



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 5TH DAY OF SEPTEMBER 2023 / 14TH BHADRA,
1945

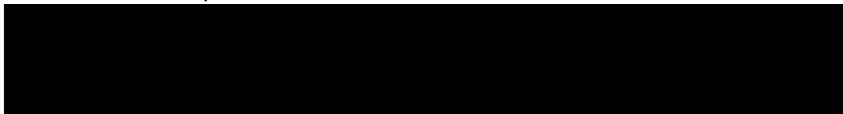
RSA NO. 395 OF 2023

AGAINST THE ORDER/JUDGMENT IN AS 10/2019 OF SUB COURT,
CHENGANNUR

OS 136/2013 OF MUNSIFF COURT, MAVELIKKARA

APPELLANT/APPELLANT/COUNTER CLAIM DEFENDANT:

ANIL KUMAR, AGED 52 YEARS



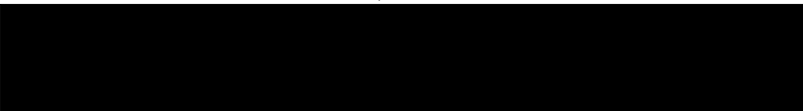
BY ADV R.SUNIL KUMAR

RESPONDENTS/RESPONDENTS/COUNTER CLAIM PLAINTIFFS:

1 SUNIL KUMAR, AGED 56 YEARS,



2 KUSHALA SUNIL KUMAR, AGED 54 YEARS



BY ADV HENA BAHULEYAN FOR R1 & R2

THIS REGULAR SECOND APPEAL HAVING COME UP FOR
ADMISSION ON 05.09.2023 ALONG WITH RSA.NO.223/2023,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



2023/KER/54339

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 5TH DAY OF SEPTEMBER 2023 / 14TH BHADRA, 1945

RSA NO. 223 OF 2023

AGAINST THE ORDER/JUDGMENT IN AS 9/2019 OF SUB COURT, CHENGANNUR

OS 136/2013 OF MUNSIFF COURT, MAVELIKKARA

APPELLANT/APPELLANT/PLAINTIFF:

ANIL KUMAR, AGED 52 YEARS

[REDACTED]

1.

BY ADV R.SUNIL KUMAR

RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 SUNIL KUMAR, AGED 56 YEARS,

[REDACTED]

2 KUSHALA SUNIL KUMAR, AGED 54 YEARS

[REDACTED]

BY ADV HENA BAHULEYAN FOR R1 & R2

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 05.09.2023 ALONG WITH RSA.NO.395/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**"C.R"****COMMON JUDGMENT**Dated this the 5th day of September, 2023

RSA No.223 of 2023 has been filed by the appellant in A.S.No.9 of 2019 on the files of the Sub Court, Chengannur, challenging judgment dated 30.07.2019 in the above appeal.

2. RSA No.395 of 2023 is also one filed by the same appellant challenging judgment dated 30.07.2019 in A.S.No.10 of 2019 on the files of the Sub Court, Chengannur.

3. Respondents herein are the defendants in O.S.No.136 of 2013 on the files of the Munsiff Court, Mavelikara, wherefrom A.S.Nos.9/2019 and 10/2019 were filed before the Sub Court. The present Second Appeal arises out of A.S.Nos.9/2019 and 10/2019. As per the trial court decree and judgment, the learned Munsiff dismissed the suit filed by the plaintiff for declaration of title of the plaintiff over the plaint schedule items and decreed the counter filed by the 1st defendant allowing recovery of possession on the basis of Ext.B1/A2 title of the 1st defendant. In fact, the suit was one



filed by the appellant herein as plaintiff seeking declaration of title over the plaint A and B schedule properties and also seeking permanent prohibitory injunction restraining the defendants from obstructing running of a bakery business in plaint B schedule room.

4. Resisting the contention raised by the appellant herein, the first respondent/first defendant in the above suit filed counter-claim contending that he obtained absolute title in respect of the plaint A and B schedule items by virtue of sale deed No.1422 of 1999 and accordingly, the first defendant sought for declaration of his title over counter-claim item No.1 property and counter-claim item No.2 shop room situated therein (The same are plaint A and B schedule items respectively).

5. The parties in this Second Appeal shall be referred as 'plaintiff' and 'defendant' for easy reference, hereafter.

6. The trial court ventured the matter. PWs 1 and 2 were examined and Exts.A1 to A7 were marked on the side of the plaintiff. DW1 and DW2 were examined and Exts.B1 to B8 were marked on the side of the defendants/counter-claim plaintiffs. Ext.C1 was also marked.



