Supreme Court of India
Laxmidas Dahyabhai Kabarwala vs Nanabhai Chunilal Kabarwala And ... on 27 March, 1963
Equivalent citations: 1964 AIR 11, 1964 SCR (2) 567
Author: N R Ayyangar
Bench: Ayyangar, N. Rajagopala

PETITIONER:
LAXMIDAS DAHYABHAI KABARWALA

Vs.

RESPONDENT:
NANABHAI CHUNILAL KABARWALA AND ORS.

DATE OF JUDGMENT:
27/03/1963

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
DAS, SUDHI RANJAN
SARKAR, A.K.

CITATION:
1964 AIR 11 1964 SCR (2) 567

ACT:
Civil Procedure-Amendment of Pleadings-Suit for decree on settled accounts-Counter-claim made in written statement-Court-fee paid as on plaint-Court if can treat counter-claim as plaint in cross-Suit-Amendment when to be refused or allowed-Plaint in cross-suit when sould be treated as having been filed-Liability of surviving partner-Goodwill of a,firm--Exercise of discretion by trial court, when can be interfered with--Constitution of India Art. 136-Partnership Act. 1932 (9 of 1932) s. 37-Code of Civil Procedure, 1908 (Act 5 of 1908) O. 6, r.17, O. 8, r. 6

HEADNOTE:
The appellant filed a suit for the enforcement of an agreement to the effect that a partnership between himself and one Bai Itcha since deceased had been dissolved and that the partners had arrived at a specific amount to be paid by the appellant in full satisfaction of the share of Bai Itcha in the partnership. The respondents who were the heirs of Bai Itcha, not only denied the allegations in the plaint but also made a counter-claim in the written statement for the rendition of account against the appellant and paid court fee on the counter-claim as on a plaint. At a later stage,

the respondents made a prayer to treat the counterclaim as a plaint in a cross-suit, The trial court dismissed the suit on the ground that appellant had failed to prove the
568
agreement. The counter-claim was also dismissed on the ground that it did not lie and the prayer of the respondents to treat the counter-claim as a plaint in a cross-suit was also rejected, the respondents being asked to seek their relief by filing a fresh suit. The respondents appealed against the order of the trial court but their appeal was dismissed. However, the High Court accepted their appeal and set aside the dismissal of the counter-claim and remanded the case to the trial court with a direction that the counterclaim be treated as a plaint in the cross-suit and the reply of the plaintiff to the counter-claim be treated as a written statement to the cross-suit and the cross-suit be tried and disposed of in accordance with law. The appellant came to this Court by special leave.

Held per Das and Ayyangar JJ.) that the order of the High Court was correct and there was no ground for interference with the same under Art. 136 of the Constitution. There was no miscarriage of justice. It was pointed out that if what is really a plaint in a cross-suit is made a part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. However, the appellant was allowed to file a fresh written statement. The respondents were also allowed to file a fresh plaint in place of their counter-claim provided there was no substantial variation in the allegation to be made or the relief to be claimed by them.

Held also, that the curcial date for the purpose of determining when the plaint in a cross-suit should be treated as having been filed was not the date on which the conversion was ordered but the date on which the written statement containing the counterclaim was filed.

Held also, that save in exceptional cases, leave to amend under Or. 6, R. 17 of the Code of Civil Procedure will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. This rule can apply only when fresh allegations are added or fresh reliefs are sought by way of amendment. However, where an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, it had never been held that the question of a bar of limitation is one of the question
569
to be considered in allowing such clarification of a matter already contained in the original pleading. The decisions holding that amendments should not ordinarily be allowed

beyond the period of limitation did not apply to the present case.
Section 37 of the Partnership Act lays down the substantive law realating to the liability of a surviving partner who without a settlement of account with the legal representatives of a deceased partner, untilises the assets of the partnership for continuing the business as his own. This section cannot stand in the way of conversion prayed for by the respondents.
The good-will of a firm being part of the assets has to be sold just like other assets before the accounts between the partners can be settled and partnership would up.
Even if the trial court and the first appellate court exercised a discretion in refusing the respoildent's prayer to treat the counter-claim as a plaint in a cross-suit, they did so on grounds not legally tenable and the High Court was justified in ignoring the exercise of their discretion.
Saya Bya v. Maung Kyaw Shun (1924) 1. L. R. 2, Rangoon 276, Currimbbhoy and Co. Ltd. v. Creet (1932) L.R. 60 1. A 297, (Main) Pir Bux v. Mohomed Tahar A.I.R. 1934 P. C. 235. Gour Chandra Goswami v. Chairman of the Nabadwip Municipality A. I. R. 1922 Cal. 1 and Baj Bhuri v. Rai Ambalal Chotalal First Appeal No. 737 of 1951 (Bombay High Court), referred to.
Per Sarkar J. A defendant has no right apart from a statutory provision to set up a counter-claim strictly so called that is, one to enforce a right independent of and unconnected with the claim in the plaint. Nor has he any right whatever to claim that such a counter-claim made by him in his written statement be treated as a plaint in a cross-suit. A court permitting a counter-claim to be treated as a plaint in cross-suit does so merely by way of granting an indulgence. Where a counter-claim is so treated as plaint, the plaint must be deemed for the purposes of the law of limitation to have been filed on the day the court made the order permitting it to be so treated.
Bai Bhuri v. Rai Ambalal Chotalal, First Appeal No. 737 of 1951 (Bombay High Court) dissented from.
570

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 759 of 1962. Appeal by special leave from the judgment and order dated August 22, 23, 1961 of the Gujarat High Court, in Appeal No. 29 of 1960.

S.T. Desai and A. G. Ratnaparkhi, for the appellant. M.H. Chhatrapati, J. B. Dadachanji, 0. C. Mathur and Ravinder Narain for the respondents.

