

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 370 of 2005

[Manzoor Ahmed Shahzad v. Muhammad Shakir Shan and others]

Date of hearing : 24-04-2018 & 23-05-2018

Date of Decision : 15-08-2018

Plaintiff : Manzoor Ahmed Shahzad, through Mr. Kashif Paracha Advocate.

Defendants 1 to 4 : Muhammad Shakir Shan and 3 others through Mr. Zayyad Khan Abbasi Advocate.

Defendant 5 & 6 : Muhammad Nazim and another through Mr. Muhammad Sadiq Advocate.

ORDER

ON CMA No. 1222/2011

ADNAN IQBAL CHAUDHRY J. -

1. The subject matter of the suit is a sale agreement for immovable property dated 16-12-2004 between the plaintiff as seller and the defendants 1 to 4 as buyers. The defendants 5 and 6 are estate agents who brokered the said sale agreement. The plaintiff filed this suit for cancellation of the sale agreement on the ground that he had been duped/mislead by the defendants into signing the sale agreement. In filing a written statement to deny the allegations in the plaint, the defendants 1 to 4 also made a "counter-claim" and "additional pleas", which was a prayer for specific performance of the sale agreement, and in doing so the requisite court fee was also affixed to the written statement.

2. Issues were settled by the Court on 13-08-2007 and amongst the issues settled, issue No.3 was "whether the defendants No.1 to 4 are entitled for specific performance of agreement dated 16-12-2004 ?" This issue arose from the "counter-claim" in the written statement.

3. By CMA No.1222/2011, which is under Order XIV Rule 5 CPC, the plaintiff prays for striking out issue No.3. Mr. Kashif Paracha, learned counsel for the plaintiff contended that under the Code of Civil Procedure the only provision that allows for a counter claim is Order VIII Rule 6 CPC, and under such provision a counter-claim can only be made in a money suit which the present suit is not. In support of such contention he relied upon the case of *Civil Aviation Authority, Quaid-e-Azam International Airport v. Japak International (Pvt.) Ltd.* (2009 SCMR 666). He therefore submitted that the said "counter-claim" ought to have been ignored and consequently the aforesaid issue No.3 does not arise. In the counter-affidavit to CMA No.1222/2011 it was stated on behalf of the defendants 1 to 4 that the plea in the written statement is not a counter-claim but a plea for specific performance of the sale agreement. Such statement in the counter-affidavit was construed, *albeit* erroneously, by Mr. Paracha as an acknowledgment that there was no counter-claim, and therefore he submitted that the matter should be put to rest and the application to strike off the impugned issue should be allowed. Lastly, Mr. Paracha contended that the plaintiff has been prejudiced by treating the written statement also as a counter-claim because the plaintiff had never been given an opportunity to reply to the said counter-claim.

On the other hand, apart from contending that the objection to the counter-claim was raised at a belated stage only to stall the recording of evidence, Mr. Muhammad Sadiq, learned counsel for the defendants 1 to 4, relied upon the case of *Niamat Ali v. Dewan Jairam Dass* (PLD1983 SC 5) to contend that a counter-claim, even though not strictly covered by Order VIII Rule 6 CPC, the Court can nonetheless treat it as a plaint in a counter-suit. Mr. Zayyad Khan Abbasi, learned counsel for the defendants 5 and 6 supported the submissions made by Mr. Muhammad Sadiq Advocate.

4. Order VIII Rule 6 of the Code of Civil Procedure, 1908 reads:
"6. (1) *Particulars of set-off to be given in written statement.* 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) *Effect of set-off.* 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 affect 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."

In the case of *Niamat Ali v. Dewan Jairam Dass* (PLD 1983 SC 5) it was held that Order VIII Rule 6 CPC read with Order XX Rule 19 CPC permits a counter-claim of a specific kind, i.e., where it is for an ascertained amount in the plaintiff's suit for recovery of money, called a "legal set-off", or where it is for an "equitable set-off" in which case a defendant may even seek a set-off in respect of an unascertained sum of money on the principle that if there be some connection between the plaintiff's claim for a debt and the defendant's claim to set-off, it will be inequitable to drive the defendant to a separate suit. The distinction between a legal set-off and a counter-claim was discussed in the case of *Niamat Ali* as follows:

"There is well-recognized distinction between a set-off and a counter claim. Although in one sense both are identical inasmuch as they are cross actions on the part of the defendant but a set-off is essentially a weapon of defence. If the defendant succeeds in establishing it, it serves the purpose of answering the plaintiff's claim either wholly or pro tanto because a set-off is really a debt claimed by the defendant against the plaintiff to counter-balance a debt claimed by the plaintiff against the defendant. A counter claim, on the other hand, is essentially a weapon of offence and is not really relevant as a plea in defence to the claim of the plaintiff. It enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. It's essential nature is that of a cross suit pleaded

through the means of the written statement in the same suit. Having regard to these essential features of the character of a counter claim, it is plain that a right to make a counterclaim is not admissible if it does not fall within the ambit of Order VIII Rule 6 CPC or qualify as an equitable set-off.”

