

(2019) 10 UK CK 0004

In the Uttarakhand High Court

Case No : Writ Petition No. 2563 Of 2016 (M/S)

Durga Singh Chauhan And Another

APPELLANT

Vs

Rajendra Kothiyal And Others

RESPONDENT

Date of Decision : 01-10-2019

Acts Referred:

Limitation Act, 1963 — Section 5
Code Of Civil Procedure, 1908 — Section 96, Order 8 Rule 6A, Order 8 Rule 6A(4),
Order 41 Rule 11, Order 41 Rule 22
Arbitration Act, 1940 — Section 20, 41

Citation : (2019) 10 UK CK 0004

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Piyush Garg, Siddhartha Singh

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. The respondents, herein in the Writ Petition, are the plaintiffs in a Suit, which was instituted by them on 9th July, 2008, for the grant of a decree of permanent injunction in relation to the property, which was described at the foot of the plaint, constituting of Khata No. 539, Khasra No. 4882 Ka, having a total area of 0.0480 hectares, situated in Mauja Babugarh, Pargana Parwadoon, Tehsil Vikas Nagar, District Dehraun. At this stage, since the precinct of the property, in question, is not of much relevance, hence, it is not being referred to.

2. When the Suit, in question, was instituted by the plaintiff/respondents, the defendants/petitioners have put in appearance and they had filed their written statement on 14.07.2008, and along with the written statement, they have invoked the provisions contained under Order 8 Rule 6A of the CPC, which reads 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 action according to the defendant against the plaintiff either before or after the filing of the suit, but before 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 damage 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."

3. By virtue of relief which, the defendants/petitioners had claimed for in the counter claim, it was to the following reliefs :-

"क- यह कि वादी, उसके प्रतिनिधि, अभिकर्ता वा सहयोगियों को स्थाई व्यादेश द्वारा निषिद्ध किया जावे कि यह खसरा संख्या-4882ख क्षेत्रफल 0.0510 हैक्टेयर, स्थित मौजा-बाबूगढ़ परगना पछवाढ़, तहसील विकासनगर, जिला देहरादून, उत्तराखण्ड कि जो प्रतिवाद-पत्र के साथ संलग्न मानचित्र में शब्द ए, बी, सी, एफ, ए से नारंगी रंग से प्रदर्शित किया गया है, में प्रतिवादीगण के मार्ग के प्रयोग में किसी प्रकार का कोई हस्तक्षेप न करे और न ही हस्तक्षेप किये जाने का कारण बने और न ही उस पर कोई निर्माण करे या किसी प्रकार की कोई बाधा उत्पन्न करे।

ख- यह कि उपरोक्त प्रतिकारों के साथ या अलग से अन्य कोई प्रकिर कि जो प्रविदीगण को वादी से मिलना सम्भव हो, प्रतिवादी को प्रदान किया जावे।

ग- यह कि प्रतिदावे का समस्त व्यय प्रतिवादीगण को वादी से दिलवाया जावे।"

4. As per the provisions contained under Order 8 Rule 6A, and particularly, as it has been contained under Sub-clause (4) of Rule 6A of Order 8 of the CPC, it specifically provides that the relief claimed by the defendants in the counter claim "Shall be treated as a plaint and its procedure would be governed by the rules as applicable to plaints"

5. In the case at hand, when the counter claim was filed and the same was adjudicated by the learned Trial Court by the judgment dated 30th April, 2015, along with the Suit, the learned Trial Court had determined the issues, meaning thereby, it included the issues framed in relation to the merits of the Suit as well as that in relation to the claim of decree raised in the counter claim by defendants/petitioners and, consequently, the Trial Court vide its judgment and decree dated 30th April, 2015, had passed the following judgment:-

"वादी पक्ष का वाद निरस्त किया जाता है। प्रतिवादीगण का प्रतिवाद भी निरस्त किया जाता है।

पक्षकार अपना-अपना वाद व्यय स्वयं वहन करेंगे।

पत्रावली नियमानुसार सिविल अभिलेखागार प्रेषित की जाये।"

6. As a result thereto to the judgment dated 30.04.2015, the Suit was dismissed as well as the counter claim of the defendants/petitioners was also dismissed.

