

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1369 of 2017**

1. Krishna Kumar Sinha, S/o Late Shyam Bihari Lal.
2. Smt. Sunita Sinha, W/o Shri Krishna Kumar Sinha
Both residents of village Chandaura, P.O- Oina Via Kako, P.S. Kako,
District Jehanabad.
At present residing at Mohalla Shri Ram Colony, P.O. Begampur, P.S.
Chowk, District Patna, Patna-800009.

... .. Petitioner/s

Versus

1. Smt. Seema Kumari, D/o Late Shyam Bihari Lal and W/o Shri Anuj Kumar @ Anoop Kumar Verma.
2. Shri Anuj Kumar Verma @ Anoop Kumar Verma, S/o Shri Bharat Lal.
Both residents of village Bisai Bigaha, P.S. Ekanger Sarai, P.O-
Nischalganj, Dist.- Nalanda.
3. Shri Brijdeo Prasad, S/o- Kamala Lal, C/o-Shri Arjun Prasad Master,
Gurhatta, P.S.- Khajekalan, P.O Jhauganj Patnacity, Dist.-Patna.
4. Shri Basant Yadav, S/O Shri Rajdeo Prasad Yadav, resident of Ranipur,
P.O.- Jhauganj, P.S. Mehdiganj, Patna City, Dist.-Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ashok Nandan Prasad, Advocate
For the Respondent/s	:	Mrs. Mohini Kumari, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 12-06-2024

Heard learned counsel for the petitioners as well as
learned counsel for the respondents on the point of admission
and I intend to dispose of the present petition at the stage of
admission itself.

2. The instant petition has been filed by the petitioners
under Article 227 of the Constitution of India for setting aside
the order dated 29.02.2016 passed by the learned Sub Judge-III,



Patna in Title Suit No. 337 of 2010.

3. Briefly stated, the facts, as it emerges from the record, are that the petitioners as plaintiffs filed Title Suit No. 337 of 2010 are seeking declaration that plaintiffs are joint owners in possession of the suit properties and for further declaration that gift deed dated 21.10.1994 purportedly executed by plaintiff no.1 in favour of defendant no.1/respondent no.1 (for convenience I will refer him as defendant no.1) is forged, fabricated, *void ab initio* and inoperative besides seeking other reliefs. The suit was filed by the plaintiffs claiming that the suit properties are self-acquired properties of the plaintiffs/petitioners through the registered sale deed dated 06.07.1994 and these properties are situated within Patna District. Defendant no.1 appeared and filed her written statement-cum-counter claim and defendant nos. 2 to 4/respondent nos. 2 to 4 filed their own written statement. Defendant no.1 sought partition of properties of Jehanabad District as mentioned in Schedule-I of the counter claim submitting that the said property was exclusively purchased properties of mother of the defendant no.1. Thereafter, the petitioners filed objection petition dated 04.06.2012 challenging the maintainability of the counter claim of defendant no.1 who



filed rejoinder dated 25.06.2012 to the said petition. After hearing the parties, the learned trial court rejected the petition dated 04.06.2012 filed by the plaintiffs/petitioners vide the impugned order dated 29.02.2016. Thereafter, the plaintiffs/petitioners filed another petition dated 06.05.2016 under Order 47 Rule 1 and 2 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for review of the order dated 29.02.2016. A reply was filed by the defendants to the said review petition and after hearing the parties, learned trial court rejected the review petition of the plaintiffs/petitioners vide order dated 24.04.2017. Thus, the impugned order remained unaltered and, hence, the present petition.

4. Learned counsel appearing on behalf of the petitioners submitted that the learned trial court has illegally accepted the counter claim of the defendant no.1 which is filed for partition in respect of property situated in the jurisdiction of Jehanabad District and the counter claim is for partition in respect of those properties whereas different issues are involved in Title Suit No. 337 of 2010 which is in respect of properties situated in the jurisdiction of Patna District and the suit is for declaration and injunction. Learned counsel further submitted that the learned trial court committed an error as it failed to



appreciate that the counter claim is having different cause of action. Further the learned trial court did not appreciate that the properties under counter claim were the exclusively purchased property of mother of the plaintiff no.1/petitioner no.1 and the defendant no.1 as the same were purchased through the registered sale deeds dated 05.06.1954 and 03.12.1957. The mother of the petitioner no.1 partitioned the properties mentioned in Schedule-I of the counter claim between her two sons, namely, Krishna Kumar Sinha and Sanjay Kumar Sinha through a memorandum of partition dated 17.06.2002/18.06.2002 during her lifetime and both her sons came in possession over their allotted shares. The said memorandum of partition is duly signed by the mother Sushila Devi and her two sons Krishna Kumar Sinha and Sanjay Kumar Sinha and two daughters of Sushila Devi, namely Radha Devi and Pushpa Devi, and also by Mukhiya of Panchayat and elder brother of Mukhiya, namely, Arjun Prasad and one Surendra Prasad as witnesses. Learned counsel further submitted that there was no good relationship between Sushila Devi and her daughter Seema Kumari, who is the defendant no.1. Learned counsel further submitted that when the property of counter claim has already been partitioned by mother of the petitioner



