

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 565 OF 2021

In the matter of an application under Article 227 of
Constitution of India.

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Susama Rout and others Petitioners

-Versus-

Gouranga Charan Samal & others Opp. Parties

A.F.R.

For Petitioners : Mr. Gautam Mishra, Senior Advocate
being assisted by Mr. Anupam Dash, &
Mr. Dinesh Kumar Patra, Advocates.

For Opp. Parties : M/s. Sukanta Kumar Nayak &
S.S.K. Nayak

Date of Judgment - 17.01.2023

CORAM :
MR. JUSTICE K.R. MOHAPATRA

JUDGMENT

1. This matter is taken up through hybrid mode.
2. Order dated 28th September, 2021 (Annexure-4) passed in C.S. No. 44 of 2017 is under challenge in this CMP, whereby learned Civil Judge (Junior Division), Bhadrak refused to accept the written statement along with counter-claim filed by Defendant Nos.1(Ka) to 1(Ga)-Petitioners.
3. Opposite Party Nos.1 to 3 as Plaintiffs have filed C.S. No. 44 of 2017 claiming right of way over 'Ga' schedule property of the plaintiff. They also prayed for permanent injunction to restrain the Defendants

from interfering with their right of way over 'Ga' schedule property and for cost.

4. Briefly stated the case of the Plaintiffs is that 'Ka' schedule property of the plaintiff belongs to them (Plaintiffs) and 'Kha' schedule property belongs to Defendants. 'Ga' schedule property is being used as a passage by the Plaintiffs from time immemorial. Pursuant to an agreement dated 27th March, 2016 executed between the parties to the suit, the Defendants allowed the Plaintiffs to use eastern portion of vacant land as a road. In lieu of the same, the Plaintiffs also left a space of 3 feet width over 'Ka' schedule property in Plot Nos.1283 and 1284 for use of Defendants and for maintenance of their house. Since the Defendants tried to obstruct the open space in 'Ga' schedule property, the suit has been filed for the aforesaid relief. The Defendants filed a joint written statement admitting about the agreement. It was also pleaded, *inter alia* that within few days of execution of the agreement, the Defendants shifted the Tulasi Chounra as agreed upon. They also left an open space to the western portion ('Ga' schedule) of their house as agreed upon. However, the Plaintiffs did not allow the Defendants to use 3 Kadis width of land as per the terms of the agreement. Hence, dissension arose between the parties. Since the Plaintiffs did not respect the terms of the agreement, as per the advice of the gentlemen, the situation prior to the agreement was restored. It was also stated therein that the Plaintiffs didn't have any right over 'Ga' schedule property for their access, as alleged. They were temporarily using 'Ga' schedule property as their access. Hence, he prayed for dismissal of the suit.

5. After closure of the evidence, when the suit was posted for hearing on argument, the Defendant No.1 died. Thus, the present Petitioners were substituted in his place. After being substituted, the

Petitioners, namely, Defendant Nos.1(Ka) to 1(Ga) filed a written statement along with counter-claim. The Plaintiffs-Opposite Party Nos.1 to 3 filed their objection refuting acceptance of the written statement and counter-claim. Learned trial Court vide its order dated 28th September, 2021 (Annexure-4) refused to admit the counter-claim holding it to be not maintainable. Hence, this CMP has been filed.

6. Mr. Mishra, learned Senior Advocate submitted that each of the defendants to a suit has a right to file its written statement. This is in accordance with the principles of natural justice. Since the Defendant Nos.1(Ka) to 1(Ga) were impleaded as parties to the suit after the death of Defendant No.1, they have a right to file their written statement. In support of his case, he relied upon the case of ***Sumtibai and others –v- Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) through Mankanwar (Smt) W/o Parasmal Chordia (Dead) and others***, reported in (2007) 10 SCC 82 in which it is held as under:

“8. Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to get a hearing. The appellants in the present case have already been made parties in the suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by learned counsel for the respondent.”

