

ORIGINAL CIVIL.

Before Mr. Justice Kania.

1939
July 3

HIRJI RAMJI AND OTHERS, PLAINTIFFS *v.* DAULATRAM RATANJI AND COMPANY, DEFENDANTS.

AND

DAULATRAM RATANJI AND CO., PLAINTIFFS TO COUNTERCLAIM *v.* MISTRI RAMJI DAYA, DEFENDANT TO COUNTERCLAIM (ORIGINAL PLAINTIFF).*

Suit and counterclaim—Death of plaintiff—Title to plaint amended—Defendant's failure to amend title to counterclaim—Counterclaim abates—Duty to amend counterclaim on defendant not plaintiffs.

A counterclaim stands in the same category as a cross-suit for the purposes of the Civil Procedure Code, and abates on the omission by the plaintiff to the counterclaim to bring the heirs of the deceased defendant to the counterclaim on the record.

On an order obtained by the plaintiffs in a suit to amend the plaint and the third party proceedings arising by reason of the counterclaim it was not the duty of the plaintiff to the suit to amend the title to the counterclaim. It was the duty of the defendants to the suit to amend the title to their counterclaim.

SUMMONS to set aside abatement.

One Mistry Ramji Daya filed a suit against the defendants to recover a sum of Rs. 69,458-1-7. The defendants filed their written statement counterclaim and/or set-off and claimed by way of counterclaim Rs. 27,340 against the plaintiffs. The original plaintiff and defendant to the counterclaim filed his reply and on July 25, 1938, because of the counterclaim, took out a third party notice under chapter VIII of the High Court rules. Directions on this notice were given on September 28, 1938.

On December 27, 1938, the plaintiff to the suit and defendant to the counterclaim died. This was communicated to the defendant to the suit on January 4, 1939. On an application of the legal representatives of the deceased

* O. C. J. Suit No. 185 of 1938.

plaintiff the Court on March 17, 1939, ordered that Hirji Ramji Avalbai and Bai Prembai be brought on the record of the suit. It was further ordered that for the purpose of proceeding with the third party proceedings the said Ramji, Bai Avalbai and Bai Prembai, the heirs and legal representatives of the deceased Mistry Ramji Daya, be brought on record in the third party proceedings in the place of the deceased Mistry Ramji Daya, and the plaint and proceedings amended accordingly and all consequential amendments be made therein.

The applicants pursuant to the chamber order amended the title to the plaint and after service of the order on the defendants to the suit the amendments in the plaint were incorporated in their copy of the plaint.

On June 28, 1939, the defendants to the suit and plaintiffs to the counterclaim took out a chamber summons for leave to amend their written statement and counterclaim by bringing the heirs of the deceased Mistry Ramji Daya on record and prayed that the abatement of the counterclaim, if any, be set aside and the delay in applying for setting aside the abatement, if any, be excused and the application be admitted and order made thereon.

The summons was heard by Kania J.

C. K. Daphtary, for the defendants.

M. C. Setalvad, Advocate General, for the plaintiffs.

KANIA J. The first contention raised in this Summons is that the counter-claim has not abated because (a) it is not necessary to insert a separate title as no other party than the parties to the original suit was impleaded in the counter-claim; and (b) there being no other defendant to the counter-claim, the provisions of O. XXII, r. 4, do not in terms apply. I do not agree with these contentions. Rule 130 of the High Court Rules, which permits the filing of a counter-claim, states that a counter-claim shall have the same effect as a cross-suit. There are provisions in

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the rules for service of the counter-claim, for making persons other than the original parties defendants to the counter-claim, filing of a reply to the counter-claim by the plaintiff or by the additional defendants, and a provision that in default of such a reply the defendant to the suit will be entitled to have the suit put on board for an *ex parte* decree on the counter-claim. Whether a separate title is made or not is not important. It is important to note, however, that it is permissible to frame a counter-claim against persons other than the plaintiff. It is common knowledge that applications for affidavits of documents, motions, and such interlocutory proceedings are taken in respect of the counter-claim alone, which are not directly related to the suit. Having regard to this it appears to me clear that a counter-claim stands in the same category as a cross-suit for the purposes of the Civil Procedure Code. The contention of the applicants that the counter-claim has not abated by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim must fail.

It is next urged that the plaintiffs had amended the plaint by bringing the heirs on record and they took an order for amendment of the plaint and also the third party proceedings which were taken by the plaintiffs as a result of the counter-claim. It is urged that it was therefore the duty of the plaintiffs to amend the title of the written statement itself. In my opinion that contention is wrong. The plaintiffs can amend their own pleadings, and if the defendants wanted to amend the title of the counter-claim it was their duty to obtain the order for the purpose.

It is next urged that as the plaintiffs had obtained the order to amend the plaint and the third party notice which arose out of the counter-claim, defendants thought that the written statement would also be accordingly amended. In the affidavits the blame is sought to be put on the plaintiffs for not doing so. Counsel on behalf of the applicants has

urged that in light of the rules framed by the Court and the interpretation put on them by the legal advisers of the applicants, the applicants did not think that they were bound to come to Court and they have taken out this summons as a matter of precaution. If their contention, as to the construction of the rules is incorrect, the applicants should not suffer for the advice tendered to them by the legal advisers and their claim should not be prejudiced. I think this argument cannot be disregarded. There is thus a sufficient cause under the circumstances of this case and the abatement is therefore set aside. The summons is made absolute. The applicants to pay the costs of the summons and bear the costs of the amendment of the title of the written statement and the consequential amendments. Leave granted to the plaintiffs to amend the title of their reply to the counter-claim. The time to amend the third party proceedings extended up to July 10, 1939. Counsel certified.

Attorneys for plaintiffs : Messrs. *Pandia & Co.*

Attorneys for defendants : Messrs. *Ferreira & Vallabhdas.*

Summons made absolute.

N. K. A.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

THE WESTERN ELECTRIC CO. LTD., PLAINTIFFS *v.* KAILAS CHAND AND
ANOTHER, DEFENDANTS.*

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Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Lawful agreement, meaning of—Power of Court in recording compromise.

On an application under O. XXIII, r. 3, to record a compromise, it is not open to the Court, in determining whether the agreement is lawful, to inquire if the agreement is liable to be set aside or avoided.

* O. C. J. Suit No. 1915 of 1938.

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