

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 370 of 2020
(Arising out of SLP(C) No 11067 of 2019)

Shiv Narain

.... Appellant(s)

Versus

Tej Singh Manohar & Anr

....Respondent(s)

ORDER

1 Leave granted.

2 This appeal arises from a judgment and order of a learned Single Judge of the High Court of Judicature for Rajasthan in SB Civil Second Appeal No 516 of 2017.

3 In December 2015, the appellant instituted a suit against the respondents for a permanent injunction and for a declaration. The first respondent's advocate filed his vakalatnama on 2 January 2016. On 1 February 2016, when time was sought for filing a written statement, the Trial Court directed that the suit be put up on 2 February 2016. On 2 February 2016, no written statement was filed nor was an extension of time to file the written statement sought in terms of the provisions

contained in Order VIII Rule 1¹ of the Code of Civil Procedure 1908². The appellant submitted an application for amendment of pleadings under Order VI Rule 17. On 25 July 2016, when the application under Order VI Rule 17 was posted for hearing, it was adjourned to 5 August 2016 to pass a 'proper order' since the appellant and his counsel were absent. On 5 August 2016, the suit instituted by the appellant was dismissed in default. However, after the suit was dismissed, the Trial Judge noted that the written statement filed by the first respondent on 5 March 2016 had remained to be taken on record and it was accordingly directed to be taken on record. The order dated 5 August 2016 reads thus:

"Advocate for Plaintiff absent. Plaintiff absent Advocate for Defendant present. On last date of hearing also the plaintiff and his advocate were absent. Today – there is half day leave after lunch.

Calls for Plaintiff and his advocate were made time and again. The time now is 1.10 PM. The suit of Plaintiff against the Defendants in default and on non prosecution is dismissed and on behalf of defendant in the post on dated 05.03.16 written statement of the suit along with counter claim was filed, which due to oversight remained to be taken on record, which is taken on record. On the counter claim filed on behalf of defendant no.1 ex-party proceedings are initiated. For – be put up on 09.09.16.

Sd/ Additional Civil Judge & Metropolitan Magistrate (West)
Jaipur Metropolitan City."

Together with the written statement, the first respondent filed a counter claim. An *ex parte* preliminary decree was passed on 31 January 2017 on the counter claim.

11. Order VIII, Rule 1- Written Statement.-The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

4 On 23 February 2017, the appellant submitted an application under Order IX Rule 9 of the CPC against the order dismissing the suit on 5 August 2016 for non-prosecution. The appellant also filed a regular first appeal under Section 96 of the CPC against the preliminary decree dated 31 January 2017, which was dismissed on 6 July 2017 on the sole ground that the claim for setting aside the *ex parte* decree must be pursued under Order IX Rule 13. The appellant moved a second appeal before the High Court on 31 July 2017. On 2 August 2017, the appellant filed an application under Order IX Rule 13, which is pending. On 23 March 2018, the Trial Court dismissed the application under Order IX Rule 9. An appeal against that order was dismissed by the appellate Court on 1 October 2018 against which a writ petition has been filed before the High Court, which is pending. The second appeal filed by the appellant against the order dated 6 July 2017 was dismissed by the High Court on the ground that even if the suit of the appellant was dismissed in default on 5 August 2016, the counter claim of the first respondent could be taken on record as of 5 March 2016 and that the counter claim could be proceeded with against the appellant.

5 On behalf of the appellant, Mr Pranav Sachdeva, learned Counsel submitted that:

- (i) On 5 August 2016, the suit was dismissed for non-prosecution and, as a consequence, the Trial Judge was in error in taking the counter claim on the record with effect from an anterior date, namely, 5 March 2016;
- (ii) On 5 March 2016 and even thereafter until 5 August 2016, the appellant had not been served with a copy of the counter claim;
- (iii) The time for filing a written statement in the suit had expired on 1 February 2016

and after the expiry of the period of thirty days, no application was filed on behalf of the first respondent to condone the delay;

- (iv) No reasons were recorded by the learned Trial Judge either as of 5 March 2016 or 5 August 2016 for taking the written statement on the record; and
- (v) Consequently, the counter claim could not have been entertained having regard to the provisions of Order VIII Rule 6A.

6 On the other hand, Mr Parveen Kumar Aggarwal, learned Counsel appearing on behalf of the first respondent, submitted that:

- (i) Matters of procedure are in aid of substantive justice;
- (ii) The record indicates that the written statement had not been filed within thirty days as required under Order VIII Rule 1 and there was no application for condoning the delay in doing so;
- (v) When the Trial Judge took the written statement and the counter claim on the record on 5 August 2016, it was implicit that the delay in filing the written statement and counter claim was condoned;
- (vi) From an inspection of the record, it emerges that the written statement had been duly tendered before the officer of the Court on 5 March 2016, when the Judge was on leave since there is an office endorsement to that effect; and
- (vii) It was for the Court to have recorded reasons for taking the written statement on the record and the failure of the Court to do so ought not to prejudice the first respondent.

