

Neutral Citation No. - 2024:AHC:79757-DB

AFR

Court No. - 29

Case :- FIRST APPEAL No. - 374 of 2024

Appellant :- Ishita Dua

Respondent :- Tarun Kumar Sharma

Counsel for Appellant :- Aditya Bhushan Singhal

Hon'ble Vivek Kumar Birla,J.

Hon'ble Syed Qamar Hasan Rizvi,J.

- 1.** Heard Sri Aditya Bhushan Singhal, learned counsel for the appellant and perused the record.
- 2.** The Present appeal has been filed challenging impugned judgement and order dated 27.2.2024 passed by the Additional Principal Judge, Family Court, Gautam Budh Nagar in Case No. 883 of 2021 (Ishita vs. Tarun), under Section 13 (1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act') only to the extent whereby the counter-claim of the respondent-husband has been permitted to proceed on its own as an independent petition.
- 3.** The appellant-wife has filed the divorce petition under Section 13(1)(ia) of the Act. A counter-claim under Section 23 (a) of the Act has been filed the respondent-husband for custody of a girl child born out of the wedlock. Issues were framed in the suit and thereafter one withdrawal application filed by the appellant-wife under Order XXIII Rule (1)(3) of Civil Procedure Code, 1908 (hereinafter referred to as the 'C.P.C.') read with Section 151 C.P.C. Withdrawal of the suit was not opposed by

stating that the respondent-husband has no objection to the withdrawal application as long as his counter-claim is proceeded with by the Court. In reply, it has been stated by the appellant-wife that the counter-claim by itself is not maintainable. Withdrawal application was allowed by the impugned order dated 27.2.2024, however, it was found that the respondent-husband has filed counter-claim on 15.7.2022 and no objection was raised regarding maintainability or admissibility of the counter-claim by the appellant-wife at that stage and thereafter, issues were framed on the basis of the said counter-claim filed by the respondent-husband and even upto that stage no objection was raised by the appellant-wife. The Court below held that maintainability of counter-claim cannot be considered while deciding the withdrawal application. Accordingly, the withdrawal application filed by the appellant-wife was allowed and divorce petition was dismissed as withdrawn, however, it was provided that the counter-claim filed by the respondent-husband shall proceed on its own as an independent petition and date was fixed for evidence with respect to the counter-claim.

4. Submission of the learned counsel for the appellant is that withdrawal application was not opposed by the respondent-husband and therefore, counter-claim cannot proceed. He submits that since the principal suit itself does not exist, therefore, the counter-claim does not survive. He has drawn attention to the provision of Order VIII Rule 6-D of C.P.C. to contend that although this provision provides for the effect of discontinuance of suit, however, it is provided that if in any case the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed and counter-claim may

nevertheless be proceeded with. He submits that the suit, in the present case, has not been 'dismissed' and that suit has only been 'withdrawn' and therefore, the withdrawal of the suit is not covered under Order VIII Rule 6-D of C.P.C.

5. We have considered the submissions of learned counsel for the appellant and perused the record.

6. For the purpose of disposal of present appeal, it would be appropriate to take note of the relevant provisions of C.P.C., which are quoted as under:

Order XXIII Rule 1

1. Withdrawal of suit or abandonment of part of claim.-(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded for instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

Order VIII Rule 6-A to 6-G

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 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 judgement 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.*

6-C. 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.*

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

6-E. Default of plaintiff to reply to counter-claim.- *If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgement 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.*

6-F. Relief to defendant where counter-claim succeeds.- *where in any suit a set-off or counter-claim is established as a 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 judgement to the party entitled to such balance.*

6-G. 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.*

Order VIII Rule 7

7. Defence or set-off founded upon separate grounds.- *Where the defendant relies upon several distinct grounds of defence or set-off or*

counter-claim founded upon separate and distinct facts, they shall be stated, as far as may be separately and distinctly.

