SUPREME COURT OF INDIA

Rohit Singh and Others

Vs

State of Bihar (Now State of Jharkhand)

Civil Appeal No. 4517 of 2006 With C.A.No. 4518 of 2006

(S. B. Sinha and P. K. Balasubramanyan, JJ)

17.10.2006

JUDGMENT

P. K. BALASUBRAMANYAN, J.

Leave granted.

2. Respondent No. 6 herein as the Plaintiff filed a suit T.S. No. 9 of 1996 for a declaration of his title to the suit property, for confirmation of his possession over it and if it were to be found that the plaintiff had been dispossessed from the plaint schedule property during the pendency of the suit, for the grant of a decree for recovery of possession through the process of court, for a perpetual injunction restraining the defendants from interfering with his peaceful possession of the plaint schedule property and for other incidental reliefs. The suit was filed against two defendants; the Divisional Forest Officer and the State of Bihar, who are respondents 1 and 2 herein. Defendants 1 and 2 filed a written statement denying the claim of title and possession by the plaintiff. They pleaded that the property was vested forest having been notified as such under section 29 of forest Act, 1927, which remained vested in the state; that the plaintiff had no cause of action and that the sit was not maintainable for want of notice under section 80 of the code of civil procedure. The suit went to trial . Evidence was closed .Arguments concluded. Judgment was reserved

3. At that stage, certain third parties who are the appellants herein, filed an application under Order

I Rule 10(2) of the Code of Civil Procedure claiming that they are in possession of properties including the suit property as owners and that they have right, title, interest and khas possession over the suit land. They submitted that their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. It is to be noted that there was no allegation that the plaintiff was attempting to interfere with their right or possession. It was only stated that they had come to know that the plaintiff had filed a suit based on some illegal and invalid documents and was proceeding with the suit speedily without impleading them. The said application was allowed by the trial court. The impleaded parties were ranked as defendants 3 to 17 in the suit.

4. A written statement was filed on behalf of defendants 3 to 12 disputing the claim of the plaintiff and pleading that the suit properties were held by them as descendants of one Tikait Maharaj Singh and they were in khas possession of the land. They pleaded that they were in peaceful possession of the plaint schedule property by inheritance that they and their ancestors have acquired raiyati right over a large extent of land which took in the suit land, both under law by adverse possession and under the provisions of the Bihar Land Reforms Act. They reiterated that they were claiming to be in peaceful possession of the suit lands ever since the time of their ancestors. The land had not been demarcated by the forest authorities in the year 1964-65.

5. In the mean time, certain other persons claiming to be lessees of portions of the land filed applications for getting themselves impleaded in the suit. They were ranked as defendants 18 to 20 by the court which, though permitted their intervention, directed that they can only watch the proceedings and participate in the trial but they would have no right to file any written statement.

6. Again, after some delay and after the suit had gone on, an application was made on behalf of defendants 12 to 17 seeking an amendment of the written statement earlier filed and adding a sentence at the end of paragraph 16 reiterating their claim of acquisition of title based on long and uninterrupted possession. This amendment was allowed by the trial court. We think that it will be useful to quote paragraph 16 of the written statement as amended.

"16. That the statements made in paras 9 to 11 are incorrect and concocted and are denied. These defendants are in peaceful possession of the suit lands ever since the time of their ancestors. These defendants have claimed acquisition of title based on long and uninterrupted possession so they crave leave to get their title declared in the suit for which a declaratory court fee is paid."

It is seen that the trial court permitted them to pay the court fee as proposed by them. But, it has to be seen that no prayer for a decree was added in the written statement by way of amendment, even for the declaration sought for, for which court fee was paid.

7. The manner in which the trial court went about trying the suit is baffling. Clearly, the relevant procedural and other aspects were ignored by the trial court or were not brought to its notice. Impleading third parties against whom the plaintiff was making no claim and that too after the issues are framed, evidence is closed, arguments are concluded and judgment is reserved was not

proper. Thereafter, after again closing the evidence permitting them to make a vague amendment to their written statement and permitting them to pay court fee on a relief which was not even claimed as a specific relief in the written statement and entertaining the vague claim not even supported by the necessary pleadings can only be described as strange.

