

(2004) 03 AP CK 0075
In the Andhra Pradesh High Court
Case No : AS No. 2933 of 1996

Sugesan and Co. Pvt. Ltd.

APPELLANT

Vs

Hindustan Machine Tools Ltd.

RESPONDENT

Date of Decision : 12-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A, Order 8 Rule 6A(1), Order 8 Rule 6A(4), Order 8 Rule 6C, Order 8 Rule 6E

Citation : AIR 2004 AP 428 : (2004) 3 ALD 57 : (2004) 3 ALT 267 : (2005) 2 APLJ 323

Hon'ble Judges : D.S.R. Varma, J

Bench : Single Bench

Advocate : Y. Vasudeva Rao, for the Appellant;

Judgement

D.S.R. Varma, J.—Despite service of notice, none appears for the respondent. Heard the learned Counsel for the appellant.

2. This Appeal Suit is directed against the common judgment and decree, dated 23-8-1995, passed by the Additional Subordinate Judge, Ranga Reddy District at Saroornagar, Hyderabad, only insofar as the dismissal of the counter-claim in O.S. No. 369 of 1987 (old O.S. No. 167 of 1983) is concerned.

3. The appellant herein is the defendant and the respondent is the plaintiff.

4. For the sake of convenience, the parties will be referred to as arrayed in the suit.

5. The defendant in O.S. No. 369 of 1987 filed a counter-claim also. The Court below dismissed both the suits filed by the plaintiff and while dismissing the suit in O.S. No. 369 of 1987 also dismissed the counter-claim filed by the defendant.

6. The facts, in brief, which lead to filing of the suit are as under:

The plaintiff is a public sector undertaking involved in activities of importing various materials from foreign countries. The defendant was acting as a clearing

and forwarding agent to the plaintiff and in that regard terms and conditions were reduced into writing.

7. The grievance of the plaintiff was that since the defendant violated certain terms and conditions, he filed the suit for recovery of consignments, original documents, and demurrage charges.

8. The defendant in O.S. No. 369 of 1987 filed a counter-claim for recovery of a sum of Rs. 2,20,179/- with interest and costs against the plaintiff for the services rendered by him as an agent. Initially, it appears that the defendant was intending to file a suit for the same relief and in fact a plaint under Order 7, Rule 1 was drafted, but subsequently altered the same into a counter-claim under Order 8, Rule 6-A of the Code of Civil Procedure, The counterclaim has also to be decided as a suit as per law.

9. The Court below while dismissing both the suits, dismissed the counter-claim also filed by the defendant. Hence, this Appeal Suit is only to the limited extent of the dismissal of counter-claim. The rest of the common judgment in both the suits is not under challenge.

10. The Court below dismissed the counter-claim, as could be seen from the common judgment, mainly on two grounds; firstly the counter-claim was filed after the written statement was filed, which is not permissible under Order 8, Rule 6-A of the Code of Civil Procedure, and secondly the leave of the Court as postulated under Order 8, Rule 6-A(9) was not obtained by the defendant before filing the counterclaim. Of course, incidentally, the Court below went into the aspect of merits, the effect of which would be dealt with at a latter stage of the judgment.

11. Hence, the point that falls for consideration before this Court is as to whether the Court below can dismiss the counter-claim on the grounds referred to supra?

12. Insofar as the 1st ground for the Court below to dismiss the counter-claim as not maintainable is concerned, it could be seen from the common judgment of the Court below wherein the reasoning recorded by the Court below is extracted hereunder for ready reference:

"This indicates that the counter-claim also shall be included in the written statement. After filing the written statement the defendant cannot be permitted to file a counter-claim except by way of amendment of the written statement. Section 6-A further indicates that the plea of counter-claim has to be taken before the defendant has delivered his defence or before the time limited for delivering his defence has expired. By this it is abundantly clear that the counterclaim must be filed before the written statement or statement. In the instant case the defendant has filed his written statement on 14.9.1983 and filed the counter-claim on 26.2.1985."

13. From the above, it is clear that the Court below was under the impression that the counter-claim must be filed before filing the written statement or the

same be included in the written statement, but not after filing of the written statement.

14. In this regard, it is relevant to look into the provisions of Order 8, Rule 6-A of the Code of Civil Procedure:

6A. 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 counterclaim 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.

(2) Such counter-claim shall have the same effect a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

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

15. From a plain reading of the above provisions, it is abundantly clear that the defendant in addition to his right of pleading set off can also file a counter-claim against the plaintiff regarding any right or claim in respect of a cause of action that accrues to the defendant against the plaintiff, either before or after filing of the suit. But, it should be done by the defendant before he files the written statement or before the time granted by the Court for filing the written statement. In other words, the defendant has a right to make a counterclaim regarding cause of action that accrued either before filing of the suit or subsequent to the filing of the suit, The only limitation is that such counter-claim should be presented before the written statement is filed or within the time prescribed by the Court for filing written statement.

