

Before B.S. Walia, J.

AZAD SINGH—Petitioner

versus

PREMO AND OTHERS—Respondents

CR No. 2241 of 2018

February 20, 2019

Civil Procedure Code, 1908— O. 8 Rl. 6 (a)— Limitation Act, 1963—S. 3(2)(b), Art 59— Counter claim to be filed within Limitation provided under Limitation Act— Suit for declaration and permanent injunction on basis of judgment and decree dated 03.08.2009 —Petitioner proceeded ex-parte on 13.05.2013—Ex parte order set aside on 06.07.2013— Written Statement filed on 19.04.2016—Application moved for filing Counter claim on 14.02.2018 after closing of evidence of plaintiff/ respondents and initiation of evidence of defendant/petitioner declined— Held, as per S. 3(2) (b) of Limitation Act. 1963, counter claim be treated as separate suit on the date on which it is filed— Limitation for raising counter claim same as limitation for filing suit as per Art. 59 of the Act i.e. 3 years from the date the facts entitling the plaintiff to have the decree cancelled/set-aside first become known to him i.e. on 13.05.2013 when petitioner moved an application to set-aside ex parte order—Application clearly barred by limitation— Revision petition dismissed.

claim is to be treated as a separate suit on the date on which the counter claim is made in Court, and that a counter claim is nothing but a separate suit. Accordingly limitation for raising counter claim is as is provided under the Limitation Act 1963. In the instant case, the petitioner-defendant sought to challenge by way of counter claim on 14.02.2018, judgment and decree dated 03.08.2009 after having put in appearance in the civil suit on 06.07.2013. Limitation for filing a suit for setting aside a judgment and decree as per Article 59 of the Limitation Act is within 3 years from the date the facts entitling the plaintiff to have the decree cancelled or set aside first become known to him. The petitioner/defendant was proceeded against ex parte by the learned trial Court on 13.05.2013 and an application was moved by him for setting aside the ex parte order on 06.07.2013 and thereafter, written statement was filed on 19.04.2016. As per Order 8 Rule 6 (A) of the CPC, counter claim can be filed by the defendant in respect of 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. The facts of the case were to the knowledge of the petitioner/defendant on the date when he put in appearance before the learned trial Court and moved an application on 06.07.2013 to set aside the *ex parte* order dated 13.05.2013. Since a counter claim is akin to a suit, the period of limitation prescribed for filing of counter claim by the petitioner was three years in terms of Article 59 of the Limitation Act and since the counter claim was filed on 14.02.2018, the same was clearly barred by limitation. Accordingly, finding no merit in the revision petition, the same is dismissed, however with no order as to costs.

(Para 13)

Surinder Gandhi, Advocate
for the petitioner.

Atul Gaur, Advocate for
Sumeet Goel, Advocate
for respondent Nos.1 to 4.

B.S.WALIA, J (Oral)

(1) Revision petition has been filed under Article 227 of the Constitution of India, for setting aside order (Annexure P-1) dated 09.03.2018, passed by the learned Civil Judge (Junior Division), Gohana, District Sonapat, with a further prayer that the application filed to place on record counter claim dated 14.02.2018 in Civil Suit No.987 of 2013 in case titled as **Premo** versus **Azad Singh and others** pending in the Court of the learned Civil Judge (Junior Division), Gohana attached as Annexure P-2, be allowed.

(2) Brief facts of the case, leading to the filing of the revision petition are that the respondents-plaintiffs filed civil suit No.987 of 2013 for declaration and permanent injunction on the basis of judgment and decree dated 03.08.2009 titled as **Premo etc.** versus **Smt. Mukesh** in Civil Suit No.619 A of 2009, claiming themselves to be owners and in possession of the suit property.

(3) The petitioner-defendant was proceeded *ex parte* in said civil suit on 13.05.2013 whereupon an application was moved by the petitioner on 06.07.2013 to set aside the *ex parte* order. Written statement was filed on 19.04.2016 whereafter counter claim was sought

to be filed on 14.02.2018 after the evidence of the plaintiff had been closed and the petitioner-defendant had also availed two opportunities to lead his evidence.

(4) The application for filing counter claim was dismissed by the learned Civil Judge (Junior Division), Gohana on the ground that as per Order 8 Rule 6(A) of the CPC, counter claim could be filed by the petitioner- defendant in respect of cause of action accruing to the petitioner-defendant against the respondent-plaintiff either before or after the filing of the suit but before the defendant had delivered his defence or before the time limited for delivering the defence had expired. The learned trial Court further held that the petitioner-defendant had put in appearance in the civil suit on 06.07.2013 by moving an application to set aside *ex parte* order dated 13.05.2013 and filed written statement on 19.04.2016 and since a counter claim for challenging the judgment and decree dated 03.08.2009 was to be treated as a suit the period of limitation for filing of counter claim by the applicant was till 06.07.2016 in view of his having put in appearance in the civil suit on 06.07.2013, therefore, the application filed for placing on record counter claim on 14.02.2018 was barred by limitation. Besides, evidence of the plaintiff had been closed and the petitioner-defendant had also availed two opportunities to lead evidence.

