
(2006) 08 CAL CK 0019
In the Calcutta High Court
Case No : C.S. No. 45 of 1986

Sunil Baran Chowdhury

APPELLANT

Vs

Anath Bandhu Chowdhury and Others

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6

Citation : (2007) 1 CALLT 356

Hon'ble Judges : Arun Kumar Bhattacharya, J

Bench : Single Bench

Advocate : Sabyasachi Chowdhury and Debdatta Basu, for the Appellant; Sunrit Deb and Sucharita Biswas, for the Respondent

Final Decision : Dismissed

Judgement

Arun Kumar Bhattacharya, J.—The Court: Learned Counsel for both the parties are present.

2. Mr. Chowdhury, learned Counsel for the Plaintiff, urged for judgment on admission under Order 12, Rule 6 read with Order 8, Rule 5 of the Code of Civil Procedure.

3. Before I open the discussion, the miniaturized version of the Plaintiff as borne out in his plaint need be stated.

4. Defendant No. 1 being the eldest brother of the Plaintiff and Defendant No. 2 and Karta of the family used to manage the joint family. On 24.05.63 the Plaintiff and Defendant Nos. 1 and 2 took lease of a vacant land appertaining to plot No. 21 in. Scheme No. LXIVA containing about 4 cottahs 3 chittaks 34 sft. from the Calcutta Improvement Trust for 99 years with option to renew for a further period of 99 years at a premium of Rs. 1,02,480/-, out of which Rs. 51,240/- was paid by them in equal shares and the balance amount by equal and annual installments and thus the Plaintiff and Defendant Nos. 1 and 2 have undivided one-third share each in the said plot of land which was originally known as

premises No. 21, Sahitya Parishad Street and subsequently came to be known as 9, Boys" Own Library Row, Calcutta-6. The Plaintiff and Defendant Nos. 1 and 2 constructed a four-storeyed masonry building on the said land at the joint expenses in equal shares and came to use and occupy the premises partly in khas and partly by letting out to tenants. Defendant No. 1 being the Karta of the joint family used to induct tenants on behalf of the Plaintiff and Defendant No. 2. The Plaintiff and said Defendants land 2 carried on a partnership business in the name and style of M/s. M.N. Chowdhury and Sons in equal shares in the said premises, and the business was looked after by Defendant No. 1 as the eldest brother. The Plaintiff having good faith in Defendant No. 1 treated him as the custodian of his purse and valuables and as such major portion of income out of the said business and property in the shares of the Plaintiff and Defendant No. 2 were held by Defendant No. 1. The said business became a losing concern for which it was stopped running in 1970, and at the advice of Defendant No. 1, the Plaintiff and Defendant No. 2 ultimately left Calcutta and came to live at their native place in the District of Bankura so as to curtail the establishment in Calcutta and to enable Defendant No. 1 to restore the said business. At the time of leaving Calcutta, the Plaintiff left with Defendant No. 1, 30 bharis of gold ornaments, utensils, dressing table and Godrej steel almirah as his safe custodian. Taking advantage of the absence of the Plaintiff in Calcutta and his total reliance, Defendant No. 1 started letting out the said premises to various new tenants at high rates of rent and taking considerable amount from them as selami as sole landlord without the knowledge of the Plaintiff and started depriving the Plaintiff of his due share of rents and selamis and thus Defendant No. 1 thereby amassed enormous wealth. Defendant No. 1 started two business in the names and style of M/s. Chowdhury Printers and M/s. Dipti Industries at the said premises in the names of his son Defendant No. 3 and wife Defendant No. 4 respectively, by making investments of the said wealth and remaining assets and capital balance of the above defunct business M/s. M.N. Chowdhury and Sons. Defendant Nos. 3 and 4 had never any fund of their own to commence the said business, and as such the Plaintiff and Defendant Nos. 1 and 2 are jointly entitled to enjoy the assets and usufructs of the said two business. Defendant No. 1 failed and neglected to pay shares of income out of the said premises No. 9, Boys" Own Library Row, Calcutta-6 and the said two business or to render accounts or to distribute assets and capital balance of the defunct business M/s. M.N. Chowdhury and Sons, for which the Plaintiff and Defendant No. 2 by a notice dated 20.10.82 through their advocate demanded share of rents realized, accounts, the said 30 bharis of gold ornaments, utensils, dressing table and Godrej steel almirah. Though Defendant No. 1 admitted the Plaintiffs right to share the rents realized, to return the utensils, dressing table, Godrej steel almirah and 15 bharis of gold ornaments disputing custody of 30 bharis and agreed to settle the dispute amicably, he avoided to hold any sitting for settlement. By another notice dated 14.11.83 through advocate the Plaintiff again demanded his one-third share of rents and shares of profit out of the said two business. Defendant No. 1 reiterated earlier reply, but Defendant No. 3 in his

reply dated 25.11.83 denied any right, title and interest of the Plaintiff in the business M/s. Chowdhury Printers though it was admitted that out of the capital balance of the defunct business the business of M/s. Chowdhury Printers was started in 1981. Through notice dated 25.11.85 the Plaintiff and Defendant No. 2 demanded partition of the said premises, accounts of rents, 30 bharis of gold ornaments etc. and their due shares of profits out of the said two business, but the Defendants failed to comply with the requisition of the said notice. Hence the suit for declaration, permanent injunction, partition, accounts, recovery of gold ornaments etc. and other relief"s.

