

In The High Court At Calcutta

Civil Revisional Jurisdiction

Appellate side

Present :

The Hon'ble Justice Harish Tandon.

C.O. No. 521 of 2015

Sri Chandreswar Prasad Shaw & Anr.

- vs -

Sri Chandra Sekhar Biswas

For the petitioners : Mr. Siva Prasad Ghose, Advocate

For the opposite party : Mr. Biswajit Basu, Advocate
Mr. S Banik, Advocate

Heard on : 05.06.2015

Judgment on : 15.6.2015

HARISH TANDON, J.

This solitary point involved in this revisional application is whether the defendant can be permitted to bring counter claim in the written statement by way of amendment when cause of action for such counter claim arose after the filing of the written statement.

The challenge is made to an order dated 15th December 2014 passed by the learned Civil Judge (Junior Division), Third Court, Sealdah in title Suit No. 208 of 2009 rejecting an application for amendment of the written statement incorporating counter claim. Though the Trial Court did not have the occasion

to consider the point enumerated herein above but the said legal point is agitated at the bar which this Court feels assume importance and, therefore, allowed the respective counsels to address the Court on the said legal point.

Admittedly the plaintiff /opposite party instituted a suit for declaration of his title in respect of the suit premises and recovery of possession against the defendant/petitioner alleging that he illegally and forcibly trespassed into the suit premises on 18.03.2009. The plaint was presented before the Trial Court on 17.06.2009 and the defendant after entering appearance filed the written statement on 28.4.2010. Indisputably, the defendant did not make any counter claim at time of delivering the defence by way of written statement. The counter claim is sought to be incorporated in the written statement by amendment under Order 6 Rule 17 of the Code.

The respective counsels are ad idem on the proposition of law that the counter claim can be brought in the written statement by amendment but are at variance on the cause of action if accrued after the filing of the written statement.

The learned advocate of the defendant/petitioner submits that the counter claim can be made to bring an independent cause of action in respect of any claim forming the subject matter of the independent suit. It is further submitted that the counter claim is treated as a plaint and is recognized under Order 8 Rule 6A of the Code of Civil Procedure to avoid the multiplicity of the

proceedings as held in case of Jag Mohan Chawala and another v. Dera Radha Swami Satsang and others reported in AIR 1996 Supreme Court 2222. He vehemently submits that only fatter to bring the counter claim subsequent to the filing of the written statement is when the issues are settled and the evidence has commenced and in support of the aforesaid submissions, he placed reliance upon a judgment of the Karnataka high Court in the case of Hanumanthagouda v. Bandu alias Bandeppa Venkatesh Kulkarni and others reported in AIR 2001 Karnakata 10 and M/s Southern Ancillaries Pvt. Ltd. v. M/s Southern Alloy Foundaries Pvt. Ltd. reported in AIR 2003 Madras 416. By referring judgment of this Court in the case of Seema Dasgupta V. Gopal Banerjee reported in 2004 (1) CHN 6, he submits that the expressions “any right of claim in respect of the cause of action accruing with the defendants” does not indicate that it should have any nexus to the cause of action against the plaintiff but any independent cause of action which may form the subject matter of the independent suit can be claimed by way of a counter claim. The strong reliance is made to a judgment of a Karnakata High Court delivered in case of Ryaz Ahmed and others v. Lalith Kumar Chopra Builders, Bangalore reported in (2008) 1 ICC 702 where in it is held that if cause of action arose subsequent to the filing of the written statement, the defendant is entitled to make counter claim to avoid the multiplicity of the proceeding and conflicting decisions. The learned advocate for the petitioner refers the judgment rendered by this Court in case of Bimanta Biswas and another v. Monoranjan Kha and Another (C.O. 2386 of 2009 decided on 11.07.2011) to support the contention

that the Court can take note of a subsequent events which arose after the filing of the suit. Lastly, the reliance is placed upon the judgment of the Madras High Court in case of Dr. K. Rajasekaran v. M. Rajeswari reported in AIR 2014 Madras 178 for the proposition that an independent cause of action can be made in a counter claim and the Court should not relegate the defendant to file a separate suit. The petitioner concludes by saying that there is no fatter in incorporating the counter claim by way of an amendment even if the cause of action arose after the filing of the written statement in order to avoid the multiplicity of preceding and conflicting decisions.