1963. March 27. The judgment of Das and Ayyanger 11. was delivered by Ayyangar J. Sarkar J.

delivered a separate judgment.

AYYANGAR J.-The principal point that is raised for consideration in this appeal by special leave is as regards the legality and propriety of an order by the learned Single judge of the High Court of Gujarat directing a counter-claim filed by the respondents to be treated as a plaint in a cross-suit and remanding the case for trial on that basis. The facts necessary to appreciate the points raised before us are briefly as follows : The plaintiff, who is the appellant before us, and one jamnadas Ghelabhai were partners in a business commenced in October 1913 and carried on under the name and style of Bharat Medical Stores at Broach, the two partners having equal shares. During the subsistence of the partnership and from and out of the assets thereof an immovable property-a house was purchased at Broach in July 1932, jamnadas Vhelabhai died on August 12, 1943 but the partnership business was continued thereafter by the plaintiff-appellant taking in Bai Itcha- the widow of the deceased partner-in his place. A change was, however, made in the shares of the two partners, in that Bai Itcha was given only a 1/4 th share as against the 1/2 share enjoyed by her husband.

With this alteration the same business was carried on between the two partners. In the early part of 1950 Bai Itcha fell ill. It was the case of the plaintiff that there were negotiations between the two partners as regards the winding up of the firm and it was his further case that on July 9, 1950 two matters were the subject of a concluded agreement with her. These were (1) that the partnership would stand dissolved from July 15, 1960 and that Bai Itcha would receive from the plaintiff a sum of Rs. 13,689/- in full satisfaction in respect of the capital contributed by her as well as for her share of the profits of the firm, (2) that the plaintiff was to take over the immovable property in Broach purchased by the firm in July 1932 for its book value and that he should on that account pay over to Bai Itcha Rs. 2,202/9/9 being a moiety of the book value. The agreement was stated to be wholly oral and was admittedly not reduced to writing. Before, however, anything was done in pursuance of the alleged arrangement, Bai Itcha died on July 31, 1950 leaving as her heirs the respondents who were the sons of a brother of jamnadas Ghelabhai -Bai Itcha's husband. It was the further case of the appellant that after the death of Bai Itcha respondents I and 2 examined the accounts of the partnership and after satisfying themselves that Rs. 13,689/- was the proper figure of the sum due to the deceased partner agreed to receive the same in full satisfaction of the amount to which they were entitled in respect of that item. All these allegations about the agreement with Bai Itcha and the confirmation by them of the said agreement after her death were, however, denied by the respondents who insisted upon their rights under the law as legal representatives of the deceased partner.

The appellant consequently filed a suit in the Court of the Civil judge at Broach for enforcing the agreement which he alleged and for relief on that basis. It would be necessary to set out and discuss in detail the reliefs claimed in this suit as the same have a materialbearing on some of the arguments addressed to us. We shall, however, revert to this after completingthe narrative of the proceedings up to the stage of the appeal before us. To this suit the respondents who had been impleaded as defendants filed a Written Statement which was mainly concerned with denying the truth of the agreement with Bai Itcha and the story regarding the subsequent confirmation by themselves and they wound up the statement by a counter-claim which might usefully be extracted even at this

stage. In paragragh 25 of the Written Statement they pleaded :

> "25. In view of the above facts the plaintiff suit may please be dismissed and the defen- fendants costs may be awarded. The defendants further pray that if the Honourable Court holds that the said partnership was dissolved upon the death of Bai Itcha on date 31-7-50, the same may be legally wound up under the supervision and directions of the Honourable Court. And necessary instructions for the purpose may please be given, the accounts upto the date of complete winding up may be lawfully taken, the claims of the parties against one another may be ascertained and the costs of the defendants may also be awarded. rhe defendants have filed this counter claim for this purpose."

The concluding paragraph-paragraph 26 contained details of the valuation of the counterclaim and of the court fee they paid for the relief which they sought in the preceding paragraph.

The plaintiff thereafter filed a reply to the counter-claim and of the contentions raised in this reply it is sufficient if at this stage we notice the plea that a counter-claim was not legally maintainable and they prayed for the dismissal of the counter-claim with costs. The Civil judge framed the necessary issues but most of them related to the claim made in the plaint on the basis of the alleged agreement and Issue No. 15 relating to the counter-claim and the plaintiff's objection to the maintainability thereof ran :

"15. Are defendants entitled to the counter- claim made by them ?"

On these pleadings and the issues as framed the parties went to trial. By judgment dated November 30, 1954 the Civil judge recorded findings on the several issues relating to the plaintiff's claim and dismissed the plaintiff's suit on the ground that he had failed to prove the agreement. Coming to Issue No. 15 relating to the counter-claim the learned judge considered, in the first place, a contention urged by the defendants-the respondents before us-that the suit was virtually one for dissolution and the taking of accounts on a particular basis, viz., on the basis of a settled account and that when the plea of settled accounts failed the suit got reduced into a plain one for the taking of the accounts of a dissolved partnership and on that footing the defendants had a legal right to have the relief of accounting. The learned judge negatived this contention basing himself on the allegations in the plaint and holding the real nature of the suit to be one for the specific enforcement of the agrement set up. He next considered the question whether the counter-claim was admissible in law and after an examination of the decisions on the point reached the conclusion that in the absence of any specific provision therefor in the Civil Procedure Code and in the light of certain decisions of the Privy Council and of the High Courts a counterclaim was not admissible in the Muffasil. A prayer by the defendants to treat the counter claim as a plaint in a cross suit by them was rejected. The learned judge therefore dismissed the counter-claim but he added that the defendants could bring a separate suit for accounts and for a share of the profits of the dissolved partnership if so advised.

