

Sr. No. 211

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

**RSA No.2643 of 2012(O&M)
Decided on: 27.07.2017**

Soma Devi

.....Appellant

versus

Kashmiri Lal and another

.....Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Rajesh Gupta, Advocate for
Mr. Pritam Saini, Advocate
for the appellant.

Mr. Rajesh Arora, Advocate
for respondent No.1.

Rajbir Sehrawat, J.(Oral)

This is the second appeal filed by defendant No. 1 in the suit against a judgment and decree whereby the lower Appellate Court has reversed the decree passed in her favour by the Trial Court in her counter claim.

For the reference in the present appeal, the parties would be referred to as the plaintiff and defendant No. 1 and defendant No. 2 as described in the original plaint.

The facts of the case as mentioned in the judgment of the lower Appellate Court, are that the suit was filed by one Baljeet against Soma Devi, defendant No.1 (the present appellant) and Kashmiri Lal, defendant No. 2 (respondent No. 1 in the present appeal) alleging that he was owner in

possession of the residential house situated at Sodagran Mohalla, Ravidass Nagar, Thanesar, District Kurukshetra. The patnala (water outlet) and the ventilator of the house of the plaintiff open on the back side in a common 'gher' (common yard). It was further pleaded that on the southern side there was house of defendant No. 1 and on the eastern side there was house of defendant No. 2. It was further pleaded that the ventilator and the water outlet of his house in the common yard were in existence for the last 50 years. It was further pleaded that defendant No. 1; in collusion with defendant No. 2 wanted to grab whole of the common yard shown in red colour in the site plan attached in the plaint. It was further pleaded that the defendants had constructed two pillars and they wanted to close down the ventilator and the water outlet of the plaintiff towards the common yard. Therefore, the injunction was prayed for.

Defendant No. 2 filed written statement on 13.06.2006 wherein he claimed that the plaintiff had not come to the Court with clean hands. It was further pleaded that the alleged portion of common yard was exclusively in the use of defendants No. 1 and 2. It was further pleaded that a wall is existing between the house of defendant No. 1 and defendant No. 2 and their houses were adjoining each other. It was further claimed by defendant No. 2 that just to harass him and to grab the suit land the plaintiff has moved the Court without any cause of action. The existence of any common yard was denied by defendant No. 2. It was further claimed that the plaintiff had no right to create nuisance and that defendant No. 2 had every legal right to use the property in the manner he liked; being full owner of the suit property. Defendant No. 2 denied the existence of ventilator and the water outlet as claimed by the plaintiff. Accordingly, he prayed for dismissal of

the suit.

After defendant No. 2 had filed written statement then defendant No. 1 filed her written statement on 24.08.2006 wherein she also claimed that the plaintiff was neither owner in possession of the suit property nor was there a common yard. It was further claimed by defendant No. 1 that the ventilator and the water outlet has been created by the plaintiff forcibly and illegally without any right, title or interest in the suit property. Earlier her mother was residing alone in the house adjoining this alleged common yard and defendant No. 1 was away from home due to work. Taking advantage of this situation the plaintiff had installed this ventilator and the water outlet. It was claimed by defendant No. 1 that previously there was '*Chabutra*' being used by Smt. Bhagti Devi widow of Daulat Ram son of Hira Lal, resident of House No. 2889/5, Ravi Dass Nagar, Thanesar. However, that house alongwith '*Chabutra*' was purchased by the mother of defendant No. 1. The defendant No. 1 and her mother were in possession of the suit property in question. Later on, the house purchased by mother of defendant No. 1 was gifted by her to defendant No. 1. Hence, defendant No. 1 was the owner in possession of the suit property. She also claimed that even defendant No. 2 had raised construction of wall of approximately 2.5 feet in width and 9.3 feet in length. It was further claimed that defendant No. 1 had asked the plaintiff and defendant No. 2 not to harass her and to remove the ventilator, water outlet and the wall created by defendant No.2. However, they colluded with each other and have filed the suit. Alongwith the written statement the defendant No. 1 also filed counter-claim alleging that she was the owner in possession of the property marked by letters ABCD shown in red colour in the site plan and the same is

the part of the house of defendant No. 1. Plaintiff and defendant No. 2 have no right, title or interest in the suit property. Therefore, defendant No. 1 sought an injunction directing the plaintiff to close the ventilator and the water outlet and direction to the defendant No. 2 to remove the illegal construction made by him on the part of the land; which was approximately 2.5 feet in width and 9.3 feet in length and further for restoring the possession of the same to defendant No. 1.

Issues were framed by the Trial Court.

Plaintiff and defendant No. 1 led their evidence. However, defendant No. 2 did not opt to contest the case and he was proceeded ex parte on 15.01.2009.

