

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1131 of 2019**

Sima Devi @ Sima Kumari Daughter of Jawahar Singh Resident of Madharpur, Bichala Tola, Post Office and Police Station- Teghra, District- Begusarai.

... .. Petitioner

Versus

Manoranjan Singh Son of Balmiki Singh Resident of Village- Barahiya, Police Station- Barahiya, Tola Ramcharan, Ward No. 08, District- Lakhisarai.

... .. Respondent

Appearance :

For the Petitioner : Mr. J. S. Arora, Sr. Advocate
Mr. Manoj Kumar, Advocate
For the Respondent : Mr. Om Prakash Maharaj, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date :03-04-2024

The petitioner has filed the present petition under Article 227 of the Constitution of India for setting aside the order dated 29.06.2019 passed in Miscellaneous Case No. 12 of 2018 by the learned Principal Judge, Family Court, Begusarai whereby the miscellaneous case filed by the petitioner for deciding the counter claim made in Matrimonial Case No. 18 of 2011/11 of 2015 has been dismissed.

02. Briefly stated the facts of the case are that the respondent filed a matrimonial case against the petitioner vide Matrimonial Case No. 18 of 2011/11 of 2015 in the court of learned District Judge, Munger/Lakhisarai, which was later on transferred to the Family Court at Begusarai. The petitioner appeared and filed her written statement claiming that the



respondent has wrongly retained the *stridhan* of the petitioner and prayed that those belongings and *stridhan* of the petitioner which the petitioner was entitled, be returned to her, thus, purportedly making a counter claim in the written statement. Subsequently, the learned Principal Judge, Begusarai vide order dated 16.04.2018 dismissed the matrimonial case of the respondent. However, as the counter claim of the petitioner was not considered while dismissing the matrimonial case filed by the respondent, the petitioner filed the miscellaneous case bearing no. 12 of 2018 for consideration of her counter claim and to decide the same on merit. The said miscellaneous case was dismissed at the stage of admission vide impugned order dated 29.06.2019 by the learned Principal Judge, Family Court, Begusarai.

03. Learned senior counsel, Mr. J. S. Arora, appearing on behalf of the petitioner submitted that the learned Family Court has completely misconstrued the provisions of Order 8 Rule 6A to 6D of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). Mr. Arora further submitted that the learned Family Court committed jurisdictional error by not appreciating the fact that in the matrimonial case no. 18 of 2011/11 of 2015, while filing written statement, this petitioner as



a respondent of that case had made counter claim and it has been wrongly held by the learned court below that there was no counter claim. The learned Family Court further committed jurisdictional error by not appreciating the law that under Order VIII Rule 6A of the Code and its analogues provisions if a counter claim has been made, the same has to be treated as plaint of the defendant of that suit and to be decided as a suit. The learned Family Court has also not considered that dismissal of the suit has no effect on counter claim made in the same suit, which is to be decided on its own merits. Mr. Arora further submitted that the learned family court even misconstrued the pleadings and committed an error on record while holding that the matrimonial case has been decided on merit and it did not find any counter claim and further held that the said suit for the purpose of counter claim was not liable to be restored and wrongly dismissed the miscellaneous case at the stage of admission itself.

Mr. Arora further submitted that there are three modes of making counter claim and a counter claim cannot be rejected or refused to be considered only on the ground that it was not made in the proper format or not filed as a separate petition. Mr. Arora further drew the attention of the Court towards written



statement filed by the petitioner especially, paragraph no. 16 and the last paragraph of the relief portion wherein the petitioner has specifically made prayer to the learned Family Court that the respondent herein be directed to return all the gifts given by the parents of the petitioner. Mr. Arora further submitted that Section 23A of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the HMA') provides that in any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent can make a counter claim for any relief under this Act to which he or she would have been entitled. Thus, it was perfectly legal for the petitioner to make her counter claim in her written statement itself and as such there is no bar. Mr. Arora relied on paragraph-21 of the decision of Kerala High Court in the case of *Anil Kumar v. Sunil Kumar and Anr.*, reported in **2023 SCC OnLine Ker 8218** to stress the point that any omission with regard to form and contents of the counter claim is a curable defect and the same should be allowed to be removed in the interest of justice. Further, Section 23A of the HMA provides no particular format for filing a counter claim and under Section 20 of the Family Courts Act, 1984 (for short 'the FC Act'), provisions of the Family Courts Act, 1984 have overriding effect on all other statutory provisions since the FC



Act governs the proceedings under the HMA.

