

(1997) 09 OHC CK 0031

In the Orissa High Court

Case No : Civil Revision No's. 46 and 47 of 1996

Pradipta Kishore Routray and Others

APPELLANT

Vs

Narendra Chandra Pandey and Others

RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 141

Citation : (1997) 2 OLR 375

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Bijan Ray, B. Mohanty, S. Patnaik, S. Mohanty and C. Choudhury, for the Appellant; S.P. Misra, A.K. Misra, P.K. Ghose, S. Latif, A.R. Dash, N. Lenka, N. Das and M.R. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—Since both the Civil Revisions are between the same parties and raise common questions of law, both have been heard together and are disposed of by this common judgment.

2. Civil Revision No. 45/96 is directed against an order dated 3.2.1996 in title Suit No. 50/92 and Civil Revision 47/96 is directed against order dated 3.2.1996 in Title Suit No. 49/92 rejecting the prayer of defendants 4 to 6 for amendment of the written statement. Plaintiffs opposite parties 1 and 2 have filed the aforesaid suits for declaration of their right, title and interest and for declaration that the sale deeds executed by defendants 1 to 2 in the suit in favour of recovery of possession. The substance of their cases is that since, the disputed property was the undivided interest of joint family, the alienations were invalid.

3. Written statement had been filed by defendants 4 to 6, the alienees, who are the petitioners in these two civil revisions. In their written statement, defendants 4 to 6 had taken the plea that in a family settlement, all the joint family ancestral properties had been divided and one share had been allotted to plaintiff

No. 1 and the other share had been allotted to defendant No. 1 and the disputed property had fallen to the share of the latter. Subsequently, they filed a petition for amendment of the written statement wherein it was stated that if it is found that there was no partition, the entire property of the joint family be partitioned and the alienated property be allotted to the share of their vendors and consequently, to their share. In the petition for amendment, they described the ancestral properties of plaintiffs and defendants 1 to 3 in Schedules "A" and "Y" of the amendment petition. Thereafter, while the petition for amendment was under consideration, they filed another application under Order 6, Rule 17, read with Section 141, Code of Civil Procedure, for amending the petition for amendment of written statement to the effect that the said prayer for amendment of the written statement may be taken to be a counter-claim and necessary relief be granted to them for which they paid the court-fee. In other words, in the subsequent petition, they prayed that the amended written statement may be treated as a counter claim. Both the petitions were rejected by the trial Court. Hence the present revisions by defendants 4 to 6.

4. The trial Court refused the petitions for amendment of written statement on the ground that such amendment would cause prejudice to the plaintiffs by changing the nature of the suit and by depriving the plaintiffs of the relief claimed. The subsequent petition for amendment of the petition for amendment of the written statement was rejected on the ground that there was no provision in Order 6, Rule 17 for amending a petition for amendment.

5. The first question is relating to the legality of the order of the trial Court refusing the prayer for amendment of the written statement. The main ground for such rejection, as already noticed, was that the amendment sought for if allowed would cause prejudice to the plaintiffs by changing the nature of the suit and depriving the plaintiffs of the relief claimed. The observation of the trial Court that the amendment it allowed would change the nature of the suit is not correct. Whether amendment is allowed or not, the main issue in the suit is relating to the question of partition between the parties. The amendment which was by way of an alternative averment would not change the nature of the suit in any manner. Even otherwise, law is well-settled that even in a suit for declaration of the title and possession, in appropriate case, the relief for partition can be granted. 1977 (1) C. W. R 121 (Bui Sahuani and Ors. v. Seshadev Sahu and Ors.). It cannot be perceived how by allowing the alternative prayer for partition could change the nature of the suit.

6. Similarly, the observation of the trial Court that the amendment would deprive the plaintiffs of the relief claimed is equally misconceived. By merely allowing amendment of a pleading, the Court does not accept the case of a party. After the amendment, the parties are to establish their respective rights as claimed by them by adducing evidence. In the present case, admittedly, evidence in the case has not been taken and as such it is not possible to agree with the view of the trial Court that allowing the amendment of the written statement by adding

an alternative plea would have the effect of depriving the plaintiffs of their right claimed in the suit. Whether the parties are entitled to any relief or not would ultimately depend upon the evidence on record.