7. Referring to para-6 of ***Sumtibai*** (supra), Mr. Mishra, learned Senior Advocate submits that learned counsel for the Respondent therein had taken a stand that a person who was made party on substitution can only take such plea, which is appropriate to his character as legal representative of the deceased. Such a plea was not accepted by the Hon’ble Supreme Court. He further submits that the cause of action for filing of the written statement along with counter-

claim arose when the Plaintiffs on 19th April, 2021 tried to put fence obstructing 3 feet width road as described in 'Ga' schedule property, i.e. over Plot Nos.1283 and 1284 ('Ka' schedule). Since the cause of action arose after framing of issues, there should be no legal bar under the Civil Procedure Code to file a written statement along with counter-claim by the substituted Defendants. In support of his case, Mr. Mishra, learned Senior Advocate relied upon the case of **Ashwini Kumar Naik –v- Gobardhan Naik**, reported in 2011 SCC Online Ori 236 in which it is held as under:

“7. The following observations in the aforesaid decisions are relevant. “The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings & save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims & 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 could 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”. Therefore, the Court held that generally speaking the counter claim not contained in the original written statement may be refused to be taken on record, especially when the issues were framed & more so when the trial was commenced. This proposition as it appears is not absolute & without exception.

8. In the instant case, it is not in dispute that the suit between the parties was decreed on compromise without trial, but the compromise decree was set aside in appeal at the instance of the Defendant-Opp. Party & the matter was remanded to the Trial Court for hearing & disposal. Whereafter, the Opp. Party sought to amend his written statement by incorporating the counter claim seeking relief of declaration of right, title & interest & recovery of possession, as because basing on the compromise decree passed earlier the suit land had been mutated in the name of the Plaintiff-Petitioner.

9. In the circumstances, in my considered opinion, the general proposition laid down in the aforesaid decisions of the Apex Court will have no application to the instant case. Permitting the counter claim of the Opp. Party by way of amendment of the written statement (sic) will not have the effect of prolongation of the trial or complicating otherwise smooth flow of proceedings forcing a retreat on the steps already taken by the Court. On the contrary, it would help avoid multiplicity of judicial proceedings, facilitating all disputes between the parties being decided finally. In the aforesaid circumstances, I find no illegality in the order of the Trial Court allowing amendment of written statement introducing the counter claim. The Writ Petition is, therefore, dismissed. No costs."

8. It is his further case that the substituted Defendants can file additional written statement appropriate to their character. Since the cause of action for filing of the written statement arose after closure of the evidence, when the Plaintiffs made an attempt to obstruct the open space over Plot Nos.1283 and 1284, they filed the additional written statement. Due to subsequent events as set out in the written statement, it was imperative on the part of the Petitioners (substituted Defendants) also to file a counter-claim. Learned trial Court without discussing the contentions raised by the parties and without assigning any valid reason jumped to a conclusion by not accepting the written statement with counter-claim holding it to be not maintainable. He, therefore, prays for setting aside the impugned order under Annexure-4.

9. Mr. Nayak, learned counsel for the Plaintiffs-Opposite Party Nos.1 to 3 refuting the same contended that on receiving summons in the suit, all the Defendants appeared and filed their written statement jointly on 29th June, 2017. In sub-para (Gha) of their written statement, the Defendants have categorically stated that the Plaintiffs deviated the compromise agreement and put fence over Plot Nos.1283 and 1284 by obstructing the Defendants from using the said plots. Thus, the

Defendants were constrained to revert back to the position as it was before the agreement was executed. As such, there is no fresh cause of action to file a written statement by the substituted Defendant Nos.1(Ka) to 1(Ga), as alleged. After closure of the evidence from both sides when the suit was posted for hearing on argument, the Defendant No.1 died and his legal heirs, namely, the Petitioners, filed written statement along with counter-claim to which the Plaintiffs-Opposite Party Nos.1 to 3 objected. After hearing the matter in detail from both the sides, the impugned order has been passed holding the written statement along with counter-claim to be not maintainable. The written statement along with counter-claim sought to be filed by the Petitioners contains the pleadings contrary to the joint written statement filed by the Defendants earlier. In support of his case, he relied upon the case of ***Ramgopal and another –v- Khiv Raj and others***, AIR 1998 Rajasthan 98 in which it is held as under:

“7. In my opinion, the contention of the learned counsel appearing for the petitioners is devoid of any force. It is settled law that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may be, and they must adopt the position occupied by his predecessor plaintiff or defendant. The legal representatives, therefore, must proceed with the litigation from the stage where death of defendant or plaintiff had taken place. They are legally bound by the pleading of his predecessors-in-interest in whose place they have been substituted. Hence, the legal representatives substituted under Order 22, Rule 4, C.P.C. cannot set up a new case. The petitioners are bound by the proceedings taken so far against the deceased-defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the ex parte order was passed against the deceased-defendant-Govind Ram.”

He further submitted that since the Defendants who jointly filed written statement did not prefer to file any counter-claim, the

substituted legal heirs of the deceased Defendant No.1 cannot maintain a counter-claim, that too after closure of the evidence from both sides.

10. Distinguishing the applicability of law laid down in *Sumtibai's* (supra) case, Mr. Nayak, learned counsel submits that the case of *Sumtibai* arises out of a suit for specific performance of contract. Kapurchand along with his son as co-owners had entered into an agreement to sell the disputed property with the Plaintiffs therein, but the Plaintiffs only impleaded Kapurchand as a Defendant. During pendency of the suit, said Kapurchand died and his wife and sons applied to be brought on record as legal representatives. After they were impleaded, they filed an application under Order 1 Rule 10 C.P.C. praying, *inter alia*, that they should be permitted to take plea as would be available to them being not bound by the written statement filed by the deceased defendant therein. Considering that they were parties to the agreement in question, the Hon'ble Supreme Court held that they have independent right to file written statement as they had a right to defend the suit in their individual capacity. In the suit at hand, the status of the Petitioners is completely different and they are only legal representatives of the deceased Defendant No.1. Hence, they should not be allowed to take a different stand which the Defendants did not raise in their pleadings. As such, learned trial Court has committed no error in not accepting the written statement as well as counter-claim as not maintainable.

11. Heard learned counsel for the parties at length. Perused the materials as well as case law placed before this Court.

12. Order VIII Rule 6-A C.P.C. deals with counter-claim. Likewise, Order VIII Rule 9 C.P.C. deals with subsequent pleadings. Rule 6-A of Order VIII C.P.C. makes it clear that by way of a counter-claim, the Defendant may set-off any right or claim in respect of a

cause of action accruing to the said Defendant against the Plaintiff either before or after filing of the suit but before the Defendant has delivered his defence or before the time limited for delivery of his defence has expired. In the case of **Ashok Kumar Kalra -vs.- Wing CDR. Surendra Agnihotri and others**, reported in (2020) 2 SCC 394, the Hon'ble Supreme Court laid down the guidelines to entertain a counter-claim, which is as under:

“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 counterclaim, 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.”

It is further held *inter alia* that:

“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.”*

It is thus clear that a counter-claim may be accepted at any stage of the suit but not after framing of the issues. Thus, keeping in mind the position of law, as aforesaid, the contentions of the parties have to be assessed.

13. Admittedly, the trial of the suit had already commenced by the time the written statement along with counter-claim was filed by the Petitioners. In view of the ratio decided in *Sumtibai* (supra), Defendant has a right to file a written statement appropriate to its character. In the case in hand, the Defendant No.1 along with other Defendants had already filed a written statement in the suit. Thus, the written

statement, if any, filed by the substituted legal heirs of the deceased Defendant No.1, namely, the Petitioners, will be subsequent pleadings, which is commonly called as additional written statement. An additional written statement may be presented with leave of the Court, if in the facts and circumstances of the case, the Court feels it necessary for just adjudication of the suit. Since the Petitioners have stepped into the shoes of the deceased Defendant No.1, they cannot take any plea contrary to the pleadings already filed by him. As submitted by Mr. Mishra, learned Senior Advocate, an occasion to file additional written statement along with counter-claim arose as the Plaintiffs on 19th April, 2021 obstructed three feet width road by putting fence, which they had already agreed to part with for access of the Defendants to their residential house.