7. The trial court appraised the evidence and finally dismissed the suit and decreed the counter-claim as under.

"In the result, the suit is dismissed and counter claim is allowed in part as follows :

- (1) "It is hereby declared that the counterclaim 1st plaintiff (1st defendant) has got right and title over counterclaim schedule item No.1 property and counterclaim schedule item No.2 shop room.*
- (2) Counterclaim defendant/original plaintiff is hereby directed to hand over vacant possession of counter claim schedule item No.2 shop room to the counter claim 1st plaintiff, within one month from the date of the decree. Failing which, the counter claim 1st plaintiff is at liberty to evict the counter claim defendant through the process of the court.*
- (3) There will not order as to costs."*

8. Separate appeals were filed before the appellate court, challenging dismissal of the suit as well as grant of decree in the counter-claim. On re-appreciation of the evidence, the appellate court dismissed both appeals and confirmed the decree and judgment of the trial court.

9. Heard the learned counsel appearing for the appellant/plaintiff and the learned counsel appearing for the respondents/defendants.

10. The learned counsel for the plaintiff submitted that the counter-claim filed by the defendants in the suit is not in



conformity with the provisions of Order VIII Rule 6B of the Code of Civil Procedure (`CPC' hereafter) since the counter-claim shall mandatorily be filed in the form of a plaint as provided under Order VII of CPC.

11. Learned counsel for the plaintiff placed a copy of the counter-claim for perusal of this Court to buttress his contention that the counter-claim filed by the defendants did not justify the mandate of Order VIII Rule 6B read with Order VII CPC.

12. But this contention was specifically opposed by the learned counsel for the defendants and submitted that the counter-claim filed by the defendants is in accordance with the mandate of Order VIII Rule 6B read with Order VII of CPC and therefore this contention shall not sustain. It is also submitted that there is nothing in this matter to revisit the concurrent verdicts of the trial court and the appellate court and the Second Appeal deserves dismissal.

13. In view of the rival submissions, this Appeal stands admitted raising the following questions of law:

(i) What are the requirements to be fulfilled for filing a counter-claim as mandated under Order VIII Rule 6A and 6B



of CPC?

(ii) Can minor omissions in fulfilling the requirements while filing the counter-claim are grounds to non-suit the counter-claim plaintiff/plaintiffs at the first or second appellate stage?

(iii) When omissions, if any, in the form and content of the counter-claim to be pointed out at the appellate stage (first and second), can the same alone be a ground to dismiss the counter-claim?

14. In order to answer the above legal questions, it is necessary to refer Order VIII Rule 6A & 6B of CPC. Order VIII Rule 6A(1) provides that 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. Proviso states that, such counter claim shall not exceed to pecuniary limits of the jurisdiction of the court. As per sub rule 1 of Rule 6A, 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.

15. As per sub rule 4 of Rule 6A, the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Order VIII Rule 6B provides that, where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall in his written statement, state specifically that he does so by way of counter-claim.

16. Therefore, the legal position is clear on the point that even after filing written statement, a separate counter-claim at the instance of the defendant can be filed by resorting to Order VIII Rule 6A(1) of CPC. Decision of the Apex Court reported in [AIR 1987 SC 1395 : 1987 KHC 661], **Mahendra Kumar & anr. v. State of M.P & Ors.**, is on this point. Similarly, a defendant is entitled to raise counter-claim in the written statement as of right and the defendant can also raise counter-claim by amending the written statement. Decision reported in [2007 (1) KLT 92 : 2006 KHC 1516 : 2006 (3) KLJ 631], **Kerala Nadvathur Mujahideen v. Hussain Madavoor**, is on this point. It is also well settled that only if



the cause of action arose prior to filing of written statement, either by amending the written statement or as a separate claim, counter-claim can be filed (see decision of this Court reported in [2015 KHC 624] **Xavier & Ors. v. Maruvakkad Padasekhara Karshaka Union**).

17. Coming to the form and content of the counter-claim, it shall be as provided under sub rule 4 of Rule 6A of Order VIII and the same shall be governed by the rules applicable to plaints.

18. Order VII Rule 1 deals with the particulars to be contained in plaint and the same are as under:

(a) *the name of the Court in which the suit is brought;*

(b) *the name, description and place of residence of the plaintiff;*

(c) *the name, description and place of residence of the defendant, so far as they can be ascertained;*

(d) *where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect, and, in the case of a minor a statement regarding his age to the best of the knowledge and belief of the person verifying the plaint;*

(e) *facts constituting the cause of action and when it arose;*

(f) *the facts showing that the Court has jurisdiction;*

(g) *the relief which the plaintiff claims;*



(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits."

Thus it appears that a counter-claim shall be filed incorporating items (a) to (i) herein above referred.