7 The provisions for filing a counter claim are contained in Order VIII Rule 6A which 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 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.”

Sub-rule (1) of Rule 6A indicates that a counter claim against the plaintiff can be set up by the defendant in respect of a cause of action accruing to 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 the defence has expired.

8 The time prescribed by the substantive provisions of Order VIII Rule 1 for filing the written statement, namely, thirty days, had come to an end on 1 February 2016. This provision is directory and it was open to the first respondent to move the court to allow him to file the written statement beyond that period. Upon such a request being made, the Trial Court was empowered, after recording its reasons in

writing, to allow the written statement to be taken on record. For the purpose of the appeal, we will proceed on the basis that on 5 March 2016, the first respondent was ready with the presentation of his written statement. There is an endorsement on the file to the effect that the learned Trial Judge was on leave and that the proceedings should be put up on 21 March 2016. Be that as it may, it is not in dispute that no order had been passed by the Trial Court allowing the first respondent to file the written statement and counter claim at any time before 5 August 2016. On 5 August 2016, the suit instituted by the appellant was dismissed in default. The counter claim, which was filed by the first respondent, would have been maintainable if prior to the suit being dismissed, the first respondent had lodged his written statement and, together with it, the counter claim. The facts before the Court show that the first respondent did not deliver his defence and the time for delivering his defence had also come to an end without an order of the Trial Court permitting the written statement to be taken on the record in terms of the proviso to Order VIII Rule 1. The counter claim was taken on the record, together with the written statement, upon the dismissal of the suit on 5 August 2016. The learned Trial Judge made an effort to overcome the legal effect of the position which would emerge as a result of the failure of the first respondent to lodge the written statement and counter claim within the prescribed period by observing that the written statement would be taken on the record as of 5 March 2016. This was clearly not open to the learned Trial Judge. The position which then emerges is that the written statement as well as the counter claim was not validly taken on the record prior to the dismissal of the suit. Hence, the basis on which the counter claim was decreed is flawed.

9 For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 26 February 2019. In consequence, the decree passed on 31 January 2017 is set aside. The proceedings under Order IX Rule 13 will not survive. In the circumstances, there shall be no order as to costs.

10 We, however, clarify that the present judgment and order will not stand in the way of the first respondent taking due and necessary steps in accordance with law. We further clarify that in the event that the suit gets revived in future, as a result of the orders that may be passed as a consequence of the remedy which may be adopted by the appellant, it would be open to the first respondent to apply afresh for taking the written statement on the record, together with an application for condoning the delay in not filing it within the prescribed period under Order VIII Rule 1 of the CPC. The Trial Court, it is needless to add, would decide such an application independently and on its own merits. The first respondent, it is clarified, would also be at liberty to adopt such remedies as are open to him in law to pursue his claim in an independent suit, if so advised.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[Hrishikesh Roy]

New Delhi;
January 17, 2020

ITEM NO.41

COURT NO.8

SECTION XV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s).11067/2019

(Arising out of impugned final judgment and order dated 26-02-2019 in SBCSA No. 516/2017 passed by the High Court of Judicature for Rajasthan at Jaipur)

SHIV NARAIN

Petitioner(s)

VERSUS

TEJ SINGH MANOHAR & ANR.

Respondent(s)

Date : 17-01-2020 This petition was called on for hearing today.

CORAM : HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE HRISHIKESH ROY

For Petitioner(s) Mr. Pranav Sachdeva, AOR
Mr. Jatin Bhardwaj, Adv.
Mr. Harsh Tikoo, Adv.
Ms. Neha Rathi, Adv.
Mr. Sudesh Kumar Singh, Adv.

For Respondent(s) Mr. Parveen Kumar Aggarwal, Adv.
Mr. surinder Singh Pannu, Adv.
Mr. Abhishek Grover, Adv.
Mr. Pareekshit Bishnoi, Adv.
Mr. Hagee Nanya, Adv.
Mr. Sanjay Jain, AOR

Mr. Sumit Thakur, Adv.
Mr. Surjeet Singh, Adv.
Mr. Surya Hari Kamuju, Adv.
Ms. Sneha Z. Masani, Adv.
Ms. Divya Roy, AOR

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed in terms of the signed order.
No costs. Pending application, if any, stands disposed of.

(SANJAY KUMAR-I)
AR-CUM-PS

(SAROJ KUMARI GAUR)
COURT MASTER

(Signed order is placed on the file)