

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.02.2020

PRONOUNCED ON: 28.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A.No.581 of 2009
& MP.No.1 of 2009

Ponnusamy ... Appellant/Defendant

Vs.

Chinnaraj ... Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 29.01.2009 passed in A.S.No.91 of 2008 on the file of the Principal Sub Court, Erode reversing the judgment and decree dated 29.04.2008 made in O.S.No.461 of 2004 on the file of learned District Munsif-Cum-Judicial Magistrate, Perundurai.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.Sanjesh Mahalingam for
M/s.S.T.S.Murthi

JUDGMENT

This Second Appeal has been directed against the Judgment and decree dated 29.01.2009 passed by the learned Principal Sub Judge, Erode in A.S.No.91 of 2008 reversing the judgment and decree dated 29.04.2008 passed by the learned District Munsif-Cum-Judicial Magistrate, Perundurai in O.S.No.461 of 2004.

2. The brief facts which gave rise to the filing of the present Second Appeal are stated hereunder:

2.1 The appellant is the defendant and the respondent is the plaintiff. The parties are described as per their litigative status in the suit proceedings.

2.2 The plaintiff has approached the trial Court for passing judgment and decree against the defendant for a sum of Rs.47,140/-. The case of the plaintiff was that he has purchased a piece of land measuring an extent of Ac.

1.40 1/3 cents from the defendant for a valid consideration sum of Rs.1,40,000/- under a registered sale deed dated 08.09.1994. According to the plaintiff, the defendant represented to the plaintiff that he was an absolute owner of the land to the extent of 1/12th share in common Survey number as mentioned in the description of property. Later on, according to the plaintiff, it was found that the defendant was the owner only to an extent of Ac.0.80 cents of the land sold to the plaintiff and therefore, excess land which was sold by him to an extent of Ac.0.60 1/3rd cents, the defendant had been paid for that extent also. Since what was conveyed to the plaintiff was not actually promised, but the sale consideration of Rs.1,40,000/- was paid for a total extent of Ac.1.40 1/3 cents. The plaintiff was constrained to approach the Civil Court seeking for recovery of amount proportionate to the excess land sold to him from the defendant to the tune of Rs.47,140/-.

2.3 On behalf of the defendant, a written statement was filed resisting the claim of the plaintiff. The first written statement was filed on 30.06.1998. According to the defendant, there was no misrepresentation on his part and what was agreed between the plaintiff and the defendant alone was sold and there was no excess payment made to him by the plaintiff. He also denied the averments that he had played fraud and cheated the plaintiff.

2.4 The defendant also filed an additional written statement under Order VIII Rule 6(A) of CPC on 22.08.2005 setting up a counter-claim seeking direction to the plaintiff to re-convey the suit properties to him on receipt of the sale price quoted in the sale deed dated 08.09.1994 by way of pre-emptive right.

2.5 The trial Court which went into the issues after framing the same and on consideration of the evidence and

pleadings placed on record, dismissed the suit filed by the plaintiff for recovery of sum of Rs.47,140/- but allowed the counter-claim set up by the defendant and directed the plaintiff to execute sale deed in favour of the defendant within two months by directing the defendant to pay 12% interest from the date of the suit till the date of payment on Rs.1,40,000/- which was the original sale consideration.

2.6 The judgment and decree of the trial Court dated 29.04.2008 was subjected to first appeal before the Principal Sub Court, Erode in A.S.No.91 of 2008 by the plaintiff.

2.7 The Appellate Court, after advertng to both oral and documentary evidence and submissions of the rival parties and also after appreciating the judgment of the trial Court, has reversed the findings of the trial Court to the extent of allowing the counter claim of the defendant by the

trial Court. The lower appellate Court has concluded that after the sale was effected in 1994 it was not open to the defendant to set up a counter-claim in 2005 after a period of 11 years. According to the lower Appellate Court, once the Written Statement was filed in 1998, in view of the embargo as found in Order VIII Rule 6(A), it was not open to the defendant to have any pre-emptive right. The lower appellate Court has also reasoned that as per Sub Clause 4 of Rule 6(A) of Order VIII, counter claim should be treated as a plaint and governed by the Rules applicable to the plaints, which meant that the counter claim of the defendant was hit by limitation. Therefore, the counter-claim set up by the defendant was not maintainable and hence concluded that the trial Court's direction for allowing the counter claim of the defendant, was unsustainable in law. In fact, the lower appellate Court has also found that no evidence was let in on behalf of the defendant in order to establish his counter claim. Therefore, the lower appellate

Court has found that the defendant did not establish his counter claim both in terms of law and facts. The lower appellate Court has also held that the counter claim of the defendant was also outside the pecuniary jurisdiction of the trial Court concerned and therefore, even on that ground, the judgment and decree of the trial Court cannot be sustained. As against that, the defendant is before this Court.