04. On the other hand, learned counsel appearing on behalf of the respondent vehemently contended that there is no merit in the present petition and the impugned order does not need any interference by this Court since it is a perfectly legal order. Learned counsel further submitted that the counter claim was required to be pleaded specifically, so that the learned Family Court could have decided it. On this aspect, learned counsel relied on the decision of Hon'ble Apex Court in the case of *Nitaben Dinesh Patel v. Dinesh Dahyabhai Patel*, reported in *(2021) 20 SCC 210*. Learned counsel further submitted that the counter-claim filed by the petitioner was not in conformity with the provisions of Order VIII Rule 6B of the Code since the counterclaim shall mandatorily be filed in the form of a plaint as provided under Order VII of the Code. Thus, the counter claim should contain all the particulars as are required in plaint under Order VII Rule 1 of the Code. In this regard, learned counsel also relied on the decision of Kerala High Court in the case of *Anil Kumar v. Sunil Kumar and Anr.*, reported in *2023 SCC OnLine Ker 8218*. Learned counsel further submitted that since the counter claim has not been filed giving all the particulars by the petitioner, the learned Family Court rightly held that the



miscellaneous case of the petitioner was not maintainable. Learned counsel further relied on the decision of Madras High Court in the case of *Ramani Ammal v. Susilammal*, reported in *AIR 1991 MADRAS 163*, on the proposition of law that the trial court must make a noting about counter claim of the defendant and merely treating it as pleadings and framing an issue and not treating as a counter claim would not suffice. If the contention of the defendant was not treated as a counter claim by the learned trial court the that would be the end of the matter.

05. I have given my thoughtful consideration to the rival submission of the parties. The short question involved in the present case is whether any claim made in the written statement by the respondent-wife regarding return of the gifts given at the time of marriage to the petitioner-husband could be treated as counter claim. Counter claim has been provided under Order VIII Rule 6A of the Code, which reads as under:-

“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 plaints.”

06. Thus, the defendant may set up a counter claim against the claim of the plaintiff with regard to his right or claim in respect of a cause of action accruing to the defendant against the plaintiff. Such counter claim would be treated as a cross suit and the plaintiff has been given liberty to file a written statement in answer to such counter claim of the defendant within the period fixed by the court. At the same time, it has been provided that the counter claim shall be treated as a plaint and governed by the rules applicable to plaints.



07. Order VII Rule 1 of the Code deals with form and contents of the plaint, which reads as under:-

“1. Particulars to be contained in plaint.—The plaint shall contain the following particulars:—

(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;

(e) the 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.”

From conjoint reading of Order-VIII Rule 6A and Order VII Rule 1 of the Code, it is obvious that the counter claim must contain the particulars as provided in Order-VII Rule 1 of the Code.

08. Chapter-III of the FC Act is related to the



‘jurisdiction’ of the Family Court and Section of the FC Act reads as under:-

“7. Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

***Explanation.**—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—*

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the



matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.”

Explanation (c) is relevant for the purpose of the present case since the respondent-wife has prayed from the petitioner-husband to return of the gifts which were given to him at the time of marriage.



09. Section 20 of the FC Act gives the provisions of this Act an overriding effect on other statutory provisions which are inconsistent with the provisions of the FC Act.

10. Chapter IV of the FC Act provides ‘the procedure’ to be adopted by the Family Courts and Section 10 of the FC Act reads as under:-

“10. Procedure generally.—(1)
Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a



view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

From the aforesaid provision, it is obvious that unless inconsistent, the provisions of the Code shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure before a Family Court.

11. Now, the parties were before the Family Court and they had been agitating the matter under the provisions of the HMA and the FC Act. Section 23A of the HMA reads as under:-

“23A. Relief for respondent in divorce and other proceedings.—*In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner’s adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner’s adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.”*



The aforesaid provision gives right to the respondent to not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but can also make a counter-claim for any relief under this Act on that ground. At the same time, if the petitioner's adultery, cruelty or desertion is proved, the court may grant the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

12. Coming back to the facts of the case, the admitted position of the parties is as follows:-

(i) the respondent of this case filed a petition for dissolution of his marriage against the petitioner of this case. The respondent-wife/petitioner appeared and filed her written statement denying the claim of the petitioner-husband/respondent.