(5) At the time of issuance of notice of motion and even during the hearing, learned counsel for the petitioner vehemently relied upon the decision of a Co-ordinate Bench of this Court in **Vinod Kumar** versus **Jagmohan and another**¹ to contend that Order 8 Rule 6(A) of the CPC did not impose any period of limitation for filing counter claim therefore the impugned order was liable to be set aside and the counter claim filed by the petitioner accepted.

(6) *Per contra*, learned counsel for the respondent reiterated the reasoning, leading to the passing of the impugned order and prayed for upholding of the same.

(7) I have considered the submissions of learned counsel for the parties but for the reasons recorded hereunder, I am of the considered view that the revision petition is bereft of merit and is therefore liable to be dismissed.

(8) A perusal of the decision in **Vinod Kumar's case** (supra)

¹ 2003(1) RCR (Civil) 140

reveals that the case therein pertained to a challenge to the order passed by the learned Civil Judge (Junior Division), Faridabad, allowing the application of the defendant-respondent under Order 6 Rule 17 read with Order 8 Rule 6 (A) and Section 151 of the CPC. Apparently the counter claim had been filed alongwith the written statement and it was later on that an application was moved under Order 6 Rule 17 read with Order 8 Rule 6(A) and Section 151 of the CPC for amendment of the counter claim. Prayer for amendment was to incorporate the word “possession” after the word “decree” and before the word “mandatory injunction” on the ground that by oversight, relief of possession could not be pleaded in the counter claim. The application was opposed on the ground that the relief of possession was barred by limitation and it would change the nature of the controversy.

(9) The Hon’ble Co-ordinate Bench in paragraph No.8 of its decision observed that Order 8 Rule 6(A) of the CPC did not in terms impose any period of limitation. Thereafter, by referring to the decision of Hon’ble the Supreme Court in *Mahendra Kumar* versus *State of M.P.*² the Hon’ble Co-ordinate Bench observed that the same did not deal with the amendment of counter claim but merely postulated that counter claim could be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or the time limit for filing defence had expired. The argument raised on behalf of the plaintiff-petitioner that amendment could not be allowed as the application for amendment of the counter claim had been filed after the defence had been disclosed by the defendant and written statement filed was noted by the coordinate Bench as having been specifically rejected by Hon’ble the Supreme Court while the plea that the amendment prayed for was hit by limitation was rejected by observing that Order 8 Rule 6 A CPC did not impose any period of limitation. The Hon’ble Co-ordinate Bench further observed that even as per Article 65 of the Schedule to the Limitation Act, 1963, a period of 12 years had been provided for seeking relief of possession and the plaintiff-petitioner had failed to place on record any material to show that the period of 12 years had expired. The Hon’ble Co-ordinate Bench observed that the import of the provisions’ of Order 8 Rule 6 (A) of the CPC was not that no counter claim could be filed after the written statement was filed but that any cause of action arising after the filing of the written statement could not be made the subject matter of a counter claim. The argument in the aforesaid case was that the proposed amendment seeking relief of

² (1987) SCC 265

possession was barred by limitation for as per the provisions of Order 8 Rule 6(A) of the CPC, counter claim could only be filed before the defendant had delivered his defence and that in the said case, defendant-respondent No.1 had not only closed his defence but even the final arguments had been heard on 16.01.2001. However, the aforementioned judgment is of no avail to the petitioner-defendant as the same is qua the stage at which amendment to counter claim can be made, besides limitation for the proposed amendment therein not having expired in terms of Article 65 of the Limitation Act, 1963.

(10) In *Rakesh Ahuja and another* versus *Jagan Nath*³, the petitioner-defendant therein had filed the written statement but subsequently sought amendment to the written statement so as to raise a counter claim to recover a sum of Rs.2,75,000/- on account of improvement in the construction of the house. The said amendment was declined by the trial Court on the ground that the counter claim was barred by limitation. Petitioner-defendant therein relied upon the decision in '*Vinod Kumar's* case (supra), whereas reliance by the respondent-plaintiffs therein was on the decision in '*Kohinoor Hosiery Mills and another* versus *New Bank of India and others*⁴, wherein it was held that a counter claim could be filed even after the filing of the written statement provided it was within the period of limitation. Reliance was also placed in the said case on the decision in *M/s Oriental Ceramic Products Private Limited* versus *Calcutta Municipal Corporation*⁵ wherein it was held that the time limit for filing of counter claim was the same as prescribed in relation to a particular claim or cause of action.

