

(2009) 11 CAL CK 0012

Calcutta High Court

Case No: C.O. No. 3417 of 2005 with C.O. No. 3417 of 2005

M/s. Raja Ram Dal Mill

APPELLANT

Vs

Smt. Gayatri Debi

RESPONDENT

Date of Decision: Nov. 19, 2009**Acts Referred:**

- Constitution of India, 1950 - Article 227

Hon'ble Judges: S.P. Talukdar, J**Bench:** Single Bench**Advocate:** Amal Kumar Mukhopadhyay and Mr. Dilip Banerjee, for the Appellant;
Rabindra Nath Mahato and Mrs. Jayeeta Chakraborty, for the Respondent**Final Decision:** Dismissed

Judgement

S.P. Talukdar, J.

By filing an application under Order XLVII Rule 1 of the Code of Civil Procedure, the plaintiff/petitioner sought for review of this Court's order dated 27th February, 2008. By the said order, this Court dismissed the revisional application, being C.O. No. 3417 of 2005.

2. The backdrop of the present case may briefly be stated as follows:

The petitioners, as plaintiffs, filed a suit before the learned 2nd Court of Civil Judge (Jr. Divn.), Sealdah, praying for a decree declaring their tenancy right in respect of two tenancies as well as for other reliefs. The said suit was contested by the defendant by filing written statement on 14th June, 2001. On 8th January, 2002, the defendant filed a counter-claim under Order VIII Rule 6A of the CPC praying for a decree for recovery of possession, mesne profit and other reliefs. Plaintiffs, by filing an application, claimed that the counter-claim having been filed long after filing of the written statement is not maintainable. Plaintiffs, thus, prayed for striking out of the counter-claim. learned trial Court, by order dated 1st September, 2005, rejected the petition.

3. Being aggrieved by and dissatisfied with the said order dated 1st September, 2005, the plaintiffs, as petitioners, approached this Court with an application under Article 227 of the Constitution.
4. This Court by order dated 27th February, 2008 dismissed the application, being C.O. No. 3417 of 2005.
5. In the instant application under Order XLVII Rule 1 of the C.P. Code, the petitioner alleged that this Court did not consider the decision of the Apex Court in the case between [Ramesh Chand Ardawatiya Vs. Anil Panjwani](#), .
6. The present application had been resisted by the opposite party/defendant on the ground that the petitioner failed to make out a case justifying review of this Court's order dated 27th February, 2008.
7. After hearing learned counsel for both parties and taking into consideration the facts and circumstances, it appears that this Court is now called upon to decide two aspects i.e., whether a review application under Order XLVII Rule 1 of the CP Code is maintainable and whether there is any justification for review of the said order dated 27th February, 2008 as sought for.
8. Order XLVII of the CPC reads as follows:

"1. Application for review of judgment. - (1) Any person considering himself aggrieved -

 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
 - (b) by a decree or order from which no appeal is allowed, or
 - (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation. - The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a Superior Court in any case, shall not be a ground for the review of such judgment.]"

9. In the present case, the review has been sought for on the ground that the law, as settled by the Apex Court in the case between [Ramesh Chand Ardawatiya Vs. Anil Panjwani](#), has not been taken into proper consideration. If so, that is certainly a mistake or error, which demands review. Moreover, review application can also be entertained for any other sufficient reason.

10. Having regard to the grievances, as ventilated in the application for review, I find no reason for standing in the way. It cannot be disputed that non-consideration of a settled position of law, apart from everything else, is a sufficient ground for entertaining a review application.

11. In course of submission, reference was made to the decision of the Apex Court in the case between [Mohd. Akram Ansari Vs. Chief Election Officer and Others](#). The Apex Court in the said case observed that "there is a presumption in law that a judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed..... If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the Court concerned to pass appropriate orders, including an order of review....."

12. In the present case, it had been categorically claimed that the order dated 27.02.2008, which had been sought to be reviewed, does not reflect consideration of the decision in the case of Ramesh Chandra (supra).

13. However, after due consideration of all relevant aspects, I am inclined to hold that the petitioner could succeed to establish that there is sufficient reason for entertaining the instant application for review.

14. Referring to the decision of the Apex Court in the case between [Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others](#), it was submitted 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.

15. The crux of the controversy is, thus, whether the cause of action in the factual backdrop of the case under reference for the counter-claim had arisen before the filing of the written statement or not. If the answer is yes, the counterclaim is certainly maintainable.

16. In [Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day \(dead\) by LRs.](#), the Apex Court referred to the earlier decision in the case between [Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others](#). It was submitted that right to file a counter-claim under Order VIII Rule 6A of the CPC is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing written statement or extended date of filing written statement, such counter-claim can be filed even after filing the written statement.

17. The Apex Court in the case between [Ramesh Chand Ardawatiya Vs. Anil Panjwani](#), shows that the counter-claim has necessarily to find its place in the written statement. Once the right of the defendant to file a written statement has been lost or the time limited for delivery of the defence has expired then neither can the written statement be filed as of right nor can a counter-claim be allowed to be raised. It was further held that the Court has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim to be filed belatedly but such discretion should be exercised in a reasonable manner keeping in view all the facts and circumstances of the case.