19. On perusal of the copy of the counter-claim, the name and address of the parties are not stated in detail in the counter-claim in tune with the mandate of Order VII Rule 1(b) and 1(c). Apart from the said omission, the counter-claim would justify the mandate of Order VIII Rule 6A read with Order VII Rule 1 of CPC.

20. It is true that when the statute mandates the form and content of a counter-claim, the counter-claim shall be in the said format and any omission in complying the rules in the form and content of the counter-claim, that should be raised before the trial court by the adverse party so as to get the defect cured, since the same is a curable irregularity. If omissions of such a nature are pointed out after a full-fledged trial before the first or second appellate court, the same shall not be a ground to reject the counter-claim and such omission



to be ignored in the interest of justice. Therefore, the questions of law raised in this appeal are answered as above, holding that the plaintiff herein shall not succeed in this appeal merely on the basis of omissions pointed out in the counter-claim filed by the 1st defendant.

21. In the case at hand, the case put up by the appellant/plaintiff before the trial court was that Ext.A2/B1 sale deed No.1422 of 1999 of Mavelikara Sub Registry Office was executed in the name of the first defendant as a Binami and the funds for execution of the same was met by the plaintiff. Therefore, the plaintiff is the title holder of the plaint A and B schedule items (counter-claim 1 and 2 items). Whereas the first defendant asserted title based on Ext.A2/B1 and submitted that he had purchased the plaint schedule/counter-claim schedule items by spending his own money. The trial court appraised the rival contentions. Before the trial court, PW1, the plaintiff, and PW2, the mother of the plaintiff, were examined and PW1 deposed before the court that he had sent money for purchase of the property and for the construction of a shop room therein and the first defendant withdrew the money from the mother's account and



purchased the property and made construction therein. Even though PW1 given such oral evidence, nothing produced before the trial court to substantiate transfer of money by PW1 in the account of PW2 or withdrawal of the same for the purpose of purchase of property or for making construction therein by the 1st defendant. It is true that PW2 also given oral evidence in this regard without support of any documents. At the same time, the first defendant produced Ext.B6 to show that he had drawn an amount of Rs.50,000/- on 16.12.1999 as personal loan from the Bank by pledging licence of `Devika Bakery`. The nomenclature of the bakery business is now going on in the plaint B schedule/counter-claim item No.2 is also `Devika Bakery`. That apart, an independent witness was examined from the side of the defendants as DW2 and he had given evidence before the trial court that first defendant borrowed Rs.50,000/- in 1999 for purchase of the property and for construction of the shop room.

22. In this matter, the trial court as well as the first appellate court found on evidence that the plaintiff miserably failed to prove title over the plaint A and B schedule items and nothing substantiated to ignore or to read Ext.A2/B1 as a



sham document or a document executed in the name of the first defendant as a name lender. To the contrary, both courts below concurrently found that the first defendant purchased the property and constructed building therein and therefore, the first defendant is entitled to declare his title in relation to the counter-claim item Nos.1 and 2 property and to get recovery of possession of the same.

23. Thus on appreciation of the available materials, nothing substantiated to revisit the concurrent verdicts rendered by the trial court as well as the appellate court after correctly appreciating and re-appreciating the evidence available. Therefore, the Second Appeals must fail and are liable to be dismissed.

24. In the result, the Second Appeals fail and are accordingly dismissed. Consequently the decree and judgment impugned herein stand confirmed. Considering the nature of this case, parties are directed to suffer their respective costs.

25. Faced with the situation, the learned counsel for the plaintiff sought breathing time to surrender vacant possession of the building to the 1st defendant on the submission that at



present the plaintiff has been running bakery business in the shop room and he wants to arrange a suitable building to shift his business. Therefore, one year time was sought for.

26. The learned counsel for the first defendant zealously opposed grant of time and submitted that the first defendant is a differently-abled person and he has been trailing to survive, since no income by way of rent or damages for use and occupation was granted by the trial court. Therefore, one month time alone is liable to be granted.

27. In consideration of the fact that the plaintiff has been running bakery business in the plaint B schedule item, I am inclined to grant two months' time to the plaintiff to vacate counter-claim items, provided that he should file an affidavit before the trial court in the execution proceedings pending, stating that he shall vacate the property and the building within a period of two months, without raising any objection.

28. It is specifically made clear that if such an affidavit is not filed within a period of three weeks from today, the breathing time granted by this Court will not be available and the execution court is at liberty to execute the decree as such without fail.



The Registry is directed to forward a copy of this judgment for information and compliance.

Sd/-

**A. BADHARUDEEN
JUDGE**

csf