8. Ultimately, the trial court held that the suit by the plaintiff was not maintainable for want of notice under Section 80 of the Code of Civil Procedure. It further held that the plaintiff has not established his claim based on a Hukamnama allegedly granted by one F.F. Christian and that the plaintiff had failed to prove his possession or right to possession. Thus the suit was found liable to be dismissed. Thereafter, the trial court proceeded, as if defendants 3 to 17 have made a counter-claim in the suit as against defendants 1 and 2, and defendants 18 to 20 and that it has to adjudicate on such a counter-claim. It recorded a clear finding:

"Of course, there is no tangible proof of act of possession on the day of vesting but I find that his case has not at all been denied by either plaintiff or defendants 1 and 2."

Then, it proceeded to grant a decree to defendants 3 to 17 on the ground of non-traverse. This was on the basis that on the trial court allowing the amendment of the written statement by defendants 12 to 17 and on their paying court fee, there has come into existence a counter-claim in terms of Order VIII Rule 6A of the Code and since the plaintiff, defendants 1 and 2 or defendants 18 to 20 had not filed any answer to the counter-claim, that must be treated as a default under Order VIII Rule 6E of the Code and defendants 3 to 17 should be granted a decree on the basis that the counter-claim had not been denied. It totally forgot its own order (the correctness of which itself is doubtful) that though added, defendants 18 to 20 were not entitled to file written statements and were merely to be observers. Nor did it bear in mind that the suit had never been posted for the pleadings of the plaintiff or of defendants 1 and 2 in answer to the alleged counter-claim. Thus, on the basis of the alleged default in filing an answer to the counter-claim, the trial court decreed the counter-claim of defendants 3 to 17. A decree was hence passed dismissing the suit and decreeing the counter-claim declaring that defendants 3 to 17 are and have got absolute right, title and interest in the suit property and they are entitled to recovery of possession of the same. From whom, it was not clarified. It was not noticed that there was no prayer for recovery of possession or for any relief consequential to the declaration sought for though not by way of a formal prayer.

9. Defendants 1 and 2 challenged the decree of the trial court in T.A. No. 26 of 2000. Defendants 18 to 20 on their part challenged the decree of the trial court in T.A. No. 24 of 2000. In both these appeals though the plaintiff was impleaded as a respondent and he was served, he did not even appear. Of course, he did not also file an appeal against the dismissal of his suit. The dismissal of the suit thus became final.

10. The learned Additional District Judge, who heard the appeals, rejected the initial prayer of defendants 18 to 20 that the suit be remanded to the trial court and they be given an opportunity to file a written statement in the suit or an answer to the alleged counter-claim on the ground that they had not challenged the order of the trial court initially made, impleading them and ordering them only to watch the proceedings. Obviously, the court failed to see that such an interlocutory order

could also be challenged in an appeal from the decree by invoking Section 105(1) of the Code of Civil Procedure. Thereafter, disbelieving a notification issued on 8.12.1953 under Section 29 of the Indian Forest Act, 1927 on the ground that issues of the vernacular newspapers in which its translation was published had not been produced by the State to show that the procedural requirements were complied with, the court proceeded to dismiss the appeal of defendants 1 and 2 on the same basis as adopted by the trial court, that defendants 1 and 2 had not filed an answer to the alleged counter-claim made by defendants 3 to 17. That court did not properly consider the question whether there was in fact a counter-claim in law, whether such a counter-claim was maintainable and whether a counter-claim could be entertained after closure of evidence, that too at the instance of some strangers who sought to get themselves impleaded so as to assert their right, not against the plaintiff, but against the State, the defendant. It did not also investigate whether the title claimed by defendants 3 to 17 was established by them. It did not also scrutinise whether there was adequate pleading as known to law in support of a case of prescriptive title, whether such an inconsistent prescriptive title could be set up after claiming proprietary title in the property and whether there was any acceptable evidence to establish a title by adverse possession. The manner in which the Additional District Judge has disposed of the appeals and the questions arising therein is more disappointing than the manner in which the suit was tried and disposed of by the munsiff, who could at least be assumed to be inexperienced. One would have expected the Additional District Judge to show a little more awareness of the procedural and substantive law and his obligation as a first appellate court. Thus, the first appellate court ended up by dismissing both the appeals but purported to modify the decree of the trial court by declaring the title and interest of defendants 3 to 17 and granting them a decree permanently restraining defendants 1 and 2 and defendants 18 to 20 from carrying on further mining operations. It did not even advert to the written statement to see whether there was any prayer in the so called counter-claim justifying such a decree. It incidentally noted that the suit of the plaintiff was liable to be dismissed for want of notice under Sec. 80 of the Code.