The plaintiff was content with the judgment which he obtained on his claim but the defendants preferred an appeal to the District judge Broach questioning the correctness of the order dismissing the counter-claim as not maintainable. The learned District judge examined the authorities and reaching the same conclusion as the trial judge, dismissed the appeal. Thereafter the defendants brought the matter before the High Court by way of a second appeal and before the learned Single judge who heard it an oral application was made to treat the counterclaim made in paragraph 25 of the written statement as the plaint in a cross- suit and that the same should be tried and disposed of as if it were such a suit. An objection was raised by the plaintiff- respondent before that Court to the granting of this prayer on various grounds, the main one being that on the date when the matter was before the High Court when such an order was being prayed for--in August 1961, the claim for accounts was hopelessly barred by limitation. The learned Judge, however, following an unreported decision rendered by a Division Bench of the Bombay High Court in September, 1956 allowed the application and passed an order setting aside the dismissal of the counter-claimand remanding it to the trial judge "with a direction that the counter-claim be treated as a plaint in the cross-suit and that the reply of the plaintiffs to the counter-claim be treated as a written statement to the cross-suit and that the cross-suit be tried and disposed of in accordance with law", adding that the issues arising in the cross-suit which also arose in the suit and which had been disposed of already should not be tried over again and the final decisions on those issues reached in the suit and the appeal therefrom shall be binding on the parties in the cross-suit. It is the correctness of this order by the learned Single judge that is challenged in this appeal.

The first submission made by Mr. Desai, learned Counsel for the appellant was that no counter-claim was maintainable in the Muffasil. There is not much controversy before us about this point and in view of the course of the proceedings it really does not arise for consideration, though we must add that we are not to be understood as doubting the two propositions that a right to make a counter-claim is statutory and that the present case is admittedly not within O.Vlll. r. 6, Civil Procedure Code. We say it does not arise because a finding adverse to its maintainability was recorded by the trial Judge and by the District judge on appeal on a consideration of the decisions of the Privy Council and the various High Courts and when the matter was in the High Court the learned judge also proceeded on the basis that a counter-claim was not admissible and the respondents have not preferred any appeal therefrom and that has become final. We might therefore proceed with the points arising in the case on the basis that a counter-claim is not admissible in the Muffasil, and the only question is whether the Court could treat a counter-claim as the plaint in a cross-suit.

Learned Counsel for the respondents however made two alternative submissions : (1) That even without converting the counter-claim into the plaint in a cross suit the defendants in the present case were entitled to the taking of the accounts of the dissolved partnership on the pleadings as they stood, and (2) that in the circumstances of the case the order of the learned judge directing the conversion was legal and was proper and justified on the merits. We consider that the first of the above submissions has no substance. The point urged was that the plaintiff's suit was in substance one for the taking of the accounts of the dissolved partnership, though in form the primary relief claimed was for a decree or) the basis of a settled account. It was submitted that when that primary relief, viz., a decree on a settled account was rejected, because the facts alleged were not proved,

there remained a plaint praying for an account of which the defendant was entitled to take advantage and claim the same relief. In support of this submission a number of decisions rendered on the construction of s. 69 (3) (a) of the Partnership Act were referred. In these decisions it was held that in every suit for dissolution a prayer for accounts and a relief for accounting was implicit. We consider that these authorities are of no assistance for determining the nature of the plaint before us. It was in substance one for specific performance of an agreement by which one partner agreed to convey his interest to his co-partner. In such a suit there could obviously be no prayer for any relief for accounting and unless there is a prayer for accounting there is no question of a defendant claiming the benefit of that relief in the same suit. The decisions in which it has been held that in a suit for accounts between accounting parties a defendant is virtually a plaintiff have no application to cases where the relief prayed for by the plaintiff is not one for the rendition of accounts. That situation will apply only to cases where the relief sought is common to the parties, though ranged on either side. The suit in the present case filed by the plaintiff prayed for no such relief and could not in the nature of things pray for any such, and hence unless there is a claim made by the defendant for accounting and that claim is treated as a plaint the defendant is entitled to no relief. The other submission of learned Counsel for 2 S.C.R. SUPREME COURT REPORTS 577 the respondents seeking to support the judgement of the High Court stands on quite a different footing. Mr. Desai contended that the learned judge of the High Court had no jurisdiction to treat the counter-claim contained in paragraph 25 of the Written Statement as the plaint in a cross-suit. As we stated earlier, the learned judge took this course because he considered there was authority for this mode of proceeding in the decision of a Division Bench of the Bombay High Court. Mr. Desai contended that this decision of the Division Bench was wrong. He pointed out that the sole authority for the adoption of such a treatment of a counterclaim was a passage in Mr. Mulia's commentary on the Civil Procedure Code (12th Edition) at page 634 where the learned author relies on a decision of a Bench of the Rangoon High Court in Saya Bya v. Maung Kyaw Shun (1) Desai pointeed out that no reasons are adduced for the proposition laid down by the learned judges of the Rangoon High Court for their conclusion that "There is nothing to prevent a judge treating the counter-claim as a plaint in a cross suit and hearing the two together if he is so disposed and if the counter-claim as properly stamped". His further contention was that the view here expressed was contrary to two decisions of the Privy Council reported in Currimbhoy and Co. Ltd. v. Crereet (1), and (Mian) Pir Bux v. Mohomed Tahar (3). It is, no doubt true that no authority is cited in the Rangoon decision for the dictum and the learned judges seem to proceed on the basis that in the absence of any established principle or binding precedent their conclusion was reasonable, but the further submission of Mr. Desai that their view is opposed to the decisions of the Privy Council is not correct. Currimbhoy and Co. Ltd. v. Creet(2),is not authority for any proposition otherthanthat a counter- claim is not maintainable intheMuffasil (1) (1924) I.L.R. 2 Rangoon 276, (2) (1932) L.R. 60 I.A.

