

(2010) 05 JH CK 0019

Jharkhand High Court

Case No: None

Narbadeshwar Prasad

APPELLANT

Vs

Ram Kishore Mishra
and Others

RESPONDENT

Date of Decision: May 7, 2010

Acts Referred:

- Constitution of India, 1950 - Article 227

Citation: AIR 2011 Jhar 15 : (2010) 58 BLJR 731

Hon'ble Judges: D.G.R. Patnaik, J

Bench: Single Bench

Final Decision: Allowed

Judgement

D.G.R. Patnaik, J.

The present writ application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 13.04.2007 passed by the Subordinate Judge-IV, Ranchi in Title Suit No. 77/2000 whereby the petition filed by the present petitioner under Order XIV Rule 1 and 2 of the Code of Civil Procedure, was dismissed.

2. Heard counsel for the parties.

3. The case of the plaintiff/petitioner is that he had entered into an agreement with the Respondent No. 1 namely the Secretary, Pandra Sahkari Grih Nirman Samiti Ltd., Ranchi under which, the Secretary had agreed to allot a house situated at Mauza Lalit Gram, Kathitanr, Ratu to the petitioner for a total consideration amount of Rs. 3,25,000/-. The petitioner paid a total sum of Rs. 26,200/- as advance of the stipulated consideration amount and obtained possession of the allotted house from the Respondent No. 1. The rest of the settled consideration amount was to be paid by the plaintiff/ petitioner in equal monthly installments.

4. Sometime later, the defendant No. 2 namely the present Respondent No. 2 had also staked his claim in the suit property claiming ownership over the same and began demanding payment of installments to him instead of the defendant No. 1 on the ground that the petitioner is obliged under an agreement which the petitioner had purportedly entered into with him.

5. Under such circumstances, the plaintiff/ petitioner instituted a suit for specific performance of the agreement which he had entered into with the defendant No. 1 vide Title Suit No. 77/2000.

The defendant No. 2 appeared in the suit and had filed his written statement on 17.06.2002. After about four years of filing his written statement, the defendant No. 2 filed his counter claim on 29.05.2006 under Order VIII Rule 6-A of the Code of Civil Procedure, on the ground that the cause of action for which the counter claim was filed arose much before the institution of the suit and the same is continuing.

6. The plaintiff/ petitioner filed an objection under Order XIV Rule 1 and 2 of the CPC on 21.09.2006 objecting to the maintainability of the counter claim and praying the trial court to decide the same as preliminary issue.

By the impugned order dated 13.04.2007, the trial court rejected the plaintiff's petition under Order XIV Rule 1 and 2, hence the present writ application.

7. As it appears from the pleadings of the plaintiff/ petitioner and as explained by his counsel, the grounds of objection taken by the plaintiff to the counter claim of the Respondent No. 2 was that the counter claim was barred by limitation and the assertion made in the counter claim was contrary to the averments made by the defendant No. 2 in his written statement.

8. Assailing the impugned order of the trial court, learned Counsel for the petitioner submits that the learned court below has failed to appreciate the objections taken by the petitioner, in as much as, it has not considered the mandatory provisions of Order VIII Rule 6 A(1) of the Code of Civil Procedure.

Referring to the admitted facts of the case, learned Counsel would explain that in his written statements, the defendant No. 2 did not choose to raise any counter claim. Instead, after four years during which period the defence of the defendants was closed and the proceedings in the suit had advanced by the trial court framing the issues on the basis of the pleadings available on record, the defendant No. 2 has raised a counter claim. Learned Counsel adds that since the defendant No. 2 had already submitted his defence, the provisions under Order VIII Rule 6A(1) of the CPC would debar him from filing his counter claim in the suit.

In support of his arguments, learned Counsel would refer to and rely upon a judgment of the Supreme Court in the case of [Ramesh Chand Ardawatiya Vs. Anil Panjwani](#), . Reliance has also been placed on another judgment of the Supreme Court in the case of [Rohit Singh and Others Vs. State of Bihar \(Now State of](#)

[Jharkhand\) and Others, .](#)

9. Per contra, the stand taken by the Respondent No. 2, who is the contesting respondent in this writ application, is that the petitioner's plea that the counter claim advanced by the Respondent No. 2 is time barred, is misconceived. Referring to the provisions of Order VIII Rule 6A(1) of the Code of Civil Procedure, learned Counsel for the Respondent No. 2 would argue that the defendant in the suit, 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 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 claim for damages or not. Learned Counsel explains that the cause of action for setting up the counter claim had accrued to the defendant/Respondent No. 2 even prior to the institution of the suit and does continue. The time prescribed in the provisions of Order VIII Rule 6A relates to accrual of the cause of action for instituting the counter claim. Learned Counsel explains further that the essential requirement is that the cause of action for filing the counter claim should arise at least before the defendant had filed his written statement.

In support of his argument, learned Counsel relies upon a judgment of the Supreme Court in the case of [Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day \(dead\) by LRs.,](#) Supreme Court 3985.

10. Referring to the petitioner's ground that the counter claim cannot be allowed to be raised after framing of issues, learned Counsel for the respondents would refer to the provisions of Order XIV Rule 2(2) of the Code of Civil Procedure, in his attempt to explain that under the aforesaid provisions, the party raising objections has to indicate that either the Court does not have jurisdiction or that the suit is barred under the provisions of law. Mere assertions that the averments contained in the counter claim are contradictory to the statements contained in the written statement, cannot be taken as a tenable ground of objection.

