
(2010) 11 AHC CK 0154

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 36561 of 2004

Mohd. Afzal

APPELLANT

Vs

VIIIth A.D.J. and Others

RESPONDENT

Date of Decision : 08-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 6 Rule 17, Order 8 Rule 6A, Order 8 Rule 6B, Order 8 Rule 6C

Citation : (2011) 112 RD 721

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—The present lis, having attained the age of around 19 years by this time, is one harrowing tale of law's delays causing frustration in the mind of litigant, who has been deprived of his property in pursuance of ex parte injunction order obtained by the plaintiff petitioner herein. The plaintiff having obtained the possession of the disputed property in pursuance of ex parte injunction order obtained by him, has very conveniently filed an application for withdrawal of the suit, which has been allowed. But when the defendant, who is respondent herein, dispossessed from the property in dispute has filed an application for amendment of his written statement and setting out the counter-claim for return of possession of the property, the plaintiff-petitioner has left no stone unturned to protect his possession.

2. The original suit No. 681 of 1991 was filed by the present petitioner herein referred to as the plaintiff, on the plea that he has purchased the property in dispute on 7th July, 1991 and defendant No. 1 Daulat Chand was its tenant on monthly rent of Rs. 100/-. The tenant of the property in dispute be restrained from delivering the possession of the property, detailed at the foot of the plaint, to any other person except the plaintiff. In the said suit, he obtained an ex parte injunction order dated 30th July, 1991. On the application dated 1st August,

1991 in the garb of ex parte injunction order, with the help of police, the plaintiff obtained possession vide memo of delivery of possession dated 6th August, 1991. The defendant No. 1 has expired and his name was subsequently deleted as ordered by the trial court from array of parties.

3. The suit is being contested by defendant No. 2, namely, Jalal Uddin alone, on the ground that the plaintiff was not entitled to get the possession as he had no title. Daulat Chand defendant No. 1 was his tenant who delivered him the possession before filing of the said suit. Various other pleas which are not required to be noticed for the time being, were raised. It has been stated in para-22 of the written statement that on 6th August, 1991, the plaintiff came on the spot with the police and forcibly dispossessed him from portion of the first floor of the property in suit and the plaintiff under law is bound to restore the possession of the same to him. The plaintiff has altered the position of the possession of the property in suit during pendency of the suit and plaintiff is neither the owner nor is entitled to any relief claimed in the suit, vide para-24 of thereof.

4. Subsequently on 8th February, 1999 the defendant No. 2 filed an application under Order VI Rule 17 of the Code of Civil Procedure, giving rise to the present writ petition being paper No. 160-C on the allegations that due to typing mistake in the original written statement, the word "counter-claim" was omitted and he may be permitted to add the same. He also sought incorporation of paragraphs 32 to 38, in the written statement. The amendment was sought for basically on the ground that he has been dispossessed from the property in question in pursuance of an ad-interim injunction order dated 30th July, 1991, on 6th August, 1991 and is entitled for its re-delivery. The counter-claim was valued at Rs. 5,000/- and the court fee was paid accordingly.

5. Thereafter, the petitioner filed applications dated 25th February, 1999 and 22nd September, 1999 for permission to withdraw his suit. Initially, he prayed that he may be permitted to withdraw the suit with liberty to file fresh suit but the said prayer was given-up through second application dated 22nd September, 1999. He also filed one more application dated 14th September, 1999 that his application for permission to withdraw the suit should be decided first and only thereafter the application of the defendant No. 2 for amendment of written statement by way of counter-claim be considered.

6. By the impugned order dated 20th March, 2001 passed by the trial court which has been confirmed in revision No. 86 of 2001 by the revisional court on 25th May, 2004, the amendment application filed by the defendant No. 2 has been allowed. Challenging these two orders, the present writ petition is at the instance of the plaintiff. But before proceeding further, it may be noted that the applications filed by the plaintiff for withdrawal of the suit were rejected by the trial court but they have been allowed by the revisional court vide order dated 13th May, 2004 in Revision No. 87 of 2001. The application for withdrawal of the suit was rejected by the trial court as it was of the opinion that the counter-claim

filed by the defendant No. 2 is pending consideration and amendment in the written statement has been allowed. The revisional court took the view that the counter-claim has its independent existence and will survive dismissal of the suit notwithstanding. The said order of the revisional court has attained finality as it has not been challenged further by any party.

7. Heard Shri B.D. Mandhyan learned senior counsel along with Shri Om Prakash Lohia, learned Counsel for the petitioner-plaintiff and Shri Prakash Gupta along with Shri Ashish Gupta, learned Counsel for the defendant No. 2, contesting respondent.