7. Being aggrieved against the dismissal of the Suit, the heirs of the deceased/ plaintiffs/respondents, herein, had preferred a Civil Appeal, being Civil Appeal No. 120 of 2015, Rajendra Kothiyal, since deceased Vs. Smt. S.D. Rana as well as against the present petitioners, who were impleaded in the First Appeal as opposite party Nos. 2 and 6.

8. The First Appeal, in question, as preferred by the plaintiff/respondent was against the dismissal of the Suit, the present petitioners, who are the opposite parties to the Appeal have filed their cross objection invoking provisions contained under Order 41 Rule 22 of the C.P.C. along with an application seeking a condonation of delay, which has chanced in filing application under Order 41 Rule 22 of the CPC. In the cross objection, thus filed by the petitioners, herein, they have prayed for that the decree, which has been rendered on 30th April, 2015, may be modified by its partial setting aside and the relief thus may be modulated to the following effects :

"अतः माननीय महोदय से नम्र निवेदन है कि वर्तमान प्रत्याक्षेप स्वीकार कर माननीय निम्न न्यायालय द्वारा पारित निर्णय एवं आजप्ति दिनांक 30.04.2015 को आंशिक रूप से निरस्त करते हुये, माननीय सिविल जज जू0डि0 विकासनगर जिला देहरादून के न्यायालय में योजित मूलवाद सं0 53 वर्ष 2008 राजेन्द्र कोठियाल बनाम श्रीमति एस0डी0राना एवं अन्य में आपत्तिकर्तागण/विपक्षीगण की ओर से योजित प्रतिदावा को स्वीकार किया जावे।"

9. In fact, in the cross objection filed by the petitioner by invoking the provisions contained under Order 41 Rule 22 of the CPC, the prayer was made that while modifying the decree, the counter claim may also be allowed. Thus, in the counter objection, the petitioner has sought two fold reliefs as rendered in Suit as well as the rejection of Order 8 Rule 6A.

10. It is this application, preferred under Section 5 of the Limitation Act in the Cross Objection 115 of 2016, Smt. Sita Devi Rana Vs. Rajendra Kothiyal and others for condonation of delay, the said application, which was registered as paper No. 7C-2 supported by the affidavit, paper No. 8C2, it came up for consideration before the Court of Additional District Judge, Vikas Nagar, District Dehradun and the Court of Additional District Judge, Vikas Nagar, District Dehradun, rejected the application seeking for condonation of delay and, consequently, the counter claim too stood rejected, against which, the cross objection was filed under Order 41 Rule 22 of the CPC.

11. The Appellate Court, while dealing with the objection has observed that if at all, the petitioners had any grievance against the relief claimed by the plaintiffs/

respondents in the Suit and as claimed by him in continuity thereto in counter claim and it was having any prejudice to the rights of the petitioners, he ought to have preferred an independent appeal that against the part of the judgment, whereby, his relief stood denied by the judgment dated 30th April, 2015 to the defendant/ petitioner.

12. The Court has held that while interpreting the impact of the provisions contained under Order 8 Rule 6A (4), when a decision is rendered in the counter claim and same is decided on merits, it would amount to be a decision/decreed as if it has been rendered in a regular plaint and it takes the shape of the decree and, hence, in such an eventuality, while raising the claim or relief in the nature to allow the counter claim in an appeal preferred by the plaintiff, against the dismissal of the suit, the same could not have been raised by way of Order 41 Rule 22 of the C.P.C. until and unless the petitioner/defendant himself claims a relief by filing a regular appeal against the dismissal of his counter claim. In the present case, there is no independent appeal filed by the petitioner under Section 96 of the CPC challenging the judgment and decree so far it relates to dismissal of his Order 8 Rule 6A, i.e. counter claim.

13. Hence, in that view of the matter, since the claim by way of counter claim, it has been legally treated as to be an independent plaint, it takes the shape of an independent decree and any adjudication made in relation thereto under Order 8 Rule 6A, once it takes the shape of decree, I am of the opinion that it has had to be challenged by filing a regular appeal by the petitioner by invoking Section 96 of the C.P.C. Having not done so, the Cross Objection under Order 41 Rule 22 of the CPC as against the rejection of the counter claim under Order 8 Rule 6A filed along with the delay condonation application would not be tenable and counter claim under Order 41 Rule 22 will not be tenable against the rejection of Order 8 Rule 6A of CPC of the petitioner and thus it has rightly been rejected by the learned Court of Additional District Judge, Vikas Nagar, Dehradun.

