

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Orders Reserved on</i>	<i>Orders Pronounced on</i>
09.03.2020	17.06.2020

CORAM

THE HON'BLE MR.JUSTICE D. KRISHNAKUMAR

C.R.P. No.1007 of 2020

and

C.M.P.NO.5525 of 2020

- 1 R.AYYASAMY
S/O LATE RAMASAMY MUDALIAR,
D.N.52/1, VENKATACHALAPATHY NAGAR,
G.GOUNDENPALAYAM, NAYAKKANPALAYAM POST,
COIMBATORE-641020 ... Petitioner/1st respondent/
Plaintiff
- Vs.
- 1 R.NAGARAJAN
S/O LATE RAMASAMY MUDALIAR,
D.NO.46/9, AMARAVATHY STREET,
GURUSAMY NAGAR,
BHARATHIYAR UNIVERSITY POST,
COIMBATORE- 641046 ... 1st Respondent/Petitioner/
1st Defendant
- 2 KALIAMMAL
W/O RAMASAMY MUDALIAR.
D.NO.11-B/22, OORGOUNDEN STREET,
MARUTHAPURAM, BHARATHIYAR UNIVERSITY POST,
COIMBATORE-641046
- 3 BABY
W/O PALANISAMY,
D.NO.47 SETHUPATHY GOUNDER STREET,
NALVAR NAGAR(SOUTH), KALVEERMPALAYAM
COIMBATORE-641046.

4 DEVAKI
W/O LATE RAMASAMY,
DURGA NAGAR, OPP. CHAVARA SCHOOL,
SOMAIYAMPALAYAM,
BHARATHIYAR UNIVERSITY POST,
COIMBATORE-641046

5 VENNILA
W/O SUBRAMANIAM,
D.NO.3/86 V.O.NAGAR,
GURU COMPLEX, MARADHAMALAI MAIN ROAD,
VADAVALLI,
COIMBATORE-641046. ... Respondents 2 to 5/Respondents
2 to 5/Defendants 2 to 5

Prayer: The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decretal order dated 22.01.2020 in I.A.No.5 of 2019 in O.S.No.147 of 2005 on the file of the V Additional District Judge, Coimbatore.

For Petitioner : Mr.D.Sivakumar
For Respondents : Mr.MA.P.Thangavel

ORDER

Based on the Will executed by one Ramasamy Mudaliar, the revision petitioner has filed a suit in O.S.No.147 of 2005 before the V Additional District Court, Coimbatore for partition by metes and bounds into two equal shares and for allotment of one such shares to the plaintiff in the

suit property by appointing a Commissioner to effect the partition and for costs. The first defendant has filed a written statement opposing the claim of the plaintiff based on the Will for equal shares in the suit properties.

2. The case of the applicant/first respondent/first defendant is as under:

It is the specific case of the first defendant that after the execution of the registered Will by the testator, during his lifetime with the knowledge of the first respondent/plaintiff, the testator has sold 1.50 acres of the land allotted to the plaintiff in "A" Schedule in the Will. Therefore, the plaintiff is entitled only to the remaining portion of the 'A' schedule property mentioned in the Will. In the suit, preliminary decree was passed in favour of the plaintiff. Challenging the judgment and decree, dated 3.7.2009, the 4th defendant viz., Tmt.Vennila had filed an appeal in A.S.No.843 of 2010 before this Court. The 1st defendant has filed cross objection No.40 of 2018 to modify the decree to the effect that the plaintiff is entitled to the remaining extent of "A" Schedule property and the 1st defendant is entitled to the "B" Schedule property as per the Will, Ex.A3. The aforesaid appeal was allowed. However, cross objection No.40 of 2018 filed by the 1st defendant was dismissed and remanded the case to the trial Court for adjudication upon the genuineness of the Will after providing opportunities to the parties to prove

the Will. Under these circumstances, the 1st defendant has filed the instant application in I.A.No.5 of 2019 under Order 8 Rule 1-A r/w Section 151 of C.P.C. to accept the petitioner's/1st defendant's counter claim and allot the share and pass a preliminary decree in the above suit.

