

IN THE HIGH COURT AT CALCUTTA

Civil Revisional Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1841 of 2019

Smt. Jharna Patra.

VERSUS

Sri Sanjib Gayen & Ors.

With

CAN No.1 of 2019

(Old CAN No. 8777 of 2019)

For the petitioner:

Mr. Tanmoy Mukherjee, Adv.

Mr. Souvik Das, Adv.

Mr. K.R. Ahmed, Adv.

Mr. Rudranil Das, Adv.

Mr. Soumava Santra, Adv.

For Opposite party no. 1:

Mr. Animesh Paul, Adv.

Mr. Haardikaa Rajdev , Adv.,

Judgment on: January 19, 2024

Biswaroop Chowdhury,J

The petitioner before this Court is a plaintiff in a suit for partition, and is aggrieved by the Order dated 16.03.2019 passed by Learned Civil Judge (Sr.

Divn) 1st Court Contai in Title Suit No- 95 of 2015 allowing prayer of opposite party no-1/Defendant in application under Order 6 Rule 17 of the Code of Civil Procedure.

The case of the opposite party no-1 before the Learned Trial Court in the application under Order 6 Rule 17 CPC may be summed up thus.

The defendant no-1/opposite party no-1 contended in the said application that the plaintiff/petitioner created obstruction in the common passage for which complaint was lodged before Ram Nagar Police station and proceedings under section 133 CrPC was instituted before S.D.E.M at Contai. The opposite party no-1 further contended that on 01/10/2015 the plaintiff along with some antisocials installed a gate on the common passage as a result of which free-movement of the opposite party no-1 is obstructed which is causing hardship to the said defendant.

The plaintiff/petitioner contested the petition by filing written objection.

By order dated 16/03/2019 the Learned Court below was pleased to allow the petition of the opposite party no-1, under Order 6 Rule -17 of the Code of Civil Procedure for amendment of written statement and permission to file counter claim.

The petitioner/ plaintiff being aggrieved by the order dated 16/03/2019 has come up with the instant Revisional Application.

It is contended by the petitioner that the learned court below in exercise of his jurisdiction acted illegally and with material irregularity by allegedly holding that 'it is necessary to decide whether any Ejmal Path-way is existing in the suit plot' i.e. within the Nursing Home area, covered with surrounded pucca brick built high boundary wall which is very much absurd and non application of judicious mind. It is further contended that the learned court below in exercise of his jurisdiction acted illegally and with material irregularity by allegedly finding 'it can be stated that the proposed amendment of the defendant is necessary for proper adjudication of the suit. As per the amendment application the cause of action arose on 1.10.2015 and the application praying for amendment was filed on 9.08.2017 and 8.2.2018 which were not pressed on technical ground and the present petition is filed on 04.08.2018 which is within three years from the date of occurrence of cause of action' it is very much biased and not at all impartial finding. It is also contended that the Learned Trial Court failed to appreciate the exact state of affairs and the involved points of law therein and thereby failed to pass judicious order for the interest of justice.

Pursuant to the filing of this application notice was issued upon the opposite party no-1/plaintiff. The service of notice upon other opposite parties were dispensed with.

Heard Learned Advocate for the petitioner/plaintiff and Learned Advocate for the opposite party no-1/defendant no-1. Perused the petition filed and materials on record.

Learned Advocate for the Petitioner/Plaintiff submits that the Learned Trial Judge failed to apply his mind to the facts of the case when he went on to allow, the application for amendment which includes prayer for filing counter-claim made by the opposite party no-1. Learned Advocate further submits that the order passed by Learned Trial Judge is contrary to the provision contained in Rule 6A of Order 8 of the Code of Civil Procedure. Learned Advocate also submits that so far mere amendment is concerned he has no objection but so far counter claim is concerned it should be filed in accordance with Rule 6A of Order 8 of the Code of Civil Procedure. Learned Advocate submits that the opposite party no-1 is not without remedy as he has liberty to file a separate suit. It is submitted that the order passed by the Learned Trial Court cannot be sustained and the same should be set aside.

Learned Advocate for the petitioner relies upon the following decisions:

- **Shyamal Kumar Das Vs Sanjay Chaudhury** {Reported in 2011(5) CHN (CAL) 115}
- **Bollepanda P.Poonacha and Anr Vs K.M.Madapa** {Reported in AIR-2008 S.C P- 2003}
- **Mahendra Kumar and anr Vs State of Madhya Pradesh and others** {Reported in AIR-1987 S.C. 1395}

- **Sisir Kumar Dutt Vs Pratima Dutt and Ors** {Reported in 2010(4) CHN. (CAL). 15}

Learned Advocate for the opposite party no-1 submits that the application for amendment and for filing counter statement was not at belated stage as all defendants were not served and the trial did not commence. Learned Advocate further submits that there is no error in the order passed by Learned Trial Judge. Learned Advocate relies upon the following judicial decision.

