
(2011) 09 CAL CK 0076
In the Calcutta High Court
Case No : C.O. No. 1372 of 2009.

Sri Ram Prosad Kundu

APPELLANT

Vs

Sri Arunangshu Kundu and Others

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), Order 8 Rule 6A, 151

Citation : AIR 2012 Cal 84 : (2012) 5 CHN 668

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Sivaprasad Ghosh, for the Appellant; Bidyut Kumar Banerjee, R.N. Dutta, Hare Krishna Halder and Pradip Basu for OP No. 1, Arun Kumar Ghosh and Biswajit Dutta for Proforma OP No. 6 and Sibasish Ghosh and Debjani Bandopadhyay, for the Respondent

Final Decision : Allowed

Judgement

Harish Tandon, J.—This revisional application is directed against an order No. 143 dated 21.2.2009 passed by the learned Civil Judge (Junior Division), 1st Court, Barasat in Title Suit No. 240 of 1999 by which applications u/s 151 and Order 23 Rule 1 of the CPC are rejected.

2. The opposite party No. 1 as Plaintiff instituted a suit for declaration of his right, title and interest in respect of the property described in the schedule to the plaint with further declaration that the Petitioners and opposite party No. 2 to 5 have no manner of right, title and interest in respect of the suit property and the alleged deed of gift on the basis whereof the said Defendants claimed their right are fraudulent, void and not binding upon the opposite party. That being the subject matter of the suit, the Defendant No. 1/Petitioner appeared and contested the said suit by filing a written statement denying that the opposite party No. 1 has any shambles of right, title and interest in the suit property.

3. After filing of the written statement the Petitioner took out an application for

permission to incorporate counterclaim which was eventually allowed. By way of counterclaim the Petitioner prayed for declaration that he is the owner in respect of 54 cents by virtue of deed of gift dated 22.9.1997 and a decree for eviction.

4. The opposite party No. 1 raised an objection as to the payment of court fee on the basis of valuation given for the said counterclaim and invited the court's attention to ascertain the value of the relief claimed by way of counterclaim, for the purpose of payment of the requisite court fee which was dismissed by the trial court on 12.8.2005. Against the said order the opposite party No. 1 preferred a revisional application being CO 3159 of 2005 which was disposed of with a direction upon the trial court to assess the court fee on the basis of valuation of the subject property and the trial court thereafter vide order No. 105 dated 27.1.2006 directed the Sheristadar to seek valuation report of the subject property included in the counterclaim from the District Collector.

5. Thereafter the Petitioner filed a review application being RVW 791 of 2006 the said order was clarified to the extent that the Petitioner should not be asked to pay the court fee any more if the court fee has been properly paid.

6. The trial court thereafter referred the matter to the District Collector, 24 Parganas, North to submit the valuation report. The Petitioner, thereafter, filed an application under Order 23 Rule 1 of the Code praying for withdrawal of the said counterclaim with a leave to file a suit on the selfsame cause of action and another application u/s 151 of the Code for an order that the suit may be directed to be proceeded with without insisting for the valuation report.

7. The aforesaid applications are opposed by the opposite party No. 1 on the plea that the counterclaim should be dismissed as the counterclaim exceeds the pecuniary limit of the court. It is contended that unless the Petitioner satisfies the court as to the formal defect, the prayer for withdrawal with a leave to file a fresh suit should not be granted.

8. The trial court rejected both the applications by passing the impugned order which is assailed in this revisional application.

9. Mr. Sivaprasad Ghosh, learned Advocate appearing for the Petitioner submits that the court fee is a matter between a court and suitor and as such the other side has no authority to object to the payment of the court fee and relies upon a judgment in case of Paresh Chandra Nath Vs. Naresh Chandra Nath and Others, He further submits that if the claim is liable to fail on defect not connected with the merit the application for withdrawal should be allowed as has been held by the Andhra Pradesh High Court in case of Somaraju Chinnammi Vs. Samanthu Sivaji Ganesh and Another,

10. Mr. Bidyut Kumar Banerjee, learned Senior Advocate appearing for the opposite party No. 1 submits that there is a distinction between the rejection of plaint and the dismissal of suit. He further contends that for non-payment of the deficit court fee, the court is obliged to dismiss the suit which does not

tantamount to rejection of the plaint and placed reliance upon a Division Bench judgement of this Court in case of Sm. Mahalakshmi Debi and Another Vs. Bama Charan Nandi and Another, . He further submits that the counterclaim should only be allowed to be withdrawn with a liberty to file afresh on the selfsame cause of action, if by reason of formal defect which is incapable of being remedied by amending the pleadings and placed reliance upon the judgement of this Court in case of Indradeo Jadav v. Golam Ghaus and Ors. reported in 1977 (1) CLJ 309

11. Having heard the respective submissions of the parties, the point which emerges for consideration is whether an application for withdrawal of the counterclaim should have been allowed by the court.

12. Filing of the counterclaim is an additional right conferred upon the Defendant to assert any right or claim in respect of a cause of action accruing against the Plaintiff either before or after filing of the suit but before the defence is delivered.

13. In the instant suit, the opposite party No. 1 prays for declaration of his right, title and interest in respect of the suit property upon further declaration that the deed of gift executed in favour of the Petitioner and the other Defendants No. 2 to 5 are fraudulent and void and is not binding upon the opposite party No. 1. By way of counterclaim the Petitioner is trying to assert his right, title and interest on the strength of the deed of gift executed in his favour by the Defendant No. 2 to 4 and further sought for recovery of possession.

14. At the initial stage an objection was made for valuation of the counterclaim for the purpose of payment of court fee and after various orders passed between the parties by the trial court as well as this Hon''ble court the matter was referred to the District Collector, 24 Parganas, North for ascertainment of the valuation for the purpose of payment of court fee.

15. The Petitioner categorically asserts in his application for withdrawal that the relief claimed therein cannot be granted in absence of any direction upon the Defendant No. 5.

16. It would be remembered that Order 8 Rule 6 A of the Code provides a counterclaim against the Plaintiff and not against the co-defendants. Because of such defect that the relief claimed in the counterclaim cannot be entertained and/or granted, the Petitioner sought to withdraw the same, the said defect cannot be cured by amending the pleading as has been held in case of Indradeo Jadav (supra).

17. Rejection of plaint and dismissal of the suit are based on different foundations which is inconceivable to be interlinked by any stretch of imagination.

18. Order 23 Rule 1, sub-rule 3 does not contemplate rejection of plaint but the dismissal of the suit by reason of some formal defect. Order 23 Rule 1 provides that at any time after the institution of suit where the court satisfies that the suit must fail by reason of some formal defect may grant permission to withdraw the

suit with liberty to institute a fresh suit. Therefore there is no impediment on the court to allow the withdrawal with a liberty to file a fresh suit even after the direction is made for ascertainment of the value of the property included in the counterclaim.

19. Thus, I find that the trial court have committed illegality and irregularity and or infirmity in rejecting the said applications.

20. The order impugned is, therefore, set aside. The application for withdrawal of the counterclaim is allowed with liberty to file a fresh suit.

21. The trial court is requested to proceed with the hearing of the suit without waiting for valuation report and shall make all Endeavour to dispose of the suit as expeditiously as possible.

22. The revisional application succeeds.

23. There shall, however, be no order as to costs.

24. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.