14. The learned counsel for the petitioners submits that in view of the judgment as reported in 2019 SCC Online SC 1009, State of Andhra Pradesh and others Vs. B. Ranga Reddy (D) by Lrs and others, particularly a reference has been made by the learned counsel for the petitioner to the contents of para 18 of the said judgment, which reads as under :-

"18) This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order XLI Rule 22 of the Code, a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objections. However, by an amendment in Order XLI Rule 22 of the Code, it is permissible to file cross objections against the finding. The respondent may defend himself without filing any cross objections to the extent to which decree is in his favour. The Court held as under:

"10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22

sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objections to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default, the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

15. In the said judgment, it was altogether a different situation contemplated. It was a situation, where the Court was interpreting the implications of the provisions contained under Order 41 Rule 22 of the CPC, where a party to the proceedings of the Suit in whose favour the decree stands in its entirety is neither entitled to or obliged to prefer any cross objection. But, here in the instant case, it is altogether a different situation. Hence, the situation is entirely

different from the view point that it is the plaintiffs' appeal, which was preferred by him against the dismissal of their suit and it is not the defendants' appeal against the dismissal of the counter claim and the ratio as propounded therein and the distinction, which has been carved out is in relation to the implication of Order 41 Rule 22, it will not be expanding its ambit to invoke Order 41 Rule 22 of the CPC in an appeal of plaintiff, challenging rejection of counter claim without putting a challenge to the rejection of the Order 8 Rule 6A by filing an independent appeal and because if in case, Order 41 Rule 22 is only a challenge to part of finding of decree of suit, in that eventuality, the order of rejection of Order 8 Rule 6A, it would amount to that there is no challenge to the decree rendered in pursuance to the rejection of Order 8 Rule 6A, thus, the application by permitting the liberty by filing the cross objection under Order 41 Rule 22, which is an intention of the petitioner and implications contemplated under the CPC and hence, this exception which has to be sought to be carved out by the petitioner by referring to para 18 of the judgment would not be attracted in the instant case, hence, it is declined to be accepted.

16. Another judgment, on which, reference has been made by the learned counsel for the petitioner is that as reported in AIR 1999 SC 1747, Superintending Engineer and others Vs. B. Subba Reddy. Particularly a reference has been made by the learned counsel for the petitioner to the contents of para 12 as well as para 13 and 14 of the judgment, which is quoted hereunder :

"12. In Sahadu Gangaram Bhagade v. Special Deputy Collector. Ahmadnagar and Anr. [1971]1SCR146, this Court was considering the question of nature of cross-objections in the context of payment of court fee under the Bombay Court Fees Act, 1959. It was submitted that Article 3 of Schedule 1 of the said Act was inapplicable because that article referred to "plaint, application or petition (including memorandum of appeal), to set aside or modify any award otherwise than under the Arbitration Act, 1940" and that no court fee was payable on cross-objections, This Court held as under (at pp.1890-91 of AIR) ;

"Before Article 3 of Schedule 1 can be attracted, there must be (1) a plaint, application or petition (including a memorandum of appeal); (2) in that plaint, application or petition (including memorandum of appeal), there must be a prayer to set aside or modify any award; and (3) the award in question must not be one under the Arbitration Act, 1940. There is no dispute that the proceedings with which we are concerned in this case fulfill two out of the three requirements enumerated above. The award concerned in the proceedings is not one made under the Arbitration Act, 1940 and through his cross-objection the appellant seeks to get the award modified. The only point in controversy is whether the cross-objection filed by the appellant can be considered as "application or petition" within the meaning of Article 3 of Schedule I. The words in the bracket "including memorandum of appeal" in our opinion refer to the word 'petition' immediately preceding those words. In other words the word 'petition' includes the memorandum of appeal as well. The question is whether a cross-objection

filed by a respondent in an appeal can be considered as a memorandum of appeal. We have no doubt that it is a memorandum of appeal in substance though not in form. It is a right given to a respondent in an appeal to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross-appeal. It is true that while Article 1 of Schedule 1 refers to 'cross-objection', Article 3 of that Schedule does not refer to cross-objection as such but that in our opinion make no difference. It is only an inartistic drafting.

