
(2014) 02 OHC CK 0031
In the Orissa High Court
Case No : W.P. (C) No. 5951 of 2012

Gokula Chandra Das

APPELLANT

Vs

Pramod Kumar Pradhan

RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 7, Order 6 Rule 17, Order 8 Rule 6, Order 8 Rule 6A, Order 8 Rule 6A
Criminal Procedure Code, 1973 (CrPC) — Section 144
Limitation Act, 1963 — Section 3, 3(2)(b), 3(2)(b)(i)

Citation : (2014) 117 CLT 1118 : (2015) 1 ILR 384 : (2014) 1 OLR 797

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J.—The petitioners, who are the defendants in the Court below, have filed this application seeking to quash the order dated 19.03.2012 passed by learned Civil Judge (Junior Division), Khurda in T.S. No. 16 of 2000 rejecting the application filed under Order 6, Rule 17 of the CPC to introduce the counterclaim by way of amendment of the written statement.

2.The short fact of the case, in hand, is that the opposite parties being the plaintiffs, filed a suit for permanent injunction before the learned Civil Judge (Junior Division), Khurda registered as Title Suit No. 16 of 2000 stating that one Narasingh'a Panigrahi was the owner in possession of Sabik Plot No. 449/1139 corresponding to Hal Plot No. 438 measuring an area of Ac. 0.058 dec. under Khata No. 141 of Mouza Sanapalla and in order to meet his legal necessities, the recorded owner, namely, Narasingha Panigrahi sold the suit land along with other properties to Pravakar Pradhan by registered sale deed dated 21.10.1963 and delivered possession. Therefore, Pravakar Pradhan, who was the father of the plaintiffs, was the rightful owner in possession of the suit land and after his death, the plaintiffs have become the owner in possession, in the R.O.R. of 1961, the suit land was recorded in the names of Batakrushna Dash (father of the

present defendants) and Nilamani Devi. Pravakar Pradhan filed Title Suit No. 12 of 1964 in the Court of Munsif, Khurda and during pendency of the said suit, Batakrushna Dash died and his widow and five sons were substituted and ultimately the suit ended in compromise between the parties on 01.08.1966. According to the plaintiffs, Pravakar Pradhan being the true owner is in possession of the suit land and the defendants were not to disturb his possession. In spite of compromise decree, since the defendants disturbed the possession of the plaintiffs, a proceeding u/s 144 of the Cr.P.C., was initiated and the defendants took a plea disputing the title of the plaintiffs and denying the decree passed in the said suit. Therefore, the present suit bearing Title Suit No. 16 of 2000 has been filed by Pravakar Pradhan seeking permanent injunction.

3. The defendant-petitioners' case is that Narasingha Panigrahi was not the owner of the suit land. The plaintiffs have not acquired any title over the suit land by virtue of the so called sale deed executed by Narasingha Panigrahi and the compromise decree, which was passed in T.S. No. 12 of 1964, being a fraudulent one, the same cannot bind defendant Nos. 3 to 5, who were minors and the provisions under Order 32, Rule 7 CPC have not been complied with as the defendant Nos. 1 and 2 have not put their signatures in any compromise petition, thereby the compromise decree is not binding on the defendants and the same was not for the benefit of the minors. Apart from the same, it is stated that the plaintiffs are not in possession of the suit land and they have filed a petition to adduce certain documents of the decree in the previous suit and some rent receipts, to which the defendants have filed objection. Similarly, the defendants also filed a petition to call for the previous suit records. By order dated 30.04.2009 the trial Court allowed the petition filed by the plaintiffs and rejected the application of the defendants. Then the defendants filed W.P. (C) No. 10592 of 2009: This Court by order dated 29.10.2009 disposed of the same with a direction to the defendants to file a better petition. Thereafter, the defendants by giving better particulars, filed a petition and the same was rejected. Again the defendants filed W.P. (C) No. 11751 of 2010 and by order dated 15.07.2011 the said writ petition was allowed and the Trial Court was directed to call for the records of the previous suit. Pursuant to the order of this Court, the trial Court called for records and the defendants on inspection of the same, found that several illegalities have been committed while obtaining the decree byway of compromise in T.S. No. 12 of 1964. After inspection of records, the defendants filed a petition for amendment of the written statement to introduce counter claim and the same was rejected by the Trial Court vide order dated 19.03.2012 under Annexure-5 holding that the counter claim is barred by limitation. Hence this petition.

