

WP(C)No. 43 of 2020
Roshan Giri & Anr. Vs. Rakesh Gurung & Anr.

IN THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Extraordinary Jurisdiction)

WP (C) No. 43 of 2020

1. Shri Roshan Giri
Aged about 39 years,
Son of Late Tika Ram Giri,
Resident of Lower Arithang,
P.O. & P.S. Gangtok,
East Sikkim.

2. Shri Rajiv Giri,
Aged about 34 years,
Son of Late Tika Ram Giri,
Resident of Lower Arithang,
P.O. & P.S. Gangtok,
East Sikkim.

...PETITIONERS

Versus

1. Shri Rakesh Gurung,
Son of Late Nar Prasad Gurung,
Aged about 43 years,
Resident of Lower Arithang,
P.O. & P.S. Gangtok,
East Sikkim, PIN:737101.

Represented by:
Smt. Laxmi Chakraborty,
Constituted Attorney,
Resident of Lower Arithang,
P.O. and P.S. Gangtok.
East Sikkim, PIN:737101.

2. The Gangtok Municipal Corporation,
Through its Commissioner,
Near Deorali, East Sikkim,
PIN-737102.

...RESPONDENTS

BEFORE

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE

For petitioners : Mr. N. Rai, Senior Advocate, with Ms. Sushmita Gurung, Advocate.

Date of hearing & judgment : 11.12.2020

JUDGMENT (ORAL)

(*ARUP KUMAR GOSWAMI, CJ*)

This petition under Article 227 of the Constitution of India is filed against the order dated 24.10.2020, passed by the learned Civil Judge, East Sikkim at Gangtok, in Title Suit No. 25 of 2018, rejecting the counter-claim.

2. It is to be noted that by the aforesaid order dated 24.10.2020, the learned trial court had also rejected an application under Order 14 Rule 5 read with Section 151 of the Code of Civil Procedure, 1908, for short, the CPC, for framing of an additional issue. Against the rejection of the application under Order 14 Rule 5 read with 151 CPC, the petitioners had filed another petition under Article 227 of the Constitution of India, which is registered as WP (C) No. 44 of 2020.

3. Mr. N. Rai, learned Senior Counsel for the petitioners has submitted that the learned court below has committed illegality in rejecting the counter-claim as after framing of issues, the case has not proceeded further. He submits that though evidence of plaintiff and his constituted attorney had been filed, same have not been authenticated and they are also not cross-examined, and therefore, there is no impediment in allowing the counter-claim.

4. The petitioners are defendant nos.2 and 3 in the suit filed by the respondent no.1 for declaration, recovery of possession, injunction and other consequential reliefs. Defendant no.1 in the suit is Gangtok Municipal Corporation through its Commissioner and defendant no.1 is arrayed as respondent no.2 in the petition.

5. The petitioners had filed written statement on 17.04.2019. The plaintiff had filed an application under Order 6 Rule 17 read with Section 151 CPC

and same was allowed by the learned trial court .The plaintiff had filed amended plaint on 06.02.2020. The written statement to the amended plaint was filed by the present petitioners on 18.02.2020.

6. Five issues were framed on 29.06.2020. The petitioners had filed the counter-claim and the application under Order 14 Rule 5 read with Section 151 CPC on 07.09.2020.

7. Having regard to the subject matter in dispute, it would be appropriate to reproduce paragraph 26 of the amended written statement filed by the petitioners. The same reads as follows:

"26. That with reference to the contents of paragraph 15 of the plaint, it is humbly submitted that there was no effect of the construction work resulting in the disconnection of the water pipelines and any damage to underground electricity cables. The footpath did suffer some damage which was restored immediately. It is further submitted that there was no protest and opposition to the said work as alleged by the plaintiff or at all such the allegations of challenging the people complaining and violent retaliation to their protests does not arise at all. It is denied that the plaintiff was even manhandled. Had there been any incident of manhandling there would be an FIR to that effect which is not there. The allegation that the answering defendants terrorized the plaintiff and his family is false and utterly baseless and vexatious. It is humble submitted that it is a common knowledge that when the jhora was under construction by the government the plaintiff objected to the ongoing construction when it came to his land stating that there was no compensation was paid to him as such non concrete drain was allowed to be constructed by the plaintiff to the Government. There was only a kutchra drain. Meanwhile, the owners of the adjoining buildings constructed the drain around their buildings on

