

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RFA No.120 of 2003 along with Cross
Objections No.340 of 2003.

Date of decision: 28th February, 2018.

National Insurance Company Ltd. and another
.....Appellants/Defendants.

Versus

M/S Kisan Poultry Farm and another Respondents/Plaintiffs -
Cross Objectors.

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?¹ No

For the Appellants : Mr.Ashwani K.Sharma, Senior
Advocate with Mr.Jeevan Kumar,
Advocate.

For the Respondents/: Mr.Anil Chauhan, Advocate.
Cross Objectors.

Tarlok Singh Chauhan, Judge (Oral).

The defendants have filed the present first appeal against the judgment and decree passed by the learned Additional District Judge-II, Kangra at Dharamshala, on 30.09.2002, whereby their counter-claim has been held to be time barred. The plaintiffs have also preferred cross objections against the findings rendered qua issue No.4 whereby it has been held that the plaintiffs had exercised fraud and collusion on the defendants.

Whether the reporters of the local papers may be allowed to see the Judgment?Yes

The facts lie in a narrow compass.

2. The plaintiffs/respondents (hereinafter referred to as the plaintiffs) filed a suit for recovery of Rs.5,00,000/- against the defendants/appellants (hereinafter referred to as the defendants) on the allegations that they had been carrying out the business of poultry farm and unfortunately a fire broke out on 13.05.1994 and as a result thereof about 18,000 birds perished. The plaintiffs informed defendant No.2, who appointed a Committee of Surveyors to calculate the loss and on the basis of the report submitted by them, the loss suffered by the plaintiffs was computed at Rs.7,23,073/-. Out of the aforesaid amount, a sum of Rs.2,00,000/- was paid to the plaintiffs while the remaining amount of Rs.5,23,073/- was not paid, as according to the defendants, the claim raised by the plaintiffs was based on fraud and misrepresentation. This led the plaintiffs to file a suit for recovery of Rs.5,00,000/- wherein the defendants raised a counter-claim of Rs.2,00,000/-.

3. As none appeared on behalf of the plaintiffs when the case was fixed on 30.09.2002, it was accordingly dismissed in default and admittedly the same has not been restored till date. However, before that the learned trial Court had framed the following issues:-

“1. Whether the plaintiff is entitled to the suit amount as alleged?

OPP.

2. Whether the suit is not maintainable as alleged? OPD.

3. *Whether the defendants are entitled to recover Rs.two lacs from the plaintiffs as claimed in the compensation as alleged? OPD.*
4. *Whether the plaintiff has exercised fraud and collusion on the defendants as alleged? If so, its effect? OPD.*
5. *Relief.”*

4. The learned trial Court proceeded to consider the counter-claim and while answering issue No.3 dismissed the same by concluding that it was not maintainable as it had been filed beyond the prescribed period of limitation constraining the defendants to file the instant appeal. At the same time, issue No.4 was answered in favour of the defendants by holding that the plaintiffs had exercised fraud and collusion on the defendants constraining the plaintiffs to file cross objections.

I have heard the learned counsel for the parties and gone through the records of the case.

5. At the outset, it may be observed that there can be no quarrel with the proposition of law that a counter-claim is a suit for all intents and purposes and if the suit is expressly barred by limitation, the same can be rejected even though the plea of limitation is not raised by the opposite side. However, equally settled is the proposition that the plea of limitation is not always a pure question of law and is normally a mixed question of fact and law. Therefore, the plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting

point of limitation has to be ascertained which is essentially a question of fact.

6. Admittedly, in this case, it was not even the case of the plaintiffs that the counter-claim filed by the defendants was barred by limitation and further admittedly no issue to this effect was framed and rightly so. Therefore, in such circumstances, in absence of proper pleadings, framing an issue of limitation and recording evidence, the counter-claim could not have been dismissed as being barred by limitation.

7. That apart, it is not in dispute that the cheque of Rs.2,00,000/- for which counter-claim has been raised was handed over to the plaintiffs only after 27.07.1994, whereas, the counter-claim was filed by the defendants on 19.06.1997 which is well within the prescribed period of limitation of three years. In such circumstances, this Court is left with no other option, but to set aside the findings of the learned trial Court insofar as it holds the counter-claim of the defendants to be barred by limitation.

8. However, as regards the question as to whether the defendants are infact entitled to the recovery of Rs.2,00,000/- from the plaintiffs, the same is a question that is required to be determined by the learned trial Court on the basis of the pleadings and evidence to this effect.

9. Now, advertng to the cross objections filed by the plaintiffs against the findings rendered qua issue No.4, it would be noticed that the learned trial Court has really made no endeavour to discuss in detail the

pleadings and evidence led by the parties and in a slip shod manner answered the issue little realizing that being the Court of first instance it was required to discuss the pleadings as also evidence led by the parties in detail. That apart, there are certain findings rendered qua issues No.3 and 4 which are overlapping and in case permitted to stand would definitely prejudice the case of the parties and are, therefore, required to be set aside.

10. Having said so, I am of the considered view that the ends of justice would be met in case the matter is remitted to the learned trial Court for giving findings on issues No.3 and 4 afresh.

11. In view of the aforesaid discussion, the appeal as also cross objections are allowed to the extent indicated above and the matter is remitted back to the learned trial Court for deciding issues No.3 and 4 afresh as expeditiously as possible and in no event later than **31st May, 2018**. The parties through their counsel(s) are directed to appear before the learned trial Court on **24th March, 2018**. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

28th February, 2018.
(krt)

(Tarlok Singh Chauhan),
Judge.