11. Being dissatisfied with the decision of the first appellate court, defendants 1 and 2 filed S.A. No. 50 of 2004 in the High Court. Defendants 18 to 20 filed S.A. No. 32 of 2004. Both these appeals were admitted on the substantial questions of law that were formulated by that court at the time of admission. The questions related to the jurisdiction to entertain and decide the counter-claim of a set of defendants made against another set of defendants, whether the court had jurisdiction to decide the dispute inter se between the defendants after dismissing the suit, whether the scope of a counter-claim in terms of Order VIII Rule 6A of the Code had not been totally misunderstood and whether on the pleadings and the evidence in the case, the courts below were justified in passing the decree on the counter-claim that was challenged in the Second Appeal. A learned judge of the High Court, on a consideration of the relevant aspects, held that the courts below without adverting to the requirements of Order VIII Rule 6A and without following the correct procedure of law had treated the amendment petition as a counter-claim and had passed a decree in favour of defendants 3 to 17 which was unsustainable. It was held that the courts had totally ignored the correct procedure of law and the rules of evidence while deciding the issue raised. The judgments, hence could not be sustained. Thereafter, the second appellate court allowed the Second Appeals and setting aside the decrees passed by the trial and the first appellate courts, remanded the suit to the trial court for rendering a fresh judgment in accordance with law on the basis of the evidence adduced by the parties. Challenging the decision in the two Second Appeals, the appeal has been filed by defendants 3 to 17 by filing two separate petitions for special leave to appeal.

12. Learned counsel for the appellants contended that a counter-claim was maintainable even if the cause of action put forward by the defendants in the suit did not arise out of the cause of action put in suit by the Plaintiff and that under such circumstances, the trial court and the first appellate court rightly considered the claim put forward by the appellants as a counterclaim and were justified in adjudicating it in the manner in which it was done. It was also contended that Order VIII Rule 6A of the Code did not preclude the filing of a counter-claim by one defendant against a co-defendant even though no relief was claimed as against the plaintiff. It was also contended that in the absence of an answer to the counter-claim being filed by defendants 1 and 2 or defendants 18 to 20, the trial court was justified in proceeding on the terms of Order VIII Rule 6E of the Code and in allowing the counter-claim on the basis that there was no resistance or answer to the claim made by way of amendment in the written statement. It is therefore submitted that the High Court was not justified in interfering with the decision of the first appellate court. On the scope and content of Order VIII Rule 6A of the Code, he referred to various decisions including those of this court, culminating in the one in Ramesh Chand Ardawatiyab v. Anil Panjwan and contended that the conclusion answered by the High Court was not warranted.

13. On behalf of defendants 1 and 2 in the suit, it is contended that there was no counter-claim at all made by defendants 3 to 17 as known to law, that such a counterclaim as against defendants 1 and 2 was not maintainable; that a counter-claim at the instance of persons who got themselves impleaded after the evidence was closed and the trial was over, could not be entertained, even if maintainable, that the High Court having found that the counterclaim had been wrongly entertained by the trial court and the first appellate court ought to have simply allowed the second appeals and dismissed the alleged counter-claim of defendants 3 to 17 and the remand of the suit was not called for especially when the suit filed by the plaintiff had been dismissed by the trial court and he had not challenged the said dismissal. It was therefore submitted that once the counter-claim was found to be not maintainable, all that was required to be done, was to vacate the decree passed by the trial court and the first appellate court on that counter-claim and to simply leave the suit of the plaintiff as dismissed. On behalf of defendants 18 to 20 it was submitted that the procedure adopted by the trial court and the first appellate court was unknown to law and their interests could not be affected without even permitting them to file written statements in the suit and the decree that was granted was even otherwise unsustainable, since there is no prayer by way of counter-claim that they had to answer and there is no discussion of the pleadings or the evidence by the trial court and the first appellate court before upholding the so called counter-claim of defendants 3 to 17. It is also pointed out that inconsistent cases have been set up by defendants 3 tol7 and even if it was permissible, there was no pleading as known to law in support of a case of adverse possession or prescriptive title set up in the written statement and under those circumstances there was absolutely no necessity for remanding the suit to the trial court. The plaintiff's suit having been dismissed and that dismissal having become final, the High Court should have simply vacated the decree on the counter claim and closed the litigation.

