

is also declared and held that all other similarly situated Agriculture Assistants (Diploma Holders) are also entitled to the benefits of this judgment. The respondent-authorities are directed to pay arrears of salary, if any, to the petitioner No. 1 and other similarly situated persons in accordance with this judgment within eight weeks from the receipt of the writ. The petition is allowed with costs.

(ATP)

Petition allowed.

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CIVIL REVISION APPLICATION

Before the Hon'ble Mr. Justice J. N. Bhatt.

SUBASH CHANDRAKANT MASHRUWALA v. SURESH
CHANDRAKANT MASHRUWALA & ORS.*

Civil Procedure Code, 1908 (V of 1908) - Order 8 Rules 6, 6A, 9 & Order 6 Rule 17 - Amendment of pleadings - 'Set-off', 'counter-claim' - Defendant raising the plea of 'set-off' virtually becomes 'plaintiff' and decree can be passed in his favour; 'set-off' is a statutory defence to plaintiff's action - 'Counter-claim' is substantially a 'cross-action' - Distinction between 'set-off' and 'counter-claim' explained - Amendment of the pleadings - It is duty of the Court to grant amendment of pleadings when it is necessary for the purpose of determining the real question in controversy - Amendment can be granted at any stage - Wide discretion is given to the Court under Order 6 Rule 17.

If the Court is satisfied that the plea of the defendant for set-off falls under Order 8. Rule 6, the Court has no option to refuse to adjudicate on it. A defendant, who is raising a plea of set-off, is virtually in the position of a plaintiff and a decree can be passed in favour of the defendant, if he is entitled to a set-off. (Para 9)

A set-off is a statutory defence to a plaintiff's action, whereas a counter-claim is substantially a cross-action. The plea of set-off which can be raised by the defendant would, by adjustment, either wipe off or reduce the plaintiff's claim for money. Under sub-rule (1) of the newly introduced Rule 6A, in Order 8 of the Civil Procedure Code, the defendant may 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-limit for delivering his defence has expired. (Para 11)

There is a distinction between set-off and counter-claim. A set-off is either legal or equitable. Rule 6 of Order 8 is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. In Civil Procedure Code under Order 20, Rule 19(3) equitable set-off is recognized. A set-off may be purely defensive. It may amount to an adjustment or satisfaction of the plaintiff's claim or may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. Thus, there is a distinction between a set-off and a counter-claim. Therefore, a set-off and a counter-claim are not the same. No doubt, in one sense, both are cross-actions. (Para 12)

*Decided on 5-8-1993. Civil Revision Application No. 509 of 1983 arising out of Civil Suit No. 1716 of 1980 of City Civil Court, Ahmedabad.

Thus, it is a duty of the Court to allow amendment of pleadings when it is necessary for the purpose of determining the real question in controversy in a suit between the parties, so that substantial justice may be done, for which alone the Court exists. The amendment of pleadings could be allowed at any stage. (Para 14)

The provisions of Order 6, Rule 17 confer a wide discretion upon the Courts to permit the amendment of pleadings at any stage of the proceedings. Thus, the prayer for amendment of a pleading cannot be refused merely on the ground of delay. The proposition of law, on this score, has been extensively explored and settled by a catena of judicial pronouncements. (Para 15)

K. S. Nanavati, for the Petitioner.

M. D. Pandya, for Respondent No. 1.

Respondent No. 3 served.

Respondent No. 4 not served.

Respondents No. 5 and 6 served by affixing.

BHATT, J. Respondent No. 1 in this revision is the original plaintiff, who instituted Civil Suit No. 1716 of 1980, in the City Civil Court, at Ahmedabad, against respondents No. 2 to 6 and the petitioner, who is original defendant No. 5. The plaintiff filed the suit for partition and accounts in respect of immovable properties described in Schedule "A" to the plaint. The accounts of the properties alleged to have been Joint Hindu Family properties were also sought.

2. The plaintiff, *inter alia*, contended that, he is one of the members of the Joint Hindu Family and defendants No. 3, 4 and 5 are his brothers, and defendant No. 2 is his mother, and the properties owned and possessed by original defendants No. 1 and 2 are Joint Hindu Family properties acquired by defendant No. 1 from the Joint Hindu Family funds.

3. The plaintiff also, *inter alia*, contended that, his grandfather was carrying on the business in the name and style of "M/s. Mulchand Jaikishandas" and the said business of M/s. Mulchand Jaikishandas was a joint family business, which was inherited by his father as well as uncle. It was further contended by the plaintiff that the properties which are, at present, owned and possessed by defendants No. 1 and 2 are, in fact, such immovable properties which are acquired out of the joint family business funds.

