

**CIVIL REVISION****PRESENT: THE HON'BLE MR JUSTICE KALIDAS MUKHERJEE****JUDGMENT ON: 29.03.2010.****C.O. NO. 2974 OF 2006****Somnath Mitra & Ors.****Vs.****Amar Krishna Basu****POINTS:**

COUNTER CLAIM- Cause of action for this counter-claim arose before the filing of the written statement- Court below whether justified in rejecting the application-Code of Civil Procedure, 1908

O 8 R 9

**Facts:**

The opposite party No. 1 herein filed a suit for declaration alleging that the judgment and decree passed by the learned 10<sup>th</sup> Court, Civil Judge (Senior Division), Alipore was not binding upon the plaintiff and there was no legal efficacy and validity. The contention of the O.P. No. 1, being the plaintiff in the said suit, is that after the death of the original owner in respect of the suit house comprising the suit premises, his widow described herself as the executrix of the will executed by the original owner and granted monthly tenancy to the plaintiff/O.P. No. 1 herein in respect of the entire second floor of the suit premises. Subsequently, the plaintiff/O.P. No. 1 allowed the proforma O.P. No. 2 to stay in one room of the second floor of the suit premises as licensee. The petitioner/defendant No. 1 in collusion with the proforma opposite party Nos. 2 & 3 obtained a decree for eviction in respect of one room of the second floor of the suit premises. The O.P. No. 1 filed written objection against the said application and the learned Trial Court by the order

impugned rejected the application of the petitioner holding that the counter-claim was filed after the filing of the written statement.

**HELD:**

The cause of action for this counter-claim accruing to the defendant against the plaintiff arose before the filing of the written statement of the defendant. The defendant has also made it clear in the application under Order VIII Rule IX of the Code of Civil Procedure by making necessary averment incorporating the counter-claim. The learned Court below failed to consider the provision contained in order VIII Rule IX of the Code of Civil Procedure from its right perspective and was not justified in rejecting the application, necessitating thereby interference in the instant application under Article 227 of the Constitution of India.

Para-13

**CASES CITED:**

1. Mahendra Kumar and another Vs. State of M.P. and other (para 15) AIR 1987 SC 1395.
2. M/S. Raja Ram Dal Mill Vs. Smt. Gayatri Debi (2010) 1 WBLR (Cal) 343.
3. Narayan Chandra De Vs. Pratirodh Sahini AIR 1991 Calcutta 54.

For the petitioner:            Mr. Jiban Ratan Chatterjee  
   Mr. Partha Pratim Roy

For the Respondent No.1: Miss Dipti Sen

**THE COURT:**

1. This is an application under Article 227 of the Constitution of India assailing the order No. 61 dated 07.6.2006 passed by learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Alipore in T.S. No. 328 of 1996.
2. The opposite party No. 1 herein filed a suit for declaration alleging that the judgment and decree passed in T.S. No. 26 of 1994 of the learned 10<sup>th</sup> Court, Civil Judge (Senior Division), Alipore was not binding upon the plaintiff and there was no legal efficacy and validity. The suit was instituted by the O.P. No. 1 in the Court of learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Alipore being T.S. No. 328 of 1996. The contention of the O.P. No. 1 being the plaintiff in the said suit is that one Raj Kumar Ghosh was the original owner in respect of the suit house comprising the suit premises. After the death of Raj Kumar Ghosh his widow described herself as the executrix of the will executed by said Raj Kumar Ghosh and granted monthly tenancy to the plaintiff/O.P. No. 1 herein in respect of the entire second floor of the suit premises. Subsequently, the plaintiff/O.P. No. 1 allowed the proforma O.P. No. 2 to stay in one room of the second floor of the suit premises as licensee. It has been alleged that the petitioner/defendant No. 1 in collusion with the proforma opposite party Nos. 2 & 3 obtained a decree for eviction in T.S. No. 102 of 1993 in respect of one room of the second floor of the suit premises. The O.P. No. 1/plaintiff is the tenant in respect of the entire second floor of the suit premises and the defendant No. 1/petitioner herein on the strength of the decree passed in T.S. No. 26 of 1994 of the learned 10<sup>th</sup> Court of Civil Judge (Senior Division), Alipore is now trying to evict the said plaintiff/O.P. No. 1 from the tenanted portion. For the said reasons, a suit was filed before the learned Court below. The petitioner herein being the defendant has been contesting the suit by filing written statement denying all the material allegations made in the plaint. It is

the specific defence of the petitioner in the said suit that the alleged tenancy of the plaintiff/O.P. No. 1 is false and the O.P. No. 1 has stated falsely that he is a tenant in respect of the entire second floor. On 20.4.2006 a petition for leave of the Court and the additional written statement was filed by the petitioner herein in the said suit with a counter-claim, inter alia, praying for recovery of khas possession from the suit premises mentioned in the schedule of the counter-claim and in the proposed schedule of the additional written statement. The O.P. No. 1 filed written objection against the said application and the learned Trial Court by the order impugned rejected the application of the petitioner holding that the counter-claim was filed after the filing of the written statement. Being aggrieved by the said order passed by the learned Trial Court the defendant has preferred the instant application under Article 227 of the Constitution of India.