4. Mr. N.C. Pati, learned counsel for the petitioners submitted that a counter claim shall be treated as a separate suit and shall be deemed to have been instituted on the date on which the counter claim is made invoking the provisions contained in Section 3(2)(b)(i) of the Indian Limitation Act. It is further contended that even if the main suit is dismissed for default, the counter claim

shall proceed and the same shall be decided on merit and the plaintiff in original suit has got a right to file additional written statement to the counter claim. So whether the counterclaim is barred by limitation, be one of the issues and the counter claim cannot be thrown out at the threshold without taking any evidence. As per the provisions contained in the Limitation Act lodging of counter claim is the relevancy of the date of the accrual of cause of action and not the date of filing of written statement and the counter claim can be filed at any stage of the suit by the defendant and only limitation is cause of action must have arisen before or after filing of the suit but before the defendant had delivered his defence. Whether the counter claim is barred by limitation and what is actual starting point of limitation is to be considered on the basis of the facts of each case and therefore, for any declaration, limitation is three years as prescribed under Article 58 of the Limitation Act when the right to sue first accrues. Mr. Pati, learned counsel for the defendants-petitioners has relied upon the judgments in *Mangulu Pirai Vs. Prafulla Kumar Singh and Others*, *Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others*, *Kanailal Das and Another Vs. Jiban Kanai Das and Another*, 128 Ind. Cas. 657 (Privy Council), *C. Mohammed Yunus Vs. Syed Unissa and Others*, and *Badhoram Mistri @ Lohari Vs. Dandapani Sahu*. It is further argued that "knowledge" means a party must have definite knowledge of the decree in a certain suit and the date of inspection of the records would be the date of knowledge and the limitation would be drawn from that date. Therefore, the defendants came to know about the fraud and illegality committed by the present plaintiffs in detail on 25.11.2011 and therefore, the cause of action arose on 28.04.2000 when the defendants appeared in the suit and on 25.11.2011 when the defendants inspected the case records in T.S. No. 12 of 1964. Therefore, the impugned order rejecting the petition on the ground of limitation cannot be sustainable.

5. Mr. S. Nayak, learned counsel for the plaintiffs-opposite parties have urged that Order 8, Rule 6-A of CPC, which deals with making of counter claim by the defendant, lays down that the counter claim shall be treated as a plaint in a suit and shall be governed by rules applicable to such suit. Similar is also the position emanating from a reading of the provisions of Section 3(2)(b) of the Indian Limitation Act, which stipulates that any claim by way of a set-off of a counter claim shall be treated as separate suit. But with regard to the date on which such a suit shall be deemed to have been instituted, there is a marked difference, which is apparent from clauses (i) and (ii) thereof. In the case of a "set-off", the suit shall be deemed to have been instituted on the same date as the suit in which the set off is pleaded. But in the case of a counter claim, the suit shall be deemed, to have been instituted on the date on "which the counter claim is made, in Court. It is admitted by Mr. Nayak that the counter claim is in the nature of an independent suit and shall be deemed to have been instituted on the date on which the petition for amendment is filed in the Court seeking to incorporate a counter claim in the written statement. The question of limitation in raising the counter claim assumes great importance inasmuch as per the provision of Sub-

section (1) of Section 3 of the Indian Limitation Act, the position is clear that even if limitation is not set up as a defence, every suit instituted after the prescribed period shall be dismissed and a duty is cast on the Court to examine this aspect before admitting the plaint. Therefore, according to him, the learned Court below has not committed any illegality in disallowing the prayer for amendment of the written statement to introduce a counter claim when the relief sought for is barred by time. To substantiate his contentions, he has relied upon the judgments in *Pramila Das v. Smt. Jugmaprava Mohanty and others*, >2010 (II) OLR 859. It is further argued that it is true that while considering a motion for grant of leave to amend the pleading, the Court is not required to delve into correctness or falsity of the claim sought to be introduced through amendment on the merit of the claim depending upon analysis and on consideration of the materials to be adduced by the parties during trial, can only be gone into finally while resolving the suit. But the said principle would not apply to a case where the relief sought to be claimed through amendment, on the face of record, is barred by time or barred by any law for the time being in force. In such a case, the Court would refuse the prayer for amendment aimed at introducing a time barred relief and has relied upon the judgment reported in *Radhika Devi Vs. Bajrangi Singh and others*, and *Dr. Laxminarayan Mohapatra Vs. Sohini Bahar Sur and others*, .

6. Before going to the merits of the case and considering the rival contentions of the parties, it is required to understand the meaning of "set-off" as contemplated under Order 8, Rule 6 of the CPC, which reads as follows:

2. Set off - What is :? -"Setoff is defined in Black's Law Dictionary,. 7th Edn. 1999 inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from a Treatise on the Law of Set Off Recoupment, and Counter Claim as stating:

Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deduced from the cross-demand.