297. (3) A.T.R. 1934 P.C. 235.

and the other case-(Mian) Pir Bux v. Mohmed Tahar (1), which is to the same effect merely affirms the law as accepted in Currimbhoy and Co. Ltd. v. Creet (1). Neither of these two decisions, Mr. Desai admitted in terms, refers to the conversion into or treatment of a counter-claim as a cross-suit, nor do they in terms or even inferentially negative the legality of the adoption of such a course. For such a position, however, Mr. Desai, relied on the decision of the Calcutta High Court in Gour

Chandra Goswami v. Chairman of the Nabadwip Municipality (3), where the learned judges set aside in revision an order of the Munsif allowing the defendant's additional Written Statement to be treated as a cross plaint. There is no doubt that this is some authority for the proposition contended for by Mr. Desai. It is not, however, clear from the judgment whether it proceeds upon the facts of the case then before them particularly as regards the contents of the Written State- ment which was treated by the District Munsif as a plaint in a cross-suit or whether the proposition of law was intended to have a wider application. The learned judges correctly pointed out that a counter-claim is the creation of the statute and in the absence of a provision in 0. VIII of the Civil Procedure Code for a counter-claim apart from the relief specified in r. 6 thereof, a counter-claim as such was inadmissible. From this the learned Judges proceeded to equate the bar to the maintainability of a counter-claim to a bar to a counterclaim being treated as a cross-suit. It must, however, be pointed out that for effecting this equation no reasons are adduced by learned judges nor for holding that a Court was precluded from treating an additional Written Statement as a cross plaint. The question has therefore to be considered on principle as to whether there is anything in law-

(1) A.I.R. 1934 P.C. 235. (2) (1932) L.R. 60 I.A. 297. (3) A.I.R. 1922 Cal. 1.

statutory or otherwise-which precludes a court from treating a counter-claim as a plaint in a cross suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counterclaim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a Written Statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the Court was not prevented from separating the Written Statement proper from what was described as a counter-claim and treating the latter as a cross-suit. If so much is conceded it would then become merely a matter of degree as to whether the counter-claim contains all the necessary requisite sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to. a Court to covert or treat the counter-claim as a plaint in a cross suit. To. hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in 0. VIII. r.6 or in any other provision of the Code which laid an embargo on a Court adopting such a course. Mr. Desai's next contention was that even if it was open to the Court to treat the counter-claim as a plaint in a cross suit, the action of the learned Single Judge in granting this relief was, in the circumstances of this case' illegal or, at any rate, improper. In support Of this further submission he urged two points : (1) The conversion of a counter-claim into a plaint in a cross suit was not any inherent or enforceable right of a defendant but the matter lay in the discretion of the Court to be exercised on judicial principles so as not to cause hardship to either side. In the present case he urged that the relief by way of counter-claim had been objected to by the plaintiff as not maintainable but the defendants had, till the very end, persisted in claiming this inadmissible re- lief. Besides, both the learned trial judge as well as the District Judge on appeal had considered the prayer for treating the

counter-claim as the plaint in a cross suit and had, for very proper and cogent reasons and in the exercise of their discretion, rejected it. The learned Single judge of the High Court, however,, it was submitted, had, without even considering the grounds upon which the Courts below had exercised their discretion and without assigning any reasons of his own set aside their judgments and allowed the defendants the relief for which they prayed. (2)Mr. Desai further submitted that at the worst even if the prayer of the defendants wag allowed, having regard to the long interval between the date of the counter-claim and the date when the conversion was being allowed as an indulgence to the defendants the learned judge ought to have put the defendants on terms and not have granted the relief in the absolute terms which we have extracted earlier. We shall now proceed to consider these objections in detail. When analysed they fall under three heads : (1) The reason adduced by the trial judge and the 1st appellate Court for refusing to grant the prayer for conversion have not been considered by the High Court and if these had been taken into account the learned judge would have disallowed the prayer, (2) If, as it must be conceded, the trial judge and the District judge on appeal had a discretion to convert or not to convert the counterclaim into a plaint in a cross- suit, the learned Single judge had no jurisdiction under the Civil Procedure Code to interfere with that discretion and, in any event, there were no sufficient reasons set out to justify such interference, and (3) Having regard to the circumstances of the case the defendants ought to have been put on terms.

It was pointed out that there were three matters which were taken into account by the trial judge for disallowing the defendants' prayer for treating the counter-claim as a cross-suit : (a) limitation, (b) s. 37 of the Partnership Act, and (c) goodwill. The point of limitation was this : The prayer in the counter-claim being one for the taking of the accounts of a dissolved partnership-on the basis that the partnership was dissolved on the death of Bai Itcha on July 31, 1950, a suit claiming the relief of accounting could under the Indian Limitation Act, be filed only within three years from the date of dissolution (Art. 106). As the Written Statement of the defendant was filed on October 18, 1951 no doubt if the counter-claim itself be treated as the plaint, the suit would be in time. But the learned trial judge held that limitation had to be computed on the footing that the suit was filed on the date when an application was made to him in November 1954 at the stage of the arguments for treating the counter-claim as a plaint in a cross suit. If so computed obviously the cross suit would be barred by limitation and that was assigned as one of the reasons for rejecting the prayer for conversion. It was urged before us that the learned judge of the High Court had not addressed himself to this aspect of the matter. It was also submitted that strictly speaking the correct date on which the plaint in the cross-suit should be taken to have been filed, in view of the orders of the trial and 1st appellate courts rejecting this prayer was that on which the oral prayer was made before the learned Single Judge i.e., 1961. It is obvious that the learned judge considered that the correct date for the computation of limitation in such cases had been decided in the unreported decision of the Division Bench of the Bombay High Court to which we have already made a reference. The learned judges there took the view that the crucial date for the purpose of determining when the plaint in a cross suit should be treated as having been filed was not the date on which the conversion was ordered but the date on which the Written Statement contain- ing the counter-claim was filed. We considered that this decision of the Bombay High Court lays down the correct rule in cases of this kind. It is, no doubt, true that, save in exceptional cases, leave to amend under 0.6,r.17 of the Code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations are