13. In *Hakam Singh v. Gammon (India) Ltd.*: [1971]3SCR314, the appellant was aggrieved by the order of the Allahabad High Court directing that a petition filed under Section 20 of the Arbitration Act, 1940 in a subordinate 'court' be returned to him for presentation to the proper court. This Court upheld the order of the High Court and said, with reference to Section 41 of the Act, that the Code in its entirety applied to proceedings under that Act and that the jurisdiction of the courts under the Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code.

14. In *N. Jayaram Reddy and Anr. v. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*: [1979]3SCR599, this Court was considering the nature of cross-appeals and cross-objections. It said (paras 41 and 42 of AIR) :

"Cross-appeal and cross-objections provide two different remedies for the same purpose and that is why under Order 41, Rule 22, cross-objections can be preferred in respect of such points on which that party could have preferred an appeal. If such be the position of cross-objections and cross-appeal a differentiation in the matter of their treatment under Rules 3 and 4 cannot be justified merely on the ground that in case of cross-objections they form part of the same record while cross-appeals are two independent proceedings"

"To say that cross-appeals are independent of each is to overlook the obvious position which parties adopt in cross-appeals. Interdependence of cross-appeals is the same as interdependence appeal and cross-objections because as in the case of appeal and cross-objections a decision with regard to appeal would directly impinge upon the decision in cross-objections and vice versa. Indubitably the decision in one of the cross -appeals would directly impinge upon the decision in the other because both ultimately arise from the same decree. This is really the interdependence of cross-appeals and it is impossible to distinguish cross-appeals from appeal and cross-objections".

"This Court then said that the cases which have taken the view that the view in cross-appeals the position is different than the one in appeal and cross-objections do not proceed on any discernible legal principle. Nor can they be explained by any demonstrable legal principle but in fact they run counter to the established legal principle."

17. This Court is slightly apprehensive to accept the aforesaid ratio for the reason that the said judgment was considering the propriety of an award as

rendered in the arbitration proceedings under the Arbitration and Conciliation Act of 1940, wherein, in the said proceedings, the provisions of the CPC under the old Act was made applicable. But reference to para 12 on which the reliance has been made is yet again not dealing with the situation, which is at hand as to whether "by filing the counter claim under Order 41 Rule 11 in an appeal preferred by the plaintiff against the decree whose suit has been dismissed, can it be used as an alternative platform to challenge a decree of dismissal of counter claim under Order 8 Rule 6A." The answer to it by this Court is absolutely in a negative and against the petitioner that he is bound to file an independent appeal against the rejection of Order 8 Rule 6A and it cannot be done by camouflage by filing a counter claim under Order 41 Rule 22 in an appeal of plaintiff against dismissal of suit, which has been preferred in an appeal preferred by the plaintiff against the dismissal of his suit. The reason being since the counter claim under Order 8 Rule 6A is decided as an independent Suit, which takes the shape of decree, it would only be challenged by way of independent appeal and not under Order 41 Rule 22 of the CPC.

18. An identical issue was dealt by Kerala High Court in a judgment reported in 2011(1) Civil Court Cases 314 (Kerala), Thomas Vs. Sudha, wherein, the Court has held as under :-

"Civil Procedure Code, 1908, O.41 R.22, O.8 R.6 - Suit as well as counter claim dismissed - Plaintiff filed appeal against dismissal of suit - Defendant cannot question the correctness of dismissal of counter claim by way of cross objections - Counter claim for all intent and purposes is a suit and dismissal of same gives rise to a distinct decree - Against dismissal of a counter claim, only an appeal lies."

19. Consequently, this Court is of the view that the Court has rightly rejected the application under Section 5 of the Limitation Act filed by the defendant/petitioner, herein, against the rejection of Order 8 Rule 6-A. In such an eventuality, even the observation which has been made by the Court by the impugned order under challenge before this Court itself has reserved the liberty to the defendant/petitioner, herein.

20. Subject to the above observations, the Writ Petition stands dismissed.