

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SECOND APPEAL No. 373 of 2010

1. Hemraj Agrawal, S/o Late Shri Goverdhan Das Agrawal, aged about 39 years, R/o Lodhipara, Station Road, Raipur, Tahsil and District Raipur (C.G.)

---- Appellant / Defendant No. 1

Versus

1. Smt. Bharti, W/o Rameshwar, aged about 31 years, R/o gudhiyari, Raipur, Tahsil and District Raipur (C.G.)
2. Rameshwar, S/o Bisauha Sunhare, aged about 36 years, R/o gudhiyari, Raipur, Tahsil and District Raipur (C.G.)
3. State of Chhattisgarh, through Collector, Raipur, District Raipur (C.G.)

---- Respondents / Plaintiffs

For Appellant	: Shri R.N. Pusty and Shri Pallav Mishra, Advocate.
For Respondents No. 1 & 2	: Shri Suresh Tandon, Advocate.
For Respondent No. 3	: Shri Arun Sao, Dy. A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

16/11/18

1. The substantial question of law involved, formulated and to be answered by this Court in this second appeal of appellant/Defendant No.1 is as under :-

“Whether the first appellate Court was justified in dismissing the appeal on the ground that the appellant/defendant No. 1 only claimed relief of mandatory injunction and did not seek declaration of title and recovery of possession ?”

2. The imperative facts required for determination of above-stated substantial question of law are as under :-

[For the sake of convenience, the parties would be referred hereinafter as per their nomenclature shown in the suit filed before the trial Court]

(2.1) The plaintiffs filed a suit for declaration of title and permanent injunction stating inter-alia that they are the title holder of the suit land bearing Khasra No.669/7, area 0.009 hectare situated at Village Gondhwara, District Raipur and also prayed for permanent injunction restraining the appellant/defendant No. 1 from interfering with their peaceful possession.

(2.2) The written statement was filed by the defendant No. 1 opposing the plaint averments. Thereafter, defendant No. 1 made an application for amendment seeking to incorporate counter claim that during the pendency of the suit the plaintiffs have made construction over the suit land, area 14 ft x 40 ft. admeasuring 560 sq.ft., by constructing house, therefore, that be removed by issuance of mandatory injunction which was rejected by the trial Court on 27.04.2007 but in a petition preferred by the appellant, this Court by order dated 28.02.2008 permitted defendant No. 1 to set up the counter claim. Ultimately, the trial Court after appreciating the oral and documentary evidence on record dismissed the suit and counter claim holding that though the

plaintiffs have made illegal construction over area 14 ft x 40 ft. admeasuring 560 sq.ft. of the suit land during the pendency of the suit but declined to grant decree in favour of defendant No. 1 on the ground that he is not a bonafide purchaser of the suit land and has no title over the suit land. The impugned decree dismissing the suit was not appealed by the plaintiff but appealed by defendant No. 1 before the first appellate Court, which came to be dismissed by the impugned decree after having held that though defendant No. 1 has established his title over the suit land but the counter claim preferred by him was not in accordance with Order 8 Rule 6(A) of CPC and further held that neither he has sought relief of declaration of title nor he has preferred a counter claim for recovery of possession.

3. Questioning the judgment and decree passed by the first appellate Court, this second appeal under Section 100 of the Code of Civil Procedure has been preferred by the appellant/defendant No. 1 in which substantial question of law has been framed and set out in the opening paragraph of the judgment.

4. Mr. R.N. Pusty, learned counsel appearing for the appellant/defendant No. 1 vehemently submits that the first appellate Court is absolutely unjustified in dismissing the appeal after having held that defendant No. 1 has established his title over the suit land, it ought to have granted recovery of possession as he has already sought the relief of mandatory injunction which covers the relief of

recovery of possession and no relief of declaration of title was required to be sought for as his title was not under serious cloud. Therefore, the judgment and decree in part contained in Para-12 of the impugned decree is liable to be set aside.