added or fresh reliefs sought by way of amendment.Where, for instance, an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, it has never been held that the question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter already contained in the original pleading. The present case is a fortiori so. The defendants here were not seeking to add any allegation nor to claim any fresh relief which they had not prayed for in the pleading already filed. If on the allegations contained in that pleading the relief prayed for could not be obtained by the defendants,the plaintiff is not precluded from urging such a contention. The defendants had valued -the relief sought as if it were a plaint in a cross suit and had paid the requisite court fee payable on such a plaint and there was no dispute that either the valuation or the Court fee was incorrect. Mr. Desai sought to belittle the circumstance about the valuation of the relief and the payment of the court fee payable thereon by the defendants by pointing out that the court fee was a comparatively small sum. If under the relevant statute the court fee payable for a particular type of relief is a small sum and a party has paid it, he has done all that the law requires, and the legal consequence of such an act cannot be discounted merely because the pecuniary burden borne by the party is not heavy.

In the circumstances, there being no addition to the allegation or to the relief, it is not possible to accept the argument that by the conversion of that pleading which was contained in the Written Statement into a plaint in a cross suit a fresh claim was made or a fresh relief which had not already been prayed for was sought which would enable the plaintiff to contend that limitation started from the date on which the conversion took place. To the facts of the present case therefore the decisions holding that amendments could not ordinarily be allowed beyond the period of limitation and the limited exceptions to that rule have no application.

The learned trial judge next referred to s. 37 of the Partnership Act and expressed the opinion that in view of the provisions of that section the conversion prayed for should not be granted. He observed:

> "Defendants have been given special rights under s. 37 of the Indian Partnership Act. No issues have been framed in this suit regarding the matter covered by s. 37 of the Indian Partnership Act..... the questions under s. 37 are not within the scope of this suit. Such questions can be within the scope of defendant's suit for an account and share of the profits of a dissolved partnership."

It is, however, difficult to appreciate the import of these remarks. So long as the counter-claim is held to be inadmissible as the basis on which a defendant < could be granted relief and so long as the conversion of it into a plaint is not granted, the questions raised by s. 37 would not be within the scope of the suit, and naturally until such a conversion is effected, no issues could or would be framed. But by themselves the matters set out could hardly be objections to the exercise of the discretion by the, Court to grant the prayer for conversion. Again, what theprovision in s. 37 has to do with the exercise of thediscretion to permit the conversion is not alsoclear. That section reads :

> "37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the

> property of the firm without any final settlement of the accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as maybe attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm.Provided that where by contractbetween the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or out going partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the forgoing provisions of this section."

It would be seen that s. 37 lays down the substantive law relating to the liability of a surviving partner who without a settlement of account with the legal representatives of the deceased partner utilises the assets of the partnership for continuing the business as his own. If in the present case the plaintiff has done so he would be liable to the obligation laid by the provision and if he has not, he would not be-so liable. Therefore the section cannot stand in the way of the conversion prayed for by the defendant. Mr. Desai suggested that what the learned trial judge had in view in referring to the section was the complete absence of any allegation in the counter-claim that the plaintiff had utilized the assets and had thus become liable for the obligations laid down by the provision. But if this were so it would only mean that the accounts which the plaintiff would be entitled to obtain if his counter-claim were treated as a plaint in a cross-suit would be an accounting without reference to s. 37, but that again would not be a ground for refusing the conversion. If such were the construction of the counter-claim as the plaint in a cross- suit, the plain circumstances therefore we consider that the learned trial judge fell into an error in considering that the provisions contained in s. 37 and the reliefs that would be open to a plaintiff under its provisions rendered it improper for the Court to allow the conversion.

The third circumstance that was referred to by the learned trial judge and which was also relied on by Mr. Desai was as regards goodwill. On this part Of the case the trial judge remarked :

> "Defendants also urge that there was a good- will of business. Whether there was a good- will or not and what is the value of the good- will are also questions of fact for which no issues have been framed in the suit. I am not therefore disposed to hear the counter-claim as a cross-suit along with the plaint in this suit. All these questions about goodwill..... are not within the scope of this suit".

We consider that the question of goodwill has even less bearing on the exercise of the discretion by the Court than even the accounting contemplated by s.37. Goodwill is apart of the assets of a firm and s. 55 (1) of the Partnership Act enacts that in settling the accounts of a firm after dissolution the goodwill shall, subject to contract between the partners, be included in the assets and it may be sold either separately or along with other property of the firm. The prima facie rule therefore is that the

goodwill of the firm being a part of the assets has to be sold just like other assets before the accounts between the partners can be settled and the partnership wound up. Why there should be any particular reference to goodwill which is only one of the several assets of a firm in a plaint for taking accounts of a dissolved partnership is hard to see. How similarly, the existence of goodwill as an asset of the firm which has to be sold and the proceeds divided between the partners in the account-taking is a bar to the conversion of a counter-claim into a plaint in a cross-suit is not easy to comprehend.

These were the only three matters which were taken into account by the learned trial judge in refusing the defendants' prayer for treating the counter- claim as a plaint in a cross-suit.

The way in which the matter was dealt with by the learned District judge on appeal was this. He first expressed doubts about the correctness of the decision of the Rangoon High Court in Saya Bya v. Maung Kyaw Shun (1). But on the assumption that the Court had jurisdiction to effect the conversion his reasons for rejecting the prayer of the defendants were: (1) The suit of the plaintiff and the counter-claim of the defendants were totally dissimilar i. e., the evidence needed to prove the facts in each would be different, (2) In the counter-claim a question about the goodwill of the firm and the right to use the premises of the firm would arise, (3) No issues had been raised in regard to the matters alleged in the counter-claim, (4) That the defendants would not be prejudiced if they were asked to file a fresh suit. We consider it unnecessary to canvass the relevancy or correctness of these reasons as what we have stated already as regards the judgment of the trial judge would suffice to show that they are untenable. In this view we do not consider that the appellant derives any advantage by the criticism regarding the absence of any reference to the grounds on which the discretion was exercised by the trial and appellate courts in the judgment of the learned Single judge.

