

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-1974-2020 (O&M)

Date of Decision: March 19, 2024

Ashok Kumar Sharma

...Petitioner

Versus

Rakesh Kumar Sharma and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE ARCHANA PURI

Present: Mr.Ashish Aggarwal, Senior Advocate with
Ms.Aashna Aggarwal, Advocate
for the petitioner.

None for respondent No.1.

Mr.Vishal Garg Narwana and Mr.Arishdeep, Advocates
for respondents No.3 to 5.

ARCHANA PURI, J.

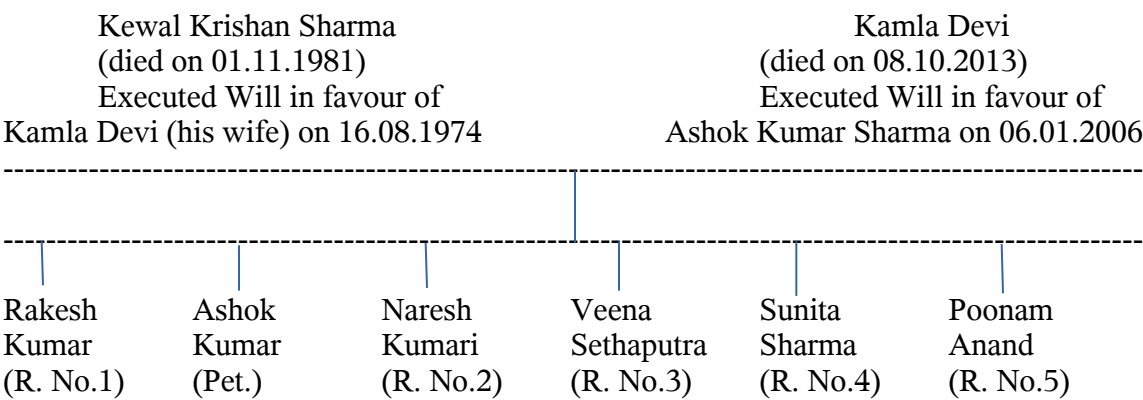
The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India, thereby, making a prayer for setting aside of the order dated 08.01.2020 (Annexure P-14), being illegal ultra-vires, void and without jurisdiction and further made a prayer that application dated 11.07.2019 (Annexure P-12) filed by the petitioner, for dismissal of the counter-claim, be allowed in the interest of justice.

The essential facts, to be noticed, are as herein given:-

That, initially, respondent No.1 (plaintiff before learned trial Court) had filed a suit for issuance of permanent injunction to restrain defendant

No.1 (petitioner in the present revision petition) from alienating, transferring or mortgaging more than his half share and further to restrain the other defendants and their attorneys etc. from alienating, transferring or mortgaging any part of the suit property, as detailed in the headnote of the plaint.

Though, not reproduced in the plaint, but what could be gathered from the title of the suit as well as from the grounds of revision, the essential pedigree table is reproduced, as herein given:-



In the plaint, it is asserted that Kewal Krishan Sharma, was owner of the suit property (as detailed in the headnote of the plaint). During his lifetime, he had executed a Will dated 16.08.1974, vide which, he had appointed his wife Kamla Devi i.e. mother of the plaintiff and defendants, as trustee and it was duly mentioned in the Will that after the death of Kamla Devi, his property is to bequeath in favour of plaintiff Rakesh Kumar Sharma and defendant No.1 Ashok Kumar Sharma, in equal shares. Probate was also granted by the High Court of Singapore. On the basis of the said Will, mutation of inheritance was sanctioned, in favour of mother of the parties i.e. Kamla Devi, vide mutation No.944, as per the order of Collector dated 25.08.2004, which has been incorporated in the revenue record.

CR-1974-2020

The said property was joint property, along with other co-sharers i.e. brothers of K.K.Sharma and the property was partitioned between the parties and mutation in this regard was sanctioned vide mutation No.1096, which entry was reflected in the jamabandi.

However, mother of the parties, namely Kamla Devi died on 28.10.2013. Defendant No.1 (petitioner), in order to frustrate the right of the plaintiff on the basis of the Will dated 16.08.1974, had moved an application before concerned office, to sanction mutation of inheritance of Kamla Devi, in his exclusive name. The plaintiff having come to know about the same, had filed objections before the concerned Tehsildar. Also, it was averred in the plaint, that the plaintiff and defendant No.1 are joint owners in possession of the said property, in equal shares, as per Will dated 16.08.1974 and the plaintiff also requested defendant No.1 and other defendants, to admit his claim, but they clearly refused in this regard. It was asserted that defendant No.1 wants to alienate whole land and other defendants are also trying to alienate the suit property, to some other persons, in order to defeat the rights of the plaintiff.

