
(2011) 08 CAL CK 0084
In the Calcutta High Court
Case No : C.O. No. 1261 of 2011

Sri Sambhu Nath Manna.

APPELLANT

Vs

Smt. Susama Manna and Another

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Civil Procedure Code Amendment Act, 2002 — Order 6 Rule 17, Order 8 Rule 6A, 151
Limitation Act, 1963 — Article 137

Citation : (2012) 1 CALLT 215 : (2012) 5 CHN 225

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Nilanjan Bhattacharya and Sanjay Karar, for the Appellant; Subhas Ch. Karar, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—This revisional application is directed against the order dated March 28, 2009 passed by the learned Civil Judge (Junior Division), 6th Court, Howrah in Title Suit No. 68 of 2009.

2. The Defendant has challenged the impugned order. The Plaintiffs / opposite parties instituted a suit being Title Suit No. 68 of 2009 for a decree of declaration that the Plaintiff No. 2 is the absolute owner in respect of the property as described in Schedule "B" to the plaint, decree of declaration that the Plaintiff No. 1 is the absolute owner in respect of the property described in Schedule "C" to the plaint, permanent injunction and other reliefs. The Defendant is contesting the said title suit by filing a written statement denying the material allegations raised in the plaint. The suit was at the stage of recording evidence. In fact, the evidence on behalf of the Plaintiffs was closed. At that time, the Defendant came with an application under Order 6 Rule 17 of the CPC read with Section 151 of the CPC for amendment of the written statement along with a prayer for counter-claim. That application was rejected by the impugned order. Being aggrieved, this application has been preferred by the Defendant.

Now, the question is whether the impugned order should be sustained.

3. Upon hearing the learned Counsel for the parties and on going through the materials on record and the decisions cited by the parties, I am of the view that the application for amendment of the written statement was filed at the stage of trial and so, the Defendant was required to prove that, in spite of due diligence, he could not have raised the matter for amendment of the written statement before the commencement of trial. Unless and until, the proviso to Order 6 Rule 17 of the CPC are complied with, the prayer for amendment of the written statement cannot be granted at the belated stage. But, on perusal of the copy of the application for amendment of the written statement appearing as Annexure "C" to the application, I find that the Defendant failed to show that in spite of due diligence, he could not pray for amendment of the written statement before the commencement of trial in either of the paragraphs of the said application for amendment. His simple contention is that the conducting lawyer for the Defendant drafted the written statement, but it was not proper. When another lawyer was appointed newly, he advised the Defendant to file the application for amendment of the written statement in order to state the facts elaborately in connection with the falsification of the documents filed by the Plaintiffs and in order to put the claim of the Defendant in respect of the suit property. This is, I hold, not at all in compliance with the proviso to Order 6 Rule 17 of the CPC and for that reason, the application for amendment of the written statement filed virtually at the close of the P.W.s, cannot be granted and the learned Trial Judge has rightly rejected the prayer for amendment.

4. So far as the counter-claim is concerned in support of his submission Mr. Nilanjan Bhattacharya appearing for the Petitioner has submitted elaborately as to the provisions of Order 8 Rule 6A of the CPC He has cited several decisions in support of his contention that the counter-claim can be even admitted after filing of the written statement and it is the discretionary power of the Court and it shall be exercised judicially by the Trial Judge. He has referred the following decisions in support of his submission:

a) The decision of Ramesh Chand Ardawatiya Vs. Anil Panjwani, particularly, the paragraph No. 28. This paragraph lays down the general principles as to the counter-claim and so, for convenience the said paragraph is quoted below:

Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6A would be a counter-claim against the claim of the Plaintiff preferred in exercise of legal right conferred by Rule 6A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6A cannot be brought on record as of right but shall be governed by the

discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the Defendant having failed to file any written statement and also having forfeited his right of filing the same the trial court was fully justified in not entertaining the counter-claim filed by the Defendant-Appellant. A refusal on the part of the court to entertain a belated counter-claim may not prejudice the Defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

Thus, Mr. Bhattacharya submits that according to this decision, the Court is to exercise the discretionary power when written statement has already been filed and the counter-claim is made subsequently.

b) The decision of Bollepanda P. Poonacha and Another Vs. K.M. Madapa, By referring this decision, he submits that if the written statement is filed earlier but cause of action arose within the period of filing the written statement or when the written statement was filed then the limitation will be counted as per Article 137 of the Limitation Act, 1963 from the date of cause of action arising.

c) He has next submitted the decision of Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, and thus, he submits that the filing of counter-claim by the Defendant after he had filed the written statement is not barred.

d) The decision of Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (dead) by LRs., and thus, he submits that the application under Order 8 Rule 6A is not ex facie barred after filing of the written statement.

e) The decision of Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., and thus, he submits that inconsistent defence can be raised in the written statement although the same may not be permissible in the case of plaint.

f) The decision of South Konkan Distilleries and Anr. v. Prabhakar Gajanan Naik and Ors. reported in (2008)14 SCC 632 and thus, he submits that the Court has the discretionary jurisdiction to entertain a counter-claim after filing of the written statement and such discretionary power should be exercised judicially, and

g) The decision of Raja Ram Dal Mill v. Smt. Gayatri Debi reported in 2010(1) WBLR (Cal) 343 and thus, he submits that the counter-claim by the Defendant may be filed after filing of the written statement when cause of action arose before filing such written statement. This decision of the Single Bench of this Hon'ble Court lays down many decisions of the Supreme Court as referred to above.