(11) After hearing counsel for the parties in the said case, the Hon'ble Co-ordinate Bench was of the view that the amendment in the written statement to plead counter claim was clearly beyond the period of limitation as in terms of Order 8 (6-A) (2) a counter claim had the same effect as a cross suit, so as to enable the Courts to pronounce final judgment in the same suit, both on the original claim as well as on the counter claim and that liberty to file counter claim was given to a defendant in addition to his right of pleading a set off under Order 8 Rule 6 so that all the questions between the parties were decided in one and the same proceedings. The Co-ordinate Bench further relied upon

³ 2004(3) RCR (Civil) 707

⁴ 1993(3) RRR 367 (P&H)

⁵ AIR 2000 Calcutta 17

the provisions of Section 3(2) (b) of the Limitation Act, 1963 as per which a counter claim is to be treated as a separate suit on the date on which the counter claim is made in Court. The Co-ordinate Bench by relying upon the provisions of Section 3(2) (b) of the Limitation Act, 1963 held that a counter claim was nothing but a separate suit which was appended to the written statement to facilitate the trial of all the issues between the parties, therefore, it was not correct to say that there was no limitation for filing the counter claim. The Hon'ble Co-ordinate Bench further held that limitation for raising a counter claim was as provided under the Limitation Act. The Co-ordinate Bench, while referring to the decision in '*Vinod Kumar's* case (supra), observed that the Court in the said case had found as a matter of fact that limitation for claiming possession was 12 years besides there was nothing on the record to show that the period of 12 years had expired, moreover, the attention of the Court had not been drawn to the earlier judgments referred to in '*Rakesh Ahuja's* case (supra), as well as the statutory provisions contained in Section 3 of the Limitation Act, according to which the period of limitation for filing of a counter claim is as is provided under the Limitation Act. Accordingly, the claim sought to be raised by way of counter claim was held to be barred by limitation.

(12) Hon'ble the Supreme Court in '*Mahendra Kumar and another* versus *State of Madhya Pradesh and others*⁶ held that filing of a counter claim by the defendant after he had filed the written statement was not barred as the cause of action for the counter claim has arisen before the filing of the written statement and that under Article 113 of the Limitation Act, 1963, period of limitation of three years from the date the right to sue accrued had been provided for any suit for which no period of limitation was provided elsewhere in the Schedule and it was not disputed that a counter claim, which was treated as a suit under Section 3(2)(b) of the Limitation Act, 1963, had been filed by the appellants therein within three years from the date of accrual of the right to sue. Relevant extract of the decision in *Mahendra Kumar's* case (supra) is reproduced as under:-

“Rule 6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under R. 6A(1) is that a counter claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence

⁶ AIR 1987 SC 1395

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. Therefore the counter claim filed by the appellant after filing of the written statement cannot be said to be not maintainable, as the cause of action for the counter claim had arisen before the filing of the written statement.

Under Art. 113, Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter claim, which is treated as a suit under S. 3(2) (b). Limitation Act, had been filed by the appellants within three years from the date of accrual to them of the right to sue.”

(13) In the light of the position as noted above, especially the provisions of Section 3 (2) (b) of the Limitation Act 1963, a counter claim is to be treated as a separate suit on the date on which the counter claim is made in Court, and that a counter claim is nothing but a separate suit. Accordingly limitation for raising counter claim is as is provided under the Limitation Act 1963. In the instant case, the petitioner-defendant sought to challenge by way of counter claim on 14.02.2018, judgment and decree dated 03.08.2009 after having put in appearance in the civil suit on 06.07.2013. Limitation for filing a suit for setting aside a judgment and decree as per Article 59 of the Limitation Act is within 3 years from the date the facts entitling the plaintiff to have the decree cancelled or set aside first become known to him. The petitioner/defendant was proceeded against ex parte by the learned trial Court on 13.05.2013 and an application was moved by him for setting aside the ex parte order on 06.07.2013 and thereafter, written statement was filed on 19.04.2016. As per Order 8 Rule 6 (A) of the CPC, counter claim can be filed by the defendant in respect of 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. The facts of the case were to the knowledge of the petitioner/defendant on the date when he put in appearance before the learned trial Court and moved an application on 06.07.2013 to set aside the ex parte order dated 13.05.2013. Since a counter claim is akin to a suit, the period of limitation prescribed for filing of counter claim by the petitioner was three years in terms of Article 59 of the Limitation Act and since the counter claim was filed on 14.02.2018, the same was

clearly barred by limitation. Accordingly, finding no merit in the revision petition, the same is **dismissed**, however with no order as to costs.

(Sumati Jund)