no.1 and respondent no.1 in the year 2002 during her lifetime, the same cannot be partitioned again. Learned counsel further submitted that the learned trial court passed the impugned order against the principles laid down by the Hon'ble Apex Court in the case of *Ashok Kumar Kalra Vs. Wing CDR. Surendra Agnihotri & Ors.*, reported in *(2020) 2 SCC 394*, in which it has been held that only in case of similarity of cause of action of plaint and counter claim, the counter claim can be allowed. In case of dissimilarity of cause of action, the counter claim can not be allowed as per the mandate of Order VIII Rule 6 C of the Code. Learned counsel further submitted that the defendants/respondents brought into existence forged and fabricated gift deed dated 21.10.1994 purported to have been executed by plaintiff no.1/petitioner no.1 in favour of defendant no.1 in respect of 3 decimal of land of C.S. Plot No. 2833 having Khata No. 1239. Against this fabricated gift deed, the plaintiffs/petitioners have filed a suit for declaration with prayer to declare the said gift deed forged, fabricated, *void ab initio* and inoperative and has sought declaration that the plaintiffs are the lawful joint owners in possession of the property. At the same time, this property is situated in Patna District. However, in the counter claim a decree for partition has been sought by the



defendant no.1 seeking carving out her 1/5 share in Schedule 1 property of the written statement apart from 1/6 share in Lot No.II of the plaint. Learned counsel further submitted that the properties in which 1/5 share is being claimed are all situated in Jehanabad District and partition is being sought for the said properties and, hence, there is no similarity of cause of action. Learned counsel further submitted that for the very reason, the claim raised by defendant no.1 could not be disposed of in a counter claim but in an independent suit and these facts were not taken into consideration by the learned trial court. Learned counsel reiterated that the issue involved in the present suit is very limited and the defendant no.1 has no right to make any claim of partition in respect of the self-acquired properties of their mother which has already been partitioned. Therefore, the impugned order is illegal, arbitrary and passed without appreciating the law and the issue involved in the matter and, hence, the said order is fit to be set aside.

5. *Per contra*, learned counsel appearing on behalf of the respondents submitted that the impugned order is quite legal and there is no infirmity in it. Learned counsel further submitted that the respondent no.1 is the full sister of petitioner no.1. Learned counsel further submitted that apart from petitioner



no.1 and respondent no.1, there are one more brother and two sisters in the family of the parties. Petitioner no.1 being the *Karta* and Manager of the family had executed and registered the gift deed dated 21.10.1994 in favour of respondent no.1 with consent and approval of all the family members and, thus 3 decimal land of Plot No. 2833 had been gifted by petitioner no.1 and accepted by respondent no.1 and remaining 3.2 decimal of land had been retained by petitioner no.1. The respondent no.1 came into possession of her gifted property. In course of time, as the respondent no.1 was in need of money, she transferred the land vide Sale Deed No. 4336 dated 28.07.2010 to respondent no.4 who got the land mutated in his name and started paying rent to the State of Bihar and rent receipts are being issued in his name. As the petitioners came to know about the transfer of the said land, under some wrong advise, they filed the suit for declaration the gift deed dated 21.10.1994 as forged, fabricated and not executed by him. Learned counsel further submitted that the counter claim cannot be rejected on the ground that properties are situated outside the jurisdiction of Patna as a part of land for which partition has been sought is within the territorial jurisdiction of the court at Patna. Section 17 of the Code provides for such eventuality when the suit properties are



situated within the jurisdiction of the different courts. Since counter claim is to be treated as a plaint and these properties are within jurisdiction of two or more courts, as the plaintiff has filed the suit before this Court for properties situated within the jurisdiction of Patna District, if counter claim is filed on behalf of the defendants, notwithstanding the fact that the properties in which partition is being sought is within the jurisdiction of Jehanabad District, the court at Patna will have jurisdiction. Learned counsel further submitted that the plea of dissimilarity of cause of action will not help the cause of action of the petitioners since in the counter claim the defendant can make any claim with regard to any right against the plaintiff. Therefore, there is no infirmity in the order of the learned trial court and the same needs to be sustained and affirmed.

