

**18.10.2023**

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**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE**

**SAT 185 of 2022  
with  
CAN 1 of 2022**

Kamal Kanti Nag & Ors.  
Vs.  
Papiya Das & Anr.

**Mr. Supratim Dhar, Advocate  
Mr. Dhananjay Nayak, Advocate  
Ms. Megha Sarkar, Advocate**

.....for the Appellants

**Mr. Somenath Bose, Advocate  
Mr. Rajsekhar Bose, Advocate  
Mr. Utpal Moitra, Advocate**

.....for the Respondents

1. By consent of both the Counsel the main appeal is taken up for disposal. Admittedly the plaintiff/respondent filed a suit for possession upon revocation of license. The defendant/appellant appeared in the suit after service of summons and took time to file written-statement. However, the written-statement could not be filed within the time limit as provided under Order VIII Rule 1 of the Code of Civil Procedure and an application was taken out for acceptance of a belated filing of the written-statement which was rejected by the Trial Court.
2. The defendant/appellant moved a revisional application before this Court being CO 2668 of 2014 which was ultimately dismissed.
3. The fact remains that the written-statement filed by the defendant/appellant was not taken on record. A plea was sought to be taken by the defendant/appellant that since a counterclaim was also included along with the written-statement, even if the written-

statement is not accepted, the defendant is entitled to file the counterclaim.

4. The Trial Court did not accept the stand taken by the defendant/appellant, obviously on the basis of the provisions contained under Order VIII Rule 6A of the Code of Civil Procedure. The said provision postulates that 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.
5. We are not unmindful of the proposition of law that the counterclaim may be incorporated in three ways. Firstly, the counterclaim can be filed along with the written-statement; secondly, the counterclaim can be brought by way of an amendment under Order VI Rule 17 of the Code of Civil Procedure in the written-statement and thirdly; by way of an additional written-statement. In all such situation the written-statement is *sine qua non* and in the event, the written-statement is not in existence in eye of law, counterclaim cannot stand independently.
6. However, we find that both the Courts below have wrongly proceeded on the premise that once the written-statement is not on record and the prayer for acceptance thereof was rejected, the defendant is denied from cross-examining the plaintiffs' witness.
7. The aforesaid observation of both the Courts below runs counter to the decision of the Supreme Court rendered in the case of ***Modula India Vs Kamakshya***

**Singh Deo** reported in **(1988) 4 SCC 619**. The point involved in the said report was whether the defendant is entitled to cross-examine the plaintiffs' witness after his defence is struck off under the provisions of Section 17(3) of the West Bengal Premises Tenancy Act, 1956. Obviously, the fall out of striking out the defence is that the written-statement is taken off the record and, therefore, the ratio of the judgment can even be applied to the situation where the Court declined to accept the written-statement filed belatedly for the simple reason that in both the situations the written-statement is not taken on record.

8. The Apex Court has considered the concept of cross-examination and a right of the litigant in an adversarial system of adjudication. The Apex Court held that even when the defence is struck off the defendant is entitled to appear, cross-examine the plaintiffs' witness and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him in the following:-

(Modula India Vs Kamakshya Singh Deo)

*18. We agree that full effect should be given to the words that defence against ejectment is struck off. But does this really deprive the defendant tenant of further participation in the case in any manner? While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff's case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing*

*in law to preclude him from demonstrating to the court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute.*

19. *To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the Court can only do this by looking the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.*
20. *We, therefore, think that the defendant should be allowed his right of cross-examination and arguments. But we are equally clear that this right should be subject to PG NO 358 certain important safeguards. The first of these is that the defendant cannot be allowed to lead his own evidence. None of the observations or decisions cited have gone to the extent of suggesting that, inspite of the fact that the defence has been struck off, the defendant can adduce evidence of his own or try to substantiate his own case.*
9. In view of the law as enunciated in the above report, the judgment and decree of both the Courts below cannot be sustained and are set aside.
10. The suit is restored to its original file and number and the Trial Court shall fix a date for cross-examination of the plaintiffs' witness and the defendant shall be permitted to cross-examine the said witness strictly in terms of the law laid down in Modula India (supra).
11. The entire exercise shall be completed within four weeks from the date of reopening of the Trial Court following Puja Vacation for the year 2023.
12. None of the parties shall seek unnecessary adjournments unless necessitated by unavoidable and unforeseen circumstances; even in such event, the Trial Court shall fix the matter keeping in mind the time limit indicated hereinabove.

13. With these observations, the appeal being **SAT 185 of 2022** and the connected application **CAN 1 of 2022** are **disposed of**. No order as to costs.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**