5. The suit is contested by Defendant Nos. 1, 3 and Defendant No. 4, since deceased, by filing a written statement inter alia denying the material allegations made in the plaint and contending that in June, 1962 after the death of Monmotho Chowdhury there was a mutual partition between his brother Bhutnath on the one hand and Plaintiff and Defendants 1 and 2 on the other whereby a shop room at 4B Jackson Lane, Calcutta was allotted in favor of the Plaintiff and Defendant Nos. 1 and 2 who started a partnership business there of stationery and Government order suppliers in the name and style of M/s. M.N. Chowdhury and Sons. The Plaintiff and Defendant No. 1 who were tenants of a premises at Haritaki Bagan Lane, Calcutta used to look after and manage the business of the said firm jointly. Defendant No, 2 was all along settled at Bankura and looked after the ancestral property at Bankura. On 24.05.63 a piece of land measuring about 4 cottahs 3 chittaks and 34 sft. appertaining to plot No. P-21, Scheme No. LXTV-A, subsequently numbered as 9, Boys" Own Library Row, Calcutta-6 was taken on lease by the Plaintiff and Defendant Nos. 1 and 2 for a period of 99 years with a renewal clause from the Calcutta Improvement Trust at a premium of Rs. 1,02,480/-, out of which 50% of the premium amounting to Rs. 51,240/- was paid from the said firm and the balance 50% was to be paid in eleven equal annual installments. On account of default in payment of six installments when several notices were issued by the Calcutta Improvement Trust with a threat of legal proceeding to the Plaintiff and Defendants 1 and 2, Defendant No. 4 due to her relationship with Defendant No. 1 as husband and wife paid a sum of Rs. 43,240/~ to save the premises. Defendant No. 1 constructed the building from his own source without any contribution from the Plaintiff or Defendant No. 2. Since 1966 the said partnership firm suffered huge loss, and as in 1967 Defendant No. 1 suffered from severe cardiac problem and became completely bedridden, the Plaintiff solely managed the affairs of the said firm. In October, 1970 the shop room of the firm was found broken and possession of the same was forcibly taken by the landlord. In 1970 the Plaintiff abandoned the said firm with litigation and huge liabilities. The Defendants gradually paid off the creditors mostly through the proprietary business of Defendant No. 4. Since 1970 the Defendants have been maintaining the two daughters of Plaintiff thus incurring an expenditure of minimum Rs. 1,000/- p.m. and thus the total expenditure incurred by them is Rs. 2,22,000/- which the Plaintiff is liable to reimburse. Gold ornaments of not more than 15 bharis, a

dressing table and a steel almirah were left by the Plaintiff at the time of shifting to Bankura permanently in 1970. If the Plaintiff takes the responsibility of marriage of his two daughters, he is at liberty to take back those ornaments. Hence the suit merits dismissal and the Defendants are entitled to counterclaim/set off of the said sum of Rs. 2,22,000/-.

6. Mr. Chowdhury, at the outset, submitted that he is pressing for the prayers (h), (j), (1) of the plaint regarding decree for partition in respect of the premises 9, Boys' Own Library Row and prayer (n) relating to direction upon Defendant No. 1 for return of gold ornaments weighing 15 bharis, dressing table and Godrej steel almirah only and no other prayers. Relying upon the cases of Badat and Co. v. East India Trading Co., reported in AIR 1960 SC 538 (paras 11 and 13), Uttam Singh Dugal and Co. Ltd. Vs. Union Bank of India and Others, and Hirendra Nath Basu v. Kshetra Mohan Dutta, reported in CAL LT 1998 (2) HC 5 and on referring to paragraphs 3 and 7 of the written statement contended that on the face of the specific admission of Defendant No. 1 that he along with the Plaintiff and Defendant No. 2 took lease for 99 years from the Calcutta Improvement Trust with a renewal clause and the Plaintiff left 15 bharis of gold ornaments, a dressing table and a steel almirah with Defendant No. 1. There is no bar in passing a judgment on admission to that extent. So far the question of payment of premium is concerned, Mr. Chowdhury contended that it is the defense case that 50% was paid from the fund of the firm M/s. M.N. Chowdhury and Sons which belonged to the Plaintiff and Defendant Nos. 1 and 2 and out of the balance 50%, Defendant No. 4, since deceased, due to her relationship with Defendant No. 1 as husband and wife paid Rs. 43,240/- to save the premises, for which no amount was claimed by Defendant No. 4 or Defendant No. 1 from the Plaintiff and/or Defendant No. 2, and such payment may be construed to be payment on behalf of all. Mr. Deb, learned Counsel for the Defendants, on the other hand, contended that since Rs. 43,240/- was paid by the wife of Defendant No. 1 i.e. Defendant No. 4, since deceased, to meet a considerable portion of balance half of the premium, a charge was created on the property. Mr. Deb further argued that as joint construction of the premises by the Plaintiff and Defendant Nos. 1 and 2 has been denied and it is the specific case of the Defendants that the construction was made by Defendant No. 1 alone without any contribution either from the Plaintiff or from Defendant No. 2, no decree on admission can be passed and the suit requires thorough trial. 15 bharis of gold ornaments which have been kept by Defendant No. 1, Mr. Deb submitted, will be required at the time of marriage of two daughters of the Plaintiff who are being maintained by Defendant No. 1. Mr. Deb further submitted that since there is a counter-claim to the tune of Rs. 2,22,000/- which requires trial, the suit should not be disposed of on admission without considering the said counter-claim.

