found that the applicant was guilty of gross negligence. He took no steps whatever to carry out the amendment for several months after the order permitting the amendment, and thereafter, when the case was at the final stage, he suddenly woke up, as it were, from slumber, and sought to amend his application. In the circumstances, the Authority rightly refused to put a premium on this delay and laxity on the part of the appellants. "

While so holding, the Court also pointed out that while it is true that Rules 17 and 18 of Order 6 of CPC. do not, in terms, apply to amendment of an application u/s 15(2), the Authority is competent to devise, consistently with the provisions of the Act and the Rules made thereunder, its own procedure based on general principles of practice, equity and good conscience.

23. In the ruling reported in *Nareshchandra Chinubhai Patel Vs. The State of Gujarat*, , the Court ruled thus:

" Then the statute fixed that time by stating, that in such cases where no time is limited then a party obtaining such leave to amend has to amend within fourteen days from the date of the order. Thereafter, a party who does not act accordingly, embargo is placed and that embargo is that such a party will not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be"

Following this, the Gujarat High Court in *Pahali Raut Vs. Khulana Bewa and Others*, ruled that it is the obligation of the party to carry out the amendment where leave to amend has been granted. Lest the party be indifferent or rest on his oars the embargo is put that unless the amendment is carried out aforesaid,

the party shall be debarred from amending his pleadings.

24. If one carefully reads the provision viz., Order-VI Rule-18 CPC., it could be seen that if a party, after the court allowing his application for amendment of the written statement, fails to carry out amendment in the written statement, then, necessarily the Court has to proceed only on the basis of the (unamended) written statement. The fact that such defendant has separately filed an amended written statement (not carrying out the amendment in the original one), would not be of any use to him. The issue is answered accordingly.

25. We sum up the legal position as under:-

i] The defendant can make a counter claim even after filing the written statement but that should be before the commencement of recording of evidence.

ii] Generally an amendment once allowed will relate back to the date of filing of the plaint/written statement.

iii] Court may make it clear while allowing such amendment that it will not relate back to the date of filing of the plaint/written statement.

iv] Even if in the order allowing amendment it is not stated that the order would not relate back, it will be open to the aggrieved party to contend that the order (allowing amendment) would not relate back at the time of the trial of the suit.

v] If after allowing the amendment, the concerned party does not take care to amend the plaint/written statement within the period allowed or within 14 days where no period is fixed, or within the extended period, the plaintiff or defendant, as the case may be, shall not be permitted to amend after the expiration of the period and the Court has to only consider the unamended plaint or written statement.

26. Having answered all the questions if favour of the appellant-plaintiff, we uphold the various claims made by it.

27. In the result, A.S. No.873/88 is allowed. Consequently, A.S. No.466/1989 stands dismissed. There will be a decree in favour of the plaintiff/appellant for a sum of Rs.1,45,790.99 and interest at the rate of 6% p.a. on Rs.1,28,450.24 from the date of suit till realisation.