The next submission of Mr. Desai was, and he laid considerable stress upon this, that the learned judge of the High Court could not, in second appeal, have interfered with the discretion exercised by the Courts below. We consider that in the circumstances of this case this particular aspect loses all significance because, as already indicated, we are satisfied that even if the Courts below exercised their discretion they did so on grounds not legally tenable and the learned judge was justified in ignoring the exercise of their discretion;

(1) (1924) I. L. R. 2 Rangoon 276, It was next submitted that the learned judge of the High Court had not assigned any reason for exercising a discretion in favour of the defendants at the stage of the second appeal and that on that account we should set aside that judgment. It is no doubt true that the learned judge has not adverted to or assigned any reason why he was allowing the conversion and contented himself with referring to the unreported decision of the Division Bench of the Bombay High Court as justifying the course that he took. We are,, however, not persuaded that considering that this appeal is by special leave under Art. 136 any interference is called for with the order passed by the learned judge. We are satisfied that there has been no miscarriage of justice by reason of the order and that even if he had properly applied his mind to it and considered the matter from the point of view of his having a discretion, the same conclusion would have been arrived at. We are not therefore disposed to interfere with the order directing the treatment of the counterclaim

as a plaint in a crosss-suit. The next part of Mr. Desai's submission was concerned with his grievance that the learned judge ought to have put the plaintiff on terms before he passed " the order directing the conversion. The ""terms could obviously not be terms as to costs, because in this case the counter-claim was dismissed with costs by the trial.' judge and the appeal therefrom was also dismissed with costs. So far as the costs in the High Court were concerned, they were directed to be the costs in the cause.

Mr. Desai, however, urged that apart from any order as to costs, "terms" ought to have been imposed as regards the nature of the accounting to be ordered if a decree were passed, directions given restricting the date from which such accounting should start and such like terms. We are unable to agree that it would have been proper for the Court to have imposed such terms. The whole basis of the order of the High Court was that the defendants had by their counter- claim filed practically a plaint duly valued and court fee payable thereon paid, though in a defective form. The defendants had on the basis that the counter-claim was as such inadmissible under the Civil Procedure Code prayed to the Trial Court for an order for treating that counter-claim as a plaint in a cross-suit. That had been opposed by the plaintiff and the prayer had been rejected on grounds which, as we have pointed out elsewhere, were wholly insufficient. Besides, the plaintiff had come forward with a case of the accounts having been settled and the story which he put forward had been disbelieved and his suit dismissed and that decision had become final. In the circumstances it is not easy to see the propriety of imposing any terms either as to the mariner or as to duration etc. of the accounting which ought to take place on the adverments in the counter-claim if the defendant succeeded in that cross-suit. We. therefore, consider that no legitimate objection could be taken to the unconditional order passed by the learned judge.

Lastly, Mr. Desai contended that the learned judge erred in confining the plaintiff to the pleas which he had raised in the reply to the counter-claim and in not allowing him to file fresh pleadings to the counter-claim when it was being treated as a plaint. It was pointed that the objections taken in the reply statement were on the basis of their being answers to a counter-claim, and that if the defendants were being permitted to alter the character of their pleading, the plaintiff should be given a chance to add such further defences as would be open to him to the claim in a plaint. In this connection Mr. Desai, pointed out that in the unreported decision of the Bombay High Court on which the learned Single judge relied, the parties had been permitted to file fresh pleadings to make the same accord with the requirements of a plaint and Written Statement under the Civil Procedure Code. We consider that there is force in this submission. No doubt, the plaintiff had traversed the allegations of fact and the sustainability in law of the claim made in the counter-claim, but still this was on the basis of the defendant's plea being a counter-claim merely. Taking into account the circumstances in which the plaintiff's plea in regard to the counter-claim were filed, we are clearly of the opinion that justice requires that he should be afforded an opportunity to raise his defences on the footing that the counterclaim, even when originally made, should be treated as a plaint in a cross-suit, and this he should be permitted to do in a Written Statement which he should be permitted to file and there will be a direction to that effect in the decree to be drawn up by this Court. As the trial of the claim by the defendants has already been delayed the plaintiff should file this fresh Written Statement within 8 weeks from the date of the receipt of this order by the trial Court.

A question has also been raised as to whether the defendants should not be likewise permitted to file a fresh pleading more in accordance with the form indicated by O.VII of the Civil Procedure Code-as was permitted to be done in the Bombay case above referred to. Mr. Desai indicated that he would not object to any such liberty being, given. There will be a direction that the defendants are at liberty to file a fresh pleading in the place and stead of their counter-claim contained in parauraphs 25 and 26 of the Written Statement dated October 17, 1951, provided however that there shall be no substatitial variation in the allegations to be made or the reliefs to be claimed by them in such fresh pleading. This they might file within 4 weeks of the receipt of this order by the trial Court. In the event of the defendants exercising the option hereby given, the plaintiff shall file the Written Statement within 4 weeks thereafter. We ought to make it clear that by the directions we have given above we do not intend to preclude the parties from seeking any other or further amendment of the pleadings or to fetter, in any manner, the power of the Court to permit such amendment under 0. VI. r. 17, Civil Procedure Code at any subsequent stage of the proceedings. Subject to the above directions, the appeal fails and is dismissed with costs.