18. Significantly enough, the Apex Court in the case between [Gurbachan Singh Vs. Bhag Singh and others](#), observed that the Law Commission of India had recommended, to avoid multiplicity of the proceedings, right to the defendants to raise the plea of set off in addition to a counter-claim in Rule 6 in the same suit irrespective of the fact whether the cause of action for counter-claim or set off had accrued to defendant either before or after the filing of the suit. The 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."

19. In *Bollepanda P. Poonacha & Anr. v. K. M. Madapa*, as reported in (SC) 2008 (3) CHN 90, it was observed that 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 therefore, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. It is found that the Apex Court in connection with the said case also referred to the earlier decision in the case of *Gurbachan Singh* (supra) Apex Court in the case of *Bollepanda P. Poonacha & Anr.* (supra), referred to several other earlier decisions including the case of *Gurbachan Singh* (supra) as well as *Mahendra Kumar* (supra).

20. While analyzing the provision of Order VIII Rule 6A, the Apex Court held that 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 therefore, however, must either before or after filing of the suit but before the defendant has raised his defence. While referring to the case of *Ramesh Chand* (supra), the Apex Court observed that a belated counter-claim

must be discouraged. It is for the Court to exercise the discretionary jurisdiction in a judicious manner. In the said case, the Apex Court held that "while considering that subservience of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual observation that while there exists a statutory bar, the Court's jurisdiction cannot be exercised.

21. After taking into consideration all relevant facts and circumstances of the present case and having regard to the findings of the Apex Court in the cases, as referred to earlier, I am inclined to hold that this Court is called upon to adjudicate as to whether entertaining the counter-claim in the present case after filing of the written statement would amount to overstepping the statute or not. So far the principles relating to the law precedent are concerned, it is, perhaps, needless to mention that what is important is the ratio decidendi. Mere observation made by any Superior Court may not necessarily have any binding force. What is to be treated as a precedent is a finding relating to a particular point of law. There are occasions when different set of facts and circumstances are required to be dealt with and the principle of law as decided in one case may not be in regard to the doctrine of sub silencio.

22. This reminds us of Professor T. B. Smith of Edinburgh University who said:

Why should a Court, which in the past clearly refused to be strictly bound by precedent (and has subsequently tied its own hands) not resume the earlier and more equitable practice? It is astonishing to observe the most eminent legal minds of the country reacting to the prison of precedents (of precedents which they recognize as unjust) like a child who has shut himself in a room and screams to be let out - presumably by the legislature".

Attitude of Lord Denning to precedent can best be summed up in his own words:

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law: This has evolved by broadening down from precedent to precedent. By standing by previous decisions we have kept the common law on good course. All that I am against is its too strict application, a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly, so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you find yourself lost in the thickets and the brambles. My plea is simply to keep the path to justice clear of obstructions which impede it.

23. Moreover, Lord Halsbury in *Quinn v. Leatham* said :

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are

qualified by the particular facts of the case in which such expressions are to be found." (Ref: Quinn v. Leathem [1901] AC 495 at 506).

24. It is settled law that a case is only authority for what it actually decides.

25. In the present case, the petitioner in C.O. No. 3417 of 2005 filed an application under Article 227 of the Constitution, being aggrieved by an order of the learned trial Court whereby the plaintiff's petition was rejected and the learned Court proceeded to entertain the counter-claim filed by the defendant.

Order VIII Rule 6A reads:

"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:

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."

26. It, thus, appears that a counter-claim against the claim of the plaintiffs can be set up in respect of a cause of action accruing 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. This Court in its order dated 27th February, 2008 held that the restriction, thus, appears to be in respect of accrual of the cause of action. Such cause of action is required to accrue either before or after filing of the suit but before filing of the written statement or before expiry of the time be said that the "cause of action" for the counter-claim accrued after filing of the written statement or after expiry of the time for filing of defence. In order to avoid multiplicity of proceedings and in the best interest of justice and in absence of any statutory restriction, such counter-claim deserves to be entertained.

27. In the case under reference, the defendant filed written statement on 14th June, 2001. Thereafter, on 8th January, 2002, the defendant filed a counter-claim under Order VIII Rule 6A of the Code of Civil Procedure. It was, thus, manifestly done after

filing of the written statement. But since the cause of action of such counter-claim cannot be said to have accrued after filing of the written statement, this Court finds no reason nor any rational justification for not entertaining the same. Thus, the order of the learned trial Court whereby the counter-claim as set up was entertained did not require any interference.

28. In such view of the matter, while entertaining the application under Order XLVII Rule 1 of the CP Code seeking review of this Court's earlier order dated 27th February, 2008, I do not find any merit in the grievances and it cannot also be said that there had been any mistake either factual or legal, apparent on the face of the record justifying such review.

The present application, as such, fails and be dismissed.

There is no order as to costs.

Xerox certified copy of the judgment be supplied to the parties, if applied for, as expeditiously as possible.