(Emphasis supplied)

7. The meaning of the words 'Abandonment', 'Counter-claim' and 'Discontinuance' indicated in Black's Law Dictionary (Eighth Edition) reads as under:

'Abandonment'- 1. *The relinquishing of a right or interest with the intention of never again claiming it.*

2. *Family law. The act of leaving a spouse or child willfully and without an intent to return.*

'Counter-claim'- *A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim.*

'Discontinuance'- 1. *The termination of a lawsuit by the plaintiff; a voluntary dismissal or nonsuit.*

2. *The termination of an estate-tail by a tenant in tail who conveys a larger estate in the land than is legally allowed.*

(Emphasis supplied)

8. Similarly, the meaning of the words 'Abandonment', 'Counter-claim', and 'Discontinue' indicated in Legal Glossary published by the Government of India reads as under

'Abandonment'- *the action of abandoning*

'Counter-claim'- *a claim set up against the plaintiff in the same suit, being based on a cause of action*

'Discontinue'- *to cause to cease; to put a stop to*

(Emphasis supplied)

9. As interpretation of the provision of C.P.C. is required, it would be appropriate to take note of golden Rules of interpretation. This Court has considered the golden Rules of interpretation in **Prithvi Singh vs. State of U.P. and others**, 2022 (8) ADJ 29 (DB) (delivered by one of us, Vivek Kumar Birla, J.), relevant paragraphs 10

to 17 of *Prithvi Singh* (supra) whereof are quoted as under:

“10. Before proceeding further it would be appropriate to take note of the principles of statutory interpretation as the decision of the question involved in the present case is directly dependant on the interpretation of the statutory provisions. For this purpose we have taken help of the book 'Principles of Statutory Interpretation' '13th Edition, 2012' written by Justice G. P. Singh (Former Justice of M. P. High Court).

11. One of the main basic principles of interpretation is that if meaning of words of statute are plain, effect must be given to it irrespective of consequences.

12. In Nelson Motis vs. Union of India, AIR 1992 SC 1981 it has been observed that when the words of a statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences.

13. In Kanailal Sur vs. Paramnidhi Sadhu Khan, AIR 1957 SC 907 it was observed that if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

14. In State of Uttar Pradesh vs. Vijay Anand Maharaj, AIR 1963 SC 946 it was held that when a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

15. It is also a guiding rule of interpretation that language of the statute should be read as it is.

16. In Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd vs. Custodian of Vested Forests, AIR 1990 SC 1747 it was observed that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

17. In Raghunath Rai Bareja vs. Punjab National Bank, (2007) 2 SCC 230 Supreme Court held that departure from the literal rule should be done only in very rare cases and ordinarily there should be judicial restraint in this connection.”

10. A perusal of the aforesaid provisions of C.P.C. would clearly indicate that when the suit is filed, the defendant has a right to file counter-claim 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. Rule 6-A (2) clearly provides that such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgement in the same suit, both on the original claim and on the counter-claim. Sub-rule (3) of Rule 6-A provides that 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. Sub-rule (4) of Rule 6A provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to the plaints. This provision by itself clearly reflects that the counter-claim has to be treated a separate cause of action for which counter-claim shall be treated as plaint for all practical purposes and clearly, the word 'written statement' has been used for the reply to be filed by the plaintiff to such counter-claim. The words used are absolutely clear on this issue, however, provision also reflects that cause of counter-claim shall be disclosed in the counter-claim as they are mentioned in the plaint to which the plaintiff has right to file written statement. Rule 6-C clearly provides for exclusion of counter-claim and it says that where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not 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.

11. Admittedly, no objection was raised by the appellant-wife herein at the time of filing of the counter-claim or even after framing of the issues by the Court below on the basis of the counter-claim.

12. Insofar as Rule 6-D of Order VIII C.P.C. as relied on by the learned counsel for the appellant is concerned, it clearly provides for "Effect of discontinuance of suit" that 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. In the present case, the proceedings of the divorce petition have not been stayed, therefore, the said term is excluded. Insofar as the term 'discontinued or dismissed' is concerned. Once the withdrawal application is allowed, the suit stands discontinued for all practical purposes. Even otherwise, the withdrawal of the suit is always as dismissed as withdrawn and therefore, withdrawal of the suit would fall within the two words, i.e., 'discontinued or dismissed'. The definition of the word 'Discontinuance' as given in Black's Law Dictionary (Eighth Edition) is 'the termination of a lawsuit by the plaintiff; a voluntary dismissal'. Needless to say that it is the termination of proceedings by the plaintiff himself and it is a voluntary termination, therefore, as per Black's Law Dictionary (Eighth Edition) it is included in the word 'Discontinuance'. In Legal Glossary published by the Government of India, the word 'Discontinue' means 'to cause to cease; or to put a stop to'. Now, in the present case, it is the plaintiff who had caused the suit