6. I have given my thoughtful consideration to the rival submissions of the parties. Order VIII Rule 6A of the Code reads as under:-

“6A. Counter-claim by defendant.—(1) 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, whether such counter-claim is in the nature of a claim for damages or not: Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.”

7. Bare perusal of the provision shows a defendant can set up any right or claim in respect of a cause of action by way of counter claim against the claim of the plaintiff. In the present case, the plaintiffs/petitioners have sought the relief of declaration as joint owners in possession of the suit property detailed in Lot I and Lot II of Schedule A and for further declaration against sale deed dated 28.07.2010 purportedly executed by the petitioner no.1 in favour of respondent no.1 and the subject matter of the gift deed is land of Lot No. I of Schedule 1 having area of 3 decimal of C.S. Plot No. 2833,



Khata No. 1239. There is no further claim of plaintiffs/petitioners against the land mentioned in the counter claim. Since the plaintiffs have not further claimed any right over the property as mentioned by the defendant no.1 in her counter claim and the same is not even part of the suit property described in the plaint by the plaintiffs, allowing the counter claim to sustain in such situation would be in teeth of the provisions under Order VIII Rule 6C of the Code which reads as under:-

“6C. Exclusion of counter-claim.- Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.”

8. Hence, any dispute in these circumstances is required to be agitated in an independent suit and not in a counter claim as the plaintiffs have not claimed the right over the property of the counter claim. In this regard, the decision of the Hon'ble Supreme Court in the of **Satyender & Ors. Vs. Saroj & Ors.**, reported in **2022 SCC OnLine SC 1026**,



paragraph nos. 19 and 20 could be referred advantageously.

Paragraph nos. 19 and 20 read as under:-

“19. A counter claim can be set up only “against the claim of the plaintiffs”. Since there was no claim of the plaintiffs regarding Killa No. 6//8 and 23, the defendants were barred to raise any counter claim on these Killa numbers in view of Order VIII, Rule 6A of the CPC as it has nothing to do with the plaintiffs. It is true that a counter claim can be made by the defendant, even on a separate or independent cause of action (Jag Mohan Chawla & Anr. v. Dera Radha Swami Satsang & Ors.⁶).

20. The Legislature permits the institution of a counter claim, in order to avoid multiplicity of litigation. But then it has certain limitations such as that the counter claim cannot exceed the pecuniary limits of the jurisdiction of the court, and that such counter claim must be instituted before the defendant has delivered his defence or before the time limit for delivering his defence has expired. More importantly, such a counter claim must be against the plaintiff! Evidently, in the present case the counter claim was not against the plaintiffs. Moreover, as the plaintiffs had not claimed any right over the property and the Killa Nos. 6//8 and 23 are not even a part of the suit property described in the plaint by the plaintiffs. Despite the same, such a claim has been allowed against the plaintiffs. In fact, we do not find on record any reply



submitted by the plaintiffs against the counter claim. To be fair, such a counter claim should have been excluded in terms of Order VIII, Rule 6C of the CPC. Suffice it to state here that the counter claim set up by the defendants has been rightly rejected by the High Court.”

9. On this aspect, I find merit in the submission of learned counsel for the petitioners and the reliance placed on the three Judge Bench decision of the Hon’ble Supreme Court in the case of **Ashok Kumar Kalra** (supra) on the point of dissimilarity of cause of action between the main suit and the counter claim.

10. In the case of **Ashok Kumar Kalra** (supra), the Hon’ble Supreme Court observed that even if a counter claim 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 filing counter claim so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counter claim is limited by various considerations based on the facts and circumstances of each case. In **Ashok Kumar Kalra** (supra), the Hon’ble Supreme Court further held that Order VIII Rule 6A of the Code does not give absolute right to the defendant to file the counter claim with substantive delay, even if limitation prescribed has not elapsed and summed up its findings in paragraph no.21 which



reads as under:-

“21. We sum up our findings, that Order VIII Rule 6A of the Code 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.”*

(Underline supplied for emphasis)

11. In the light of discussion made hereinbefore and in view of the dissimilarity of cause of action between the main suit and the counter claim and the counter claim apparently



running counter to the provisions of Order VIII Rule 6C of the Code, I am of the considered opinion that the learned trial court has committed an error of jurisdiction when it rejected the objections of the petitioners against the maintainability of the counter claim and, hence, the impugned order dated 29.02.2016 passed by the learned Sub Judge-III, Patna in Title Suit No. 337 of 2010 is not sustainable and the same is set aside.

12. Accordingly, the instant civil miscellaneous petition stands allowed.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
CAV DATE	07.05.2024
Uploading Date	12.06.2024
Transmission Date	NA