After hearing learned counsel for the plaintiff and the defendant No. 1 the Trial Court dismissed the suit filed by the plaintiff and held that the plaintiff has failed to prove on record that he was the exclusive owner of the property in question. However, the counter-claim filed by defendant No. 1 was allowed by holding that defendant No. 1 has proved on record, by sufficient oral and documentary evidence, her ownership over the suit land. It was held that Ex:D-1 i.e. Deed of purchase by mother of defendant No. 1 shows that house in question was purchased alongwith '*Chabutra*' and the same property was given to defendant No. 1, Soma Devi, by her mother. Hence a decree was passed directing the plaintiff to close the patnala (water outlet) and the ventilator and also directing defendant No. 2 to remove the illegal construction made by him on part of the suit land.

Aggrieved against judgment and decree passed by the Trial Court, defendant No. 2, Kashmiri Lal, filed an appeal before the lower Appellate Court. However, Baljeet, who was the plaintiff in the suit had not filed any

appeal against the dismissal of his suit. Therefore, the appeal before the lower Appellate Court was against allowing the counter-claim of defendant No. 1 against defendant No.2. The lower Appellate Court allowed the appeal filed by defendant No. 2 and set aside the judgment and decree passed by the Trial Court qua defendant No. 2. One of the grounds recorded for setting aside the judgment and decree qua defendant No. 2 is that the counter claim could not have been filed against him, he being a co-defendant and the claim against him being an independent claim; having no relation with the claim raised by the plaintiff in the suit. However, liberty was granted to defendant No. 1, to seek her remedy against defendant No. 2 by filing a separate suit. Besides this a further direction was also issued against defendant No. 1 and she was directed to restore the original position of the open yard; which was claimed to be the suit property in the case. Challenging this judgment, defendant No. 1 has filed the present appeal.

Learned counsel for the appellant submits that the lower Appellate Court has wrongly held that the appellant could not have filed a counter claim against her co-defendant. He has submitted that the counter claim against a co-defendant is very much maintainable. It is his submission that the provision of counter claim has been made to reduce the litigation and to ensure that the dispute is decided in one go. To buttress his argument, learned counsel for the appellant places reliance on the judgment of Keral High Court reported in **2017(1) ILR (Kerala) 454** titled as ***Pulikkipoyil Salsamath Usman and another vs. Pulikkipoyil Moideen Kunhi and others***. He further relies upon the judgment of Jharkhand High Court reported in **2012(4) CivCC 765** titled as ***Anil Kumar Mehra vs. Rameshwar Prasad Mehta and others*** and submits that where the counter

claim is mainly filed against plaintiff in the suit but some incidental relief is claimed against a co-defendant; in that situation a counter claim against co-defendant is maintainable. This judgment of the Jharkhand High Court further relies upon the judgment of the Hon'ble Supreme Court rendered in **(2006) 12 SCC 734** titled as ***Rohit Singh and others versus State of Bihar (now State of Jharkhand) and others.*** Learned counsel for the appellant further argues that even the Hon'ble Supreme Court has held that a counter claim against a co-defendant is permissible. To the same effect, he relies upon the judgment of the Patna High Court reported in **2008 AIR (Patna) 55** titled as ***Bhagmati Devi vs. Anandi Devi and Ors.*** Still further the reliance is placed on the judgment of this Court rendered in **2015(3) PLR 706** titled as ***Som Pal vs. Kashmiri Lal and others.***

The next contention of learned counsel for the appellant is that even if the lower Appellate Court was to set aside the judgment and decree of the Trial Court; in her counter claim; then also the lower Appellate Court has erred and issuing further direction to her to restore the original position of the common yard. It is submitted by learned counsel for the appellant that this was not even the claim of the appellant before the lower Appellate Court. Hence, the relief granted was even beyond the claim made by defendant No. 2 before the lower Appellate Court and the Trial Court in the suit. Hence, it is submitted by him that the judgment and decree passed by the Trial Court be restored.

On the other hand, learned counsel for respondent No. 1 has submitted that the lower Appellate Court has rightly held that no counter claim is maintainable against a co-defendants. Still further it was submitted by him that lower Appellate Court has rightly recorded that counter claim

was filed behind the back of defendant No. 2 and he was not even given any notice regarding the counter claim filed against him. Defendant No. 2 did not even have the knowledge of the counter claim; since he had been proceeded ex parte due to communication gap with his counsel. It is further submitted by him that the direction regarding restoration of the original position of the common yard by the lower Appellate Court is also perfectly legal and right.