Defendant No.1-petitioner filed written statement. Besides raising preliminary objections, also defendant No.1, asserted about the execution of Will by his father on 16.08.1974, on the basis whereof, property has been transferred/mutated in the name of Kamla Devi. Furthermore, it was asserted that during her lifetime, Kamla Devi had executed a Will dated 06.01.2006, in his favour. The said Will was upheld at various forums and accordingly, land in Karnal had been mutated in the name of the answering defendant vide mutation No.8203. Even, on the basis

CR-1974-2020

the Will, executed by his mother, mutation No.733 has been sanctioned in favour of the answering defendant by the Revenue Officer at Kapurthala. Also, it was asserted that plaintiff had sought to set aside the Will of Lt.Smt.Kamla Devi before the Hon'ble High Court of Singapore in suit No.963 of 20-15 and the said suit has been dismissed. Furthermore, it was asserted that Kamla Devi had become absolute owner of the estate left by K.K.Sharma. She died on 28.10.2013. During her lifetime, she had executed a Will dated 06.01.2006, in favour of answering defendant, which Will has been upheld at various forums. As such, a prayer was made for dismissal of the suit.

Defendants No.3 to 5 (respondents No.3 to 5 in the present revision petition) had filed separate written statement, thereby, asserting their right to the property in question, on the basis of natural inheritance. Even, counter-claim by making part of the written statement was filed by defendants No.3 to 5, thereby, denying the rights solely of plaintiff and defendant No.1. They had sought declaration that defendants No.3 to 5 are equal owners along with plaintiff and defendants No.1 and 2, all having undivided interest in the land, belonging to Kewal Krishan Sharma, as comprised in the land, as detailed in the clause (a) of paragraph 15 of the counter-claim. They also sought relief of permanent injunction to restrain defendant No.1 or the plaintiff from alienating or creating any sort of charge upon the said property.

In this backdrop, further, it should be noticed that when the case was taken up on 30.11.2018, the following order was passed:-

“Today the case was fixed for plaintiff evidence and for payment of cost of Rs.5000/- Case called repeatedly since

morning, but none has appeared on behalf of plaintiff. It is 04.00 PM. No further wait is justified. Therefore, the present suit filed by the plaintiff is dismissed U/O 9, Rule 8 CPC.

Perusal of the file shows that counter claim filed by the defendant Nos.3 to 5 is pending. Therefore, case is adjourned to 17.12.2018 for the evidence of counter claimant. Ahlmad of this Court is directed to register the counter claim in CIS system.”

In pursuance of the aforesaid order, the application, in hand, for seeking dismissal of the counter-claim, was filed, at the instance of the petitioner (defendant No.1). In the application, there is mention made about the property to be owned by Kewal Krishan Sharma, who had executed a Will, in favour of Kamla Devi, as a result whereof, Kamla Devi, further asserted to have executed a Will, in favour of Ashok Kumar Sharma, on the basis whereof, the property was inherited by him, which fact is disputed by the plaintiff, in the suit. Furthermore, it is submitted that the counter-claim has been filed basically against the petitioner-defendant No.1 and it has been filed in collusion and in connivance with the plaintiff. With these assertions, it was also pleaded that the counter-claim is not maintainable, qua co-defendant i.e. the petitioner.

Reply was filed, thereby, denying the assertions made by the petitioner-defendant No.1.

After hearing learned counsel for the parties, vide impugned order dated 08.01.2020, the application for dismissal of the counter-claim was dismissed.

Being aggrieved, the petitioner-defendant No.1 has filed the

present revision petition.

The petitioner has basically challenged the filing of the counter-claim against him, being co-defendant with the counter claimants.

Learned counsel for the parties heard.

The provisions relating to the filing of the counter claim is contained in Order 8 Rule 6A to 6G of the CPC. For ready reference the same is reproduced as herein given:-

“Rule 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 counterclaim against the claim of the plaintiff, any right or claim in respect of a cause action according to the defendant against the plaintiff either before or after the filing of the suit, but before 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 damage or not:

1.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.

Rule 6B. Counter-claim to be stated

Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim. Rule

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.

Rule

6D. Effect of discontinuance of suit

If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

Rule 6E. Default of Plaintiff to reply to counterclaim.

