

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 540 OF 2022

Isidorio Furtado & anr.	... Petitioners
<i>Versus</i>	
Cassiano J. M. Pereira & 4 Ors.	... Respondents

Mr. J. J. Mulgaonkar, Advocate *for the Petitioners.*

Mr. C. A. Coutinho, Advocate *with Mr. Ivan Santimano,*
Advocate for the Respondents.

CORAM: M. S. KARNIK, J
DATED: 9th MARCH 2023

ORAL ORDER

1. Heard learned Counsel for the Petitioners and learned Counsel for the Respondents.

2. The challenge in this Petition is to an Order dated 13th April, 2022, passed by the Trial Court below Exhibit 65, whereby the leave to file Counter Claim is rejected. The Petitioners also challenge the Order dated 5th September 2022, passed below Exhibit 66 and 67 seeking recall of the Order dated 13th April 2022 passed below Exhibit 64 and Order dated 13th April 2022 passed below Exhibit 56.

3. Shri Coutinho, learned Counsel for the Respondents, has raised a preliminary objection that against an Order rejecting the Counter Claim, a Writ Petition is not maintainable. Learned Counsel

relied upon a decision of the Hon'ble Supreme Court in the case of **Rajni Rani vs. Khairati Lal**¹ to contend that an Order passed by the Trial Court rejecting a Counter Claim is in the nature of a Decree which can only be challenged by way of a Regular Appeal and not in exercise of powers under Article 226 and 227 of the Constitution of India. It is further submitted by the learned Counsel for the Respondents, that the nature of the Order rejecting the Counter Claim is such that the rights have been finally adjudicated between the parties so far as the Counter Claim is concerned and, therefore, the same will assume the status of a Decree. It is therefore vehemently contended by learned Counsel for the Respondents that the present Petition is not maintainable.

4. As submitted by the learned Counsel for the Respondents, that if by virtue of the Order of the Court, the rights have been finally adjudicated, it would assume that status of Decree in consonance of what has been observed by the Hon'ble Supreme Court in the case of **Rajni Rani vs. Khairati Lal** (supra). I am afraid it is not possible for me to accede to the submission of learned Counsel for the Respondents in the facts of the present case. It is an admitted position that the Counter Claim was not filed by the Petitioners along with the written statement. After the application for leave to file the Counter claim was made, the Plaintiffs filed a say to the Counter

¹ Civil Appeal No. 6862 of 2014 decided on 14.10.2014

Claim. The Plaintiff urged that the Trial Court lacks jurisdiction to entertain the purported Counter Claim and the same ought to be returned to the concerned Defendant Nos. 1 and 2 in accordance with Order 7 Rule 10 of the Code of Civil Procedure 1908 (CPC) read with Order 8 Rule 6A(4) of the CPC.

5. During the course of the oral arguments, the Plaintiffs invited the attention of the Trial Court to the provisions of Section 26 of the Goa Civil Court's Act 1965, which reads thus :

“(1) No Court other than the District Court shall receive or register any suit in which the Central Government or the Administrator of the Government of Goa, Daman and Diu or any Officer of the Government in his official capacity is a party.

.....

(2)

6. The Trial Court was of the view that the Administrator of Comunidade is an Officer of the Government and he holds public office. In view of the provisions of Section 26 of the Goa Civil Court's Act, the Trial Court was of the opinion that the Counter Claim cannot be received or registered before it. The application at Exhibit 56, which was an application for leave to file the Counter Claim, was

therefore rejected. At this juncture, it will be necessary to refer to the decision of the Hon'ble Supreme Court in the case of **Ashok Kumar Kalra vs. Wing CDR. Surendra Agnihotri & Ors.**², wherein the scheme of Order 8 has been explained in the context of legislative intention to impose restrictions on belated filing of written statement set off and Counter Claim under Order 8. Observations have also been made in the context of filing of Counter Claim after submission of written statement. Their Lordships in Paragraph 21 have summed up their findings observing thus :

“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.

² (2020) 2 SCC 394

- (viii) Prejudice to the opposite party.
- (ix) And facts and circumstances of each case.
- (x) In any case, not after framing of the issues.”

7. As observed earlier, if upon filing of Counter Claim the Trial Court were to dismiss the Counter Claim which would have the effect of rights of the parties being finally adjudicated, then it was open for learned Counsel to contend such an Order would assume the status of a Decree. In the present case, the Trial Court upon considering the objections raised by the Plaintiffs that it cannot receive or register any suit in which any Officer of the Government in its official is a party, rejected the application seeking leave to file the Counter Claim. When the Counter Claim itself is not received or registered by the Trial Court, the Order refusing to receive or register any suit, in my opinion, cannot be construed to mean that the rights of the parties are finally adjudicated. I do not find force in the submission of the learned Counsel that the present Writ Petition is not maintainable.

8. Having come to a conclusion that present Petition is maintainable, I find that the impugned Order was passed in the absence of the Petitioners. In a collateral application made under Sections 140 and 141 of the Civil Procedure Code to recall the exparte Order on leave to file Counter Claim, the Petitioners have stated that the Petitioners as well as their Counsel were under the impression that the case was fixed at 2.30 p.m., whereas the case came to be

heard exparte in the morning session. Learned Counsel for the Petitioners submitted that they have been diligently defending the suit and for default on their part in appearing on one date, the consequence should not be so drastic. Alternatively, it is prayed that the Petitioners be given an opportunity to pursue the Application Exhibit 56, for which they are willing to pay reasonable costs. This submission of learned Counsel for the Petitioners is opposed by the learned Counsel for the Respondents.

9. In my opinion, considering the nature of the default, in the interest of justice, an opportunity can be granted to the Petitioners to pursue the Application Exhibit 56 on its own merits. The Respondents can be adequately compensated with costs. The impugned Order is set aside subject to payment of costs of Rs.2,000/- payable by the Petitioners to the Respondent Nos. 1 and 2 within a period of two weeks from today. The Application Exhibit 56 to be considered afresh upon hearing the parties. The Petitioners shall not seek unnecessary adjournment and shall cooperate with the Trial Court in the disposal of the Application Exhibit 56.

10. All contentions are kept open. I have not expressed any opinion on the merits of the contentions as regards the Application-Exhibit 56.

11. Parties to appear before the Trial Court on 27th March, 2023 at 10.30 a.m. If possible and subject to the workload, the Trial Court may decide the Application on the same date. The Petitioners shall not seek any adjournment.

12. Writ Petition is disposed of.

M. S. KARNIK, J

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Date: 2023.03.16 10:30:00 +05'30'