

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16990 of 2012

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1. Surendra Pd S/O Late Prsadi Mahto Resident Of Village- Sikriya, P.O- Rukhai, P.S- Chandi, District- Nalanda At Present Resident Of Jogipur Road, Surya Mandir North Of Pond, Patel Nagar, P.O And P.S- Hilsa, District- Nalanda.

.... Petitioner/s

Versus

1. Shashi Bhushan Pd. S/O Krishna Prasad Resident Of Gajendra Bigha, P.O- Bhokitapar, P.S- Hilsa, District- Nalanda.

2. Raja Ram Prasad S/O Ram Sharan Prasad Resident Of Sikriya, P.O- Rukhai, P.S- Chandi, District- Nalanda.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Jitendra Kishore Verma, Advocate

For the Respondent/s : Mr. Partha Sarthy, Advocate

Mr. Utsav Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

5 17-12-2015 Petitioner/Plaintiff has challenged the order dated 11.07.2012 passed by Sub-Judge-II, Hilsa, Bihar-Sharif, Nalanda in Title Suit No. 97/2010 whereby and whereunder the learned lower court had allowed the prayer of the respondent/defendant in terms of Order VIII Rule 9 C.P.C.

2. The fact of the case as is evident from the pleadings is that petitioner/plaintiff filed Title Suit No. 97/2010 claiming affirmation of his right having accrued on the basis of lease-cum-agreement dated 05.10.1995 executed by one Ram Sharan Prasad, predecessor of defendant no.2. The aforesaid lease-cum-agreement was for 50 years effective from 05.10.1995 and in terms thereof, plaintiff got the land on tenancy of a monthly rent of Rs.100.- as well as payment of Rs. 85,000/- was made by way of advance



which was to be refunded after 50 years on termination of tenancy after deducting rent as well as cost of construction work. A liberty was also given by way of preferential right to the plaintiff to purchase the land in case the lessor or his heir intends to sell. It has also been submitted that plaintiff invested Rs. 2,85,000/- in making construction over the suit property. Because of the fact that defendant no.2 sold away the suit property in favour of defendant no.1 without touching the plaintiff in utter violation of terms of agreement arrived at on 05.10.1995, therefore, a relief has been sought for, for acknowledgement of preferential right in terms of agreement dated 05.10.1995 directing the defendants to execute sale-deed in favour of plaintiff after adjusting the amount in terms of agreement, restraining the defendants permanently from interfering with peaceful possession of plaintiff. Respondents/defendants appeared and filed WS whereunder denied the possession of the plaintiff over the land under dispute. Further, they claimed the lease-cum-agreement dated 05.10.1995 to be forged and fabricated document. It has been admitted that defendant no.2 had sold away the land under dispute to defendant no.1 vide sale-deed dated 26.03.2010 and on the basis thereof, defendant no.1 is coming over land under dispute peacefully.

3. Subsequently thereof, on 24.05.2011 a petition was filed on behalf of respondents/defendants seeking leave to file an

additional WS-cum-counter claim on the plea that on 19.03.2011, he has been forcibly dispossessed which has been allowed by the learned lower court by the order impugned at the cost of Rs. 500/-, hence this petition.

4. Learned counsel for the petitioner has submitted that learned lower court had acted illegally in allowing petition filed on behalf of respondents/defendants for the cause of action which has been shown to have effected after filing of the WS. It has further been submitted that Order VIII Rule 9 of the C.P.C. has got no independent identity rather is governed by Order VIII Rule 6A whereunder subsequent filing of counter claim after filing of WS having a subsequent cause of action is not permissible. So submitted that the learned lower court failed to acknowledge the relevant provisions of law while passing the order impugned and on account thereof, is fit to be set aside.

5. Per contra, it has been submitted on behalf of respondents/defendant that intention of the legislature has to be perceived during course of its applicability. It has further been submitted that Order VIII Rule 6A of the C.P.C. was available since before whereunder there happens to be barrier on the score of counter claim when a cause of action accruing to the defendant happens to be after filing of WS. However, had there been intention of the legislature to stick over Order VIII Rule 6A of the

C.P.C, the legislature would not have brought up Order VIII Rule 9 which specifically prescribe permission to the defendant in order to bring the subsequent event even after filing of WS with the permission of the Court and that happens to be reason behind that a permission has been sought for from the court which, the court had granted by the order impugned.

