

CASE NO.:
Appeal (civil) 1959 of 2008

PETITIONER:
Bollepanda P. Poonacha & Anr

RESPONDENT:
K.M. Madapa

DATE OF JUDGMENT: 13/03/2008

BENCH:
S.B. SINHA & V. S. SIRPURKAR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 1959 OF 2008
(Arising out of SLP(C) No. 11131 of 2007)

S.B. SINHA, J.

1. Leave granted.
2. Whether a counter claim is permissible to be filed after filing of a written statement, is the core question involved herein.
3. Appellant filed a suit against the respondent claiming title and possession over the property in suit. Their names were mutated in the revenue record of rights. Respondents had filed a suit against the appellant which was marked as O.S. No. 67 of 1996. An order of interim injunction was passed therein on the premise that he under the garb of ex-parte interim injunction started making attempts to interfere with the possession of the appellant in the scheduled properties.
4. O.S. No. 54 of 1997 was filed in the Court of Civil Judge, Senior Division at Virajpet on 19.2.1997. Respondent filed a written statement on 21.3.1997 contending that he had purchased the said properties in terms of an order passed by the Assistant Registrar of Cooperative Societies, Kodagu, Madikeri.
5. On or about 4.1.2006, inter alia on the premise that the plaintiffs have dis-possessed the respondents in the year 1998, an application for leave to file counter claim was filed. In the said counter claim, it was contended that the land bearing Survey No. 61/1 had fallen to his share in a partition of the family properties in 1980 and 1986 and the remaining land was purchased by him in a public auction. The cause of action for filing the said counter claim was said to have arisen on 19.2.1997, when the suit was filed and in the end of summer of 1998 when the plaintiff trespassed and encroached upon the lands belonging to them. In the application for amendment of the written statement, a prayer was made for passing a decree of recovery of possession of the suit land stating;

"Pass a judgment and decree against the plaintiffs declaring that the defendant is the absolute owner of the written statement schedule 'A' properties and direct the plaintiffs to vacate and deliver possession of the schedule 'B' properties to the defendant and the same be ordered to be delivered by a fixed date and on default; the same shall be delivered to the defendant by the due process of

the court.."

The said application has been allowed by the learned Civil Judge by an order dated 12.10.2006, opining that the cause of action for filing the said counter claim arose prior to filing of the written statement.

Revision application filed by the appellant has been dismissed by the High Court by reason of the impugned judgment.

6. Mr. Dayan Krishnan, learned counsel appearing on behalf of the appellant submitted that filing of a counter claim where cause of action arose after filing of the written statement is impermissible under Order 8 Rule 6A of the Code of Civil Procedure.

7. Mr. Girish Ananthamurthy, the learned counsel appearing on behalf of the respondent, however, urged that with a view to avoid unnecessary litigation, the view taken by the learned Civil Judge as also the High Court cannot be said to be wholly impermissible in law.

8. Order VIII Rule 6A of the Code of Civil Procedure 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;

(Emphasis supplied)

9. Order VI Rule 17 of the Code provides for amendment of pleadings. Subject of course to the applicability of the proviso appended thereto (which is not applicable in the instant case), such applications ordinarily are required to be considered liberally. It is also not much in doubt or dispute that amendment of written statement deserves more liberal consideration than an application for amendment of plaint. Order VIII Rule 9 again, subject to the statutory interdict enables a defendant to file additional pleadings.

10. The provision of Order VIII Rule 6A must be considered having regard to the aforementioned provisions. A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. Respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands, in question, in the summer of 1998. Cause of action for filing the counter claim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Sri Ryaz Ahmed (supra) is based on the decision of this Court in Baldev Singh and Others Vs. Manohar Singh and Another [(2006) 6 SCC 498].

Further, the facts of the instant case are distinguishable from those of the Sri Ryaz Ahmed (supra). In that case, the proposed amendment by the

defendant was allowed to be filed as he wanted to make a counter-claim by way of a decree for grant of mandatory injunction to remove the built up area on the disputed portion of land. It was therein held that instead of driving the defendant to file a separate suit therefor, it was more appropriate to allow the counter-claim keeping in mind the prayer of a negative declaration in the plaint. However, in the instant case, the counter-claim was purported to have been filed for passing of a decree for recovery of possession of the disputed land after the suit had been filed.

Baldev Singh (supra) is not an authority for the proposition that the Court while allowing an application for amendment will permit the defendant to raise a counter claim although the same would run counter to the statutory interdicts contained in Order 8 Rule 6A. Some of the decisions of this Court in no uncertain terms held it to be impermissible. See Mahendra Kumar Vs. State of Madhya Pradesh [(1987) 3 SCC 265], Shanti Rani Das Dewanjee (Smt.) Vs. Dinesh Chandra Day (Dead) by Lrs. [(1997) 8 SCC 174].

11. In Gurbachan Singh Vs. Bhag Singh and Ors. [(1996) 1 SCC 770], this Court clearly held;

"\005\005the limitation was that the counter-claim or set-off must be pleaded by way of defence in the written statement before the defendant filed his written statement or before the time limit for delivering the written statement has expired, whether such counter claim is in the nature of a claim for damages or not."

A belated counter claim must be discouraged by this Court. See Ramesh Chand Vs. Anil Panjwani [(2003) 7 SCC 350].

12. We are, however, not unmindful of the decisions of this Court where a defendant has been allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case.

13. The Court in such matters has a wide discretion. It must, however, subserve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that joinder of several causes of action in a suit is permissible.

The Court, must, however, exercise the discretionary jurisdiction in a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while undoubtedly would take into consideration the questions of serious injustice or irreparable loss, but nevertheless should bear in mind that a provision for amendment of pleadings are not available as a matter of right under all circumstances. One cause of action, cannot be allowed to be substituted by another. Ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away. See State of A.P & Ors. Vs. M/s. Pioneer Builders, A.P. [(2006) 9 SCALE 520] and Steel Authority of India Ltd. Vs. Union of India & Ors. [2006 (9) SCALE 597] and Himmat Singh and Ors. Vs. I.C.I. India Ltd. and Ors., [2008 (2) SCALE 152].

14. We, for the reasons stated hereinbefore, are of the opinion that the learned Civil Judge was not correct in allowing the application for amendment of the written statement.

15. 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."

16. 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.

17. For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. The appeal is allowed.

18. The defendant, however, would be entitled to file a suit or an application to amend the plaints to such extent, which may be held to be permissible in law. Respondent shall bear the costs of the appellant. Counsel's fee assessed at Rs. 10,000/-.