The learned advocate for the opposite party refuted the contention of the petitioner by submitting that the language of Order 8 Rule 6A of the Code of Civil Procedure is abundantly clear that the counter claim can be made if the cause of action arose prior to the institution of the suit or after the institution of the suit but before the filing of the written statement. According to him, the cause of action pleaded in the proposed amendment admittedly arose after the delivery of defence and, therefore, the said counter claim cannot be permitted to be incorporated by way of an amendment in the written statement. He attacked arguments of the petitioner that once the suit for recovery of possession is filed it is inconceivable that the plaintiff/opposite party shall make an open threat to the defendant/petitioner to oust him forcibly from the suit premises. He thus submits that the application for amendment is mala fide and the Trial Court has rejected the same. On the point whether the

counter claim can be allowed to be incorporated in the written statement if cause of action for the same arose after the filing of the written statement, he placed reliance upon a judgment of the Supreme Court rendered in case of Mahendra Kumar and another v. State of Madhya Pradesh reported in (1987) 3 SCC 265. According to him, the counter claim is permissible if based on a cause of action accrued prior to the institution of suit or even thereafter but before filing of the written statement and not otherwise.

Before proceeding to deal with the legal point emanates from the respective submissions it would be profitable to quote Order 8 Rule 6A of the Code which is as follows:

“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 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 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.”

The plain and simple reading of the language employed in the aforesaid provision indicates that the defendant in addition to his right of pleading may set up a counter claim in respect of any right or claim in relation to a cause of action against the plaintiff arose either before or after the filing of the suit but before the delivery of the defence or before the time limit for delivery of defence has expired. The restriction imposed to such counter claim is made in the proviso to Sub-Rule 1 thereof, by which the counter claim was restricted to the pecuniary limit of the jurisdiction of the said Court.

The counter claim is an additional rights conferred upon the defendant which have the same effect as of a cross suit. Prior to the amendment brought in the Code of Civil Procedure by CPC (Amendment) Act 1976, Order 8 Rule 6 limited the remedy to set off and counter claim to be laid in the written statement only in money suit. By the said Amendment Act, Rule 6A to 6G were brought in the statute book, providing an additional right to the defendant to set up by way of a counter claim in respect of any cause of action, independent to a cause of action of the plaintiff. The expression “any right or claim in respect of cause of action accruing with the defendant” would show that the cause of action from which the counter claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff. The aforesaid proposition can be fortified from a judgment of this Court rendered in case of **Seema Dasgupta** (supra) wherein it is held :

“ In Jag Mohan Chawala & Anr. vs. Dera Radha Swami Satsang & Ors. reported in AIR 1996 SC 2222, it has been observed that in a suit for injunction, counter-claim for injunction in respect of the same or a different property has been maintainable. A defendant could claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it has been independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. In sub-rule (1) of Rule 6A, the language has been so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it has been no longer confined to money claim or to cause of action on the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words “any right or claim in respect of a cause of action accruing with the defendant" would” show that the cause of action from which the counter claim arose need not necessarily arise from or have any nexus with the cause of action of the plaintiff.”

Even in the case of **Dr. K. Rajasekharan**(supra), it is held:

“The defendant can claim any property by way of counter claim in respect of any cause of action that has accrued to him even though it is independent of the case of action averred by the plaintiff and the same cause of action can be adjudicated without relegating the defendant to file a separate suit. So, the view beyond is to avoid multiplicity of proceedings, especially when the dispute is between the same parties.”