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their own. There is no column that has been erected on or over the jhora/drain. It is reiterated that the blue print plan referred to by the plaintiff is the old one prior to the diversion of the jhora flowing through the landholding of the answering defendants. It is submitted that the plaintiff one day told the Defendant No.3 that he could buy some timber at more economic rate from one Mr. Jabber who was head mason working in the construction work of the plaintiff's sister. The Defendant No.3 told the plaintiff that he could not buy the timber at present since he had no place to store them. At this the plaintiff asked Defendant No.3 to construct a store house or kutcha sheds in their vacant land for storing the timbers and shuttering materials of the answering defendants. After few such verbal assurances and suggestions from the plaintiff the answering defendants constructed the kutcha shed with the materials of the answering defendants. The head mason, Mr. Jabber, working simultaneously as baidar for the construction works of the plaintiff and his sister offered to sell some timber to the answering defendants. Meanwhile there was some dispute between the head mason and the plaintiff's sister Mrs. Rajani Gurung and brother-in-law (Rajani Gurung's husband) over the said timber. It is to be noted that the police had taken the timber to their custody for some time and later they returned the said timber to Mr. Jabber. Being confident that the dispute has been settled and Mr. Jabber was the true owner of the timber, the answering defendants bought the timber from him. The answering defendants also brought their old timber stored in their old house and stored in the same kutcha shed. On 20.12.2018 the plaintiff and his wife came to the said kutcha shed and started taking out the timber stored therein without informing the answering defendants. When the answering defendant No.3 stopped them from doing so the plaintiff and his wife started

shouting by saying that the defendant No.3 had no papers to show that the timber belonged to him. This resulted in some verbal exchange of words between the plaintiff, his wife and the answering defendant No.3 and his wife. It is further submitted that in one of the evenings following the relevant day the defendant No.3 was called by the plaintiff and his wife to their residence to talk the matter over. They asked the defendant No.3 for Rs.1,00,000/- (Rupees one lakh only) if he wished to avoid the court case and also said that he should forego all the timber kept in the said kutcha shed in favour of the plaintiff. The plaintiff and his wife threatened the defendant No.3 that if he refused to give them the amount demanded then they would make sure that he has to go to courts for years on account of various allegations that they could and would level against him. The answering defendant No.3 did not oblige to such threats and told the plaintiff and his wife that he would not yield to such extortionist method and ill will. It is humbly submitted that this suit is the result of such refusal by the answering defendant No.3."

8. Paragraphs 5 to 8 and part of paragraph 9 of the counter-claim are more or less reproduction of the averments made in paragraph 26 of the amended written statement. In paragraphs 9 and 10 of the counter-claim, it is stated as follows:

"9. That in one of the evenings following the instant event, the Defendant No.3 was called by the plaintiff and his wife to their residence to talk the matter over. They asked the Defendant No.3 for Rs.1,00,000/- (Rupees one lakh only) if he wished to avoid the court cases and also said that he should forego all the timber kept in the said kutcha shed in favour of the plaintiff. The plaintiff and his wife threatened the Defendant No.3 that if he refused to give them the

amount demanded then they would make sure that he has to go to courts for years on account of various allegations that they could and would level against him. The Defendant No.3 did not oblige to such threats and told the plaintiff and his wife that he would not yield to such extortionist method and ill will. It is humbly submitted that the suit of the plaintiff is the result of such refusal by the Defendant No.3. Also the plaintiff and his wife told Defendant No.3 that if he wishes to take away the timber and materials from the kutcha shed then he or his brother (Defendant No.2) should show the No Objection Certificate issued by the plaintiff for the construction of the said kutcha shed. Further the plaintiff's wife told the Defendant No.3 that they will file a suit in the court and neither the plaintiff nor the Defendant Nos.2 and 3 shall touch the kutcha shed till the disposal of the suit. The said kutcha shed was then sealed with the nail. The plaintiff and his wife are playing with the façade of the good will they projected and afterwards turning against the Defendant No.2 and 3 to loot their properties."