14. In reply, it is reiterated that in view of the amendments to the Code brought about by Act 104 of 1976, the scope for entertaining a counter-claim was enlarged and the counter-claim made by the appellants falls well within the ambit of Order VIII Rule 6A of the Code.

15. We shall first consider whether there was a counter claim in the suit in terms of Order VIII Rule 6A of the Code in this case. The suit was filed against the Divisional Forest Officer and the State of

Bihar as defendants 1 and 2 on 26.2.1996 by respondent No.6 herein. After the written statement was filed by the defendants issues were framed and the suit went to trial. On 3.6.1996 and 6.6.1996 the evidence on the side of the plaintiff was concluded. On 14.6.1996 the evidence on the side of the defendants was completed. On 24.6.1996 arguments were concluded. Judgment was reserved. 25.6.1996 was fixed as the date for pronouncing the judgment. The judgment was not pronounced and it appears that the judge was subsequently transferred. Therefore, on 20.8.1996 arguments were again heard by the successor judge and judgment was reserved. 27.8.1996 was fixed as the date for judgment. Apparently, it was not pronounced. It is thereafter that defendants 3 to 17 filed an application on 11.9.1996 for intervention in the suit. We have already referred to the allegations in that application for impleading filed. We only notice again that they claimed to be in possession of the property and that their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. On 19.9.1996 the application for intervention was allowed. On 30.9.1996 a written statement was filed by defendant Nos.3 to 12. We have already summarised the pleas raised therein.

16. After this, the witnesses of the plaintiff were recalled and permitted to be cross-examined by these defendants. That was on 5.10.1996. Again the witnesses for defendants 1 and 2, were recalled and they were permitted to be cross-examined on behalf of these defendants. The evidence on the side of defendants 3 to 17 was let in. It commenced on 24.2.1997 and was closed on 30.1.1997. Thereafter arguments were heard again and the arguments on the side of the defendants including that of defendants 3 to 17 were concluded on 4.3.1997. The suit was adjourned for arguments on the side of the plaintiff. On 5.3.1997, the suit was dismissed for default of the plaintiff. It was then restored on 29.5.1998. It was thereafter on 5.6.1998, that defendants 3 to 17 filed an application for amending the written statement. The amendment was allowed on 20.7.1998. There was no order treating the amended written statement as a counter-claim or directing either the plaintiff or defendants 1 and 2 to file a written statement or an answer thereto. Defendants 3 to 17 had questioned the pecuniary jurisdiction of the trial court in their written statement. That plea was permitted to be withdrawn on 4.2.1999. It is clear that after the evidence was closed, there was no occasion for impleading the interveners. Even assuming that they were properly impleaded, after they had filed their written statement, the suit had gone for further trial and further evidence including that of the interveners had been taken, the evidence again closed and even arguments on the side of the interveners had been concluded. The suit itself was dismissed for default only because on behalf of the plaintiff there was a failure to address arguments. But the suit was subsequently restored. At that stage no counter-claim could be entertained at the instance of the interveners. A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter-claim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so called counter-claim of defendants 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction. On that short ground the counter-claim so called, filed by defendants 3 to 17 has to be held to be not maintainable.

17. As can be seen, what defendants 3 to 17 did, was to merely amend their written statement by adding a sentence to paragraph 16 of the written statement they originally filed. In paragraph 16 it was only pleaded that those defendants were claiming to be in peaceful possession of the suit lands ever since the time of their predecessors. They wanted to add that they had claimed acquisition of title based on long and uninterrupted possession and they crave leave to get their title declared in the suit for which a declaratory court fee is paid. It may be noted that not even a prayer was sought to

be added seeking a declaration of their title as is the normal practice. It is, therefore, clear that on going through the original written statement and the amendment introduced, that there was no counter-claim in terms of Order VIII Rule 6A of the Code in the case on hand, which justifies a trial of that counter-claim even assuming that such a counter-claim was maintainable even if no relief was claimed against the plaintiff in the suit but it was directed only against the co-defendants in the suit. The counter-claim so called is liable to be rejected on that ground as well.

