



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2022

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.R.P.No.400 of 2022
and
C.M.P.No.2085 of 2022

1.A.Dharmamurthi @ Dharmalingam

2.Ramasamy

... Petitioners

Vs.

1.Kumarasamy

2.Suthan

3.Mathan

4.Santhamani

... Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 16.02.2021 made in I.A.No.01 of 2019 in O.S.No.303 of 2017 on the file of the II Additional District Judge, Tiruppur by allowing the Civil Revision Petition.

For Petitioners : Mr.M.Guruprasad

For R1 to R3 : Mrs.E.Chitra

For R4 : No Appearance



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ORDER

The Civil Revision Petition has been filed challenging the fair and decretal order dated 16.02.2021 passed in I.A.No.01 of 2019 in O.S.No.303 of 2017.

2. The revision petitioners are the plaintiffs, who have instituted a Suit for partition and the issues were framed and the plaintiffs side evidence was closed. The Suit was posted for examination of defendants side witnesses. At that point of time, the defendants 1 to 3 filed an Interlocutory Application under Order VIII Rule 9 of Code of Civil Procedure to grant leave to the defendants to file an additional written statement. The Trial Court adjudicated the issues and arrived a conclusion that the prayer in the counter claim is regarding family arrangement and therefore, not a new claim. Since the counter claim is not a new claim and relating to the family arrangements, which was already raised as an issue in the Suit. The said Interlocutory Application was allowed. The Trial Court made a finding that the averments set out in the counter claim is relatable to the family arrangement between the parties, which was raised as an issue in the Suit. While so, the Interlocutory Application is to be allowed and accordingly, it was allowed.



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3. The learned counsel for the revision petitioners mainly contended that the plaintiffs side evidence were already completed and the Suit was posted for examination of defendants side witnesses. In the event of accepting the defendants to file a counter claim, the same would cause prejudice to the interest of the plaintiffs in the Suit. Since the plaintiffs side witnesses were already examined, again the plaintiffs cannot file a petition for reopening of evidence, which would cause prejudice. Thus, the Trial Court had committed an error.

4. The learned counsel for the respondents objected the said contention by stating that the respondents have not raised any new claim and the counter claim relates to the family arrangement, which is an issue was already under consideration in the Suit before the Trial Court and therefore, the Civil Revision Petition is to be rejected.

5. This Court is of the considered opinion that the defendants are entitled to file a counter claim in a Suit instituted. Question arises, whether the counter claim filed by the defendants can be entertained after completion



of the examination of the plaintiffs witnesses. In this regard, the Three Judges Bench of the Hon'ble Supreme Court of India in the case of **Ashok Kumar Kalra Vs. Wing CDR. Surendra Agnihotri and Others** reported in [2020 (2) SCC 394], held as follows:

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.*



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- 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.*

6. In the present case, the similarity of cause of action between the main Suit and the counter claim was established before the Trial Court, which was rightly accepted by the Trial Court. Thus, this Court do not find any infirmity in respect of the findings made by the Trial Court regarding the similarity of the cause of action between the main Suit and the counter claim. However, the counter claim was filed by the defendants after completion of plaintiffs side witnesses.

7. Order VIII Rule 6(A) contemplates procedures for filing counter claim by the defendant. Accordingly, the counter claim is to be filed either before or after the filing of the Suit but before the defendant has delivered his



defence or before the time limited for delivering has expired, whether such counter claim is in the nature of a claim for damages or not. Therefore, if the defendant has chosen to file counter claim, it must be filed before the defendant has delivered his defence or before the time limit delivered has expired. In the present case, the written statement was filed and the issues were framed, plaintiffs side witnesses were already examined. Therefore, the counter claim filed after completion of examination of witnesses on the plaintiffs side is not entertainable, in view of the specific procedure contemplated under Order VIII Rule 6(A) of the Code of Civil Procedure.

8. As per the principles laid down by the Apex Court, counter claim in any case cannot be entertained after framing of the issues because there may be further issues required to be framed based on the counter claim. That apart, in the present case, the plaintiffs side examination of witnesses were completed and therefore, in the event of allowing the counter claim, the plaintiffs are unnecessarily deprived of their right to examine or cross-examine the plaintiffs side witnesses. That is the reason why the Courts have held that the counter claims are to be filed before framing of issues. If such counter claims are entertained at the final stage, it would cause prejudice to



the plaintiffs and thus, in the present case, the Trial Court has failed to appreciate the stage of the Suit for the purpose of allowing the Interlocutory Application filed by the defendants for filing the counter claim. Thus, the Trial has committed an error in allowing the Interlocutory Application, more specifically, after closing the plaintiffs side evidence and when the Suit was posted for the examination of defendants side witnesses.

9. Thus, the stage on which the counter claim was allowed is improper and in the event of allowing their counter claim it would cause prejudice to the plaintiff and thus, the defendants are at liberty to institute a fresh Suit if any grievance exist.

10. In view of the facts and circumstances, the fair and decretal order dated 16.02.2021 passed in I.A.No.1 of 2019 in O.S.No.303 of 2017 is set aside and the Civil Revision Petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Jeni
Index : Yes
Speaking order



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The Judge
II Additional District Court,
Tiruppur.



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S.M.SUBRAMANIAM, J.

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