

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)**

**F.M.A.T. 97 of 2021
With
CAN 1 of 2021**

**Medica Hospitals Private Limited
Vs.
Dr. Bala Subhramanian Ramanna**

**Mr. Tanmoy Mukherjee
Mr. Arindam Chandra
Mr. Ayan Dutta
Mr. Atish Ghosh
Mr. Souvik Ghosh For the Appellant.**

Re: CAN 1 of 2021

An affidavit of service is on record.

Learned counsel for the appellant/defendant submits that the sole respondent/plaintiff has been duly served.

None appears for him.

We are disposing of the appeal and the connected application today, dispensing with all formalities.

S.D.

A question of law of some importance has been raised in this appeal. The suit (M.S. 432 of 2018) was filed before the learned Civil Judge, Senior Division, 5th Court

at Alipore. It was subsequently transferred to the Commercial Court at Alipore and renumbered as M.S. 32 of 2019. The summons was served upon the appellant/defendant on 8th October, 2018.

The appellant duly filed their written statement. However, about two years and three months after filing of the suit they made an application to the court to file a counter claim. On the ground that there was insufficient explanation for the delay in filing the application to present the counter claim, the learned judge allowed it to be filed but imposed cost of Rs.25,000/-.

Aggrieved, the appellant/defendant appeals to this court.

It is true as Mr. Tanmoy Mukherjee learned counsel for the appellant pointed out that a counter claim could be based on a cause of action, before or after filing of the suit upto the time of filing of the written statement, as provided in Order 8, Rule 6A of the Civil Procedure Code. Such a counter claim would have the effect of a cross suit. The Supreme Court in Mahendra Kumar and Anr. Vs. State of Madhya Pradesh and Ors. reported in (1987)3 SCC 265 opined that a counter claim on the above cause of action could be filed after the written statement was presented as there was no bar to it in the Civil Procedure Code or any other law. However, the claim should not be barred by the law of limitation.

The facts of this case are a little different from those before the Supreme Court.

Suppose the cause of action accrues just before filing the written statement. The defendant has two options, either to file a counter claim before or after the written statement within the period of limitation as stated in the above Supreme Court judgement or file a separate suit. Assuming that the period of limitation is three years, such a defendant is within his right to choose either of the two options within three years, subject to approval by the Court. The Court might refuse the prayer if issues have been framed or trial has commenced.

But suppose, as in this case, the cause of action has arisen much earlier. In that case allowing the defendant to nearly exhaust the period of limitation before presenting the counter claim would only delay trial of the suit. In considering an application to file a counter claim, the court is required to consider the facts judiciously, assess the time taken to file an application to present the counterclaim, and the reason for it and to pass an order accordingly.

In our opinion, in this case the learned judge has mentioned the delay factor but has not advanced any reason as to when the cause of action arose, when the defendant was in a position to file the counter claim and so on.

Considering all the factors, we affirm the impugned order dated 27th January, 2021 of the court below with the modification that the cost should be reduced to Rs.1,000/- (One thousand) only.

The appeal (F.M.A.T. 97 of 2021) and the connected application (CAN 1 of 2021) are disposed of.

(I.P. Mukerji, J.)

(Subhasis Dasgupta, J.)

