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**(2011) 06 AHC CK 0157**  
**In the Allahabad High Court**  
**Case No : Writ Petition (M/S) No. 1297 of 2011**

Sohan Singh Negi

APPELLANT

Vs

Manmohan Singh Negi

RESPONDENT

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**Date of Decision :** 29-06-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13  
Limitation Act, 1963 — Section 5

**Citation :** (2011) 06 AHC CK 0157

**Hon'ble Judges :** B.S.Verma, J

**Final Decision :** Disposed Of

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## Judgement

B.S. Verma, J.(Oral)

1. Heard learned counsel for the petitioner and perused the record.
2. By means of this writ petition, the petitioner has sought a writ in the nature of certiorari quashing the order impugned dated 452011 (Annexure No. 11) passed by the Additional Civil Judge 1st, (Senior Division) Dehradun in Original Suit No. 376 of 2000, Manmohan Singh Vs. Uma Devi and others, whereby the applications paper no. 235A and 237A moved by the petitionerdefendant no.4 have been rejected and the objection (246C) has been allowed.
3. A perusal of the record shows that the plaintiffrespondent no.1 herein filed Original Suit No. 376 of 2000 before the trial court for injunction as well as to declare the Will of Smt. Tulsi Devi dated 2791987, which is in possession of defendant no. 4, a void document. The defendant no.4 by filing his written statement lodged his counter claim for partition of the suit property on the strength of the alleged will of Smt. Tulsi Devi dated 2791987. It also appears that by registered sale deed dated 21112006 the petitionerdefendant no.4 sold his 1/6th undivided and undefined share in the property bearing plot No. 180 to 188 as mentioned therein in favour of the defendant no.10 (respondent no. 10 herein). 2

4. By means of application paper no. 235A, the petitionerdefendant no. 4 sought permission under Order 23, Rule 1 C.P.C. to withdraw his counter claim against the plaintiff in the suit, which was lodged by filing written statement. Thereafter another application (paper no. 237A) was also moved to the effect that the pleadings whereby the counterclaim was raised by the defendant no.4 be deleted from the written statement.

5. Objections have been filed by the newly impleaded defendant no. 10 (respondent no. 10 herein) to whom the defendant no. 4 has assigned his interest in the suit property. The plaintiffrespondent no.1 apart from seeking relief of injunction has also sought relief B that the Will of Smt. Tulsi Devi dated 2791987, which is in possession of defendant no. 4 be declared a void document.

6. In the counter claim relief has been sought by the petitionerdefendant no.4 against the plaintiffrespondent no.1 for partition of his share. This fact is not disputed that the defendant no. 4 during the pendency of the suit, sold 1/6 share in the suit property to one Ashok Jain, who has been arrayed as defendant no. 10 to the suit, by the saledeed dated 21112000, referred to above, when he moved an application under Order 22, Rule 10 C.P.C.

7. The learned trial court has observed in the impugned order that since the defendant no.4petitioner herein has already transferred his share in favour of defendant no.10 and the defendant no. 10 has acquired the right and interest in the suit property on the basis of the sale deed dated 21112006 executed by defendant no. 4, therefore, the defendant no. 4 has no right to withdraw his counter claim, which would adversely affect the interest of defendant no.10 and on this ground both the applications have been rejected.

8. Learned counsel for the petitioner has contended that as per Order 23, Rule 1 C.P.C., the petitionerdefendant no. 4 has a right to withdraw or to abandon a part of his claim against the parties to the suit. This argument of the learned counsel cannot be accepted for the simple reason that since, the petitioner has already transferred 1/6th share in the suit property to defendant no.10 and has filed his written statement since before and now evidence of the defendants has to be recorded. Plaintiff's evidence has been closed, according to the petitioner himself. Now the newly impleaded defendant no. 10 cannot file a counter claim at this stage and his counter claim would be barred by limitation. The defendant no. 10 has only stepped into the shoes of the defendant no.4petitioner, who claimed his rights in the suit property and also sought relief by lodging counter claim. Even otherwise in view of Section 52 of the Transfer of Property Act, which deals with lis pendence, the defendant no.4petitioner cannot be permitted to withdraw his claim by transferring his share during the pendency of the suit. The impugned order does not suffer from any manifest error of law or perversity. The writ petition being devoid of merit is liable to be dismissed outright at the threshold.

9. The writ petition is dismissed in limine.

10. All pending applications stand disposed of.