3. While admitting the Second Appeal, the following substantial questions of law were framed for consideration:

(i) Whether the lower appellate Court is correct in holding that the defendant is debarred from filing a counter claim?

(ii) Whether the lower appellate Court is correct in dismissing the counter claim on the premise that the same is beyond the pecuniary jurisdiction of the trial Court?

(iii) Whether the lower appellate Court has committed an error in holding that the counter claim is time barred?

4. Mr.N.Manokaran, the learned counsel appearing for the appellant/defendant would rely on Sub Section 2 of Section 21 of CPC which reads as under:

21. Objection to jurisdiction:

(1)

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance of the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.”

(3)”

5. According to the learned counsel, unless there was an objection with reference to the pecuniary limit of the jurisdiction at the earliest point of opportunity, the appellate Court was not right in rendering a finding in regard to the counter claim being beyond the pecuniary

limit of the trial Court concerned. According to the learned counsel, on behalf of the plaintiff, no such objection was raised before the trial Court and therefore, it was not open to the lower appellate Court to reverse the judgment and decree of the trial Court on that ground.

6. The learned counsel would further submit that it is always open to the defendant to set up a counter claim either before the suit or after the suit. According to the learned counsel, counter claim was not hit by limitation for the simple reason that the defendant had occasion to raise the counter claim only when the suit was filed by the plaintiff in 1996 and only in response to return of his money for Rs.47,140/- the defendant had an opportunity to put forth his counter claim. Therefore, the counter claim made by the defendant was not hit by any limitation. Therefore, he would submit that the judgment and decree of the lower appellate Court dated 29.01.2009 is liable to be

interfered with.

7. Per contra, the learned counsel Mr.Sanjesh Mahalingam would submit that the defendant sold the property to the plaintiff on 08.09.1994 and when the plaintiff approached the trial Court for return of excess amount paid to him in 1996, a Written Statement was initially filed by the defendant, resisting the claim of the plaintiff in 1998. Thereafter, after lapse of nearly six years, an additional Written Statement was filed by way of counter claim and such counter claim set up by the defendant, was clearly barred under Order VIII Rule 6A of CPC, which reads as under:

“Order VIII- Written Statement, Set-off and Counter-claim.

6-A. Counter-claim by defendant.-

(1) A defendant in 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. The learned counsel would also submit that Sub Clause (4) of Rule 6(A) of Order VIII CPC extracted above, would also be a bar to the counter claim of the defendant. He would further submit that once the counter claim is treated as plaint, the law of limitation would be very much

applicable. Therefore, the lower appellate Court was perfectly correct in appreciating the legal position and discountenanced the claim and counter claim of the defendant by setting aside the judgment and decree of the trial Court. According to him, the defendant cannot be allowed to set up his counter claim leisurely in order to defeat the operation of limitation of law by taking refuge under Order VIII Rule 6A CPC.

9. In support of his submissions, the learned counsel would rely on a decision of the Hon'ble Supreme Court reported in "2019 SCC OnLine SC 1493 (**Ashok Kumar Kalra versus Wing Cdr.Surendra Agnihotri and others**)", wherein, he particularly draw the attention of this Court to paragraph 18, which is extracted as under:

"18. The time limitation for filing of the counter-claim, is not explicitly provided by the Legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further

complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counter-claim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order VIII Rule 6A. Having said so, this does not mean that counter-claim can be filed at any time after filing of the written statement. As counter-claim is treated to be a plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.”

10. The learned counsel would submit that the above observation of the Hon'ble Supreme Court would fully strengthen his arguments and the lower appellate Court has correctly understood the legal principle with reference to both Order VIII Rule 6A and the Limitation Act and disallowed the counter-claim. Therefore, he would submit that the judgment and decree of the lower appellate

Court is liable to be upheld.

11. By way of reply, the learned counsel appearing for the defendant would rely on a decision reported in “(2008) 13 SCC 179 (***Bollepanda Poonacha and another versus K.M.Madapa***)”, wherein, he would draw the attention of this Court to paragraphs 11 and 15, which are extracted as under:

“11. 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].

12. to 14.

15. A belated counter claim must be discouraged by this Court. See **Ramesh Chand Vs. Anil Panjwani** [(2003) 7 SCC 350]. 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. 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 & Ors. Vs. M/s. Pioneer Builders, A.P.** [(2006) 9 SCALE 520] and **Steel Authority of India Ltd. Vs. Union of India & Ors.** [2006 (9) SCALE 597] and **Himmat Singh and Ors. Vs. I.C.I. India Ltd. and Ors.,** [2008 (2) SCALE 152].”

According to the learned counsel, once the defendant was allowed to file additional Written Statement, it is always permissible for the defendant to elaborate his claim or set up of his counter claim.