SARKAR J.-The appellant carried on a business in partnership with one Jamnadas Ghelabhai from sometime in 1923 till August 12, 1943, when jamnadas died. Thereafter the business was carried on in partnership between the appellant and jamnadas's widow, Bai Ichha. Bai Ichha died on July 31, 1950. Disputes then started between the respondents, who are Bai Ichha's heirs, and the appellant concerning the partnership and a certain house and those disputes led to the suit out of which this appeal arises.

The appellant contended that by an agreement made with Bai Ichba shortly prior to her death, the partnership between them had been disolved as from July 15, 1950, and it had been decided that upon the appellant paying to Bai Ichha the amount found due to her on the taking of the accounts, she would give up her rights in the business which would thereafter become the sole property of the appellant; that Bai Ichha died before the accounts could be taken; and that thereafter the accounts were settled between the respondents and the appellant whereby a sum of Rs. 13,689/- was found due to the respondents in respect of Bai Ichha's share in the firm. The appellant also contended that Bai lchha had agreed to convey to him a half share in a house which she had inherited from her husband and the other half share in which belonged to the appellant, for a sum of Rs. 2,202-9-9. The appellant said that he had offered the said sum of Rs. 13,689/- to the respondents in respect of Bai Ichha's share in the firm and requested them to convey the half share in the house upon payment of Rs. 2, 202-9-9 but the respondents wrongfully decied the agreements and adjust- ment of accounts and refused to convey their share in the house to the appellant and were further obstructing him in the conduct of business. On these allegations the appellant filed the suit in the Court of the Civil judge, Broach, on July 15, 1951 claiming the following reliefs :-(a) a declaration that the partnership betweeen him and Bai Ichha stood dissolved as from July 5, 1950, or from July 31, 1950, and that its accounts had been settled, (b) an order directing the respondents to convey to him a half share in the house upon payment of Rs. 2,202-9-9 and (c) an injunction restraining them from interfering with his conduct of the business.

The respondent No. 1 filed a written statement in that suit on October 18, 1951, which was adopted on the same day by the other respondents. The respondents denied that there was any agreement

with Bai Ichha about the dissolution or otherwise and also that there had been any settlement of accounts with them. The written statement contained a paragraph in which it was stated that the partnership between the appellant and Bai Ichha stood dissolved on her death on Tuly 31, 1950 and it was claimed that the accounts of the firm be taken. In the end of this paragraph it was stated, "The defendants have filed this counter-claim for this purpose." They paid counter-fee on the counterclaim as on a plaint claiming the accounts of a dissolved firm. The appellant filed a reply to the written statement in which dealing with the counterclaim, he stated that it was "not in accordance with law and the defendants have no right to make such a counter- claim."

The appellant's suit was dismissed by the trial court on November 30, 1954. With regard to the counter-claim which was for accounts of the partnership, the trial Court held that it was "incompetent and any such claim must be enforced by a seprate suit." It appears that at the stage of arguments learned counsel for the respondents had verbally requested the court to treat the counter-claim as a plain in a cross-suit and this the court refused to do. The appellant did Dot appeal from the judgment of the trial court but the respondents did from the decision holding that the counter- claim was incompetent and not maintainable. That appeal was heard by the District judge of Broach who on April 27, 1956, upheld the decision of the trial court. It appears that he also had been asked to treat the counter-claim as a plaint in a cross-suit but refused to do so.

The respondents then went up in further appeal to the High Court of Bombay. This appeal was on the creation of the State of Gujarat transferred to the High Court at Ahmedabad. In the High Court it was contended, as it had been in the two courts below, that the counter-claim was maintainable and the High Court was also requested verbally to treat the counter-claim as a plaint in a cross-suit. The High Court did not go into the question of the competence of the counter-claim but by its judgment and order of August 22, 1961 accepted the request of the respondents to treat it as a plaint in a, cross suit. Relying on an unreported judgment of the Bombay High Court in Bai Bhuri v. Rai Ambalall Chotalal (1), to which I will have to refer later, it rejected the contention of the appellant that the counter-claim could not be treated by the High Court as a plaint in a cross-unit because a suit on that plaint had become barred by limitation (1) (First Appeal No, 737 of 1951.) long before the matter had come to that Court. The High Court held that the cross-suit would be. within time as it must be deemed to have been filed on the date that the written statement containing the counter claim had been filed. In the result, the High Court sent the matter back to the learned trial Judge with a direction to treat the counter-claim as a plaint in a cross-suit and the reply of the appellant to it as his written statement a and to try the crosssuit according to law. It is from this judgment that the present appeal ariscs.

Now the counter-claim made by the respondents was clearly to enforce an independent right unconnected with the claim made in the plaint. It is a counterclaim strictly so called and not intended to be a defence to the claim in the plaint. Our laws, except, it appears, a rule made by the Bombay High Court for its Original jurisdiction, have made no provision for such a counter-claim. In other courts, like the court in Broach, a defendant is permitted to plead a set off as contemplated in 0. 8. r. 6 of the Code of Civil Procedare and also what is called an equitable set off. Plainly, the present counter-claim is not either of these. I would like to observe here that in England, a counter-claim strictly so called has always been the creature of statute see Halsbury's Laws of