3. The learned Counsel appearing on behalf of the petitioner submits that the written statement was filed on 27.3.2001 and the cause of action arose on 14.6.1996. It is submitted that the counter-claim was filed in April, 2006. The learned Counsel has referred to and cited the decisions reported in *AIR 1987 SC 1395 (Mahendra Kumar and another Vs. State of M.P. and other (para 15) & (2010)1 WBLR (Cal) 343 [M/S. Raja Ram Dal Mill Vs. Smt. Gayatri Debi]*.
4. The learned Counsel appearing for the O.P. No. 1 submits that the order impugned is appealable one and the instant application under Article 227 of the Constitution of India is not maintainable. The learned Counsel has referred to the decision reported in *AIR 1991 Calcutta 54 [Narayan Chandra De Vs. Pratirodh Sahini]*.

5. As regards the question of maintainability of the instant application under Article 227 of the Constitution of India, it has been held in the case of *Narayan Chandra De Vs. Pratirodh Sahani (Supra) in para 15* as follows:-

***“15. Ours is a completely different case. The defence laid a claim in a suit. The court finally dismissed the claim on a finding that the counter claim was not maintainable. It thereby finally adjudicated the rights of the parties involved in the cross-suit of the opposite party.”***

In the aforesaid case upon final adjudication the counter-claim was found not maintainable. But the instant case stands in a different footing. The defendant filed additional written statement with counter claim and also with the prayer for leave of the Court. Such application was dismissed by the order impugned. As there was no final adjudication of the rights of the parties, the aforesaid decision as referred to by the learned Counsel appearing for the O.P. No. 1 is not applicable in the facts of the instant case.

6. The learned Judge of the Court below rejected the application under Order VIII Rule IX of the Code of Civil Procedure holding that the written statement was filed earlier by the defendant wherein there was no mention of the counter claim and, as such, the counter claim could not be accepted.
7. The learned Court below further held that in the additional written statement there was a proposed amendment, but, it was not clear what did the defendant mean by virtue of that proposed amendment. However, the learned Court held that if definite situation arose in that case the defendant could file additional written statement.
8. The provision contained in Order VIII Rule 6-A of the Civil Procedure Code runs thus:-

***“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.”*

9. On perusal of the papers filed in support of the instant application it appears that the written statement was filed by the defendant No.1 on 27th March, 2001. Thereafter, on 20.04.2006 an application under Order VIII Rule IX read with Section 151 of the Code of Civil Procedure was filed. The learned Counsel appearing for the petitioner herein relied on the decision reported in 2010 (1) WBLR (Cal) 343 (Supra). In paras 31 & 33 of the aforesaid decision it has been observed as follows:-

*“31. It, thus, appears that a counter-claim against the claim of the plaintiffs can be set up in respect of a cause of action accruing either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. This Court in its order dated 27<sup>th</sup> February, 2008 held that the restriction, thus, appears to be in respect of accrual of the cause of action. Such cause of action is required to accrue either before or after filing of the suit but before filing of the written statement or before expiry of the time limited for delivering his defence.”*

*“33. In the case under reference, the defendant filed written statement on 14<sup>th</sup> June, 2001. Thereafter, on 8<sup>th</sup> January, 2002, the defendant filed a counter-claim under Order VIII Rule 6A of the Code of Civil Procedure. It was, thus, manifestly done after filing of the written statement. But since the cause of action of such counter-claim cannot be said to have accrued after filing of the written statement, this Court finds no reason nor any rational justification for not entertaining the same. Thus, the order of the learned trial Court whereby the counter-claim as set up was entertained did not require any interference.”*

10. In another decision reported in AIR 1987 SC 1395 (Supra) it has been held in para 15 as follows:-

***“15. The next point that remains to be considered is whether Rule 6A(1) of Order VIII, Civil P.C. bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for 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 Rule 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 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 .....*”**

11. In the instant case the written statement was filed on 27<sup>th</sup> March, 2001. In the additional written statement under Order VIII Rule IX together with the counter-claim as mentioned in the schedule for the proposed amendment, it has been mentioned in para 12 that the cause of action for this present counter-claim arose on or about 14.6.1996 and the same has been continuing till date.
12. In the application under Order VIII Rule IX read with Section 151 of the Code of Civil Procedure for additional written statement the defendant has incorporated a prayer to allow the petitioner to file the written statement as mentioned in the schedule. In the said application a schedule has been mentioned as the proposed amendment. It has been stated therein that at page 7 of the written statement, after the paragraph No. 22, the new paragraphs, indicating the same as paragraphs No. 22A, 22B and 22C and so on etc. be incorporated. In paragraph No. 22D, it has been stated that in the prayer portion of the original written statement there will be the addition of the words “and to decree the counter-claim of this defendant No. 1 for recovery of possession from the suit premises.”
13. Relying on the decisions as referred to and cited by the learned Counsel for the petitioner, I find that the cause of action for this counter-claim accruing to the defendant against the plaintiff arose before the filing of the written statement of the defendant. The defendant has

also made it clear in the application under Order VIII Rule IX of the Code of Civil Procedure by making necessary averment incorporating the counter-claim. The learned Court below failed to consider the provision contained in order VIII Rule IX of the Code of Civil Procedure from its right perspective and was not justified in rejecting the application, necessitating thereby interference in the instant application under Article 227 of the Constitution of India. The impugned order passed by the learned Court below is hereby set aside.

14. Having heard the learned Counsel appearing for the parties and in view of the discussions made hereinabove, I allow the application under Order VIII Rule IX of the Code of Civil Procedure filed by the defendant No. 1/petitioner herein.
15. In the result, the application under Article 227 of the Constitution of India is allowed. There will be no order as to costs. The learned Court below will proceed to hear the suit according to law. Interim order passed on October 27, 2006 stands vacated.
16. Let a copy of this judgment be sent to the learned Court below immediately.
17. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J. )