12. Considered the submissions put forth by Mr.N.Manokaran, learned counsel for the appellant/defendant and Mr.Sanjesh Mahalingam, learned counsel for respondent/plaintiff and perused the entire materials placed on record.

13. The entire issue on hand falls on a narrow compass as to whether the trial Court was right in allowing the counter-claim of the defendant under Order VIII Rule 6A when such counter claim was put forth after the defence was disclosed by the defendant and after very many years since the suit was filed by the plaintiff for recovery of excess amount paid to the defendant and as to whether the lower appellate Court is right in applying the legal principles with reference to Order VIII Rule 6A CPC and the provision of the Limitation Act and also as to the pecuniary jurisdiction of the trial Court concerned.

14. Although the learned counsel for the appellant/defendant would submit that the cause of action as far as setting up OF the counter claim had arisen only when the suit was laid by the plaintiff for recovery of the so-called excess money paid to the defendant, yet, the fact of

the matter is that originally, a Written Statement was filed by the defendant in 1998 wherein, there was no whisper of counter-claim. But only after expiry nearly seven years, the so-called counter-claim was set up by way of additional Written Statement in 2005, seeking to re-convey the suit property which was sold to the plaintiff on 08.09.1994. In the said facts and circumstances, the trial Court though dismissed the suit claim filed by the plaintiff, has proceeded further to examine the counter claim of the defendant and allowed the same. In the opinion of this Court, the trial Court has not examined the scope and import of Order VIII Rule 6A in proper perspective. Order VIII Rule 6A provides clear embargo on the defendant in raising counter-claim after delivery of defence and in the case on hand, the defendant had filed his Written Statement in 1998 itself. Once the defence was delivered, the embargo become active and the defendant was precluded from putting up any counter-claim thereafter. Rule 6A is very clear and plain

and no interpretative skill is required to understand its implication. Moreover, any counter claim must be circumscribed by the law of Limitation and it cannot be raised *ad infinitum* at any time of sweet will and wish of the defendant. The learned counsel for the respondent/plaintiff relied upon a decision of the Hon'ble Supreme Court reported in "2019 SCC OnLine SC 1493 (**Ashok Kumar Kalra versus Wing Cdr.Surendra Agnihotri and others**) and in paragraph 18 (extracted supra), the Hon'ble Supreme Court has succinctly elucidated the concept of embargo provided under Order VIII Rule 6A and application of Limitation Act and the consequence of invocation of Rule 6A. The ruling of the Hon'ble Supreme Court of India in its entirety clinch the issue in favour of the respondent/plaintiff. In such view of the matter, this Court has to come to an inexorable conclusion that the reasons of the lower appellate Court for reversing the judgment and decree of the trial Court allowing the counter-claim of the

defendant, are perfectly in order and the same do not suffer from any infirmity at all. In fact, the lower appellate Court has found the counter-claim of the defendant was legally unsustainable and factually not established. Since the first lower appellate Court was a final Court in respect of factual finding, the finding as such does not require any interference, as such finding is on the basis of presence or absence of the materials, which cannot be re-appreciated by this Court.

15. As regards the decision relied upon by the learned counsel for the defendant, the same does not advance the claim of the defendant when the fact of the matter is that the additional Written Statement was filed after a period of nearly seven years from the date when the original Written Statement was filed wherein, admittedly, the defendant has not whispered anything about the counter claim.

16. Since the reversing finding of the lower appellate Court is principally on the basis of proper understanding of Order VIII Rule 6A and Sub Clause 4 of Rule 6A, the other finding of the lower appellate Court regarding the pecuniary jurisdiction of the trial Court is concerned, need not be gone into for the disposal of the present Second Appeal. On the whole, this Court is of the view that the judgment and decree of the lower appellate Court is supported by the established legal principles and also supported by the factual finding against the defendant and in that view of the matter, this Court does not think that the appellant/defendant can succeed in the Second Appeal. Accordingly, the substantial questions of law framed, are answered against the appellant/defendant.

17. In the result, the Second Appeal fails and the same is dismissed. Consequently, the judgment and decree dated 29.01.2009 in A.S.No.91 of 2008 passed by the Principal