England, 3rd ed. vol. XXXIV p. 410. In England apparently no equitable right to such a counter-claim is recognised. The reason perhaps is that a suit can always be filed on the subject-matter of the counterclaim and where there is remedy in law, aid of equity is not available. The position should be no- different in our country. There is, therefore, no justification for allowing a counter-claim as such in the absence of a statutory provision. The decision of trial court and the Court of first appeal that the counter-claim was not maintainable was obviously right. As I have already said the High (court did not go into this question, It was then said that the suit of the appellant was really a suit for the accounts of the partnership and in such a suit each side was in the position of a plaintiff and, therefore, the respondents were entitled to a decree for the accounts even without the counter-claim. This contention is clearly unfounded, for the suit was not for the partnership accounts at all. It was a wholly different suit, for it asked for a declaration thatthe partnership accounts had been taken out of court and could not,therefore,be ordered by the court. In such a suit a defendant partner has obviously no right to ask that the partnership accounts be taken. The real question that was argued in this appeal was whether the High Court was right in directing the counter-claim to be treated as a plaint in a cross-suit. I do not think it was. First, it is obvious that the respondents themselves had DO right in law or equity to have their counter-claim treated as a plaint. As no counter-claim is maintainable to enforce a right independent of the claim in the plaint, as I have earlier said, the respondents should have filed a suit to enforce the subject matter of the counter-claim. If they did not, that was their error and an error cannot create a right. It is true that in the law reports there are a few cases where courts have permitted a counter-claim to be treated as a plaint in a cross-suit. I will assume that a court has the power to do so. But even so, the court exercises the power by way of granting the defendant an indulgence out of pity at the defendant's folly. It is not a case of granting a discretionary relief in which case the partyasking for the relief would have a right to it, a right at least that the discretion be judicially exercised. I think it is entirely for the court asked to grant the indulgence, to decide as its free choice, whether it will do so or not. No question of its decision being erroneous can arise for there can be no error in refusing to grant that to which there is no right. That being so, I think that the High court had no right in appeal to set aside the order of the courts below refusing to treat the counter-claim as a plaint in a cross-suit. I also venture to think that the High Court's order was erroneous for another reason. Under s. 3 of the Limitation Act a suit instituted after the period of limitation prescribed for it must be dismissed and a suit is instituted when the plaint is duly presented to the court. Now it seems to me that when, as in the present case, a court directs a counterclaim to be treated as a plaint in a cross- suit, the date of presentation of that plaint is the date of the court's order. The reason is this. I have earlier said such an order is made only by way of an indulgence for no one has any right or equity to have what was not a plaint, treated as a plaint. It is the court's order which makes what was not a plaint, a plaint for obviously if there was already a plaint filed, no order would be necessary treating it as a plaint. As the order turns something which was not a plaint Into a plaint, that plaint comes into existence on the date of the court's order; it must, therefore, be a plaint filed on that date. I would like here to observe, as indeed is well known, that no court has anypower to extend the prescribed period of limitationand from this it would follow, a court has no powereither to treat a plaint filed on a certain date as having been filed on an earlier date so as to avoid the bar of limitation. If this is the correct view, as I think it is, a court would not make an order treating a counter-claim as a plaint on a date when a suit filed on that plaint would be barred, for the court would not make a futile order.

It seems to me that the order in the present case is futile for the reason mentioned above. The cross,suit which came into existence as a result of the High Court's order in this case was for the accounts of a partnership which was dissolved on July 31, 1950. Under Art. 106 of the First Schedule to the Limitation Act, such a suit would be barred if filed after July 31, 1953. The order of the High Court was made long after that date, namely, on August 22, 1961. That order was, for the reasons earlier mentioned, completely futile as it brought into existence a suit which was bound to be dismissed. The High Court following Bai Bhuri's case earlier mentioned, however, took the view that in such a case the plaint in the cross-suit must be deemed to have been filed when the written statement containing the counter-claim was filed. The reason for this view is in the judgment in Bai Bhuri's case to which I now turn. In that case the plaintiff had objected to an order treating the counter-claim as a plaint in a cross-suit on the ground that the court would thereby "be permitting an amendment to the written statement after a suit for specific performance is barred by lapse of time". The counter-claim there, it appears, was for specific performance of a contract. This objection was rejected and the Court observed, "We are unable to agree with the conten- tion..... By putting the written statement in the form of a plaint in a counter claim of a cross-suit, the defendants are not seeking to make any new averment which was not contained in the written statement. What the defendants are seeking to do is merely to put the written statement in the form of a plaint in a cross suit. To such an amendment the rule that an amendment will not be permitted to be made if it takes away from the opposite party a defence which he has acquired by lapse of time, will not apply." I venture to think that the contention dealt with by the Court in Bai Bhuri's case was based on a misapprehension. There is no question of amendment (1) (First Appeal No. 737 of 1951) when a court orders a counter-claim to be treated as a plaint in a cross-suit, because initially a counterclaim is part of a written statement and by amendment a written statement cannot be converted into a plaint. I am not aware of any rule which permits of such amendment, nor has any been brought to our notice. Indeed what is done here is to split up a pleading expressly filed as a written statement into two, one of which remains a written statement and the other becomes a plaint. That is why it is said that the counter-claim is treated as a plaint in a "cross-suit". Even if such a thing is permissible, it does not seem to me that it is achieved by an amendment and its propriety cannot be judged by rules whereby amendment of pleadings is governed Neither does it seem to me that the order can be treated as one curing an irregularity ; as a case where the counter- claim had been a plaint from the beginning but as it had not complied with the rules concerning a plaint it had been a plaint irregularly filed. First, the respondents never contended that they had filed a plaint. They said, they had filed a written statement in which they had made a counter- claim and that counter-claim was maintainable as such. That was their contention. They persisted in this attitude all through. They did not even raise an issue as to whether they were entitled to treat the counter-claim as a plaint. It would be strange if the Court said that the respondents had filed a plaint though they did not themselves say so. Secondly, I am not aware that a plaint and a written statement can be combined in one pleading so that the filing of the one is the filing of the other. This is impossible under our procedure. It must be taken that what had originally been filed was a written statement, and, therefore, that no plaint had at all been filed. If no plaint had been filed, no question of curing any irregularity in the filing of a plaint can arise.

For these reasons I would allow the appeal with costs here and in the High Court.

By COURT : In accordance with the majority opinion the appeal is dismissed with costs subject to the directions contained in the judgment.

Appeal dismissed.