10. *That after the said incident neither the Defendant No.2 and Defendant No.3 nor the plaintiff and his wife had touched the said Kutcha shed. However, sometime in the month of September 2019, Smt. Yamuna Giri, the mother of the Defendant No.2 and Defendant No.3 saw the plaintiff opening the said kutcha shed and taking some timber away while the Defendant No.2 and Defendant No.3 were not at home. When the suit was brought by the plaintiff the Defendant Nos. 2 and 3 had hoped that the disposal of the suit would bring an end to their restriction imposed by the threat of the plaintiff for the access to the said kutcha shed. The instant counter claim became necessary when the plaintiff himself took away the materials belonging to*

Defendant Nos.2 and 3 before the disposal of the suit brought by him before this Hon'ble Court."

9. The details of timber, shuttering materials stated to be sold by Mr. Jabbar to the petitioners are stated in paragraph 11. In paragraph 12, the petitioners had stated about the timber and shuttering materials stored in the said *kutchha* shed from their own house. It is stated in the counter-claim that the total value of the materials stored in the *kutchha* house comes to Rs.3,64,300/- and the damage caused to the materials as indicated in paragraph 13 is valued at Rs.1,25,440/- and accordingly, the counter- claim is valued at Rs.4,89,740/-. In the counter-claim, defendant nos.2 and 3 prayed for the following reliefs:

"20. That the Defendants Nos 2 and 3 therefore, pray for the following relieves:

a. An Order or decree directing the plaintiff to return all the timber and shuttering materials including the bamboos if they are not used by the plaintiff for any purpose.

Or in the alternative

A compensation amount of Rs.4,89,740/- (Rupees four lakhs eighty nine thousand seven hundred and forty only) may be paid to the Defendant Nos.2 and 3 by the plaintiff if the said materials are used by the plaintiff for any purpose.

b. A decree for pendent-lite and future interest at the rate of 12% from the date of the presentation of this counter claim i.e. from 06.08.2020 til the final realization of the arrears amount where the order for compensation is deemed fit by this Hon'ble Court.

c. Any other relief or relieves as this Hon'ble Court may deem fit and proper under the present facts and circumstances."

10. The learned trial court noted that the issues were framed on 29.06.2020 and the evidence on affidavit of the plaintiff and the constituted attorney were filed on 20.08.2020. The learned trial court relied on a decision of the Hon'ble Supreme Court in **Ashok Kumar Kalra vs. Surendra Agnihotri**, reported in **(2020) 2 SCC 394**, and held that no counter-claim can be allowed to be filed after framing of issues. Accordingly, the counter-claim was rejected.

11. Order 8 Rule 6A of the CPC reads as follows:

"6A. 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 to 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."

12. The decision in **Ashok Kumar Kalra** (supra) was rendered by a 3-Judge Bench of the Hon'ble Supreme Court on a reference to consider, amongst others, as to whether the language of Order 8 Rule 6A CPC is mandatory in nature. In paragraph 18, the Hon'ble Supreme Court stated as follows:

"18. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects

sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC.”

13. Although the learned trial court had quoted Paragraph 21 of the aforesaid judgement, it would be appropriate to reproduce the same in this order also for better appreciation:

“21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

(i) Period of delay.

(ii) Prescribed limitation period for the cause of action pleaded.

(iii) Reason for the delay.

(iv) Defendant's assertion of his right.

(v) Similarity of cause of action between the main suit and the counterclaim.

- (vi) Cost of fresh litigation.
- (vii) Injustice and abuse of process.
- (viii) Prejudice to the opposite party.
- (ix) And facts and circumstances of each case.
- (x) In any case, not after framing of the issues.”

14. From the above, it is seen that the Hon'ble Supreme Court has made it clear in illustration (x) that in any case, discretion to entertain filing of the counter-claim cannot be exercised after framing of issues.

15. It will also be necessary to refer to the judgment of Hon'ble Mohan M. Shantanagoudar,J, in the aforesaid case. His Lordship had partly supplemented and partly dissented to the judgment noted above. His Lordship at paragraph 60 of the judgment observed as follows:

“60. Having considered the previous judgments of this Court on counterclaims, the language employed in the rules related thereto, as well as the intention of the legislature, I conclude that it is not mandatory for a counterclaim to be filed along with the written statement. The court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counterclaim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.”

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16. In the instant case, the counter-claim was filed after issues were framed and the plaintiff and his constituted attorney had filed evidence and therefore, there is no merit in this petition. Resultantly, the petition is dismissed.

(Chief Justice)

Jk/