“In view of the aforesaid, it is right for the learned counsel for the appellants to contend that the counter claim of the respondents cannot be supported by the provisions of Order VIII Rule 6 CPC, or as an equitable set-off for the simple reason that it is not a money claim, which is a common ingredient for both kinds of set-off. It is an independent claim for possession sought to be enforced by the defendant in his written statement. It has, however, been held that although a counter-claim which is neither a legal set-off nor an equitable set-off, yet there is nothing in law, statutory or otherwise, which precludes a Court from treating a counter claim as a plaint, in a cross suit. The reasons advanced in support of this view is that the Court has such a power are that, although a counter claim incorporated in the written statement does not conform to the requirements of the Code relating to contents of a plaint, this by itself is not sufficient to deny the Court the power and jurisdiction to read and construe the pleadings in a reasonable manner, that the Court is not prevented from separating the written statement proper from what was described as a counter-claim and treating the latter as a cross suit, and if the counter claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought, it would be open to a Court to convert or treat the counter-claim as a plaint in a cross suit.”

5. Thus, the case of *Niamat Ali v. Dewan Jairam Dass* (supra) had settled that though a counter-claim (incorporated in a written statement) which is not a set-off, is not permitted under Order VIII Rule 6 CPC, the Court can nonetheless construe such counter-claim as a plaint of a cross-suit. The case *Civil Aviation Authority, Quaid-e-Azam International Airport v. Japak International (Pvt.) Ltd.* (2009 SCMR 666), relied upon by Mr. Paracha had followed the case of *Niamat Ali v. Dewan Jairam Dass* (PLD 1983 SC 5).

6. Having discussed that, it will be seen that the Sindh Chief Court Rules as applicable to the Original Side of this Court, which

Rules would prevail over the Code of Civil Procedure, 1908 in terms of Rule 7 of the Sindh Chief Court Rules (O.S.), categorically provide for a counter-claim in addition to a set-off that is dealt with by Order VIII Rule 6 CPC. The relevant Sindh Chief Court Rules (O.S.) are :

“162. Counter claim, by defendant. (1) A defendant in a suit, in addition to be right of pleading a set-off under O. VIII, rule 6 of the Code, may set up by way of counter claim against the claims of the plaintiff any right or claim, whether such counter claim sounds in damages or not.

(2) Subject to the provisions of rule 165, such counter claim shall have the same effect as a cross-suit so as to enable the Court to pronounce final judgment in the same suit, both on the original and on the counter claim.

163. Counter Claim. Where any defendant seeks to rely upon any grounds as supporting the right of counter claim he shall, in his written statement, state specifically that he does so by way of counter claim.

164. Reply to counter claim. Where a counter claim is made in a written statement, plaintiff may deliver a reply to the counter claim within the time within which he may deliver a written statement if the counter claim were a plaint.

165. Excluding counter claim. Where a defendant sets up a counter claim, the Court may on the application of the plaintiff made in that behalf at any stage of the proceedings and after hearing the defendant, make an order directing that the counter claim may be tried separately and may make such other order as shall be just.

166. Proceeding with counter claim where action stayed. If in any case in which the defendant sets up a counter claim the suit of the plaintiff is stayed, discontinued or discontinued or dismissed, the counter claim may nevertheless be proceeded with.

167. O.XX, R. 19 to apply to decree in such suits. Sub-rules (1) and (2) of rules 19 of Order XX of the Code shall apply to the decree in a suit in which counter claim is made.”

7. The above mentioned Sindh Chief Court Rules (O.S.) are a complete answer to the objection raised by Mr. Kashif Paracha. When confronted with the aforesaid Rules, in particular Rule 162, the fall-back argument of Mr. Paracha was that even then the counter-claim of the defendants 1 to 4 does not fulfill the requirements of a plaint in a cross-suit as it lacks particulars for the relief of specific performance. However, a perusal of the written statement of the defendants 1 to 4 which incorporates the counter-claim shows that it does contain all the necessary requisites sufficient to be treated as a plaint in a suit of specific performance of the subject sale agreement.

8. For the foregoing reasons, the objections raised on behalf of the plaintiff to the counter-claim of the defendants 1 to 4 are misconceived. The counter-claim of the defendants 1 to 4 is maintainable and is expressly permitted in terms of Rule 162 of the Sindh Chief Court Rules (O.S.). **Consequently, CMA No.1222/2011 is dismissed.**

As regards Mr. Paracha's contention that the plaintiff had never been given an opportunity to reply to the said counter-claim, the order sheet of the Additional Registrar shows that on 03-05-2005, four weeks' time was allowed to the plaintiff to file a reply to the counter-claim, but no such reply was filed. However, since there does not appear to be a subsequent order de-barring the plaintiff from filing such reply, in the interest of justice, the plaintiff is allowed two weeks to file a written statement to the counter-claim of the defendants 1 to 4 with a copy in advance to the defendants 1 to 4.

JUDGE