3 The first respondent/plaintiff has filed counter statement before the trial Court as under:

The trial Court on proper application of judicial mind over the facts in issue and also the law, has rightly decreed the suit in favour of the plaintiff/revision petitioner. The 1st defendant/1st respondent herein cannot file such application to make counter claim at the belated stage and the same is unsustainable. In the appeal filed by the 4th defendant in A.S.No.843 of 2010, this court by its judgment and decree, dated 26.10.2018, remanded the matter to the trial Court and dismissed the cross objection No.40 of 2018 filed by the first defendant. The counterclaim which is sought to be raised by the first defendant at this distance of time is absolutely unsustainable in law, that the same is barred by limitation. Thus, the application is liable to be rejected.

4. The Court below after hearing the arguments advanced by the parties and considering the application on merits, held that the relief as prayed for in the application can be decided only after trial, i.e. after deciding upon the genuineness of the Will. Challenging the impugned order, dated

22.1.2020 passed by the trial Court, the plaintiff has filed the instant Civil revision petition on the following grounds.

5. In the additional written statement filed by the first respondent/first defendant, it is specifically averred in paragraph 5 that the property mentioned in S.F.No.102/1 of Somayampalayam Village, out of 2.32 acres, both plaintiff and the first defendant are entitled for an extent of 1.16 acres each which is shown as 'A' and 'B' schedule properties. Some portion of the lands have been acquired by the Tamil Nadu Government for the purpose of Bharathiar University. For enhancement of compensation, L.A.O.P. No.31 of 1986 was filed. The petitioner was also impleaded as party in L.A.O.P.No.31 of 1986 as legal heirs of late Ramsamy Mudaliar.

6. According to the learned counsel appearing for the petitioner, the aforesaid counter claim has been filed by the first respondent/first defendant nearly 14 years after filing the written statement and framing of issues. Further, it is also contended that the trial Court has passed preliminary decree in favour of the first respondent/plaintiff. Challenging the judgment and decree, an appeal suit was filed in A.S.No.843 of 2010 and this Court by judgment, dated 26.10.2018 allowed the appeal and remanded the case to the trial Court to consider the genuineness upon the Will. After the case was

remanded to the trial Court, the case was restored on the file of the trial Court to proceed the trial as directed by this Court. At this juncture, the first defendant has filed the instant application to file counter claim which is unsustainable in law and the trial Court is erred in allowing the said application. According to the learned counsel appearing for the petitioner, the counter claim sought to be raised by the first defendant is already made in the written statement as early as on 18.8.2005 and additional written statement filed by the first defendant and as such, the Court below lost at sight by allowing the application seeking permission to raise a counterclaim. As the suit is for partition and separate possession, the first defendant without even filing counter claim, it is always open for him to claim a share by paying proper court fee. Therefore, the impugned order passed by the Court below is liable to be set aside.

7. Per contra, the learned counsel appearing for the first respondent/first defendant strongly objected the contention of the revision petitioner and submitted that the suit filed by the revision petitioner is for partition and separate possession and that the contention of the revision petitioner that the counterclaim sought to be filed by the first defendant/first respondent is barred by limitation is incorrect. It is further contended by the counsel appearing for the first respondent that the revision petitioner has raised a technical ground objecting the counter claim sought to be filed by the

first respondent. Further, according to the learned counsel appearing for the first respondent/first defendant, since the suit is for partition, at any point of time, the defendant can make a counter claim for partition of his share in the suit properties upon paying necessary court fees. The first respondent being the first defendant in the suit having right over the share on the suit property, therefore, the petitioner cannot defeat the right of the respondent/first defendant seeking relief to file counter claim on the aforesaid suit property. Thus, the Court below by considering the submissions made by the parties, has rightly allowed the application and hence, prayed for dismissal of the Civil revision petition.

8. Heard the learned counsel appearing for the parties, having regard to the rival submissions of the parties and perused the materials available on record.

9. The point for determination in the Civil revision petition is that whether the instant application filed by the first respondent/first defendant seeking to file counter claim is barred by limitation ?

10. The learned counsel appearing for the revision petitioner has submitted that the revision petitioner/plaintiff has filed a suit in O.S.No.147 of 2005 on 31.3.2005. The first respondent/first defendant has filed a written statement on 18.8.2005 and also filed additional written statement. The first

defendant whatever has now claimed by way of counterclaim is already raised in the written statement as early as on 18.8.2005. According to the learned counsel appearing for the petitioner, already preliminary decree was passed in the suit in favour of the plaintiff/revision petitioner and challenging the judgment and the preliminary decree dated 3.7.2009, the fourth defendant has preferred an appeal in A.S.No.843 of 2010 before this court. By judgment and decree, dated 26.10.2018, this court allowed the appeal suit and remanded the case to the trial Court to decide upon the genuineness of the Will, Ex.A3 and the trial Court was also directed to consider the point raised in the cross objection. Pursuant to the aforesaid judgment and decree, the suit was restored on file and when the case was taken up for trial by the trial Court, the instant application has been filed by the first defendant seeking permission to file counter claim. The court below ought not to have entertained the said application for the reason that the said application is barred by limitation. In support of his contention, the learned counsel appearing for the petitioner has relied upon the decision of the Hon'ble Supreme Court in **ASHOK KUMAR KALRA VS. WING CDR. SURENDRA AGNIHOTRI AND OTHERS [(2020) 2 SCC 394]**.