7. The matter can be examined from another angle. Assuming that the amendment as prayed for should not be allowed, there is no bar for the defendants to advance such a case by filing an independent suit and if such a suit were to be filed in future, in normal circumstances both the suits would be taken up together for disposal. Therefore, allowing the amendment in such circumstances would not cause any prejudice to the plaintiffs.

8. Though such a point was not taken before the trial Court, the learned counsel for the plaintiffs-opposite parties has submitted that under Mitakshara Law, a coparcener cannot alienate undivided share in the joint family property or a specific item of the joint family property without the consent of other co-sharers and such alienation being void, the amendment, if allowed, would not entitle the defendants to claim the property by way of partition. It is also contended that the disputed house being dwelling house of the undivided family, the purchasers cannot enforce their claim for partition of the entire properties as the alienation is void ab initio. I am afraid, such contention cannot be accepted for the purpose of rejecting the prayer for amendment of the written statement. While considering the question of amendment, ordinarily the Court is not concerned about the ultimate tenability of the amended pleading. In other words, ordinarily a Court should not reject prayer for amendment on the ground that ultimately the facts sought to be included by way of amendment will not be accepted on merit. Of course, where the amendment sought for is on the very face of it vexatious and palpably unacceptable, the Court may reject such prayer for amendment as unnecessary. However, ordinarily the Court should not delve into the merits of the case sought to be set up by way of amendment and should leave that for ultimate decision in the trial Court itself. For the aforesaid reasons, I consider that the trial Court has committed material irregularity by refusing the prayer for amendment.

9. The next question relates to the subsequent petition filed by defendants 4 to 6 for treating the amended written statement as a counter claim under Order 8, Rule 6-A, Code of Civil Procedure. The said application was rejected by the trial Court on the ground that there is no scope for amending a petition for amendment. This seems to be a hyper-technical view of the matter. If after filing written statement and allowing amendment, subsequently such amended written statement could have been treated as a counter claim by filing a fresh petition for amendment of the written statement, there was no bar for the trial Court to consider such a petition for amending the petition for amendment to the extent that the amended written statement would be treated as a counter claim.

10. It has been urged on behalf of opposite parties 1 and 2 that a counter claim can be raised only before the defendant has delivered his defence and since the defendants had already filed their written statement, it was not open to them to

raise a counter claim subsequently by way of amendment. However, in view of the decisions reported in Mangulu Pirai Vs. Prafulla Kumar Singh and Others, and Ramsewak Kashinath Vs. Sarafuddin and Others, law is now well-settled that a counter claim can be raised by filing amendment petition even after filing of the original written statement, the only restriction being that the cause of action for such a counter-claim must have arisen before the filing of the written statement, or before expiry of the time limited for filing the written statement and, of course, subject to the question that the counterclaim should not exceed the pecuniary limits of the jurisdiction of the Court. In the present case, since the suit has been filed before the Civil Judge (Senior Division), the question of limit of any pecuniary jurisdiction does not arise. The cause of action for the counter-claim also cannot be said to have arisen after the filing of the original written statement. Therefore, there is no embargo for permitting defendants 4 to 5 to raise the counter-claims by way of amendment.

11. In the result, the Civil Revisions are allowed and the impugned orders are set aside. Defendants 4 to 6 are permitted to amend their written statement and raise the counter-claim as indicated in their petition. This order is subject, however, to the condition that a sum of Rs. 500/- is to be paid to plaintiffs 1 and 2 or their counsel as cost within a period of one month from today. The trial Court after being satisfied about the payment of cost as indicated above, shall permit the amendment and proceed with the suits. It is made clear that allowing the amendment does not in any way reflect about the merits of the case of either party and the trial Court has to decide the matter in accordance with law on the basis of materials on record without being influenced in any manner by any of the observations made in this order.