7. Now coming to the meaning of "counter claim" as contemplated under Order 8 Rule 6A, which has been inserted by Act 104 of 1976. "Counter Claim" means--

1. Counter-claim--A defendant in a suit may 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. It is-not confined to money claim or to causes or action of the same nature as the original action. Such counter claim shall have the same effect as a cross-suit. Counter-claim thus shall be treated as plaint and governed by the rules applicable to the plaint. Counter-claim shall be heard together with plaintiff's suit to enable the Court to

pronounce a judgment Manikchand Fulchand Katariya Vs. Lalchand Harakchand Katariya, . A counter claim should be treated as a plaint and the same is governed by the rules that are applicable to plaints. It can be filed even after written statement subject to fulfillment of all the conditions that are applicable.

Now the distinction between "set-off" as well as "counter-claim" is to be considered. While set-off is a defence, the counter claim is more than that of a suit. Counter claim need not be an action of the same nature as the original action or even analogous thereto. The counter claim is not confined to a money suit only. Even after filing of written statement or before evidence is recorded and issues are settled, the Court is only competent to take cognizance in separate suit to entertain the plea of counter claim. Separate claim and a separate suit for the separate claim are maintainable and it is set off.

8. In view of the aforesaid facts and circumstances, now it is to be considered in the present context that the defendant-petitioners filed a petition under Order 6 Rule 17 of the CPC vide Annexure-3 stating that the plaintiffs have begun hearing of the suit adducing witness and they have not filed all their documents relied on by them. The plaintiffs filed registered sale deed dated 21.10.1963 on 22.11.2011 in course of cross-examination of P.W.-3, Pramod Kumar Pradhan, who is the plaintiff No. 1 in the suit. When the advocate for the defendants made inspection of the case record on 25.11.2011, it was revealed that the suit plot is not covered under the sale deed dated 21.10.1963. It is also revealed in such inspection that in the compromise petition filed in T.S. No. 12/64, the signatures of the defendants are forged and the defendants have not put their signatures on it. Therefore, the defendants wanted to amend the written statement by incorporating the materials, which have been discovered due to inspection on 22.11.2011 by making the averments that pursuant to the registered sale deed dated 21.10.1963 all the properties measuring Ac. 3.920 dec. purported to have been sold to Pravakar Pradhan are on the basis of current settlement land particulars. The suit property has never been sold to Pravakar Pradhan in the said sale deed. As such the compromise petition as well as the decree is outcome of fraud and the same is void. In addition to the same, a specific averment has been made in the counter claim which is as follows:

That the compromise petition filed in O.S. No. 12/64-1 was never signed by Parbati Dibya, mother of present defendants. The defendants No. 1 and 2 have also never put their signatures appearing in the said compromise petition are not their signatures. Mandatory provisions under Order 32, Rule 7 of C.P.C. was not complied. The said. compromise was not for the benefit of the ten minors. Sisters of the defendants namely Bilasini Devi and Binodini Devi though were parties to the said suit were not signatories to the said compromise petition. The defendants have never appeared in the Court nor has engaged any lawyer on their behalf. The compromise decree is a nullity-. It would defeat provisions of law and opposed to the to the public policy. Signatures of the alleged parties in the compromise petition has also not been attested. Furthermore, the then

plaintiff, Pravakar Pradhan have no title to the suit property during pendency of the said suit. So, the compromise decree is also a nullity. The plaintiff cannot derive any title by virtue of the said compromise decree in as much as it is non est in the eye of law and the same is required to be set aside and it is void and not binding on these defendants. That the cause of action for the counter claim arose within jurisdiction of this Court on dated 28.4.2000, when these defendants appeared in this suit and came to know about the decree in question in T.S. No. 12/64-1. Therefore, in the said counter claim, the defendants seek for decree declaring the compromise decree passed on the T.S. No. 12/64-1, in the Court of the then Munsif, Khurda is null and void and not binding on these defendants.

9. Mr. S. Nayak, learned counsel for the plaintiffs-opposite parties fairly admits that the counter claim filed by the defendants shall be treated as plaint and he governed by the rules applicable to the plaint. It is further admitted that in view of the provisions contained in Section 3(2)(b) of the Indian Limitation Act, any claim by way of set off or a counter claim shall be treated as a separate suit. In a case of set-off, the suit shall be deemed to have been instituted on the same date as the suit in which set off is pleaded. But in the case of counter claim, the suit shall be deemed to have been instituted on the date on which the counter claim is made in Court. Therefore, he stoutly submitted that when a counter claim is permitted to be introduced through amendment of written statement, the counter claim in the nature of an independent suit shall be deemed to have been instituted on the date on which the petition for amendment is filed in Court seeking to incorporate the counter claim in the written statement. Therefore, the question of limitation raising the counter claim assumes great importance inasmuch as Sub-section (1) of Section 3 of the Indian Limitation Act makes the position clear that even if limitation is not set off as a defence, every suit instituted after the prescribed period shall be dismissed. He supported the impugned order passed by the learned Court below referring to the judgments in *Pramila Das v. Smt. Jugmaprava Mohanty and others*, in >2012 (II) OLR 859 stating that the learned Court below has not committed any illegality in disallowing the prayer for amendment of the written statement to introduce a counterclaim when the relief sought for is barred by time.