11. From the rival submissions of the counsel for the parties, it appears that the plaintiff/petitioner had entered into two separate agreements for the same house. One with the defendant No. 1/Respondent No. 1 and the other with the defendant No. 2/Respondent No. 2.

The contradictions as the plaintiff/petitioner would want to point out in the pleadings of the defendant No. 2 is that whereas in the written statement the defendant No. 2 had agreed to execute the sale deed in favour of the plaintiff in respect of the house property, in the counter claim the defendant No. 2 has purportedly resiled from his earlier commitment of executing the sale deed and has sought to dispossess the plaintiff from the suit property.

12. On perusal of the impugned order of the court below, it appears that the plaintiff's prayer for rejecting the counter claim set up by the defendant No. 2 and for deciding the issue as a preliminary issue, has been rejected on the ground that the objections raised by the petitioner involves both questions of law and facts and that the plaintiff has not raised the question of maintainability on the ground of jurisdiction or on the ground that the counter claim of the defendant is barred by any specific provision of law and therefore there was no necessity to decide upon the maintainability of the counter claim as a preliminary issue. The trial court has however left the issue to be decided at the time of deciding the other issues.

13. The question which revolves around the controversy raised by the parties are:

(i) Whether the counter claim of the defendant No. 2 under Order VIII Rule 6 A(1) can be allowed after the defendant No. 2 had delivered his defence ?

(ii) Whether the counter claim of the defendant No. 2 can be allowed after expiry of about four years from the date of filing of his written statement when such claim is allegedly barred by limitation ?

14. To reiterate, the facts admitted are that the defendant No. 2, after filing his appearance, had submitted his written statement on 17.06.2002 and thereafter the trial court had framed the issues and proceeded with the trial by allowing the plaintiff to lead his evidence.

After almost four years i.e. on 29.05.2006, the defendant No. 2 raised the counter claim by filing his application under the provisions of Order VIII Rule 6 A(1) of the Code of Civil Procedure.

The pleadings of the defendant No. 2 as originally declared in his written statement, appear to be contradictory to the counter claim set up by him.

It may be mentioned here that in the present writ application the operation of the impugned order of the trial court dated 13.04.2007 has been stayed. However, the suit had proceeded and the defence evidence was also closed on 30.09.2009. The defendant No. 2 was however not allowed by the trial court to adduce evidence in support of his counter claim.

15. Order VIII Rule 6 A and 6 B of the CPC reads as follows:

6-A. 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 counterclaim 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.

6-B. 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.

16. It would be manifest from a reading of the above provisions of law that Order VIII Rule 6 A of the CPC provides that the 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 filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired.

In the case of Ramesh Chand Ardawatiya (Supra) the Supreme Court has explained that the pleading by way of counter claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to a right of pleading set off. A set off or counter claim has therefore to be pleaded in the written statement.

In the case of Rohit Singh (Supra), the Supreme Court has explained that a counter claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter claim can be raised after issues are framed and the evidence is closed.

17. As it appears from the averments contained in the petition under Order VIII Rule 6A, the defendant No. 2 has set up the counter claim for restoration of possession of the suit property on the ground that the plaintiff had committed breach of contract/agreement by failing to pay the balance of the consideration amount. The objections of the plaintiff/petitioner in this context was that the counter claim based on the purported breach of agreement, was time barred under the law of limitation.

18. The powers of the trial court to pronounce judgment on the issues framed is laid down under the provisions of Order XIV Rule 2 of the Code of Civil Procedure. Order XIV Rule 2(1) and (2) of the Code of Civil Procedure, in particular, reads as under:

2. Court to pronounce judgment on all issues.-(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may,

if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

19. As observed from the facts pleaded, the plaintiff in his objections to the counter claim and his prayer for deciding the issue of maintainability of the counter claim of the defendant No. 2 as a preliminary issue, had pleaded that the counter claim is barred by limitation under the provisions of Limitation Act and that the pleadings in the counter claim are totally contradictory to the pleadings of the defendant in the written statement. It appears that the trial court has not discussed the plaintiff's objections in proper perspective and has rejected his claim by a cryptic statement that the plaintiff has not raised the "ground of jurisdiction or that the counter claim is barred by specific provisions of law".

The trial court ought to have examined the plaintiff's objections in the light of the ground as to whether the counter claim is barred by limitation or not, nor has it examined the issue as to whether, the provisions of law and the facts and circumstances of the case, the defendant could set up the belated counter claim.

20. In the case of [M/s. Oriental Ceramic Products Pvt. Ltd. Vs. Calcutta Municipal Corporation](#), a Bench of the Kolkata High Court has held that where no reason has been given as to why the defendants did not file counter claim at the time of filing of written statement or before settling of issues or before closing of evidence of plaintiff, a counter claim is liable to be rejected since the plaintiff would be seriously prejudiced in defending the counter claim if the same is admitted at such belated stage.

21. As observed in the same judgment, since the counter claim is to be treated as an independent plaint, the question whether it is barred by limitation, undoubtedly falls within the jurisdiction of the court for determination at the stage when it is filed and if on the basis of the submissions made in such a plaint the claim appears to be barred by law of limitation, it would at once be liable for rejection under Order VII Rule 11(d) of the Code of Civil Procedure.

22. In the light of the above facts and circumstances and the discussions made, I am satisfied that the impugned order of the trial court cannot be sustained in law and therefore the same is hereby quashed. In the result, this application is allowed. However, in the facts and circumstances of the case, there shall be no order as to cost.