If the plaintiff makes default in putting in reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him or make such order in relation to the counter-claim as it thinks fit.

Rule 6F. Relief to Defendant where counterclaim succeeds

Where in any suit a set-off or counter-claim is established as defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

Rule 6G. Rules relating to written statement to apply

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim."

From the aforesaid provision, it is evident that a counter claim can be filed against the claim of the plaintiff and it can be filed regarding a cause of action, accruing to defendant, against the plaintiff. However, in the light of the aforesaid provision, there is no question of a counter claim being permissible against a co-defendant by a defendant in the suit. Still, further perusal of the provision contained in Rule 6A(3) states that in case the counter claim is filed by the defendant, then the plaintiff shall be at liberty to

CR-1974-2020

file written statement, in answer to the counter claim. Further, Rule 6C gives entitlement to the plaintiff to raise an objection to the counter claim filed by the defendant before the issues are framed, in relation to the counter claim and the plaintiff can make a claim that counter claim of defendant be excluded from his suit and the defendant, filing the counter claim, may file a separate suit, if he so desires. Likewise, Rule 6E provides that if the plaintiff defaults in filing reply to the counter claim; the Court may pronounce the judgment against the plaintiff, in relation to the counter claim, made against him. Even, Rule 6F provides that the relief to be granted in the counter claim is against the plaintiff.

This relates to express provision, vis-a-vis, counter claim filed against the plaintiff. In the entire provision, nowhere, a co-defendant is contemplated, as a person required to suffer a counter claim against him by another co-defendant. In the eventuality, the defendant files a counter claim against a co-defendant, the co-defendant has not been given any right to file written statement to the counter-claim, under Order 8 Rule 6A, nor has a defendant been given any entitlement to make an application for exclusion of a counter claim filed by co-defendant against him. Furthermore, it also not provides for pronouncement of a judgment against a co-defendant, in the eventuality of default of co-defendant to file a written statement to the counter claim by the co-defendant. Thus, absolutely, there is no provision made for permitting a counter-claim by defendant against his co-defendant.

In this regard, suffice to make beneficial reference to the observations by this Court in case titled as ‘*Soma Devi vs. Kashmiri Lal and another, 2017(4) Law Herald 3362*’, which dealt in detail with the provisions

aforesaid and the implications of the counter-claim filed by the defendant against the co-defendant and the prejudice of the rights of the co-defendant, against whom the counter-claim has been filed. It is apt to reproduce the observations made by this Court, in the aforesaid case, in paragraphs No.15 and 16, as herein given:-

“15. Hence a bare perusal of the claim of Order VIII Rule 6A to 6G shows that it is only the plaintiff; against whom a counter claim is permissible. It is only the plaintiff who has been given a right to file reply to the counter claim. It is only the plaintiff who can make an application for rejection of the counter claim on the ground that the defendant may file a separate suit and it is only the plaintiff, on whose default to file the written statement, the Court can pass a judgment against the plaintiff and it is only the plaintiff against whom any balance, which is found due after adjusting the counter claim, can be granted to the person who is filing the counter claim. In this entire scheme, nowhere a co-defendant is contemplated as a person required to suffer a counter claim against him by another co-defendant. In case defendant files a counter claim against a co-defendant then co-defendant has not been given any right to file written statement to the counter-claim under Order VIII Rule 6A. Nor has a defendant been given any entitlement to make an application for exclusion of a counter claim filed by co-defendant against him. Nor the default of a defendant to file written statement in counter claim by a co-defendant, is prescribed as a ground for pronouncing a judgment against such a co-defendant. Even the balance of the relief after adjustment of counter claim is not contemplated to be granted against a co-defendant by the CPC. Therefore, expressly, no provision is made for permitting a counter claim by a defendant against his co-defendant.

16. Even impliedly the provision for permitting counter-

claim against co-defendant cannot be read into the statute book for the simple reason that such an implied presumption would go totally in contravention with the other provisions of the Order VIII Rule 6A to 6G. If any counter claim by the defendant against his co-defendant is entertained by the Court then the Court would be finding itself in an absurd situation where the Court would not be authorised to permit filing written statement against the counter claim by the co-defendant, the Court would not be authorised to permit a defendant to move an application for exclusion of the counter claim by the co-defendant and the Court would not be authorised to grant relief against co-defendant. For assuming all these powers with court, again an implied presumption will have to be made that Court has all these powers because it has permitted the counter claim to be filed against a co-defendant. This much of interpolation and reading into the statute which is neither required nor is necessary and, rather, is prohibited by the law of interpretation. Any omission to legislation a point has to be presumed to be intentional on the part of the legislature or the rules framing authority. Any defendant has, otherwise, full right to file a separate suit against a co-defendant for any cause of action. Therefore, no such interpolation of words and phrases in Order 8 Rule 6A to 6G is called for or permissible. Hence it is held that a defendant cannot file a counter claim against a co-defendant under any circumstances. Order VIII Rule 6A to 6G provide for and conceive of only a counter claim to be filed by the defendant against the claim of the plaintiff. Hence the counter claim against the co-defendant in the present case was not maintainable.”