16. But, the Court below understood the provisions of Rule 6-A(1) as if counterclaim can be permitted to be filed along with the written statement or otherwise, except by way of seeking an amendment to the written statement. Therefore, the Court below gave a categorical finding that the counter-claim must be filed before filing of the written statement or being included in the written statement and not subsequent to the filing of the written statement.

17. As already noticed, what all envisaged by Rule 6-A(1) of Order 8 is, the defendant can make a counter-claim in respect of cause of action that accrues to him either before or after filing of the suit. Therefore, it is the time of accrual of

cause of action, whether or not before filing of the suit or subsequent to the filing of the suit. The only limitation is, such a counter-claim irrespective of time of accrual either before or after filing of the suit must be made before filing of the written statement. In other words, it is sufficient for making a counter-claim if the cause of action accrues before filing of the written statement.

18. To put it in a different way, the cause of action may accrue to the defendant even after filing of the suit but before filing of the written statement, including the time limited for filing a written statement.

19. As already noticed, what all envisaged by Rule 6-A(1) Order 8 of the Code is that the defendant can make a counter-claim in respect of cause of action that accrues to him either before or after filing of the suit. Therefore, the thrust that can be seen from the language employed in Sub-rule (1) of Rule 6-A is the time of accrual of cause of action for the defendant to make a counter-claim and such cause of action need not also be necessarily in relation to the cause of action of the plaintiff. The said cause of action of the defendant in order to make a counterclaim may be in line with the cause of action of the plaintiff or a different cause of action altogether. The object and intention of the legislation is, in other words the upper limit of the accrual of cause of action for filing counter-claim had been determined as the time fixed for filing the written statement.

20. In this context, the Apex Court in Jag Mohan Chawla and another Vs. Dera Radha Swami Satsang and others, , while dealing with the scope of object of Rule 6-A observed as under:

"It is true that in money suits, decree must be conformable to Order 20, Rule 18, CPC but the object of the amendments introduced by Rules 6-A to 6-G are conferment of a statutory right on the defendant to set up a counter-claim independent of the claim on the basis of which the plaintiff laid the suit, on his own cause of action. In Sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite Court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the

legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial."

21. The above observations made the situation clear to the extent that the causes of action of the suit and counter-claim need not necessarily be inter related or there need not be any nexus between the suit and the counter-claim, but, the only limitation is the cause of action should arise before the time fixed for filing the written statement.

22. A cursory reading of the provisions of Rule 6 A gives an impression that counter-claim can be filed only before the written statement is filed and the same is not permissible if the written statement was already filed by the defendant.

23. There might be a hypothetical situation where the cause of action for the defendant accrues on the last date of the period granted by the Court expires and at that point of time and upon realisation of such cause of action, there might hardly be any time to file a counter-claim and consequently the defendant has to file, necessarily a separate suit.

24. In this context, it is further necessary to have a glance at Sub-rule (4) of Rule 6-A, which postulates that a counterclaim can be treated as a plaint and is governed by all the rules that are applicable to plaints.

25. Now, the situation is settled by the Supreme Court to the effect that accrual of cause of action is the criteria and the same can be made a subject-matter of a counter-claim on or before the date fixed for filing the written statement.

26. Now, the further question that sprouts up for consideration is when a cause of action accrues before the time of filing of the written statement can a counterclaim be filed even after the written statement is filed.

27. Since, already noticed, a counterclaim shall be treated as a plaint and the same is governed by the rules that are applicable to plaints, all principles including the general law of limitation that are applicable for filing of a plaint are also applicable for a counter-claim. In other words, a counter-claim has to be treated as if it is a suit or as a cross suit, and the object, apparently, is to enable the Court to pronounce a final judgment in the same suit instead of driving one party to file a separate suit, which may proliferate the litigation. A counter-claim has to be treated as a cross suit, which contain all features of regular plaint, in my considered view, can be filed even after the written statement is filed subject to the fulfillment of all the conditions that are applicable to a regular plaint.

28. It is to be further seen that Rule 6-C deals with exclusion of a counter-claim and the same is extracted hereunder for ready reference:

"6-C: Exclusion of counter-claim:--Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court

for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit."

29. The said provision envisages that where a defendant sets up a counterclaim, at the instance of the plaintiff, at any time before the issues are settled in relation to the counter-claim, upon an enquiry such counter-claim can be excluded by the Court.