4. The present petitioners, who is original defendant No. 5, a brother of the plaintiff, appeared and filed a composite written statement. Ex. 21, along with defendants No. 1 and 2, disputing the claim of the plaintiff that the suit properties are joint family properties. The claim of the plaintiff for partition was, thus, challenged. The trial Court raised the issues, at Ex. 24, on the basis of the pleadings of the parties. Defendant No. 1 submitted an application for the amendment in the written statement, at Ex. 177, during the pendency of the trial. Defendant No. 1 was permitted to amend the written statement, based on a registered will executed in his favour by his father and he contended that all the suit properties are his self-acquired properties. However, his application for amendment of the written statement with respect to two properties,

namely, leasehold right of the properties situate, at Bombay, was not pressed at that stage. While allowing the amendment application of defendant No. 1 partly, the liberty was reserved with original defendant No. 1 to file another application for amendment in respect of those properties at Bombay, for which the amendment application was not pressed at that stage.

5. Original defendant No. 5 in the suit, the petitioner herein, submitted an application, at Ex. 187, under Order 6, Rule 17; Order 8, Rule 6; and Order 8, Rule 9 of the Code of Civil Procedure ("C.P.C.") for permission to file additional written statement or amendment in the written statement, which was contested by the original plaintiff and defendant No. 3. After hearing the parties, the trial Court dismissed the said application on 15th March, 1983. Hence, this revision under Sec. 115 of the C.P.C.

6. The petitioner-original defendant No. 5, by giving an application, at Ex. 187, requested the trial Court to permit him to raise the plea, whereby, defendant No. 3 could be directed to render accounts of the business of Orient Traders, at Bombay, since 1950, and to ascertain the sum which would fall to the share of defendant No. 5 from the income of the Hindu Undivided Family business carried out by defendant No. 3, in the name of "Orient Traders, Bombay" and also for decree of partition and 1/6 share out of the suit properties. The trial Court dismissed the application of the petitioner-original defendant No. 5.

7. The provisions of Order 8, Rule 6 of the C.P.C. or Order 8, Rule 6A would not be attracted in view of the facts emerging from the record of the present case. The application, Ex. 187, was preferred invoking the aids of the provisions of Order 8, Rule 6 and Order 8, Rule 9 of the C.P.C. Under the provisions of Order 8, Rule 6, the particulars of set off are required to be given in the written statement. Under Order 8, Rule 6A, counter-claim can be made by the defendant. Order 8, Rule 6 of the C.P.C. reads as under :

Rule 6. *Particulars of set off to be given in written statement.*

(1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off; but this shall not effect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set off"

8. It could very well be seen from the aforesaid provision that, in order to qualify a defendant to claim a set off, the following ingredients must exist :

- (1) The suit must be for the recovery of money.
- (2) The defendant must have a money claim against the plaintiff, which is legally recoverable from the plaintiff.
- (3) The defendant's claim ought to be for an ascertained sum of money.
- (4) Both the parties must fill the same character.
- (5) The sum claimed by way of set off should not exceed the pecuniary limits of the jurisdiction of the Court.

9. If the Court is satisfied that the plea of the defendant for *set off* falls under Order 8, Rule 6, the Court has no option to refuse to adjudicate on it. A defendant, who is raising a plea of set off, is virtually in the position of a plaintiff and a decree can be passed in favour of the defendant, if he is entitled to a set off. Having regard to the facts and circumstances of the present case and considering the nature of the suit, which is a suit for partition, the aforesaid conditions to attract the provisions of Order 8, Rule 6 are not established and, therefore, the application, Ex. 187, cannot be said to be an application under Order 8, Rule 6.

10. It was contended that, if it is not taken as a set-off, then the defendant is entitled to raise a plea of counter-claim under Order 8, Rule 6A of the C.P.C. The provisions of Order 8, Rule 6A are as under :

“Rule 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 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 plaint.”

11. A set-off is a statutory defence to a plaintiff's action, whereas a counter-claim is substantially a cross-action. The plea of set-off which can be raised by the defendant would, by adjustment, either wipe off or reduce the plaintiff's claim for money. Under sub-rule (1) of the newly introduced Rule 6A, in Order 8 of the C.P.C., the defendant may 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-limit for delivering his defence has expired. Really speaking, sub-rule (1) of

Rule 6A does not prescribe any time-limit for making of a counter-claim. The embargo of limitation is in respect of the cause of action upon which the counter-claim is founded. The cause of action arising after the filing of the written statement or after the time for its filing has expired is not covered by the said Rule. In fact, counter-claim under sub-rule (4) of Rule 6A is treated as a plaint and is governed by the rules applicable to a plaint.