5. Mr. Suresh Tandon, learned counsel appearing for respondents No. 1 and 2 would support the impugned order and submits that the first appellate Court has rightly held that in absence of claiming relief of recovery of possession and declaration of title, the suit for counter claim itself was not maintainable.

6. Mr. Arun Sao, learned Deputy Advocate General appears for the State, which is a formal party.

7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

8. The first question for consideration would be whether the counter claim filed by the appellant/defendant No. 1 claiming mandatory injunction after removing the illegal construction raised by plaintiffs was maintainable ?

9. Order 8 Rule 6-A CPC provides for counter claim which states as under :-

“O.8, R.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.”

A careful perusal of above-stated provision would show that Rule 6-A is couched in such a wide words, that it can be brought in respect of any claim that could be subject matter of independent suit. The very object of Rule 6A is to treat counter claim as an independent suit to be heard together with the plaintiff's suit to enable the Court to pronounce final judgment.

10. The Supreme Court in the matter of **Ramesh Chand Ardawatiya v. Abnil Panjwani**¹ while highlighting Order 8 Rule 6 has held that the purpose of enabling to file counter claim is to avoid multiplicity of the proceedings and saving of the Court time as also to exclude inconvenience to the parties by enabling to file claim and counter claim and that is permitting all the disputes between the same parties to be decided in the course of the same proceedings. Their Lordships pointed out all the three modes of setting up of counter claim and held as under :-

“28. Looking to the scheme of Order 8 as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order 6 Rule 17 of the CPC if sought to be

1 (2003) 7 SCC 350

introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order 8 Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced.....”

11. From the aforesaid principle of law laid down qua the setting up of counter-claim, it is quite vivid that setting up of the counter claim with amendment by defendant with the leave of Court is

permissible. In the instant case the present defendant sought to set up the counter claim by way of amendment in the written statement which was rejected by the trial Court on 27.04.2007 and which was granted by this Court in the writ petition preferred by the appellant/defendant No.1 on 28.08.2008 clearly holding that in order to raise all the issues between parties with respect to suit property should be adjudicated in one proceeding and it would not cause any prejudice to the plaintiffs and thereby appellant/defendant No.1 was permitted to maintain counter-claim. In view of the above analysis, the first appellate Court is absolutely unjustified in holding that the counter claim was not maintainable and it is not in accordance with Order 8 Rule 6(A) of CPC.

12. This brings me to the next finding recorded by the first appellate Court that defendant No.1 has not sought for relief of declaration of title. In the instant case, the first appellate Court himself has reached to the clear finding that defendant No. 1 is the title holder of the suit land after having held that defendant No. 1 is the title holder of the suit land while examining the judgment impugned in appeal against the counter claim dismissed by the trial Court, the first appellate Court could not have held that filing of the suit for declaration was absolutely necessary.

13. In the matter of **Anathula Sudhakar v. P. Buchi Reddy**², the Supreme Court has held that prayer for declaration will be necessary only if denial of title by defendant or challenge to the plaintiff title raises a cloud on the title of the plaintiff to the property and pertinently observed as under :-

'14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raise a serious dispute or cloud over the plaintiff's title, then

2 (2008) 4 SCC 594

there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.”

14. Particularly, in this instance case, the defendant No. 1 did not feel that serious cloud is raised over the title, as such, in light of the finding recorded by the first appellate Court, that defendant No.1 is the title holder of the suit property, the finding of the trial Court that the filing of the suit for declaration was imperative, cannot sustain and accordingly it is set aside.

15. Finally, coming to the plea that in the counter-claim, the defendant No. 1 ought to have claimed the relief of possession, it is admitted position on record as the trial Court has also recorded a finding that the plaintiff has made encroachment on 14x40 sq. ft 560 sq ft. over the suit land during the pendency of the suit by constructing house. The finding of construction of house to be illegal has not been challenged by either party and has attained finality. The defendant No.1 has sought for relief of mandatory injunction by demolishing the said construction. The question is

whether claiming the relief of possession was absolutely necessary to maintain the counter-claim?

