

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**C.M.No.14160-C of 2015 in/and
RSA No.5663 of 2015 (O&M)
Date of decision:20.11.2015**

Manjinder Singh and others ... Appellants

Vs.

Dharam Pal and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. G.N.Malik, Advocate
for the appellants.

AMIT RAWAL J. (Oral)

C.M.No.14160-C of 2015

For the reasons stated in the application, duly supported by an affidavit, the same is allowed and hearing of the matter is preponed from 19.01.2016 to today itself.

RSA No.5663 of 2015 (O&M)

Appellant-respondents are in Regular Second Appeal, whereby, the counter claim set up by the defendants in a suit for declaration and permanent injunction claiming right of co-ownership, has been decreed and the appellants have been directed to hand over the possession, whereas, the suit filed by the appellant-plaintiffs

for declaration claiming 1/3rd share has been dismissed as withdrawn vide order dated 30.05.2012.

Mr. Ghulam Nabi Malik, learned counsel appearing on behalf of the appellants submits that counter claim as per the provisions of Order 8 Rule 6-A of the Code of Civil Procedure (hereinafter referred to as 'CPC') was required to be filed by the defendants along with the written statement. However, in the instant case, the counter claim has been filed after six years of filing of suit, i.e., on 11.08.2010, whereas, suit was filed on 05.04.2004 and therefore, counter claim was ex facie time barred. Since the parties were at variance, the trial Court framed issue No.2 vis-a-vis maintainability of the counter claim. He further submits that suit at the instance of the appellant-plaintiffs vis-a-vis claiming the co-ownership had been withdrawn on 30.05.2012. In essence, counter claim was filed on 11.08.2010 and the suit was withdrawn on 30.05.2012.

In support of his aforementioned contention, he relied upon the judgment of the Hon'ble Supreme Court in **Gayathri Womens Welfare Association vs. Gowramma and another 2011 AIR(SC) 785**.

He further submits that both the Courts below did not ponder upon the aforementioned facts, thus, erroneously decreed the counter claim of the respondents.

I have heard learned counsel for the appellants and

appraised the impugned judgments and decrees of the Courts below.

The ratio decidendi culled out by the Hon'ble Supreme Court in **Gayathri Womens Welfare Association's case (supra)**, wherein the plaintiff had filed a suit for injunction against the respondents, who on an appearance filed a written statement contending that they are in ownership of the portion of the property and the trial Court decreed the suit. However, the same was challenged in appeal before the High Court and the High Court after hearing the matter remanded back the same to the trial Court for fresh disposal by giving liberty to the plaintiffs therein to place on record the additional documents. After the remand from the High Court, respondents amended their written statement and incorporated counter claim directing the plaintiffs to demolish the structure put up subsequent to passing of the status quo order. The trial Court framed the additional issue and ultimately on the basis of the evidence, decreed the suit while dismissing the counter claim.

The Hon'ble Supreme Court observed that High Court confirmed the decree of permanent injunction and in the counter claim High Court observed that after the remand, another application was filed for amendment of the plaint to include the additional prayer for recovery of the possession of the property. It was the said counter claim which was rejected and the Hon'ble Supreme Court held that though the power to allow the amendment is undoubtedly wide and at any stage it can be exercised in the interest of justice and not

withstanding the law of limitation but the exercise of such power may have far reaching discretionary powers, thus, is governed by judicial consideration and wider the discretion, greater ought to be care and circumspection on the part of the Court.

In the present case, the controversy revolves around to the estate of Jumma Ram who died intestate on 11.10.1990. The claim of the appellants was that they are the children of Satya Devi, daughter of Jumma Ram who had been living with Jumma Ram through out and, therefore, had claimed co-ownership, whereas counter claimant had set up a Will dated 18.09.1984, alleged to have been executed by Jumma Ram bequeathing the entire property in their favour. It is aforementioned Will which has been proved as per the provisions of Section 68 of Indian Evidence Act, much less, in accordance with the provisions of Section 63(c) of the Indian Succession Act.

The plea of Mr. Malik, that counter claim for possession could not have been filed after six years of filing of suit as it was not in consonance with the provisions of Order 8 Rule 6-A CPC, has no force, for the reason that limitation to seek possession of the property is 12 years.

The Hon'ble Supreme Court in **Mahendra Kumar and another vs. State of M.P. and others 1987 AIR (SC) 1395**, held that the question of filing counter claim after the suit was filed by the claimants, there is no substantial difference between the counter

claim and the suit. In essence, the defendants cannot be prevented from filing a counter claim under the CPC as it is independent suit to be tried by invoking the jurisdiction under Section 9 of the CPC. The relevant observations of the Hon'ble Supreme Court given in paragraph 15, read thus:-

The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter claim after the filing, of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6A(1) of the Code of Civil Procedure. As the cause of action for the counter- claim

had arisen before the filing of the written statement, the counter-claim was, therefore, quite maintainable. Under [Article 113](#) of the [Limitation Act](#), 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit under [section 3\(2\)\(b\)](#) Limitation Act has been filed by the appellants within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter claim.”

On perusal of the aforementioned findings, the Hon'ble Supreme Court found that the limitation to seek declaration by filing counter claim is three years from the date of right to sue accrued. However, in the instant case, the counter claimants had sought the recovery of the possession and the limitation prescribed under the Limitation Act, to seek declaration is 12 years, in my view, counter claim cannot be said to be barred by law of limitation and the aforementioned facts, as mentioned, in paragraph 15 of the judgment, in my view, have not been noticed in **Gayathri Womens Welfare Association's case (supra)** by the Hon'ble Supreme Court, much less, this fact has not been brought to the notice of the Hon'ble Supreme Court. Even in the present case, cause of action to seek

possession had even accrued, even before filing of written defence.

It is also settled law that when there are two views of the Hon'ble Supreme Court, High Court would apply the view which finds to be more appropriate, therefore, for the adjudication of the present case, I rely upon the judgment rendered by the Hon'ble Supreme Court in **Mahendra Kumar's case (supra)**, which is applicable to the facts and circumstances of the present case.

Keeping in view the aforementioned observations, I do not intend to differ with the findings rendered by both the Courts below, much less, no substantial question of law arises to be adjudicated by this Court.

Accordingly, the appeal is dismissed.

**(AMIT RAWAL)
JUDGE**

November 20, 2015
savita