

Bombay High Court

Kisan Sahakari Punarvasan ... vs N.M. Gowaikar And Co. on 26 February, 1971

Equivalent citations: AIR 1972 Bom 150, (1971) 73 BOMLR 817

Bench: Vimadalal

ORDER

1. The only question that arises in this Revision Application is whether court - fees are payable in respect of an equitable set - off. The plaintiff has filed this suit as a building contractor for the recovery of over rupees one lakh, interest and costs. In paragraph 23 of the written statement filed on behalf of the defendant, a co - operative society which had entrusted the work of construction of certain buildings in Poona to the Plaintiff, it has been stated that the plaintiff had not done work according to the contract and that many of the items in the contract had been left undone, and in para 31 of that written statement it is pleaded that loss had been caused to the defendants by reason thereof. It is further pleaded in the said paragraph that, although the loss was much more, the defendants were restricting their claim "by way of equitable set - off" to Rs. 50,000/-. The plaintiff thereafter filed an application dated 11th June 1968 (Ex. No. 11) in which in addition to asking for particulars of the set - off claimed by the defendants, he prayed that the defendants' claim for set - off should be rejected for want of court - fees. On that the learned Civil Judge (S. D.) at Poona passed an order dated 3rd September 1968 directing the defendants to give particulars and ordering them to pay court - fees on the equitable set - off claimed by them on or before 13th September 1968. It is from that order that the defendants have approached this court in revision.

2. Apart from the fact that the defendants have, in terms, stated that the set - off claimed by them is an equitable set - off, it does sound in damages and, therefore, though they have sought to limit it to a specific amount, in my opinion, it is really a claim for an unascertained sum arising out of the same transaction and is in the nature of an equitable set - off. On behalf of the defendants reliance was placed on the decision of the Allahabad High Court in the case of Madan Garg v. Bohra Ram in which the view taken was that court - fee is not payable on an equitable set - off. The plaintiff in that case had sued for arrears of rent to which the defendant pleaded a set - off for the value of timber supplied by the defendant to the plaintiff as a legal set - off under Order 8, Rule 6, Civil P. C. The trial Court allowed that set - off though no court - fee had been paid thereon. On Revision, a single judge of the High Court treated it as an equitable set - off and held that the trial court had not acted "illegally" in allowing the set - off observing as follows (at p. 117) :-

"If however the set - off could be claimed as an equitable set - off there is no reason why the Court should not have allowed it without payment of a court - fee. A legal set - off requires a court - fee because it is a claim that might be established by a separate suit in which a court - fee would have to be paid. But there is no such fee required in the case of equitable set - off which is for an amount that may equitably be deducted from the claim of the plaintiff where a court - fee has been paid on the gross amount. An equitable set - off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim."

With respect of the learned Judge who decided that case, I am unable to appreciate his reasoning in the passage quoted above. A legal set - off which must be for an ascertained amount may though it

need not, arise out of the same transaction as the plaintiff's claim and be in the nature of a deduction from the claim of the plaintiff. Even so, court - fee would have to be paid on the amount of the legal set - off, so claimed. On the other hand, an equitable set - off, though for an unascertained sum, may also be in respect of a claim that could be established by a separate suit in which court - fee would have to be paid. Neither the fact that an equitable set - off arises out of the same transaction as the plaintiff's claim, nor the fact that an equitable set - off would be for an amount that may be deducted from the claim of the plaintiff, can justify any distinction being made between an equitable set - off and a legal set - off in regard to liability to court - fees. I, therefore, do not agree with the view taken by the Allahabad High Court in Madan Mohan's case. It may be stated that, as against the view of the Allahabad High Court, the Nagpur, Madras and Calcutta High Courts have taken the view that court - fee is payable on an equitable set - off. It is, however, not necessary for me to deal with the decisions of those Courts in view of the fact that the question has been considered by two decisions of this Court, one of a single judge, and the other of a Division Bench approving of the view taken by the single judge, and I am in agreement with the view taken in those two cases. In the case of *Wilrow v. Mahadeo Govind*, 45 Bom LR 516 = (AIR 1943 Bom 227), the plaintiff sued the defendant for recovery of Rs. 544/- in respect of rent, and the defendant claimed to set - off Rs. 800/- being the cost of construction of an oven in the house which the plaintiff - landlord had agreed to pay. The question as to whether court - fees were payable on the defendant's set - off having arisen. Macklin, J. took the view that the defendant's claim was not really for an equitable set - off as contended by him, but was for an ascertained sum by way of legal set - off, and court - fees would, therefore, be payable by him thereon. The learned judge, however, also proceeded to consider the question of payment of court - fee on the assumption that the claim was a claim in the nature of an equitable set - off and took the view that, even so, court - fee would be payable by the defendant thereon. He did not agree with the view taken by the Allahabad High Court in the case of referred to above, but agreed with the contrary view taken by the Madras High Court in the case of *Lakshmanan v. Ramanathan* ILR 58 Mad 338 = (AIR 1935 Mad 115 (1)) and rejected the contention of the learned advocate for the defendant that a claim to an equitable set - off does not require payment of court - fees. It does appear that, having regard to the view taken by Macklin, J. that the claim was really one by way of legal set - off, his observations on the question as to whether court - fees are payable on a claim by way of equitable set - off are obiter dicta.