5. On the other hand, Mr. Subhas Ch. Karar appearing on behalf of the opposite party has referred to the following decisions:

A) The decision of State of Haryana and Others Vs. Manoj Kumar, particularly the paragraph No. 36 with regard to the limitation of the jurisdiction under Article 227 and thus, he submits that the well-reasoned judgment passed by the Court below should not be interfered with.

B) The decision of Bollepanda P. Poonacha and Another Vs. K.M. Madapa, particularly the paragraph Nos. 2, 5, 8, 10, 11, 12, 13 and 16 thus, he submits that the counter-claim as prayed for in the instant case, after long time from the date of filing of the written statement should not be considered. The statutory bar as provided under Order 8 Rule 6A of the CPC should be considered. The Court's jurisdiction cannot be exercised, when there exists a statutory bar.

C) The decision of South Konkan Distilleries and Another Vs. Prabhakar Gajanan Naik and Others, particularly the paragraph Nos. 7, 13, 17, 19 and thus, he submits that the amendment of the written statement and enhancement of counter-claim again on future losses sought for after 13 years, such amendment seeks to make out a new case, it is not simply an introduction of any subsequent event, the amended claim is barred by limitation. Moreover, the delay in seeking the amendment, has not been explained. So, the rejection of the application for amendment is proper.

D) The decision of Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) Thr. LRs., particularly the paragraph Nos. 18 and 19. This decision relates to the principle relating to amendment of the plaint. Since the amendment of the plaint and that of the written statement cannot stand on the

same footing, I am of the view that this decision need not be considered.

E) The decision of Vidyabai and Others Vs. Padmalatha and Another, particularly the paragraph Nos. 14 and 16 and thus, he submits that the proviso to Order 6 Rule 17 is a bar after trial has commenced. The trial commences on the date when the issues are framed. The Court is to decide whether the proposed amendment is necessary to decide the real dispute between the parties. Only if such conditions are fulfilled, the amendment is to be allowed. When the learned Trial Judge has not exceeded his jurisdiction in passing the order impugned before it, there is no error of law. So, no error of law has been committed by the learned Trial Judge. Interference with the order in writ jurisdiction is improper - he submits.

F) The decision of Smt. Santana Mukherjee (Nee Mohanta) v. Sri Sunil Kr. Saha and Ors. reported in 2007(2) CLJ (Cal) 182 and thus, he submits that the proposed amendment will require fresh trial which is not permissible at this stage. Therefore, the amendment of the written statement is not proper.

6. I have considered the above decisions cited by both the parties and the general principles relating to amendment of the written statement vis-a-vis the counter-claim I find that the decision of Ramesh Chand Ardawatiya (supra) lays down the general principles for amendment of the written statement and the prayer for counter-claim after filing of the written statement. There is no dispute that after filing of the written statement, if counterclaim is filed mentioning the cause of action before the filing of the written statement or within the period of filing the written statement, the Court's power to accept the counter-claim is discretionary and such discretionary power is to be exercised judicially. This was with regard to the matter before the amendment of the CPC in 2002 by the Act 22 of 2002. But, after amendment of the CPC in 2002 (w.e.f. July 1, 2002), the application under Order 6 Rule 17 of the CPC is to be disposed of in the light of the proviso to Order 6 Rule 17 of the CPC in respect of the suits filed after July 1, 2002. The instant suit having been filed in 2009, comes within the mischief of the proviso to Order 6 Rule 17 of the Code of Civil Procedure

7. As noted earlier, the Defendant has failed to show that in spite of due diligence, he could not have raised the matter for amendment of the written statement before the commencement of trial. The learned Trial Judge has exercised the discretionary power to reject the application for amendment when the evidence on behalf of the Plaintiff has been closed. The general rule is that all the amendments are allowed to settle the dispute between the parties once for all provided no injustice or prejudice is caused to the other side.

8. In the instant case, there was no prompt action on the part of the Defendant to pray for amendment at the earlier stage, but, at the time of closing of the evidence on behalf of the Plaintiffs. In that case, if the proposed amendment is allowed, it will certainly cause injustice and prejudice to the Plaintiffs because they will have to file a written statement against the counter-claim and the

evidence is to be recorded in respect of both the suit and the counter-claim afresh. The evidence already on record will not serve for the purpose of both the suit and the counter-claim. So, the proposed amendment, if allowed, would have created injustice and prejudice to the Plaintiffs. It would have caused the delay in the disposal of the suit because of the inaction or laches on the part of the Defendant.

9. In such a situation, upon due consideration of the decisions of Biddya Bai and Ors. (supra) and Bollepanda P. Poonacha and Anr. (supra) which are very much applicable in the instant case according to me, I am of the view that the learned Trial Judge has rightly exercised the discretionary power in respect of the disposal of the application for amendment of the written statement and in such a situation, according to decision of State of Hariyana and Ors. (supra), this revisional court shall not set aside a reasoned order in exercising the revisional jurisdiction under Article 227 of the Constitution of India.

10. Accordingly, I am of the view that there is no scope of interference with the impugned order. This revisional application is, therefore, devoid of merits.

11. It is, therefore, dismissed.

12. Considering the circumstances, there will be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.