proceedings to cease and thus, undisputedly has put a stop to the same. Therefore, it clearly the withdrawal of the suit is included in the term 'Discontinuance' or 'Dismissed'. In any case, the provisions clearly provides that in case the suit does not proceed for any reason whatsoever, the counter-claim shall be proceeded with. In the present case, the Withdrawal Application was not opposed on the condition clearly put forth that the counter-claim shall proceed, in other words, it is only on this condition the same was not opposed. Therefore, it is clear that there was a conditional acceptance to the withdrawal of the suit that the counter-claim shall remain alive. Rule 6-E provides that if the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgement 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 6-G provides that the rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim. It is, therefore, clear that the proceedings of the counter-claim are treated as suit proceedings. The provisions of Rule 7 of Order VIII CPC provides that once the defendant relies upon several distinct grounds of defence or set-off or counter-claim founded upon separate and distinct facts, they shall be stated, as far as may be separately and distinctly.

13. The view taken by us was taken by a co-ordinate Bench of this Court as back as in the year 1963 in the case of Hulas Rai Baijnath vs. K.B. Bass and Co. Ltd., AIR 1963 Allahabad 368 (V 50 C 105), relevant extract of paragraph 8 whereof is quoted as under:

“8..... A counter claim can be heard even if the suit is withdrawn.....”

(Emphasis supplied)

14. The same view was expressed by a Single Bench of Madras High Court in O.N. Raju vs. K. Krishnan in CMA No. 2189 of 2018 and CMP No. 17054 of 2018, decided 24.3.2022, relevant paragraphs 26 and 27 whereof are quoted as under:

“26. It also provides that such a counter claim will have the same effect as a cross suit. But when the original suit itself is withdrawn then the counter claim can stand independently as a plaint by itself. It is an assertion of a particular right by the defendant, who claims a relief against the original plaintiff and who values that particular relief for adjudication and pays necessary Court fees in accordance with such valuation.

27. Rule 6 A(2) of Order of stipulates that the Court should pronounce a judgement not only on the suit but also on the counter claim. Order 8 (6)(D) speaks about discontinuance of the suit which has happened in the instant case and provides that the counter claim should however be proceeded with. The plaintiff in the instant case had withdrawn O.S. No. 48 of 2022. If the suit of the plaintiff is, discontinued the Rule provides that the counter claim must however be proceeded with.”

(Emphasis supplied)

15. A reference may also be made to a judgement of Hon’ble Apex Court in Rajni Rani & Anr. vs. Khairati Lal & Ors., (2015) 2 SCC 682 on the nature of counter-claim. Paragraphs 9.3 to 9.6 are quoted as under:

“9.3. Rule 6-A(4) of the said Rule postulates that:

“6-A. (4) The counterclaim shall be treated as a plaint and governed by rules applicable to plaint.”

9.4 Rule 6-B provides how the counterclaim is to be stated and Rule 6-C deals with exclusion of counterclaim.

9.5. Rules 6-D deals with the situation when the suit is discontinued. It is as follows:-

“6-D. Effect of discontinuance of suit.- If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the

counter-claim may nevertheless be proceeded with.”

9.6. *On a plain reading of the aforesaid provisions it is quite limpid that a counterclaim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counterclaim shall remain alive for adjudication. For making a counterclaim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counterclaim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the judgement against the plaintiff in relation to the counterclaim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counterclaim is to avoid multiplicity of the proceedings. When a counterclaim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6-A(2) the Court is required to pronounce a final judgement in the same suit both on the original claim and also on the counterclaim. The seminal purpose is to avoid piecemeal adjudication. The plaintiff can file an application for exclusion of a counterclaim and can do so at any time before issues are settled in relation to the counterclaim. We are not concerned with such a situation.”*

16. The discussion made hereinabove clearly reflects that even after withdrawal of the suit, the counter-claim can proceed independently. We, therefore, find no force in the arguments advanced by the learned counsel for the appellant.

17. Present appeal is, accordingly, dismissed at the admission stage itself.

Order Date :- 24.04.2024

Abhishek