3. In the case of *B. S. Lokhande v. Kashinath C. R. A.* No. 566 of 1949, D/- 17-1-1950 (Bom) the same question arose before a Division Bench consisting of Rajadhyaksha and Shah, JJ. The plaintiff in that case claimed a sum of Rupees 700 due at the foot of an account in respect of goods supplied to the defendants from time to time. Several defences were pleaded by the defendants in answer to that claim, one of them being that out of the goods supplied by the plaintiff many had been returned to him, and that those were valued at a sum of Rs. 1008 and the defendants, therefore, claimed a set - off in respect of those goods. In order however to bring the case within the jurisdiction of the Court of Small Causes at Poona, the defendants had reduced the claim for set - off to a sum of Rs. 1000/-. The learned Judge of the Court of Small Causes, however, took the view that the defendants were not entitled to plead the set - off without payment of the requisite court - fee as required by Art 1 of Schedule I of the Court - fees Act, 1870. The matter having come to this Court in revision, Rajadhyaksha, J. delivering the judgment of the Bench distinguished an earlier decision of this Court in the case of *Tayabali v. Atmaram*, (ILR 38) Bom 631 = (AIR 1914 Bom 299) on the ground

that the said decision was governed by the law as it stood before Art 1 Schedule I of the Court - fees Act, 1870, was amended, and then proceeded to consider the decision of Macklin, J. in the case of Wilrow v. Mahadeo Govind which has already been dealt with above and, in terms expressed agreement, with the view taken by Macklin, j. therein, observing that that was also the view that had been taken in various decisions by the Nagpur, Madras and Calcutta High Courts. In the course of the judgment, Rajadhyaksha, J., after expressing a doubt as to whether the set - off claimed in the said case by the defendants was an equitable one in so far as they had claimed a definite sum of Rupees 1000, stated that the claim should really be regarded as being a legal set - off and not an equitable one, and that there was no dispute that on a legal set - off court - fees would have to be paid. Thereafter, the learned judge stated that, even assuming that the claim was for an equitable set - off, the question would be whether, under the prevailing law, court - fees would have to be paid thereon. In my opinion, therefore, in the judgment in the case before the Division Bench also, the view taken in regard to payment of court - fees on an equitable set - off was in the nature of an obiter dictum.

4. I agree with the obiter dicta of Macklin, J. in Wilrow's case and of the Division Bench in Lokhande's case. On principle, if the plaintiff filing a suit for an unascertained sum of money by way of damages has to pay court - fees, there is no reason why a defendant who pleads a set - off in respect of an unascertained amount should not be called upon to pay court - fees. In Art. 1 of Sch. I of the Court - fees Act, 1870, it was stated that court - fees at the rate specified in that Article had to be paid on a plaint, written statement pleading a set - off or counter claim, and on certain other documents specified therein. The term "set - off" in that Article was not limited to a legal set - off. Under Section 2(c) of the Bombay Court - fees Act, 1959, which came into force in this State on 1st August 1959, the term "plaint" is defined as including a written statement pleading a set - off or counterclaim, and there is no reason whatever for restricting the term "set - off" in that definition to a legal set - off. The position has, therefore, remained unchanged after the coming into effect of the Bombay Court - fees Act, 1959, and both on principle as well as on the view taken in the obiter dicta in the two decisions of this court referred to above, which were based on the Court - fees Act, 1870, and with which I am in agreement. I hold that court - fees are payable not merely on a legal set - off, but on an equitable set - off as well. The view taken by the lower court in the present case is, therefore, correct and this Revision Petition must be dismissed with costs. The petitioner may pay the costs of the Government Pleader also. I may, for the sake of clarification, state that no point except the point in regard to the liability to pay court - fees on the equitable set - off claimed by the defendant was argued before me.

5. Petition dismissed.