8. Learned Counsel for the petitioner submits that the court below was not justified in allowing the amendment in the written statement. He further submits that the counter-claim is barred by time. The suit having been dismissed, the counter-claim shall be deemed to have been rejected, submits the learned Counsel for the petitioner.

9. In reply, Shri Prakash Gupta, learned Counsel for the contesting respondent submits that due to typographical error the word "counter-claim" was not mentioned in the original written statement. A plain reading of the original written statement would show that essential averments with regard to the restitution of possession are there. In any case, the relevant facts are on record to show that the plaintiff armed with ex parte injunction order tried to dispossess him illegally with the help of police. The suit having been withdrawn, the contesting respondent is entitled for restitution of possession, in any case.

10. Considered the respective submissions of the learned Counsel for the parties and perused the record.

11. A copy of the original written statement of defendant No. 2 (respondent No. 2 herein) is annexure-3 to the writ petition wherein besides disputing the title of the plaintiff, it has been stated that defendant No. 1 was in occupation of the disputed portion but he got vacated it on 22nd July, 1991 after delivering the possession of first floor to defendant No. 2, vide para-20. In subsequent paragraphs it has been stated that the plaintiff is out law and a man of criminal nature. On the night of 31st July, 1991, he came to the spot and tried to dispossess him. Thereafter, on 6th August, 1991, he came along with police and forcibly dispossessed him vide para-23. By means of the amendment in the written statement, the defendant has sought permission to add paragraphs 33 to 39.

12. The defendant No. 2 has sought the permission to add certain facts already on record. Passing of ex parte injunction order is already on record. It has also been pleaded that the plaintiff with the help of police took the possession on 6th August, 1991. The vacation of the disputed accommodation by the defendant No. 1 on 22nd July, 1991 and its handing over possession to defendant No. 2 has been pleaded in para 22 of the written statement. The factum of passing of ex parte injunction order dated 31st July, 1991 is part of record of the case. The

memo of delivery of possession dated 6th August, 1991 is also on record. The defendant through amendment application has only added the facts already on record.

13. At this stage, it is desirable to notice the decisions relied by the learned Counsel for the petitioner. The first case is *South Konkan Distilleries and Anr. v. Prabhakar Gajanan Naik and Ors.* (2008) 14 SCC 632. In this case, it has been held that when there is no dispute on the question of limitation, it would not be fit and proper to hold that the court below has acted illegally in rejecting the application for amendment of written statement and counter-claim on the ground of limitation. Further it has been held that the amendment though properly made cannot relate back to the date of filing of the suit, but to the date of filing of the application. It has been also held that if a prayer for amendment merely adds to facts already on record, the amendment would be allowed even after statutory period of limitation. The relevant portion of paragraph-15 is reproduced below:

15. In *Ragu Thilak D. John v. S. Rayappan and Ors.* (2001) 2 SCC 472, this Court also observed that where the amendment was barred by time or not, was a disputed question of fact and, therefore, that prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself. In a decision in *Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another*, this Court held that the amendment though properly made cannot relate back to the date of filing of the suit, but to the date of filing of the application. Again in *Vineet Kumar Vs. Mangal Sain Wadhera*, this Court held that if a prayer for amendment merely adds to facts already on record, the amendment would be allowed even after statutory period of limitation.

14. The above decision supports the stand of the defendant respondent than the stand of the petitioner. So far as the question of limitation is concerned, it is admitted case of the petitioner that he got possession during pendency of the suit and that is why he filed application for its withdrawal. In the second withdrawal application filed under Order XXIII Rule 1 of the Code of Civil Procedure, the plaintiff has submitted in the following manner:

The deceased defendant No. 1 who was in possession of the property in suit as tenant has already delivered its physical possession to the plaintiff on 03.08.1991 and the plaintiff has come in actual physical possession of the property in suit since then. The suit has therefore become infructuous. The plaintiff therefore wants to abandon his suit against the defendant.

15. Learned Counsel for the petitioner could not demonstrate even *prima facie* that the pleas sought to be raised even if, it is taken as a fresh plea, is barred by limitation.

16. Then reliance was placed on the case of *Ramesh Chand Ardawatiya Vs. Anil Panjwani*, . The Apex Court has examined Order VIII and Rules therein. It has been held that a counter-claim can be raised by three modes. The relevant

portions of paragraphs-28 and 29 are reproduced below:

28. Looking to the scheme of O. 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 R. 1 may itself contain a counter-claim which in the light of R. 1 read with R. 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by R. 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 R. 9. In the latter two cases the counter-claim though referable to R. 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O. 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 O. VIII, R. 9 of the C. P. C. if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. 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 R. 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

29. The purpose of the defendant which was sought to be achieved by moving

the application dated 2-5-1995 under O. VIII, R. 6-A of the C. P. C. was clearly mala fide and an attempt to reopen the proceedings, including that part too as had stood concluded against him consequent upon rejection of his application under Order IX, Rule 7 of the C. P. C. Fortunately, the Trial Court did not fall into the defendant's trap. If only the Trial Court would have fallen into the error of entertaining the counter-claim the defendant would have succeeded in indirectly achieving the reopening of the trial in which effort, when made directly, he had already failed. There being no written statement of the defendant available on record and the right of the defendant to file the written statement having been closed, finally and conclusively, he could not have filed a counter-claim.