Ashok Kumar Kalra Vs Wing CDR Surendra Agnihotri and ors
{Reported in (2020) 2 SCC P-394}

Upon hearing the Learned Advocates and considering the facts of the case this court is of the view that as the main dispute involved in this application is not with regard to allowing amendment of written statement but permitting filing of counter claim it is necessary to consider the provisions contained in Order 8 Rule-6A of the Code of Civil Procedure.

Rule 6A of Order 8 CPC.

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 occurring 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 judgement 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.

Thus upon reading sub-rule-1 of rule 6A of Order 8 of the Code of Civil Procedure it will appear that right of filing counter claim whether cause of action arises before or after institution of suit can be set up before defendant has delivered his defence, or before the time for delivering his defence has expired. In the instant case the Learned Trial Court allowed the petition for amendment and filing counter claim when it is an admitted position that the cause of action for filing counter claim arose after filing of the written statement. The reasons furnished by the Learned Trial Judge in allowing

prayer for counter claim is that the counter claim is filed within three years from the date of accrual to them of the right to sue and that summons has not yet been served upon the defendant nos 2 to 5 and 7 to 12 and as such trial has not yet been commenced.

Now before proceeding further with regard to the validity of the order passed by the Learned Trial Court it is necessary to discuss the judicial decisions relied upon.

In the case of Bollepanda P.Poonacha and Anr (Supra) the Hon'ble Supreme Court observed as follows:

“Even prior to coming into force of the Code of Civil Procedure (Amendment) Act, 1976, the Court could treat a counter claim or a cross suit.

This Court in Laxmidas Dayabhai Kabrawala Vs Nanabhai Chunilal Kabrawala and Others [AIR 1964 SC 11] held;

11.The question has therefore to be considered on principle as to whether there is anything in law- statutory or otherwise- which precludes a court from treating a counter-claim as a plaint in a cross suit. We are unable to see any. No doubt, the civil procedure code prescribes the contents of a plaint and it might very well be that a counter-claim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a

plaint in a cross-suit is made part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr Desai had to concede that in such a case the court was not prevented from separating the written statement proper from what was described as a counter-claim and treating the latter as a cross-suit. If so much is conceded it would then become merely a matter of degree as to whether the counter-claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a court to covert or treat the counter-claim as a plaint in a cross suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in O.VIII,R.6 or in any other provision of the Code which laid an embargo on a court adopting such a course.

Parliament, however, has placed an embargo while giving effect to the decision of this Court in inserting Order VIII, Rule 6A of the Code of Civil Procedure. While there exists a statutory bar, the court's jurisdiction cannot be exercised."

In the case of Mahendra Kumar and anr. (Supra) the Hon'ble Supreme Court observed as follows:

“The next point that remains to be considered is whether R.6A(1) of O.VIII, Civil P.C bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for R.6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under R.6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had 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. The High Court, in our opinion, has misread and misunderstood the provision of R.6A(1) in holding that as the appellants had filed the counter claim after the filing of the written statement, the counter claim was not maintainable. The finding of the High Court does not get any support from R.6A(1), Civil P.C.As the cause of action for the counter claim had arisen before the filing of the written statement, the counter claim was, therefore, quite maintainable. Under Art.113, Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter claim, which is treated as a suit under S.3(2)(b), Limitation Act, had been

filed by the appellants within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter claim.”

In the case of Sisir Kumar Dutt (Supra) this Hon’ble Court observed as follows:

“The date of filing of the suit and the date of filing of the written statement by the respective defendants therein, have already been mentioned above. If those dates are taken into consideration, then this court has no hesitation to hold that since admittedly the cause of action for the counter-claim arose subsequent to the filing of the written statement by the defendant in the said suit leave cannot be granted to the defendant to raise counter claim in the said suit in view of the provision contained in Order 8 Rule 6A of the Civil Procedure Code as aforesaid.”

In the case of Shyamal Kumar Das(Supra) this Hon’ble Court observed as follows:

“The Apex Court in case of *Ramesh Chand Ardawatiya vs Anil Panjwani* , reported in 2003(7)SCC 350, held that the counter-claim can be set up in three eventualities- firstly, by filing a written statement under Rule 1 of Order 8 and incorporating the counter-claim as envisaged under Order 8 Rule 6A of the Code of Civil Procedure, secondly, by way of an amendment of the written

statement with the leave of the Court incorporating the counter-claim, and thirdly, counter claim by way of a subsequent pleading under Rule 9 of Order 8 of the Code of Civil Procedure.

In view of the ratio laid down by the Apex Court in the above report, I find that the counter-claim, after the disclosure of the defence, cannot be allowed to be incorporated except on the above three eventualities as held in *Ramesh Chand Ardwatiya(supra)*.’