18. Thirdly, it is seen that the trial court never formally treated the written statement as a counter-claim and give an opportunity to defendants 1 and 2 or defendants 18 to 20 to file their pleas in answer. It was not open to the trial court to proceed on the basis that no answer has been filed to the counter-claim and a decree thereon can be granted in terms of Order VIII Rule 6E of the Code. The trial court clearly found that there was no evidence on the side of defendants 3 to 17 in support their claim of possession but still granted a decree to defendants 3 to 17 only on the ground of the alleged default of defendants 1 and 2 and defendants 18 to 20 in filing an answer to the counter-claim made by defendants 3 to 17. Strangely, the court failed to keep in mind its earlier order that defendants 18 to 20, could not file a written statement and they could only watch the proceedings and participate in the trial. The whole procedure adopted was unsustainable and the decree granted on the so called failure of defendants 1 and 2 on the one hand and defendants 18 to 20 on the other, to file an answer to the counter-claim, is clearly unsustainable in law.

19. Normally, a counter-claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counterclaim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into some sort of an interpleader suit. Here, defendants 3 to 17 had no claim as against the plaintiff except that they were denying the right put forward by the plaintiff and the validity of the document relied on by the plaintiff and were asserting a right in themselves. They had no case even that the plaintiff was trying to interfere with their claimed possession. Their whole case was directed against defendants 1 and 2 in the suit and they were trying to put forward a claim as against the State and were challenging the claim of the State that the land involved was a notified forest in the possession of the State. Such a counter-claim, in our view, should not have been entertained by the trial court.

20. The observations of this Court in Ramesh Chand Ardawatiya (supra) that:

"Looking to the scheme of Order 8 as amended by Act 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 counterclaim 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."are of no avail to defendants 3 to 17 on the facts and in the circumstances of this case. In the reported decision, this Court did not have to consider whether a counter-claim can be filed after the trial is concluded and whether it could be solely directed against a co-defendant. The Court was also not dealing with an inchoate

counter-claim in that case.

21. We also find that there was no prayer as such by way of counter-claim. A mere plea that prescriptive title may be declared and payment of court fee for a declaratory relief would not suffice. Even assuming that this could be treated as a prayer for declaration of title by defendants 3 to 17, there was no warrant for granting a decree to defendants 3 to 17 for recovery of possession as was done by the trial court by way of counter-claim or a decree for permanent injunction as was granted by the first appellate court. Even the requisite court fees were not paid. Since the reliefs granted by those courts are not reliefs prayed for, that part of the decree, in any event, could not be sustained.

22. As regards the finding that the notification under Section 29 of the Forest Act has not been proved, the same has also to be held to be unsustainable. The Gazette notification issued 32 years prior to the suit was produced and marked in evidence and no circumstance proved, justified an inference that it might not have been published as enjoined by law. The regularity of issue of such a notification should have been presumed leaving it to defendants 3 to 17 to rebut that presumption. For the present, all that is required is to vacate the finding in that regard entered by the lower appellate court.

23. Having thus found that the counterclaim made by defendants 3 to 17 could not have been entertained as a counterclaim in the case on hand, we find that the High Court has committed an error in remanding the suit to the trial court for proceeding with it afresh. The suit filed by the plaintiff had been dismissed by the trial court. The plaintiff had not appealed against the decree. The dismissal of the suit has thus become final. Since the counter-claim sought to be made is found to be not entertainable, obviously there is no question of the counter-claim being tried as a counter-claim or being treated as a fresh plaint. It is, therefore, necessary, though defendants 1 and 2 and defendants 18 to 20 have not appealed to this Court against the decision of the High Court, to modify the decision of the High Court by setting aside the order of remand made by that court and simply leaving it as a case where the suit would stand dismissed and in which no counter-claim had been made.

24. In this view, even while dismissing the appeal filed by defendants 3 to 17, and upholding the decision vacating the decree on the counter-claim, we set aside the order of remand passed by the High Court and pass a decree confirming the dismissal of the suit filed by the plaintiff and holding that there was no valid or tenable counter-claim which could be entertained in the present suit. Defendants 1 and 2 would be entitled to their costs in the courts below from defendants 3 to 17 and the parties are left to bear their respective costs in this Court.