(ii) The respondent wife further claimed that the petitioner-husband was given gift articles worth of Rs. 8,35,000/- and in relief portion of her written statement, she claimed return of gift articles.

13. The FC Act, as such, does not provide for making any counter claim. However, Section 23A of the HMA provides for such eventuality. But, at the same time, the HMA is silent on



the point of form, contents and particulars to be contained in the counterclaim. As both the HMA and the FC Act are silent on the format and particulars of the counter claim, then one has to fall back on Section 10 of the FC Act providing procedure to be followed by the Family Courts and the said procedure is to be governed by the provisions of the Code. So, a counter claim even before the Family Court has to be filed in terms of provisions of Order VIII Rule 6A and Order-VII Rule 1 of the Code and there can be no deviation from the same.

14. From the discussion made so far, it is crystal clear that whatever is being claimed by the respondent-wife, the petitioner herein, the same is not in format as prescribed under the provisions of the Code. It is often said that procedural law is handmaiden of justice and should be used to further the cause of justice. But such provisions have been enacted by the legislature to facilitate the administration of justice and could not be simply sacrificed on some righteous notion of morality to deliver justice at any cost to one party without thinking whether the same could cause injustice to the other side. Providing of particular format and specifying its contents, has a salutary effect. If a defendant files a counter claim, and the same is in accordance with the provisions of the Code, the plaintiff also gets a right to file a



written statement in answer to the counter claim. If what has been submitted by Mr. Arora that claim made in the written statement be taken as counter claim, the same would amount to depriving the plaintiff from his right to file the written statement. It could never be the intent of the legislature that the other side should not be given opportunity to properly defend himself, if the submission made on behalf of the respondent-wife/petitioner is accepted.

15. Another issue, which has not been addressed by either of the parties is whether return of gift articles could be claimed under the HMA or the FC Act.

16. The dispute over properties between the parties of the marriage can though be agitated under the FC Act, but the FC Act does not provide for filing a counter claim. However, the HMA provides for filing counter under Section 23A of the HMA. On the scope of the counterclaim under Section 23A of the HMA, the Hon'ble Supreme Court in the case of *Nitaben Dinesh Patel* (supra) in Paragraph-43 held that by way of counter claim only the relief(s), namely, under Section 9 (Restitution of conjugal rights); Section 10 (judicial separation); Sections 11 & 12 (declaration of marriage between the petitioner and the respondent void) and Section 13 (divorce) can be prayed



and/or granted under the HMA. This means the respondents to the aforesaid proceeding can claim for the aforesaid relief(s) only by way of counter claim.

This authority makes it amply clear that a counter claim under Section 23A of the HMA cannot be filed with regard to return of gift articles under the HMA. However, the FC Act confers jurisdiction upon the Family Court in respect of suits and proceedings between the parties to a marriage with respect to property of the parties or either of them. At the same time, the FC Act is silent on the point of counter claim. Reading the provisions of the FC Act and the HMA together, the inescapable conclusion is that a counter claim under the HMA can be filed seeking the relief(s) only under Sections 9, 10, 11, 12 and 13 of the HMA and for no other purposes.

17. In the light of discussion made here-in-above, I am of the considered opinion that no counter claim except what has been provided under Section 23A of the HMA, can be filed in a proceeding under the provisions of HMA and the same could only be with regard to relief(s) under Section 9 to 13 of the HMA. Further, I am also of the view that the counter claim must be filed as prescribed under Order-VIII Rule 6A and Order-VII Rule 1 of the Code and merely making a claim in written



statement would not suffice for the purpose of making a counter claim. The person making counter claim must specify the fact about raising the counterclaim and it cannot be presumed from averments making assertion of facts in the written statement. Hence, I do not find any infirmity or violation of jurisdiction by the learned Principal Judge, Family Court, Begusarai while passing the order dated 29.06.2019 in Misc. Case No. 12 of 2018 and the same is hereby affirmed.

18. Accordingly, the present Civil Misc. Petition stands dismissed being devoid of any merit.

19. However, the petitioner is at liberty to take recourse of law to assert her right before the Court of competent jurisdiction, if so advised.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	NAFR
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