16. Order 39 of Specific Relief Act, 1963 provides as under :-

“39. Mandatory Injunctions.- When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

Injunctions are either prohibitory or mandatory. The former restricts the progress or doing of an act by forbidding it under Section 38 of the Act, while Section 39 directs to undo a wrongful act which the defendant has done. This provision seeks to prevent breach of an obligation existing in favour of plaintiff. By an order of mandatory injunction Court may compel the defendant to restore a thing to its formal state or condition, but court has to exercise this power with caution and circumspection as relief by way of mandatory injunction is discretionary.

17. In the matter of **Santlal Jain v. Avtar Singh**³, similar question arose before the Supreme Court in which the relief of mandatory injunction for vacating the premises was sought though relief of possession was not sought. The Supreme Court has held that

3 (1985) 2 SCC 332

though the suit was in effect for possession but merely he has couched the plaint in form of suit for mandatory injunction, relief cannot be denied and it was observed as under :-

“7. In the present case it has not been shown to us that the appellant had come to the Court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.”

18. Likewise, in the matter of **Vishram V. Sudesh Govekar**⁴ the Supreme Court has held in a suit for mandatory injunction filed by the plaintiffs for demolition of illegal construction on suit land raised by trespass, the relief of possession is not required. It was held as under :-

4 (2017) 11 SCC 345

“14.1.....It was, thus, argued that in the absence of any relief for possession, such a suit could not have been filed. For this, he placed reliance on the judgment of this Court in *Anathula Sudhakar v. P. Buchi Reddy* [*Anathula Sudhakar v. P. Buchi Reddy*, (2008) 4 SCC 594].

14.2.....Maintainability of the suit was questioned on the ground that the plaintiffs did not even seek any declaration as to title and had made a prayer simpliciter for injunction even when there was cloud over the title.

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26.....The matter is to be examined in this hue and, therefore, the argument that relief for possession should also have been sought is clearly untenable. This aspect has been touched upon and dealt with by the High Court, with which we concur, in the following manner : (*Vishram case* [*Vishram v. Sudesh Govekar*, 2013 SCC OnLine Bom 1529], SCC OnLine Bom para 16).”

19. Reverting to the facts of the present case, in light of the principle of law laid down by the Supreme Court in the above stated judgments, in the instant case the plaintiffs have encroached upon the suit land by constructing a house during the pendency of the suit and construction has been held to be illegal by the trial Court and the said finding has become final and, therefore, when the

illegal and unauthorized construction has been made during the pendency of the suit and the defendant No.1 has in fact, claimed in the counter claim relief of mandatory injunction and which is in fact relief of possession after demolishing the construction which has been made during the pendency of the suit, the first appellate Court is absolutely unjustified in holding that the relief of possession ought to have been sought for expressly in the counter claim, the relief as set up in the counter claim by way of mandatory injunction as couched would include recovery of possession as such the finding recorded by the first appellate Court that in absence of specific claim of possession counter claim cannot stand is liable to be set aside. The substantial question of law is answered in favour of defendant No. 1 and against the plaintiff.

20. As a fallout and consequence of the aforesaid discussion, the part of the decree passed by the first appellate Court as contained in Para-12 is hereby set aside partly granting the appeal. The following decree is granted in favour of defendant No. 1 :-

- (I) That defendant No.1 is entitled for possession of suit land bearing Khasra No. 669/7 situated at Gondwara, P.H. No. 108, Tahsil and District Raipur from the plaintiff.
- (ii) That the plaintiffs will deliver vacant and peaceful possession

of suit land to defendant No.1 within two months from today after demolishing the unauthorized construction. Cost of demolition will be incurred by plaintiff.

21. Parties will bear their own cost(s).

22. A decree be drawn up accordingly.

SD/-

(Sanjay K. Agrawal)
Judge