30. It is to be further seen that Rule 6-E deals with default of plaintiff to reply to counter-claim and the same is extracted hereunder for ready reference:

"6-E: Default of plaintiff to reply to counter-claim:--If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit."

31. It is to be further seen that Rule 6-G deals with rules relating to written statement to apply and the same is extracted hereunder for ready reference:

"6-G: Rules relating to written statement to apply:--The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim."

32. In the instant case, it is on record that the plaintiff did not file any rejoinder as postulated under Rule 6-E. Hence, it can be inferred that the plaintiff did not object to the filing of counter-claim by the defendant.

33. The said provision makes it clear that all the rules that are applicable to the filing of a written statement are equally applicable to the written statement to be filed in answer to a counter-claim.

34. The only thing that remains is whether there is any statutory prohibition for the defendant to make a counter-claim even after the written statement is filed.

35. As already pointed out, Sub-rule (1) of Rule 6-A envisages that the cause of action for the purpose of making a counterclaim can be extended up to the date of filing of the written statement.

36. The Code does not deal with a situation, what should happen when a counter-claim is made after the filing of the written statement with regard to the cause of action that accrued either before or after filing of the suit but within the period of limitation of filing the written statement. In my view, the provisions of the Code, which are basically procedural in nature, are silent on this aspect. The above-referred provisions cannot be read in isolation.

37. A conjoint reading of Sub-rules (1) and (4) of Rule 6-A and Rules 6-C, 6-E and 6-G, in my considered view, would only suggest that a counter-claim, being a suit in status, subject to the law of limitations can be entertained even after the written statement is filed by the defendant, of course and however, subject to the condition that such cause of action arises either before or after filing of the

suit, the upper limit of which, is, filing of the written statement.

38. Sub-clause (4) conspicuously states that a counter-claim shall be treated as a plaint and the rules that are applicable to the plaints are also applicable to a counterclaim. Hence, it suggests that any such counter-claim is filed even after filing of the written statement will be subject to all such Rules that are applicable to the plaints, which implies that the law of limitation also would be made applicable. When all the rules, including the law of limitation, are imperatively to be made applicable, there is discernible reason to give a purposive interpretation, if so, the only possible interpretation that can be given and the cumulative effect of the relevant provisions, referred to already, would be, in my considered view, that a counter-claim, even if filed, after the written statement is filed, can be entertained as a regular plaint or a cross suit, subject to the satisfaction of all the Rules that are applicable to the institution of a regular suit.

39. This aspect can be dealt with from a different dimension also. What will happen to a counter-claim, which is filed even after the written statement is filed, but beyond the statutory period of limitation ?

40. The answer would be simple viz., such counter-claim has to be rejected as not maintainable, since filed beyond the period of statutory limitation basing on the nature of the suit or counter-claim.

41. In other words, just because a counter-claim is permitted to be filed even after filing of the written statement, it does not automatically follow that the counterclaim should be entertained faithfully. Such counter-claim has to be decided on the touchstone of other Rules that are applicable to the filing of a regular plaint.

42. The main object, as already noticed, from the judgment of the Supreme Court, referred to above, is to avoid a second suit being filed and to enable the suit and the counter-claim be disposed of in the same trial.

43. The above view gain strength from the observation of the Supreme Court in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, , in the following terms:

"The next point that remains to be considered is whether Rule 6-A(1) of Order VIII of the CPC bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6-A(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 Rule 6-A(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 Rule 6-A(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. The finding of the High Court does not get any support from Rule 6-A(1) of the Code of Civil Procedure. As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter-claim was, therefore, quite maintainable. Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit u/s 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter-claim."

44. The other ground for the Trial Court to dismiss the counter-claim was that leave of the Court was not obtained as postulated under Order 8, Rule 9 is also not a valid reason to dismiss the counterclaim.

45. Rule 9 (prior to Amendment Act 22 of 2002) deals with a situation where the parties to the proceedings intends to take further pleadings subsequent to the filing of the written statement other than by way of defence to set off shall necessarily take leave of the Court except in a case where the defence to set off or a counterclaim. This is in no way a valid ground, as not relevant, for the trial Court to reject the counter-claim.

46. In Ramesh Chand Ardawatiya Vs. Anil Panjwani, , the Apex Court while dealing with Rule 6-A, observed as under:

"The words go to show that a pleading by way of counter-claim runs with the right of filing a written statement and that such right to set up a counter-claim is in addition to the right of pleading a set-off conferred by Rule 6-A set off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither can the written statement be filed as of right nor a counterclaim can be allowed to be raised, for the counter-claim under Rule 6-A must find its place in the written statement."