Learned counsel for respondents No.3 to 5 has relied upon

Rohit Singh and others vs. State of Bihar (now State of Jharkhand) and others, 2007(1) RCR (Civil) 674, to emphasize that counter-claim against

the co-defendant is maintainable.

However, it is pertinent to mention that Hon'ble Supreme Court in the subject case (*Rohit Singh's case supra*) had held that it appeared to them that the counter-claim has necessarily to be directed against the plaintiff in the suit; though incidentally or along with it, may also claim relief against co-defendants in the suit. However, perusal of the dictum of the Hon'ble Supreme Court reveals that the question, as to whether the defendant can file counter-claim against co-defendant, was never as such considered in that case, as the moot question before it was with regard to counter-claim having not been properly filed in that case. It was the stage, at which, counter-claim can be filed, which was in dispute. Looking at this, in *Soma Devi's case (supra)*, it has been observed that this judgment (*Rohit Singh's case supra*), is not the precedent on the point that the defendant, as a matter of right, can file counter-claim against co-defendant, as an independent remedy and it was also observed about the Hon'ble Supreme Court having held that the counter claim as necessarily to be directed against the plaintiff in the suit. It was only so said, while considering the counter claim against the plaintiff that Court can grant an incidental relief against a co-defendant also. Further, it was also observed that in the subject case (*Rohit Singh's case supra*), the Hon'ble Supreme Court held that where the relief is solely directed against a co-defendant, is totally not maintainable. In this context, it was observed in *Soma Devi's case (supra)* that it is only that while considering the counter claim filed against the plaintiff that the Court can grant some incidental relief, even against a co-defendant and thus, the Hon'ble Supreme Court had never laid down that a co-defendant has an

independent remedy of filing a counter claim against a co-defendant and in the light of the same, it was observed that creating an independent right in favour of a defendant, to file a counter claim against a co-defendant, is altogether different matter, than the power of the Court to grant an incidental relief against a co-defendant. However, relief has to be purely incidental to the main relief being granted by the Court.

In the given circumstances, an independent counter-claim by the defendant against the co-defendant, is not maintainable, in the independent capacity of a co-defendant. But, as an incidental relief, to the main relief, which may be granted against the plaintiff, it may be directed by the Court, even against a co-defendant, if the need, so arises.

In *Satyender and others vs. Saroj and others*, 2022(4) RCR (Civil) 89, it was held that the counter-claim can be set up only “against the claim of plaintiffs”. In this regard, also useful reference is made to *Alliance University Chikkahagade Cross, Bengaluru vs. Sudhir and others*, 2017(3) Air Kar R 209, wherein, it was observed, as herein given:-

“70. A bare perusal of Order 8 Rule 6A of the CPC reveals that the counter-claim is to be filed "against the claim of the plaintiff". It can be filed with regard to "any right or cause of action accruing to the defendant", but "against the plaintiff". That the counter-claim can be filed only "against the plaintiff" is further borne out by Order 8 Rules 6-B to 6-F of the CPC. Thus, the counter-claim cannot be filed against any other person or entity who is not the plaintiff. It is, indeed, trite to state that the purpose of permitting a counter-claim to be filed in a suit is to lessen multiplicity of litigation. Since the suit and the counter-claim are to be tried together, the common trial permits the same court to decide the issues which may not only

be common, but also may be proved by same or similar evidence. Therefore the counter-claim can be filed only qua the plaintiff. Of course, it is true that through the counter-claim the defendant is permitted to raise other cause of action, besides the ones raised by the plaintiff. But nonetheless, the focus of the other cause of action still has to be "against the plaintiff", and not against others."