11. The issue of limitation period in filing counter claim was made in the reference to the larger bench of the Hon'ble Supreme Court. Pursuant to

the reference made, the Full Bench of the Hon'ble Supreme Court in the judgment cited supra, has considered the scope of filing the counter claim in the suit in the context of the amended provisions under Order VIII Rule 6-A of C.P.C. 1908. The relevant paragraphs of the judgments are extracted as follows:

"18. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counter claim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion

conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC.

19. In this regard having clarified the law, we may note that Mahendra Kumar case [Mahendra Kumar v. State of M.P., (1987) 3 SCC 265] needs to be understood and restricted to the facts of that case. We may note that even if a counterclaim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counterclaim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counterclaim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which needs to be taken into consideration before admitting a counterclaim.

20. We may note that any contrary interpretation

would lead to unnecessary curtailment of the right of a defendant to file counterclaim. This Court needs to recognise the practical difficulties faced by the litigants across the country. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, need to be recognised as well (refer to Salem Advocate Bar Assn. case [Salem Advocate Bar Assn. (2) v. Union of India, (2005) 6 SCC 344 : AIR 2005 SC 3353]).

21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- (i) Period of delay.
- (ii) Prescribed limitation period for the cause of action pleaded.
- (iii) Reason for the delay.
- (iv) Defendant's assertion of his right.

(v) *Similarity of cause of action between the main suit and the counterclaim.*

(vi) *Cost of fresh litigation.*

(vii) *Injustice and abuse of process.*

(viii) *Prejudice to the opposite party.*

(ix) *And facts and circumstances of each case.*

(x) *In any case, not after framing of the issues.*

22. We answer the reference accordingly. The instant special leave petition may be placed before an appropriate Bench after obtaining orders from the Hon'ble Chief Justice of India, for considering the case on merits."

12. In the aforesaid judgment, the Hon'ble Supreme Court has categorically held that counter claim has to be filed before framing of the issues, in any case, not after framing the issues.

13. Therefore, in the present case on hand, the suit has been filed in the year 2005 and the first respondent/first defendant has filed written statement on 18.8.2005 and the preliminary decree was passed on 3.7.2009. Appeal suit in A.S. No.843 of 2010 was allowed on 26.10.2018. The instant application in I.A.No.5 of 2019 has been filed by the first defendant/first respondent on 11.11.2019 seeking to file counter claim over the share in the suit property. Thus, the aforesaid events would clearly disclose that the first

defendant seeks to file counterclaim nearly 14 years, after filing the written statement and the issues have been framed and preliminary decree was also passed by the trial Court. After disposal of the appeal suit in A.S.No.843 of 2010 directing the trial Court to consider the genuineness of the Will, the instant application has been filed by the first defendant/first respondent at the belated stage. Therefore, the aforesaid application filed by the first defendant is barred by limitation.

14. In the light of the decision of the Hon'ble Supreme Court cited supra, this Court has no hesitation to set aside the order passed by the Court below in I.A.No.5 of 2019 in O.S.No.147 of 2005. The suit is filed for partition and separate possession, therefore, It is open to the first defendant/first respondent to seek remedy in accordance with law.

15. Considering the facts and circumstances of the case and the decision cited supra, the order passed by the trial Court in I.A.No.5 of 2019 in O.S.No.147 of 2005 on the file of the V Additional District Court, Coimbatore is set aside.

16. Accordingly, the Civil revision petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

17.06.2020

D.KRISHNAKUMAR.J,

vaan

Speaking/Non Speaking order

Index: Yes/No

vaan

To

The V Additional District Judge, Coimbatore.



**Pre-Delivery Order in
C.R.P. No.1007 of 2020
and C.M.P.NO.5525 of 2020**

WEB COPY

Dated: 17.06.2020