

AFR

VERDICTUM IN



IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO.1018 OF 2017

(An application under Article 227 of the
Constitution of India)

Kailash Bhoi (Dead) through LRs. ***Petitioners***

-versus-

Kailash Chandra Samal (Dead) ***Opp. Parties***
through LRs.

Advocate for the Parties :

For Petitioner : Mr. Prasanna Kumar Rath, Advocate

For Opposite Parties : Mr. Sourav Suman Bhuyan, Advocate
on behalf of Mr. Bebekananda Bhuyan,
Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

Heard and disposed of on 24.07.2024

J U D G M E N T

1. This matter is taken up through hybrid mode.
2. Petitioners in this CMP seek to assail the order dated 7th October, 2015 (Annexure-7) passed in CS No.289 of 2000, wherein learned 2nd Additional Civil Judge (Senior Division), Cuttack rejected the counter-claim filed by the Petitioners applying the provision under Order VII Rule 11 CPC.



2.1. The Petitioners also assail the order dated 17th April, 2017 (Annexure-11) passed in the said suit, whereby prayer for acceptance of counter-claim filed by the Petitioners was not accepted.

3. Mr. Rath, learned counsel for the Petitioners submits that the Petitioners are LRs of one Kailash Bhoi-Defendant No.1. Before expiry of the period for filing written statement, said Kailash Bhoi died and was substituted by the present Petitioners as his LRs. On appearance, they filed their written statement along with counter-claim. The said counter-claim was rejected vide order dated 7th October, 2015 (Annexure-7) on the ground that the defects pointed out by Stamp Reporter in the counter-claim were not removed erroneously applying the provision under Order VII Rule 11 CPC and the suit was posted for settlement of issues. After settlement of issues, the Plaintiff amended the plaint. Thus, the Petitioners filed additional written statement along with counter-claim under Annexure-9. While accepting the additional written statement filed by them, learned trial Court refused to accept the counter-claim applying the principles under Order VIII Rule 6-A CPC. Hence, this CMP has been filed.

4. It is his submission that in *Ashok Kalra vs. Wing CDr. Surendra Agnihotri and others*, reported in (2020) 2 SCC 394, Hon'ble Supreme Court held that a counter-claim may be accepted even after settlement of issues, but not later than commencement of trial. In the instant case, trial of the suit had not commenced by the time additional written statement-cum-counter-claim was filed. Thus, there was no legal impediment for acceptance of the counter-claim. It is further submitted that cause of action for filing of the



counter-claim arose after the Plaintiff amended the plaint by introducing certain new facts in the pleadings. Hence, the Defendant-Petitioner should not be prevented from filing the counter-claim to the pleadings brought by way of amendment in the plaint. He further submits that the counter-claim filed earlier was rejected under the provision under Order VII Rule 11 CPC. Thus, the same is not a bar for the Petitioners to file a subsequent counter-claim. Learned trial Court, without considering the same, has passed the impugned order under Annexure-11. Hence, this CMP has been filed.

5. It is his submission that the order under Annexure-7 is also not sustainable as the provision under Order VII Rule 11 CPC is not applicable to a counter-claim in view of the specific provision under Order VIII Rule 6-C CPC. He, therefore, prays for setting aside the impugned orders under Annexures-7 and 11.

6. Mr. Bhuyan, learned counsel for the Plaintiffs-Opposite Parties submits that in view of the subsequent decision clarifying the ratio in *Ashok Kumar Kalra* (supra), a counter-claim may be accepted till settlement of issues. In the instant case, the counter claim was filed after settlement of the issues. Further, prayer made in the counter-claim with regard to declaration of RSD No.3090 dated 19th July, 1989 as illegal and invalid is barred by limitation and the same cannot be allowed to be introduced in the counter-claim in view of the provision under Order VIII Rule 6-A (4) CPC. Thus, in view of Section 3 of the Limitation Act, such a prayer cannot be entertained in a counter-claim filed on 12th November, 2016. It is his submission that a counter claim can be filed under three



circumstances; firstly, along with the written statement, secondly, by way of amendment of the written statement and thirdly, subsequent to the written statement but before time to file the written statement expires and in no case after the issues are settled. In the instant case, none of the requirements is satisfied. Hence, there is no infirmity in the impugned order. As such, this CMP merits no consideration.

7. Heard learned counsel for the parties.
8. Perused the materials available on record.
9. Order VIII Rule 6-A CPC read as under:

“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 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.]”

10. On a plain reading of the provision under Rule 6-A of Order VIII CPC, it is clear that a Defendant in addition to his right of pleading a set off under Rule 6, set up by way of a counter-claim against the claim of the Plaintiff, any right or claim in respect of the 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 time limit for delivery of defence is expired. In the instant case, the counter-claim at the first instance was not accepted on the ground that the defects pointed by Stamp Reporter, were not removed. Although, learned trial Court has applied a wrong provision under Order VII Rule 11 CPC to reject the counter-claim, but that does not take away the effect of the order that the earlier counter-claim filed by the Petitioners was not accepted for non-removal of the defects pointed out by Stamp Reporter. At the same time, the written statement filed by the Petitioners was accepted. Subsequent to the amendment of the plaint, the Petitioners filed additional written statement under Order VIII Rule 9 CPC along with the counter-claim. Order VIII Rule 6-A CPC does not contemplate acceptance of a counter-claim along with additional written statement (subsequent pleading). A counter-claim may only be accepted, if the cause of action for filing such counter-claim arises on or after filing of the suit, but, before delivering of the defence by the Defendants. In the instant case, admittedly, the cause of action for filing of the counter-claim by the Petitioners arose after the amendment of the plaint by the Plaintiffs, i.e., after delivering the defence by the said Defendants. Thus, in view of Order VIII Rule 6-A CPC, a counter-claim filed along with the additional written statement could not have been accepted. It further appears that Hon'ble Supreme Court in *Ashok Kumar Kalra* (supra) has clarified as under;

“Given the fact that on the facts of the present case, a counter-claim was filed after the issues are framed, the said counter-claim cannot be filed as per law laid down by this judgment. Consequently, the Special Leave Petition is



dismissed. However, it will be open for the Petitioner to file a fresh suit based on the cause of action in the counter-claim if it is otherwise permissible in law.”

10.1. Thus, a counter-claim may be accepted after delivery of defence, but before the issues are settled. In the instant case, the issues have already been settled. Only because some additional issues may be required to be framed, that does not *ipso facto* give a right to the Defendants to file a counter-claim.

11. It further appears that Order under Annexure-7 was not challenged within a reasonable time. Accepting the same, the Defendants filed additional written statement along with counter-claim. Thus, at this stage, order dated 7th October, 2015 (Annexure-7) is no more available to be challenged, more particularly in this CMP.

12. In view of the above, this Court finds that learned trial Court has committed no error in accepting the counter claim.

13. Accordingly, this CMP, being devoid of any merit, stands dismissed.

Urgent certified copy of this judgment be granted on proper application.

(K.R. Mohapatra)
Judge