17. The last case relied upon is Gauri Shankar v. Hindustan Trust (Pvt.) Ltd. and Ors. AIR 1972 SC 2001, which has no application to the controversy involved in the present case.

18. The argument that the suit having been dismissed, the counter-claim can be entertained has got no substance. A bare perusal of the various rules framed under Order VIII would show that the counter-claim has been treated as plaint and it is governed by rules as applicable to a plaint. Its manner of pleading has been provided under Rules 6-B of Order VIII. Order VIII Rule 6-D provides the effect of discontinuance of suit. It states that counter-claim may proceed notwithstanding the fact that the suit of the plaintiff is stayed, discontinued or dismissed. In my considered view, the argument of the petitioner that as the suit has been dismissed, the court-claim is to be dismissed, cannot be allowed to stand in view of Rules 6-A to 6-G of Order VII of the Code of Civil Procedure

19. As noticed herein above, the Apex Court in the case of Ramesh Chand Ardawatiya (supra) has held that the counter-claim can be raised through three modes of pleadings. The written statement may itself contain a counter-claim in the light of Rule 1 read with Rules 6-A. Secondly, it may be preferred by way of amendment incorporated. The court may grant leave to incorporate counter-claim in the written statement. Thirdly, the counter-claim may be filed by way of subsequent pleading under Rule 9 of Order VIII.

20. Coming to the facts of the present case, it may be noted that two courts below have permitted the defendant No. 2 to amend his written statement. The essential plea that he has been dispossessed illegally in pursuance of ex parte injunction order passed in the suit, as noticed herein above, is already therein. By way of amendment, the said plea has been sought to be elaborated by giving details. This does not change the nature of the case or the defence. The other argument that the suit having been dismissed or that the pleas sought to be raised through amendment is barred by time, as noticed herein above have got no substance.

21. Before parting with the case, it may be noted that even otherwise also on the principles of restitution as contained in Section 144 Code of Civil Procedure, the

defendant No. 2 may be entitled for possession of the disputed property on the facts of the case. It is the plaintiff who had instituted the suit that the defendant No. 1, the alleged tenant, who was in occupation of the property in suit be directed to handover the possession to him. It is a matter of record that ex parte injunction order was passed on 30th July, 1991 and to enforce the said order, application dated 1st August, 1991 was filed by the petitioner. It is stated by the defendant that the possession was taken over from him by the plaintiff as is evident from the memo of possession dated 6th August, 1991. The plaintiff having withdrawn the suit is liable to restitute the possession to the defendant No. 2 in the light of Section 144 of the Code of CPC as the suit has been dismissed as withdrawn.

22. It is an acknowledged legal position that the person who has obtained some advantage in pursuance of interim order granted in his favour in a lis is liable to restore the said advantage to the other side if the lis is ultimately dismissed. There is no dearth of the case laws on the said proposition. Even otherwise also an interim order merges in the final order. If no relief has been granted under the final order, a party is liable to return the benefit obtained under the interim order to the other party.

23. In *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, the Apex Court has held that no one shall suffer by an act of the court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict.

24. The point which I am trying to bring home is that even otherwise also if the trial court finds that interim injunction order was passed on 30th July, 1991 and possession was delivered in pursuance thereof, it is duty bound to order restitution of possession to the defendant No. 2 forthwith as the plaintiff who is petitioner here has got his suit dismissed consciously, pendency of counter-claim notwithstanding.

25. No other point was pressed.

26. In view of the above discussions, the filing of the present writ petition and obtaining the stay order therein is nothing but an abuse of process of the court. By obtaining the stay order, the petitioner has got the proceedings unnecessarily delayed before the trial court and has thus, deprived the defendant No. 2 from

possession of the disputed property. He is liable to pay exemplary costs.

27. The trial court is further directed to conclude the proceedings within six months from the date of filing of certified copy of this judgment before it. It shall adjourn the case only under exceptional circumstances that too on payment of costs not less than Rs. 500/- per adjournment. The case shall not be adjourned for a period more than one week at a time. Proceedings may be taken on day to day basis to complete it within the time schedule.

28. The writ petition is dismissed with cost of Rs. 15,000/-, payable by the petitioner to the respondent No. 2-defendant No. 2, within one month through a bank-draft or banker's cheque.