

Vasudevan Radhakrishnan Vs. Vasudevan Achari

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Court : Kerala

Decided On : Jul-14-2006

Reported in : 2006(3)KLT722

Judge : K. Padmanabhan Nair, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17 - Order 8, Rules 6A(1) and 9 - Order 8A, Rule 6A - Order 43, Rule 9 - Order 47, Rule 1; Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : W.P. (C) No. 15037 of 2006

Appellant : Vasudevan Radhakrishnan

Respondent : Vasudevan Achari

Advocate for Def. : M. Balagovindan,; M.R. Sasith and; C.S. Manu, Advs.

Advocate for Pet/Ap. : R.S. Kalkura, Adv.

Disposition : Appeal allowed

Judgement :

K. Padmanabhan Nair, J.

1. The plaintiff in a suit for injunction is the petitioner in this Writ Petition. The challenge in this Writ Petition is directed against the order passed by the learned

Additional Munsiff, Nedumangad in I.A.No. 2646/2005 accepting a counter claim filed by the respondent which was filed subsequent to the filing of the written statement. The petitioner filed O.S.No. 348/2005 against the respondent landlord for a decree of permanent prohibitory injunction to restrain the landlord from forcibly evicting the petitioner from the plaint schedule building. An exparte order of temporary injunction was passed which is still in force. The respondent filed a written statement raising various contentions. In the written statement he raised a counter claim also. The learned Munsiff accepted that counter claim. Thereafter the petitioner filed I.A.No. 2646/2005 under Order XLVII Rule 1 of Civil Procedure Code to review that order. He also filed I.A.No. 2552/2005 to restrain the landlord from disconnecting the electricity connection. The learned Munsiff allowed I.A.No. 2552/2005 and the landlord was restrained by an injunction from forcibly evicting the petitioner from the saw mill and also from disconnecting the power supply and interfering with the functioning of the saw mill. The prayer to review the order by which the court below accepted the counter claim was rejected. This Writ Petition is filed challenging that part of the order by which the court below dismissed the review application.

2. Shri R.S. Kalkura, the learned Counsel appearing for the petitioner has argued that the court below misapplied the law on the point and accepted the counter claim. It is argued that the averments in the written statement would show that the claim which was raised as a counter claim in the written statement arose long after the filing of the suit and as such the plea ought not to have been allowed to be raised in the written statement. It is also argued that the written statement itself was filed after the expiry of the statutory period without raising any counter claim. According to the petitioner the court below ought not have accepted the counter claim raised by way of filing a separate application after the filing of the written statement.

3. The learned Counsel appearing for the respondent has argued that the written statement was filed within the time allowed by law, but, the counter claim was raised by way of a separate petition subsequent to the filing of the written statement. It is argued that there is no bar in raising a counter claim separately after filing the written statement. It is argued that the contention that the written

statement was not filed within the time allowed by law is not correct.

4. It is trite law that when a cause of action for raising a counter claim arises after the defendant had delivered his defence or after the time limit for delivering his defence the defendant cannot be allowed to raise a counter claim in the suit. In *Shanti Rani Das Dewanjee v. Dinesh Chandra Day* (1997) 8 SCC 174 the Apex Court held that the right to file counter claim is referable to date of accrual of cause of action: It was held that 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 allowed to be raised even after filing the written statement. In *Mahendra Kumar v. State of M.P.* (1987) 3 SCC 265 it was held as follows: Rule 6-A(1) of Order VIII CPC does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6-A(1) is 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 limit for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

So it is clear that Order VIII A Rule 6A does not bar the filing of the counter claim even after the filing of the written statement provided the cause of action had accrued before the defendant had delivered his defence and the period of limitation fixed for raising such a claim has not expired.

5. In *Ramesh Chand Ardawatiya v. Anil Panjwani* AIR 2003 SC 2508 the Supreme Court held that the counter claim must necessarily find its place in the written statement. The Supreme Court held as follows:

These words go to show that a 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 the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither the written statement can be filed as of right nor a counter-claim can be

allowed to be raised, for the counter-claim under R.6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counterclaim being filed belatedly....(emphasis supplied)

It was also held as follows:

Looking to the scheme of Order VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counterclaim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI R. 17 of the C.P.C. if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII, Rule 9 of the C.P.C. if sought to be placed on record by way of subsequent pleading.

The core question arose for consideration in Ramesh Chand Ardawatiya's case (supra) was whether a defendant who is not entitled to file a written statement because he was set *ex parte* can be allowed to attack the plaintiff by filing a counter claim. While considering that aspect the Apex Court held that the counter claim must necessarily find its place in the written statement. It was further held that the counter claim is not entertainable when there is no written statement on record. It was further held that there being no written statement filed in the suit the counter claim was obviously not set up in the written statement within the meaning of Rule 6A. It was held that a defendant who was set *ex parte* and not entitled to file a written statement is not entitled to raise a counter claim.

6. In this case the written statement was filed at an earlier point of time, but the counter claim was raised by filing a separate application later without filing any petition to receive the same. The court below has also not considered whether the time for filing the written statement was over on the date on which the counter claim was filed. The court has a discretion to permit the written statement containing a plea of counter claim being filed belatedly. The counter claim can be permitted to be introduced by way of amendment or by way of subsequent pleadings under Order VIII Rule 9 of Civil Procedure Code. But in this case there was no such prayer also. The learned Munsiff has not applied the law on the point while considering the review petition. So the order passed by the learned Munsiff dismissing the review petition is unsustainable and liable to be set aside.

In the result, the Writ Petition is allowed. The order passed by the learned Additional Munsiff, Nedumangad in I.A.No. 2646/2005 filed in O.S.No. 348/2005 is hereby set aside. The learned Additional Munsiff is directed to take back I.A.No. 2646/2005 to file and dispose of the same afresh in accordance with law.

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