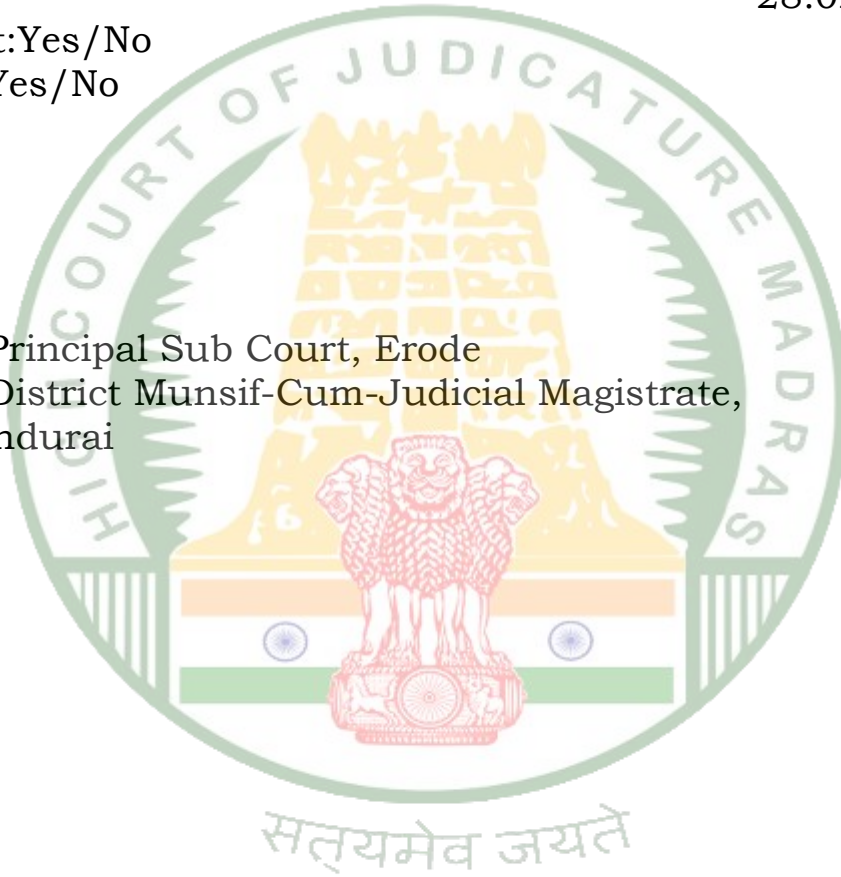
Sub Judge, Erode are hereby confirmed. The parties shall bear their own costs. Consequently, connected MP is closed.

28.02.2020

Internet:Yes/No
Index: Yes/No

To

- 1.The Principal Sub Court, Erode
- 2.The District Munsif-Cum-Judicial Magistrate,
Perundurai

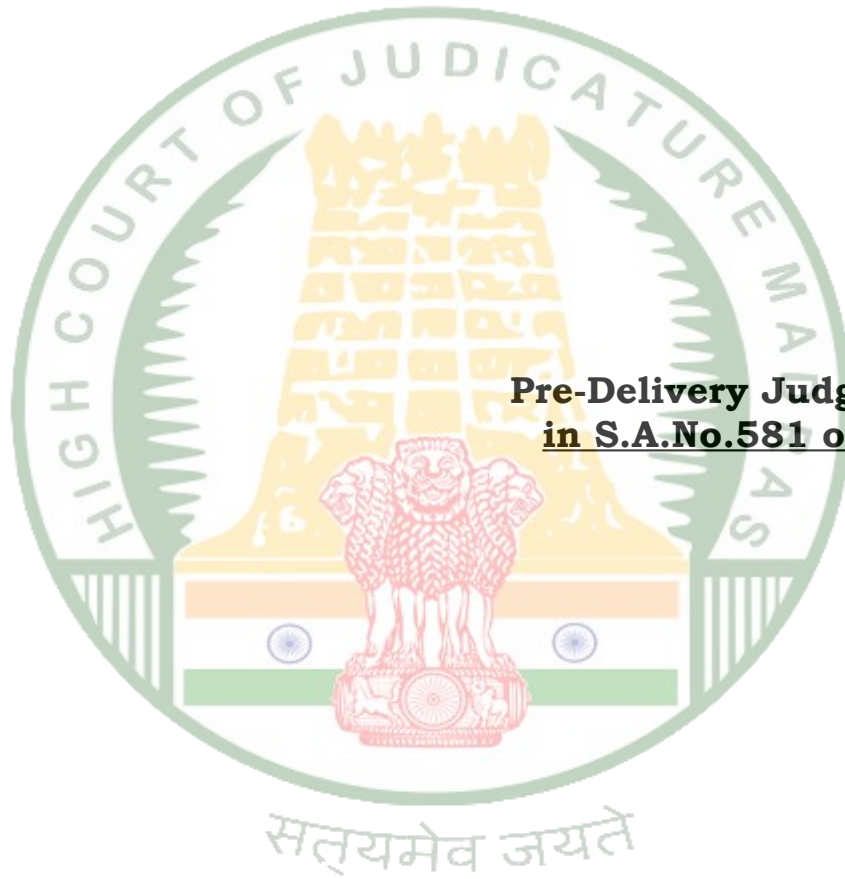


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**Pre-Delivery Judgment
in S.A.No.581 of 2009**

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