47. A reading of the above observations gives an impression that the view taken by their Lordships in the above decision runs, slightly, contrary to the principles laid down in Mahendra Kumar's case (supra).

48. In this context, it is necessary to look into the facts of Ramesh Chand's case (supra).

It was a case where after the suit was instituted, the defendant did not even file the written statement and he was being proceeded ex parte. The application filed by the defendant for setting aside the exparte proceedings was also rejected by the Trial Court as also by the High Court in revision, despite which the defendant therein adopted to make a counter-claim. In those circumstances, their Lordships in Ramesh Chand's case (supra) made the above observations.

49. Further, Mahendra Kumar's case (supra) also has been brought to the notice of the Apex Court. While dealing with the said case, and also another case, and a view taken thereof, their Lordships in Ramesh Chand's case (supra) at Paragraph No-30 observed as under:

"In Mahendra Kumar case (supra) counterclaim was sought to be brought on record after the filing of a written statement which was turned down by the Trial Court upon a misreading of Rule 6-A(1) that the counterclaim filed after the filing of the written statement was ipso facto not maintainable. This Court upset such erroneous view by clarifying the legal position, apparent on a bare reading of the relevant provision that the only requirement of Rule 6-A(1) was that the cause of action for the counterclaim should have arisen before the filing of the written statement and if that was so, the counter-claim was not simply excluded. In Shanti Rani Das Dewanjee, case (supra) the brief order of this Court deals with the situation that the right to file a counter-claim does not come to an end by filing of the written statement once. None of the two decisions deals with a situation as before us and the question of law arising therefrom, namely, whether it is permissible to raise and plead a counter-claim though the defendant has not filed a written statement and has also lost his right to file the same. On the contrary, in both the cases cited by the learned Senior Counsel for the appellant, there was a written statement filed by the defendant available on record and the counter-claim was sought to be pleaded in addition to the defence taken in the written statement. It is difficult to conceive the defendant being conferred with a right to attack the plaintiff by way of a counterclaim in that very suit in which he has been held entitled not even to defend himself by filing a written statement and pleading a positive defence to defend himself against the relief sought for by the plaintiff."

50. From the above, it could be seen that there is a basic difference between the facts and circumstances of Mahendra Kumar's case (supra) and Ramesh Chand's case (supra) viz., in the former written statement was filed and in latter there is no written statement at all and the suit was being proceeded with ex pane and in those circumstances only, the above observations, obviously were made by their Lordships.

51. Therefore, having regard to the fundamental and vital differences in the facts and circumstances in both the cases Mahendra Kumar and Anr. v. State of Madhya Pradesh and Ramesh Chand Ardawatiya v. Anil Panjwani, (supra), I am of the considered view that the observations made by their Lordships in Ramesh Chand's case (supra) and the principles laid therein, though unexceptionable, are not applicable to the present set of facts and circumstances of the case.

52. The facts in the case on hand are similar to the facts in Mahendra Kumar's case (supra). In both the cases, the written statements were filed and having regard to that context and facts the main question that had fallen for consideration in Mahendra Kumar's case (supra) was as to whether a counter-claim can be filed even after the written statement is filed.

53. But, in Ramesh Chand's case (supra), the question that arose was as to whether a counter-claim can be permitted to be filed when no written statement was filed at all. Such a situation was elaborately dealt with by their Lordships in Ramesh Chand's case (supra).

54. As already pointed out, since the facts and circumstances in Mahendra Kumar's case (supra) are akin to the facts and circumstances of the present case, I do feel it appropriate to apply the principles laid down by their Lordships in Mahendra Kumar's case (supra).

55. Of course, the Trial Court, incidentally, as pointed out earlier, had gone into the merits of the case to some extent, and the reasoning thereby is not exhaustive. However, the main reason for declining to entertain the counter-claim was on two grounds, which are already referred to above. Therefore, it is necessary for the Trial Court to have a fresh adjudication on the counter-claim treating the same as maintainable and record a finding basing on the evidence on record.

56. For the foregoing reasons and in the light of the judgments of the Supreme Court, referred to supra, I am of the considered view that the Court below was in error in holding that counter-claim was not maintainable.

57. Therefore, the common judgment of the Trial Court insofar as the suit in O.S. No. 369 of 1987 and the decree in the said suit are liable to be set aside, only to the extent of dismissing the counterclaim, and only insofar as the reasoning and the eventual conclusion to dismiss the counter-claim is not maintainable and accordingly they are set aside. However, it is made clear that the findings recorded by the Trial Court in O.S. No. 339 of 1986 remain unaltered.

58. In the result, the appeal suit is allowed only to the extent indicated above. However, there shall be no order as to costs.