

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2016

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

C.R.P.PD.No.1843 of 2014

and M.P.No.1 of 2014

N.Vijayalakshmi .. Petitioner
vs

1.Janakiyammal
2.Sivasami
3.Bhakiyalakshmi
4.Kaleeshwari
5.Minor Prashanth
Minor rep.by guardian
Mother Kaleeshwari

6.Eswaran .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and final order dated 17.02.2014 passed by the learned Sub Court, Pollachi in I.A.No.1117 of 2013 in O.S.No.85 of 2011.

For Petitioner : Mr.A.Thiyagarajan
For Respondents : Mr.C.Veeraraghavan
for RR4 and 5
Mr.N.Umapathi for R6

RR1 to 3 – given up

ORDER

The plaintiff, who is the revision petitioner, aggrieved by the order passed by the Court below in allowing the fourth defendant to file the counter claim under Order VIII Rule 9 of the Code of Civil

Procedure, has filed the above revision.

2. For the sake of convenience, the parties are referred to hereunder according to their litigative status and ranking in the suit.

3. The suit is filed for partition. The fourth defendant is the brother of the plaintiff. According to the fourth defendant, one item of property in Schedule A and the property mentioned under Schedule C, in the partition deed dated 23.05.1990 were partitioned and given exclusively to the fourth defendant. Hence, he has made a counter claim with respect to that portion of the property. The said application was allowed by Court below, which is now under challenge in this revision by the plaintiff.

4. The learned counsel appearing for the revision petitioner/plaintiff, contended that the written statement was filed by the R6/fourth defendant in the month of June 2012. However, the counter claim under Order VIII Rule 6A of the Code of Civil Procedure [in short, 'CPC'] has been filed belatedly on 05.12.2013, that too after the commencement of trial, when it is open to R6/fourth defendant to file an independent suit on the same cause of action, for which the counter claim was preferred. He would further submit that the provisions under Order VIII Rule 6A of the CPC must be considered having regard to the other provisions viz., Order VI Rule 17 and Order VIII Rule 9 of the CPC. A right to file a counter claim is

an additional right. The only criteria is that the cause of action must accrue either before or after filing of the suit but before the defendant has raised his defence. The independent claim of the fourth defendant with respect to a few items of the properties based on the partition deed dated 23.05.1990 has accrued even much prior to the filing of the suit and the same existed even as on the date of filing of the suit and continued till the counter claim is filed. Accordingly, he would pray for setting aside the order passed by the court below.

5. Heard the learned counsel appearing for the petitioner; the learned counsels appearing for respondents 4 to 6. The respondents 1 to 3 were given up and perused the records.

6. A reading of the above provision viz., Order VIII Rule 6A(1) of CPC does not, on the face of it, bar the filing of the counter claim by the defendant after he had filed the written statement. The above Rule 6A(1) only states that 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.

7. As stated earlier, the fourth defendant has made a counter claim based on the partition deed dated 23.05.1990. Therefore, the cause of action for the fourth defendant was available before he had

filed his written statement. A right to file a counter claim is an additional right under Order VIII Rule 6A of CPC, which preferably accrues from the date of cause of action, however, the cause of action must accrue before or after the filing of the suit and if such cause of action continued even after filing of the written statement, a counter claim can be filed, even after the filing of the written statement.

8. In this regard, the learned counsel appearing for the R6/fourth defendant relied on the judgment of this Court reported in **2012(4)CTC 807[A.Nandagopala Krishnan vs. Antony]**. The relevant paragraphs are as under:

“11. I derive support to my view from the following paragraph in Mahendra Kumar vs. State of Madhya Pradesh, AIR 1987 SC 1395, wherein it is held as below:

“Paragraph 15 of the above case also speaks about the fact “what is laid down under Rule 6-A(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. The word “Defendant has delivered his defence” has to be construed in the light of Order 6, Rule 17, which provides for amendment of the pleadings. A combined reading of Order 6, Rule 17 with Rule 6-A of Order 8 quoted above goes to show that before the evidence is finally closed by either side the right given to the Defendant under Order 8 Rule 6A can be exercised. In fact while dealing with Order 6, Rule 17 in two cases namely, Nair Service, etc. vs. K.C.Alexander, AIR

1968 SC 1165 and Jai Jai Ram Manohar Lal vs. National Building and Material Supply, AIR 1969 SC 1267 the following principle is evolved "mere delay and laches in making the application for amendment is not a ground for refusal of the amendment. Amendment is discretionary matter and although amendment at a late stage is not to be granted as a matter of course the court must bear in favour of doing full and complete justice in the case where the party against whom the amendment is to be allowed can be compensated by costs or otherwise."

12. Thus, taking a cue from the above dictum of the Honourable Supreme Court, I am of the view that the Court must lean in favour of full and complete justice. As rightly pointed out by the learned counsel for the respondent, there is clear factual foundation even in the original written statement filed by the defendant and he has put forward his contention regarding the counter-claim against the plaintiff except seeking for cancellation of impugned sale deed. Therefore, no question of prejudice being caused to the petitioner/plaintiff by allowing amendment of the written statement to incorporate a counter-claim."

9. Whereas the learned counsel for the revision petitioner/plaintiff relied on the judgment of the Hon'ble Supreme Court reported in **2008-2-LW 974 [Bollepanda P.Poonacha and another vs. K.M.Madapa]**. The relevant paragraph is extracted 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 1998. 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 counter-claim 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 Lrs. [(1997) 8 SCC 174].”

10. Even in the above said case, the Hon’ble Supreme Court has specifically stated that the Court in such matters has a wide discretion, which would sub-serve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that without joinder of several causes of action in a suit is permissible. Therefore, the grant of any discretionary relief will depend upon the factual background involved in each case. In the case on hand, the trial court has exercised the same and allowed the counter claim to be filed by R6/fourth defendant.

11. In view of the foregoing reasons I do not find any reason to interfere with the order passed by the court below. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

23.12.2016

vj2

Index: Yes/No

Internet: Yes

To

The Subordinate Judge, Pollachi

PUSHPA SATHYANARAYANA,J.,
vj2

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and
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