The object of the amendments introduced by incorporating Rules 6A to Order 8 of the Code are conferment of a statutory right on the defendant to set up a counter claim independent of the claim on the basis of which the plaintiff laid the suit, on his own cause of action. The Sub Rule 1 of Rule 6A is couched

with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim which may form the subject matter of the independent suit, therefore, there is no hesitation to hold that the counter claim may be made by the defendant on his own cause of action against the plaintiff and is not relatable to the cause of action of the plaintiff or restricted to a money suit or suit for damages.

There is no quarrel to the proposition that the counter claim can be incorporated and/or brought by way of an amendment in the written statement. The reference in this regard can be made to a judgment of the Karnataka High Court referred in the case of **Riaz Ahamed** (supra). There are up-teen numbers of judgments in support of the proposition that the counter claim can be brought in the written statement by amendment and no further deliberation is called for.

Suffice to say, looking to the scheme of Order 8 of the Code there are three modes of setting up a counter claim in the civil suit. Firstly, the defendant in the written statement may include the counter claim, secondly, the counter claim can be brought by way of an amendment subject to the leave of the Court and thirdly, the counter claim may be filed by way of a subsequent pleading under Rule 9 of Order 8 of the Code. In first eventuality no leave of the Court is necessary but in later two cases, the counter claim cannot be brought

on record as of right but depend upon the discretion vested in the Court. The Court may refuse to exercise discretion permitting a counter claim either by way of an amendment or by subsequent pleading if it causes the delay in the progress of the suit by forcing retreat on the steps already taken or completing the smooth flow of the proceeding or causing a delay in the progress of the suit. By bringing the provision relating to counter claim by way of an amendment, the legislature never intended the pleading by way of counter claim to be utilized as an instrument for forcing up reopening of trial or putting fetter in the progress of the proceeding. The parallel object behind the incorporation of provisions relating to counter claim is to avoid multiplicity of judicial proceedings and save upon the Court's time and also to exclude inconvenience to the parties by enabling claims and counter claims, that is all disputes between the same parties should be decided in course of same proceedings.

Therefore, there is no ambiguity in saying that the counter claim is not only an additional but a statutory right of the defendant which can be exercised at the time of filing the written statement or with the leave of Court subsequent to the filing of the written statement or by amendment.

The issue which clinches in this case is not an independent cause of action for the counter claim but the accrual thereof. Therefore, if the counter claim is allowed by way of an amendment to be incorporated in the written statement ordinarily it relates back to the filing of the written statement.

Furthermore, the counter claim can also be made if the Court permits an additional written statement to be filed by the defendant which necessarily confirms to the requirement of the provision itself, this Court, therefore, does not find any justification in restricting the counter claim based on the cause of action arose in course of the proceedings.

In the instant case, whether the amendment filed by the petitioner can be admitted as mala fide as opposed to bona fide on the attending facts and circumstances. The cause of action for the counter claim arose on the alleged threat of a forcible dispossession when admittedly the plaintiff/opposite party instituted a suit for recovery of possession against the defendant/petitioner treated him as trespasser. This Court is not oblivious to the proposition of law that the Court shall not go into the veracity and/or genuinity of the statement sought to be incorporated by way of an amendment at the time of considering an application for amendment but for the limited purpose whether the proposed amendment is mala fide or not the Court can reject the application for amendment. An illusory cause of action is created in the proposed amendment by way of a counter claim which on the face of the pleadings of the parties is inconceivable. It is not only for the decree of permanent injunction against the plaintiff sought in the proposed counter claim a further decree in the form of declaration of title is sought therein. There is no averment in the proposed counter claim when such title is invaded or threatened. Application for amendment is apparently mala fide and, therefore, is liable to be rejected.

This Court, therefore, does not find that the ultimate decision taken by the Trial Court warrants any interference in the facts and circumstances of the instant case.

The revisional application fails. No costs.

(Harish Tandon, J.)