Having heard the learned counsel for the parties and perusing the record with their able assistance, this Court finds that the submission of learned counsel for the appellant requires partial acceptance and the rejection regarding the remaining aspects. So far as the argument of learned counsel for the appellant that counter claim against a co-defendant is maintainable is concerned, the same is liable to be rejected. The provision relating to filing of the counter claim is contained in Order VIII Rule 6A to 6G of the CPC. For ready reference the same is reproduced below:-

Rule 6A. 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 action according to the defendant against the plaintiff either before or after the filing of the suit, but before 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 damage or not:

1.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.

Rule 6B. Counter-claim to be stated

Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

Rule 6C. Exclusion of counter-claim

Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

Rule 6D. Effect of discontinuance of suit

If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

Rule 6E. Default of Plaintiff to reply to counter-claim.

If the plaintiff makes default in putting in reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him or make such order in relation to the counter-claim as it thinks fit.

Rule 6F. Relief to Defendant where counter-claim succeeds

Where in any suit a set-off or counter-claim is established as defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

**Rule 6G. Rules relating to written statement to
apply**

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.

A bare perusal of this provision shows that a counter claim can be filed against the claim of the plaintiff and it can be filed regarding a cause of action accruing to defendant against the plaintiff. Therefore, there is no question of a counter claim being permissible against a co-defendant by a defendant in the suit. Still further perusal of the provision contained in Rule 6A(3) shows that in case the counter claim is filed by the defendant then plaintiff shall be at liberty to file written statement in answer to the counter claim. Still further the provision contained in Rule 6C gives entitlement to the plaintiff to raise an objection to the counter claim filed by the defendant before the issues are framed in relation to the counter claim and the plaintiff can make a claim that counter claim of defendant be excluded from his suit and the defendant filing the counter claim may file a separate suit if he so desires. Still further Rule 6E shows that if the plaintiff defaults in filing reply to the counter claim; the Court may pronounce the judgment against the plaintiff in relation to the counter claim made against him. Even Rule 6F shows that the relief to be granted in the counter claim is against the plaintiff.

Hence a bare perusal of the claim of Order VIII Rule 6A to 6G shows that it is only the plaintiff; against whom a counter claim is permissible. It is only the plaintiff who has been given a right to file reply to the counter claim. It is only the plaintiff who can make an application for rejection of the counter claim on the ground that the defendant may file a

separate suit and it is only the plaintiff, on whose default to file the written statement, the Court can pass a judgment against the plaintiff and it is only the plaintiff against whom any balance, which is found due after adjusting the counter claim, can be granted to the person who is filing the counter claim. In this entire scheme, nowhere a co-defendant is contemplated as a person required to suffer a counter claim against him by another co-defendant. In case defendant files a counter claim against a co-defendant then co-defendant has not been given any right to file written statement to the counter-claim under Order VIII Rule 6A. Nor has a defendant been given any entitlement to make an application for exclusion of a counter claim filed by co-defendant against him. Nor the default of a defendant to file written statement in counter claim by a co-defendant, is prescribed as a ground for pronouncing a judgment against such a co-defendant. Even the balance of the relief after adjustment of counter claim is not contemplated to be granted against a co-defendant by the CPC. Therefore, expressly, no provision is made for permitting a counter claim by a defendant against his co-defendant.

Even impliedly the provision for permitting counter-claim against co-defendant cannot be read into the statute book for the simple reason that such an implied presumption would go totally in contravention with the other provisions of the Order VIII Rule 6A to 6G. If any counter claim by the defendant against his co-defendant is entertained by the Court then the Court would be finding itself in an absurd situation where the Court would not be authorised to permit filing written statement against the counter claim by the co-defendant, the Court would not be authorised to permit a defendant to move an application for exclusion of the counter claim by the

co-defendant and the Court would not be authorised to grant relief against co-defendant. For assuming all these powers with court, again an implied presumption will have to be made that Court has all these powers because it has permitted the counter claim to be filed against a co-defendant. This much of interpolation and reading into the statute which is neither required nor is necessary and, rather, is prohibited by the law of interpretation. Any omission to legislation a point has to be presumed to be intentional on the part of the legislature or the rules framing authority. Any defendant has, otherwise, full right to file a separate suit against a co-defendant for any cause of action. Therefore, no such interpolation of words and phrases in Order 8 Rule 6A to 6G is called for or permissible. Hence it is held that a defendant cannot file a counter claim against a co-defendant under any circumstances. Order VIII Rule 6A to 6G provide for and conceive of only a counter claim to be filed by the defendant against the claim of the plaintiff. Hence the counter claim against the co-defendant in the present case was not maintainable.