6. Because of the fact that the learned lower court had acted in terms of Order VIII Rule 9 of the C.P.C, on account thereof, the same is incorporated hereinbelow:-

9. Subsequent pleadings.— *No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.*

7. From plain reading of the Order VIII Rule 9, it is evident that clutch has been enforced over filing of pleading subsequent to written statement and the aforesaid pleading should not be by way of defence to set-off or to advance counter claim. That means to say, the plea of defence to set-off or counter claim is found exempted under the provision of Order VIII Rule 9 of the C.P.C. and being so, its applicability is to be seen in terms of Order VIII Rule 6A of the C.P.C which deals as follows:-

[6-A. 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 counter-claim 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 as 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.]

8. From plain reading of Order VIII Rule 6A (1), it is evident that the counter-claim is permissible relating to cause of action against the plaintiff before or after filing of the suit but before the defendant has delivered his defence or the time fixed thereof. On conjoint reading of both sections, it is apparent that even as per Rule 6(A), filing of counter claim intermixed with W.S. is not warranted. That means to say, counter claim can separately be filed, and in that case, the relaxation provided under Rule 9 will come into play. As such, independent identity of both the rules as well as having overlapping stature is not at all

conceived.

9. There happens to be no controversy over the fact that defendant had already filed WS and further the cause of action shown by the defendant happens to be much thereafter.

10. The aforesaid issue has also been taken into consideration by the Hon'ble Apex Court in *Bollepanda P. Poonacha & Anr. v. K.M. Madapa* as reported in *AIR 2008 SC 2003* under the following relevant paragraphs which are as follows:-

10. The provision of Order VIII, Rule 6A must be considered having regard to the aforementioned provisions. A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. Respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands, in question, in the summer of 1908. Cause of action for filing the counter claim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Sri Ryaz Ahmed (supra) is based on the decision of this Court in Baldev Singh and Others vs. Manohar Singh and Another [(2006) 6 SCC 498].

Further, the facts of the instant case are distinguishable from those of the Sri Ryaz Ahmed (supra). In that case, the proposed amendment by the defendant was allowed to be filed as he wanted to make a counterclaim by way of a decree for grant of mandatory injunction to remove the built up area on the disputed portion of land. It was therein held that instead of driving the defendant to file a separate suit therefor, it was more appropriate to allow the counter-claim keeping in mind the prayer of a

negative declaration in the plaint. However, in the instant case, the counter-claim was purported to have been filed for passing of a decree for recovery of possession of the disputed land after the suit had been filed.

Baldev Singh (supra) is not an authority for the proposition that the Court while allowing an application for amendment will permit the defendant to raise a counter claim although the same would run counter to the statutory interdicts contained in Order 8, Rule 6A. Some of the decisions of this Court in no uncertain terms held it to be impermissible.

See Mahendra Kumar vs. State of Madhya Pradesh [(1987) 3 SCC 265], Shanti Rani Das Dewanjee (Smt.) vs. Dinesh Chandra Day (Dead) by LR. [(1997) 8 SCC 174].

11. In Gurbachan Singh vs. Bhag Singh and Ors. [(1996) 1 SCC 770], this Court clearly held;

".....the limitation was that the counter-claim or set-off must be pleaded by way of defence in the written statement before the defendant filed his written statement or before the time limit for delivering the written statement has expired, whether such counter claim is in the nature of a claim for damages or not."

A belated counter claim must be discouraged by this Court. See Ramesh Chand vs. Anil Panjwani [(2003) 7 SCC 350].

12. We are, however, not unmindful of the decisions of this Court where a defendant has been allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case.

13. The Court in such matters has a wide discretion. It must, however, subserve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that joinder of several causes of action in a suit is permissible.

The Court, must, however, exercise the discretionary jurisdiction in a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while undoubtedly would take into consideration the

questions of serious injustice or irreparable loss, but nevertheless should bear in mind that a provision for amendment of pleadings are not available as a matter of right under all circumstances. One cause of action, cannot be allowed to be substituted by another. Ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away. See State of A.P and Ors. vs. M/s. Pioneer Builders, A.P. [(2006) 9 SCALE 520] and Steel Authority of India Ltd. vs. Union of India and Ors. [2006 (9) SCALE 597] and Himmat Singh and Ors. vs. I.C.I. India Ltd. and Ors., [2008 (2) SCALE 152].

14. We, for the reasons stated hereinbefore, are of the opinion that the learned Civil Judge was not correct in allowing the application for amendment of the written statement.

11. Consequent thereupon, the order impugned is set aside. Petition is allowed. Moreover, a liberty is provided to the defendant to have his grievances redressed under duly framed suit, in case so filed within three months, failing which the rigour of limitation, if any, will come into play.

(Aditya Kumar Trivedi, J)

Patna High Court
Decmber 17th 2015
Perwez/AFR

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