10. Considering the above contention and perusing the records and in view of the subsequent materials available, the defendants by way of counter claim can approach the Court and the said counter claim is to be treated as a separate suit and shall be deemed to have been instituted on the date the said counter is made. In that case the plaintiffs in original suit have also a right to file additional written statement to the counter claim even if the main suit is dismissed for default. The counter claim shall proceed and is to be decided on merit. In essence, the counter claim can be treated as-"a cross suit before the opposite parties filed additional written statement against the said counter claim, challenging the same as barred by limitation. In that case Court has to consider the same by framing issues while deciding the counter claim. But at the

threshold the counter claim cannot be rejected as barred by limitation. The limitation with regard to lodging of counter claim is to be considered from the date of accrual of cause of action and not from the date of filing of written statement.

11. The counter claim can be filed at any stage of the suit by the defendant and the only limitation is the cause of action must have arisen before or after filing of the suit but before the defendants had delivered their defence. The said point has been considered by the apex Court in Mahendra Kumar (supra) and by this Court in Mangulu Pirai (supra). The starting point of limitation is to be considered depending upon the facts and circumstances of each case. For any other declaratory suit, the limitation is three years as prescribed under Article 58 of the Limitation Act when the right to sue first accrues. The right to sue under Article 58 of the Limitation Act which is the residuary article, on suits relating to declarations is not there until an accrual of the right asserted and its infringement or at least a clear and unequivocal threat to infringe that right by the defendants against whom the suit is instituted. Though there is no reference in Article 58 relating to knowledge of a party, there may be cases where the nature of the right imports knowledge of certain facts and in such cases the right to sue cannot be said to arise until a party had the necessary knowledge in view of the judgments reported in C. Mohammad Yunus (supra), T.H. Hancock (supra), Kanailal Das and Another Vs. Jiban Kanai Das and Another, and Sheonandan Prasad Sao Vs. Ugrah Sao and Others, .

12. Applying the aforesaid principles to the present case and considering the judgments referred to supra, when decree is passed fraudulently behind the back of a party knowledge of such suit is material. What constitutes "knowledge" is clearly explained in the judgment in Banidhar Lenka (supra) and applying the said principle to the case in hand, question of limitation has to be considered in the counter claim filed by the defendants. In considering Article 123 of the Limitation Act to set aside ex parte decree, this Court in Bandhoram Mistra (supra) has held that mere information without knowing full facts as to the suit, service of summons of ex parte decree is not sufficient unless the defendants obtained certified copy of the order or inspect the records. Therefore, knowledge means a party must have definite knowledge of the decree in a certain suit and when the records were inspected would be date of knowledge and limitation would run from that date. In view of such position of law, without examining this fact in proper perspective, the relief sought to be claimed through amendment, if on the face of record is barred by time of barred by any law for the time being in force, in that case, the Court has to refuse such prayer for amendment. Therefore, the judgments cited by the learned counsel for the petitioners in >2012 (II) OLR 859, Radhika Devi Vs. Bajrangi Singh and others, and Dr. Laxminarayan Mohapatra Vs. Sohini Bahar Sur and others, may not have any application.

13. In the present case, the defendants-petitioners had no definite knowledge

about the previous suit record, i.e. T.S. No. 12 of 1964. After the direction was given by the learned trial Court when the records were called for, the defendants came to know about the fraud and illegalities committed by the present petitioners-opposite parties in detail on 25.11.2011 when inspection was caused to the record. Therefore, the cause of action starts when the defendants inspected the records of T.S. No. 12 of 1964 in view of the first appearance in T.S. No. 16 of 2000 on 28.4.2000. Therefore the learned Court below has committed gross illegalities and irregularities in rejecting the counter claim filed by the defendants-opposite parties in the impugned order dated 19.3.2012. Accordingly, the same is set aside and the trial Court is directed to consider the counter claim as a separate suit and proceed with the matter in conformity with the provisions of law.

14. With the aforesaid observation and direction, the writ petition is allowed. No cost.