Much stress has been laid by the counsel on the judgments cited by him. However, the judgments cited by him are distinguishable on the facts of the case. Therefore these judgments are of no help to the case of the appellant. Still further all these judgments have relied upon the judgment of the Hon'ble Supreme Court in case of ***Rohit Singh and others (supra)*** to hold that a counter-claim against a co-defendant is maintainable. In this case, the Hon'ble Supreme Court has held that it appeared to them that a counter claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it may also claim the relief against the co-defendant in the suit. However, a bare reading of the judgment of the

Hon'ble Supreme Court shows that in the case before the Hon'ble Supreme Court the point whether a defendant can file a counter claim against a co-defendant did not even arise because in that case the Hon'ble Supreme Court found that the counter claim was not even properly filed in that case. The point in dispute in that case was the stage at which counter claim can be filed. Hence, this judgment is not the precedent on the point that a defendant, as a matter of right, can file a counter claim against a co-defendant as an independent remedy. Moreover even the perusal of the observations made by the Hon'ble Supreme Court; in that case, makes it clear that the Hon'ble Supreme Court has categorically held that the counter claim has necessarily to be directed against the plaintiff in the suit. Hon'ble Supreme Court has only said that while considering the counter claim against the plaintiff; the Court can grant an incidental relief against a co-defendant also. Still further the Hon'ble Supreme Court has further held that a counter claim; where the relief is solely directed against a co-defendant; is totally not maintainable. Therefore, this judgment of the Hon'ble Supreme Court clearly lays down that counter claim can be filed only against a plaintiff and that a counter claim against a co-defendant, qua the relief against defendant in his independent capacity, is not maintainable. It is only that while considering the counter claim filed against the plaintiff that the Court can grant some incidental relief even against a co-defendant. Hence the Hon'ble Supreme Court has never laid down that a co-defendant has an independent remedy of filing a counter claim against a co-defendant.

Creating an independent right in favour of a defendant to file a counter claim against a co-defendant is altogether different matter then the power of the Court to grant an incidental relief against a co-defendant also

while considering the counter claim of the defendant against the plaintiff. The Court always has a power to pass an order of incidental relief while granting the main relief in favour of a party. However, this relief has to be purely incidental to the main relief being granted by the Court. In a suit if the defendant files a counter claim against a plaintiff then Court can grant relief against the plaintiff, and any other relief; incidental to such main relief being granted against the plaintiff, can also be granted against a co-defendant. For that purpose not even counter claim is required. Hence, to say that since the Court can grant an incidental relief against a co-defendant, therefore, a counter claim against co-defendant is maintainable; would be only a jurisprudential distortion. Hence it has to be held that even for such incidental relief; which Court may ultimately grant in a counter claim against plaintiff, an independent counter-claim by a defendant against a co-defendant is not maintainable, in the independent capacity of a co-defendant. But the incidental relief, to the main relief which has been granted against the plaintiff may be directed by the Court even against a co-defendant, in his capacity as claiming through the plaintiff, if any.

Hence the lower Appellate Court has not committed any illegality perversity in holding that counter claim against a co-defendant itself was not maintainable. Otherwise also, lower Appellate Court has given sufficient reasons for setting aside the decree passed in the counter claim on the ground that defendant No. 2 did not get proper and sufficient opportunity to answer the counter claim filed by defendant No. 1. However, the right of defendant No. 1/appellant herein to file fresh suit against the defendant, if so desired, was rightly protected by the lower Appellate Court. The judgment and decree passed by the lower Appellate Court, to that extent, are

upheld.

However, the next argument of learned counsel for the appellant that the lower Appellate Court has exceeded its jurisdiction in issuing further direction to defendant No. 1 to restore the original position of the common yard; deserves to be accepted. There was no occasion for the lower Appellate Court to venture into issuance of this direction. It was neither the claim of defendant No. 2 before the Trial Court nor in appeal before the lower Appellate Court nor had the plaintiff filed any appeal against dismissal of his suit by the Trial Court. The Court was considering the judgment and decree passed on the counter claim filed by defendant No.1. At the best the lower Appellate Court could have dismissed the counter claim filed by defendant No. 1 and could have passed the decree accordingly. The direction to and decree against defendant No. 1 to restore the original position of the common yard is patently beyond the pleading and evidence in the case, as well as, beyond the scope of the appeal which was being considered by the lower Appellate Court. Hence this direction issued by lower Appellate Court is set aside. However, for this purpose the parties would be at liberty to avail their remedies in accordance with law for the same relief, if they so desire.

In view of the above, the findings, judgment and decree passed by the lower Appellate Court are modified accordingly.

No other argument was raised by learned counsel for the parties.

In view of the above, the appeal is partly accepted, to the extent of setting aside the direction to the appellant, to restore the original position of the suit property. Qua the other part, the appeal is dismissed. However, it is made clear that the parties would be at liberty to avail their remedies

regarding the suit property, independently, if they so considered appropriate.

27th July, 2017
Shivani Kaushik

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*