14. Mr. Nayak, learned counsel for the Plaintiffs-Opposite Parties, however, objected to the same submitting that no cause of action as alleged, in the additional written statement had ever arisen, as the Defendants in their joint written statement have taken a categorical stand that since the Plaintiffs did not adhere to the terms and conditions of the agreement dated 27th March, 2016 and left three feet width road, the Defendants reverted back to their original position. Thus, no fresh cause of action has arisen to file any additional written statement by the Defendant Nos.1(Ka) to 1(Ga).

15. On perusal of the pleadings of joint written statement (Annexure-2) filed by the Defendants including the deceased Defendant No.1, it transpires from paragraph-13 (Gha) that as the Plaintiffs did not leave three feet width land for use of Defendants, dissension arose between the parties. The Plaintiffs also allegedly did not adhere to the request of village gentries to respect the terms and conditions of the agreement, as a result of which the village gentries advised the

Defendants to revert back to the original position. Thus, the allegation of obstruction in the written statement filed by Defendant Nos.1(Ka) to 1(Ga) was already existing much prior to that i.e. in the joint written statement filed by the Defendants. As such, it is apparent that no fresh cause of action arose to file a separate/additional written statement by the Petitioners (substituted Defendants).

16. As laid down in *Ashok Kumar Kalra* (supra), the Court has the discretionary power to consider the acceptance of such counter-claim, but it cannot be accepted after framing of the issues. However, *Hon'ble Justice Santangoudar* in *Ashok Kumar Kalra* (supra) opined that though the normal way is that counter-claim filed after the issues are framed should not be accepted, but under exceptional circumstances, a counter-claim may be permitted to be filed after the issues have been framed but prior to commencement of recording of the Plaintiff's evidence.

17. In the instant case, written statement along with counter-claim was filed by the Petitioners after closure of the evidence from both sides when the suit was posted for argument. Thus, in any event, written statement along with counter-claim filed by the Petitioner could not have been accepted at that stage of the suit.

18. The ratio in *Sumtibai* (supra) is not applicable to this case, as the Defendants therein had independent right to file written statement in their individual capacity as they were also parties to the agreement of which specific performance was sought for in the suit. Further, the case of *Ashwini Kumar Naik* (supra) has also no application to the case, as this Court accepting the proposition of law to the effect that no counter-claim can be accepted after framing of issues, confirmed the order of learned trial Court in accepting the counter-claim in the facts and circumstances of that case.

18.1 The principle to test the case of the Petitioners would be that whether the Defendant No.1, had he been alive, could have filed a written statement along with counter-claim. The answer would be obviously 'no'.

19. It is strenuously urged by Mr. Mishra, learned Senior Advocate that the impugned order is an unreasoned and cryptic one. Hence, the same is liable to be set aside.

20. It is very difficult to accept such submission inasmuch as learned trial Court although not spelt out in too many words but has observed that since the suit is at the stage of argument, the written statement along with counter-claim cannot be accepted. I find no infirmity in such finding.

21. In view of the above, the CMP sans merit and is accordingly dismissed. As the suit is at the stage of argument, learned trial Court should make an endeavour to dispose of the suit at an early date giving opportunity of hearing to the parties concerned.

22. In the circumstances, there shall no order as to costs.

23. The interim order dated 30th October, 2021 passed in I.A. No.582 of 2021 stands vacated.

(K.R. Mohapatra)
Judge

Orissa High Court, Cuttack,
Dated 17 th January, 2023/bks