In this backdrop, at the very outset, it is to be noticed that the suit of the plaintiff was dismissed under Order 9 Rule 8 CPC, as per the order dated 30.11.2018, which has been reproduced in earlier portion of the judgment. On that very day, the counter-claim was observed to be pending. Thereupon, it was fixed for evidence of the counter claimants. Moreover, on that very day, the Ahlmad was directed to register the counter-claim.

Copies of the zimini orders passed by learned trial Court have been produced by learned counsel for the petitioner. Perusal of the same reveals that issues in the suit were framed on 02.04.2018 and the case was fixed for evidence of the plaintiff. However, on 18.04.2018, an application was filed, at the instance of the plaintiff to allow him to place on record the replication-cum-written reply to the counter-claim filed by defendants No.3 to 5, which was allowed and issues relating to counter-claim were framed and the case was adjourned further for evidence of the plaintiff. Ultimately, on 30.11.2018, the suit of the plaintiff was dismissed under Order 9 Rule 8 CPC and thereupon, the case was adjourned to 17.12.2018, for the evidence of the counter claimants. On that very, the Ahlmad was directed to register the counter-claim in CIS system.

The zimini orders further reveal that no evidence on behalf of

the counter claimants was led and an application for dismissal of the counter-claim was filed by the petitioner-defendant No.1, on 25.07.2019. After seeking reply, the said application was dismissed vide impugned order.

All this shows that at no point of time, an opportunity was given to the petitioner to file written statement to the counter-claim. May it be so. However, it is significant to note that plaintiff had filed a suit for permanent injunction, while asserting half share in the suit property, on the basis of the Will of Kewal Krishan Sharma. However, petitioner-defendant No.1, asserted his right entirely on the basis of the Will of his mother executed on 06.01.2006. In this context, it should be noticed that defendants No.3 to 5, by way of counter-claim asserted their rights by virtue of natural inheritance to the extent of 1/6th share each, of the plaintiff and defendants.

As observed aforesaid, the suit of the plaintiff was dismissed under Order 9 Rule 8 CPC. Only thereupon, counter-claim was ordered to be registered and the case was adjourned for evidence of the counter claimants. Such being the state of affairs, the contest fell on the rights of the petitioner only, who is defendant No.1 before learned trial Court and he has not been provided with any opportunity, to file written statement. Law does not permit so. In these circumstances, counter-claim definitely creates a cloud on his rights, only vis-a-vis, the suit property. By way of very smart move, the plaintiff remained away from the Court proceedings to counter the rights of petitioner-defendant No.1, who, as evident from the paperbook, has fought his right qua inheritance, in various Courts.

As evident from Annexure P-6, respondent No.1-Rakesh Kumar Sharma (who is plaintiff before learned trial Court, in the subject suit) had

earlier filed a suit for declaration, thereby, making all his brothers and sisters, as defendants, thereby, asserting himself to be owner in possession in equal share, together with the petitioner-defendant No.1. In the said suit, a counter-claim was also filed by sisters, who were defendants No.3 to 5. However, in the said suit, an application for rejection of the counter-claim was filed by the present petitioner-defendant No.1 and the same was allowed vide order dated 16.01.2019, copy where of Annexure P-5. However, there was no further challenge made by the counter claimants to the order dated 16.01.2019.

In the subject suit, the counter-claim was ordered to be registered, on the day, when the suit was already dismissed against the plaintiff and a cloud, as such, was attempted to be created, qua the rights of the petitioner, who is defendant No.1. In this view of the matter, the counter-claim filed by defendants No.3 to 5 is not maintainable qua defendant No.1-petitioner. In fact, it is found to be non-entertainable, obviously, as there is no question of counter-claim being tried, as a counter-claim qua co-defendant, who asserts his right, to the entire property, on the basis of the Will executed by his mother, in his favour, more particularly, when no opportunity had been given to contest the counter-claim, as no opportunity to file the reply, was given. So no question of counter-claim being tried as counter-claim or being treated as a fresh plaint arises.

In view of the aforesaid observations, the impugned order is set aside and consequently, the application for dismissal of the counter-claim is **allowed**.

Hence, the revision petition stands **allowed**.

Further, without prejudice to the rights of the parties, to be adjudicated in any other litigation, it is observed that defendants No.3 to 5, who are respondents No.3 to 5, shall be at liberty to assert their right, by virtue of natural inheritance of their mother, by having recourse to legal remedy and the plaintiff and defendant No.1, (who are brothers), ought to be given an opportunity to contest and raise available objections, which may be adjudicated by the Court concerned, in accordance with law, uninfluenced by any observations made hereinabove.

March 19, 2024
Vgulati

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes/No