In the case of Ashok Kumar Kalra (Supra) Hon’ble Supreme Court observed as follows:

12. ‘The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints. Order 8 Rule 6-G says that the rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counterclaim. As per Rule 8, any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Rule 9 of Order 8 prohibits presentation of pleadings subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim, except by the leave of the court, and upon such terms as the court thinks fit; and the provision further stipulates that the court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for

presenting the same. This amendment with respect to subsequent pleadings was made to CPC by way of Act 22 of 2002. At the cost of repetition, we may note the conditions for filing a counterclaim under Order 8 Rule 6-A:

- i. Counterclaim can be for claim of damages or otherwise.
- ii. Counterclaim should relate to the cause of action, which may accrue before or even after filing the suit.
- iii. If the cause of action in the counterclaim relates to one accrued after filing of suit, it should be one accruing before filing of the written statement or the time given for the same.

When we look at the whole scheme of Order 8 CPC, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set-off and counterclaim.'

13. 'We have to take note of the fact that Rule 6-A was introduced in CPC by the Code of Civil Procedure (Amendment) Act of 1976(104 of 1976), and before the amendment, except in money suits, counterclaim or set-off could not be pleaded in other suits. As per the recommendation of the Law Commission of India, to avoid multiplicity of proceedings, the counterclaim by way of Rule 6-A was inserted in the Civil Procedure Code. The Statement of Objects and Reasons for enacting the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), were –

1. A litigant should get a fair trial in accordance with the accepted principles of natural justice.

2. Every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
3. The procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.'

14. 'Before we proceed further, we deem it appropriate to note that any provision under the procedural law should not be construed in such a way that it would leave the court helpless (refer to *Salem Advocate Bar Assn. Case*). In fact, a wide discretion has been given to the civil court regarding the procedural elements of a suit. As held by this court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.'

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.'

53. 'The decision of this court in *Bollepanda P.Poonacha v K.M.Madapa*, is also significant in this regard. Referring to *Ramesh Chand Ardawatiya*, it acknowledged that belated counterclaims were to be discouraged, and called upon the court to consider questions of serious injustice and irreparable loss while permitting any such claim. However, in *Bollepanda*, the Court did not have an occasion to expound further on this proposition, as the counterclaim had been rejected on the basis that its cause of action had arisen after the filing of the written statement.'

58 "At this juncture, I would like to address the observation in *Rohit Singh* that a counterclaim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counterclaims after the commencement of recording of evidence is not illegal *per se*. However, I hasten to add that permitting such a

counterclaim would be improper, as the court's discretion has to be exercised wisely and pragmatically."

59. There are several considerations that must be borne in mind while allowing the filing of a belated counterclaim :

59.1 *First*, the court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counter claim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise.

59.2 *Second*, the interest of justice must be given utmost importance and procedure should not outweigh substantive justice.

59.3 *Third*, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counterclaims, must be accorded due consideration.

Although Learned Advocate for the opposite party relies upon the decision of the Hon'ble Apex Court in the matter of Ashok Kumar Kalra (supra) to support his case but upon perusal of the Judgment it will appear that although the Hon'ble Court took a liberal view with regard to filing of counter claim after filing of written statement till issues are framed and in exceptional circumstances even thereafter but nowhere it is observed by the Hon'ble Apex Court that Counter Statement can be filed where cause of action arises after filing of written statement. Moreover the Hon'ble Court observed that Rule 6-A (1) of Order 8 of the Code of Civil Procedure does not on the face of it bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under Rule 6-A(1) is that a counter claim

can be filed, provided the cause of action had occurred to the defendant before the defendant had delivered his defence or before the time for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. Thus upon plain reading of the decisions of the Hon'ble Supreme Court in the case of Ashok Kumar Kalra (supra), Bollepanda, P. Poonacha and anr. (supra) Mahendra Kumar and Anr (supra) leaves no scope to infer that counter claim can be permitted to be filed when a cause of action arises after filing of written statement. It is an admitted position that in the instant case cause of action for filing counter claim arose after filing of the written statement, thus the Learned Trial Judge erred in permitting to file counter claim in contravention of the provision laid down under Rule 6A Order 8 of the Code of Civil Procedure.

Moreover Learned Trial Judge did not address himself to the decision of the Hon'ble Apex Court relied by the Learned Advocate for the Petitioner/Plaintiff before arriving at the conclusion. Thus the Order passed by the Learned Trial Judge cannot be sustained and the same should be set aside.

Hence this Revisional Application stands allowed. Order dated 16/03/2019 passed by Learned Civil Judge (Senior Division) 1st Court Contai in Title Suit No. 95 of 2015 is set aside.

It is however made clear that this order will not stand in the way of the opposite party no-1 to make application for amendment without counter claim in accordance with law as this Court has not gone into the merits of amendment application but decided only with regard to right of filing counter claim. It is needless to mention that as fresh suit can be filed in accordance with law no leave of Court is required for filing fresh suit and the opposite party no-1 may exercise such right in accordance with law.

This application stands disposed.

(Biswaroop Chowdhury,J)