12. There is a distinction between set off and counter-claim. A set off is either legal or equitable. Rule 6 of Order 8 is restricted to legal set off. Equitable set off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. In C.P.C., under Order 20, Rule 19(3) equitable set off is recognized. A set off may be purely defensive. It may amount to an adjustment or satisfaction of the plaintiff's claim or may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. Thus, there is a distinction between a set off and a counter-claim. Therefore, a set off and a counter-claim are not the same. No doubt, in one sense, both are cross-actions.

13. Having regard to the nature of the suit wherein the plaintiff has claimed a "decree for partition and a rendition of accounts, and the averments made in respect of alleged joint properties in Ex. 187, strictly speaking, it cannot be said that there is a counter-claim by the defendant. Therefore, in the opinion of this Court, the provisions of Order 8, Rule 6A are also not attracted.

14. The alternative contention of the petitioner-original defendant No. 5 has been that the application, Ex. 187, should be considered and allowed by way of an amendment under Order 6, Rule 17. Therefore, it would be necessary, at this stage, to refer the provisions of Order 6, Rule 17 of the C.P.C., which read as under :

"Rule 17. Amendment of pleadings.

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The powers of amendment vested in the Courts are very wide. It is always left to the discretion of the Court to amend or not. However, the second part of the Rule makes it imperative on the Court to make all such amendments, as may be necessary, for determining the real matter in controversy between the parties. Thus, it is a duty of the Court to allow amendment of pleadings when it is necessary for the purpose of determining the real question in controversy in a suit between the parties, so that substantial justice may be done, for which alone the Court exists. The amendment of pleadings could be allowed at any stage. One of the reasons why the trial Court has rejected the application for amendment in the written statement is that the petitioner applied for

amendment at a late stage. Delay by itself is not an adequate reason for refusing permission to amend the written statement.

15. In an application for amendment of the plaint or the written statement, the Court has no power to consider the merits of the proposed amendment. Unfortunately, the trial Court has gone into the merits of the proposed amendment while refusing the leave to amend the written statement. Such an approach on the part of the trial Court is unjustified and is not permissible. The provisions of Order 6, Rule 17 confer a wide discretion upon the Courts to permit the amendment of pleadings at any stage of the proceedings. Thus, the prayer for amendment of a pleading cannot be refused merely on the ground of delay. The proposition of law, on this score, has been extensively explored and settled by a catena of judicial pronouncements. In fact, in reality, the parties in a suit for partition are virtually like plaintiff and a denial of amendment in the written statement on the ground of delay and refusing to raise a plea of putting two more properties for the partition cannot be said to be justified one in the facts of the present case. In fact, the decree for partition should be in respect of all the joint properties. There cannot be a partial partition. Having regard to the facts and circumstances emerging from the record of present case, there is no doubt in the minds of this Court that the learned City Civil Court Judge has committed a grave error of law in refusing to grant leave to amend the written statement, as prayed for, under Order 6, Rule 17 of the C.P.C. There is also a serious error of law in rejecting the application praying for amendment of the written statement. Therefore, this Court is left with no alternative but to interfere with the impugned order and put it in a proper shape.

16. No doubt, the legal objections, which could be raised by the other side, against the averments made in Ex. 187 by defendant No. 5, petitioner herein, will be available and will be open even after the grant of permission to amend the written statement and the same shall have to be decided by the trial Court on merits and in accordance with law as and when raised in the trial Court.

17. In view of the facts and circumstances emerging from the record of the present case and considering the legal background mentioned hereinbefore, this Court is of the clear opinion that the impugned order of the trial Court refusing to permit defendant No. 5 to amend the written statement is required to be set aside. Consequently, this revision is allowed and the application, Ex. 187, is granted under Order 6, Rule 17 of the Civil Procedure Code. In other two appeals, this Court has directed the trial Court to accord priority to the suit, being an old one, and to dispose of the same on or before 31st December, 1993. Therefore, a separate direction for early disposal of the suit is not required, as contended.

18. In the result, this revision is allowed to the aforesaid extent. Rule made absolute, accordingly, with no order as to costs.

Application allowed.

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