7. The object of Rule 6 of Order XII is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the Defendant, the Plaintiff is entitled. Where the other party has made a plain admission entitling the former to succeed, it should apply and also whenever

there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed, as was held in the case of Uttam Singh Duggal and Co. Ltd. (Supra). It is undisputed that the expression "or otherwise" read with the words "orally or in writing" as used in Rule 6 is wide enough to include any form of admission either in the pleadings or answering affidavit or in a letter. Reference may be made to the above case of Uttam Singh Duggal and Co. Ltd.

8. Here, that the Plaintiff and Defendants 1 and 2 took lease of the land from the Calcutta Improvement Trust is admitted. If 50% of the premium amount, as contended by the Defendants, was paid out of the fund of the firm M/s. M.N. Chowdhury and Sons, the said payment can be held to have been made by all three of them as the firm belonged to them. As regards payment of Rs. 43,240.74 out of the balance premium amount payable by installments, by Defendant No. 4 due to her relationship with Defendant No. 1 as husband and wife, on account of non-payment of the same by the Plaintiff and Defendants 1 and 2, the position of Defendant No. 4 can be said to be that of a volunteer as there is nothing to indicate that the Plaintiff or Defendant No. 2 requested her to pay and despite expiry of such a long period no claim was made by Defendant No. 4.

9. In order to attract the provision of Section 100 of the Transfer of Property Act and to create a charge in respect of an immovable property, it is necessary that the same is embodied in a document and there should be a clear intention to make a particular property as a security for payment of the money. In other words, creation of enforceable security is the essence of charge. Such requisite being absent here, the question of creation of charge in the present case, as contended by the learned Counsel for the Defendants, is out of the way.

10. In regard to the alleged construction of the building on the said land by Defendant No. 1 alone, the rights and obligations of co-owners in a joint property are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment,

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

11. Reference may be made to the case of Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and Others, .

12. It is not the prima facie right of a co-owner expending money to improve the whole or greater portion of a joint land to have in one way or another "recouped to him by his co-owners the value of the improvements which they get in the shares which are subsequently allotted to them. It would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the person Improving the property stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements, as was held in the case of Salaiman Musaji v. Jatindra Nath Mondal, reported in ILR (1930)57 Cal 538. A co-sharer covering the whole estate with improvements cannot get any compensation therefore on partition; and when a co-sharer has put building on the land, the most ordinary method in partition is to allot to him for his share a portion of the land which contains the building, but when that cannot be done or would not be fair, it may nevertheless be reasonable and necessary to treat such a co-sharer exactly as the other, as was held by the Privy Council in Nutbehari Das v. Nonilal Das, reported in 41 CWN 613 (PC) . Similar is the holding in the case of Mammathu and Others Vs. Kathijumma Umma and Others, observing that if a co-tenant covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not entitle to compensation therefore, notwithstanding they may have added greatly to the value of the land. Because it would be the improver"s own folly to extend his own improvements over the whole estate and

because it would be unjust to permit a co-tenant, at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer and cannot without the consent of the co-tenant, lay the foundation for charging him with improvement. Accordingly, Defendant No. 1 cannot claim any extra benefit for his allegedly constructing the building on the said land alone.

13. Relating to the Plaintiffs claim of 30 bharis of gold ornaments and other articles, it is admitted by the Defendants that the Plaintiff kept gold ornaments not more than 15 bharis, dressing table and a steel almirah with Defendant No. 1. It has been contended by the Defendants that the said ornaments have been kept preserved for marriages of the Plaintiffs two daughters and if the Plaintiff takes the responsibility of their marriages he is at liberty to take back those ornaments. Inclusion of the prayer (m) in the plaint indicates the intention of the Plaintiff to get back those articles which cannot be prevented by the Defendants on the ground of need of the ornaments for the marriages of two daughters of the Plaintiff who are being maintained by Defendant No. 1. Accordingly, judgment may be passed on such admission.

14. In regard to the prayer of counter-claim/set off, as made by the Defendants, it is to be borne in mind that though both in one sense are cross-actions, a set off and a counter-claim are not the same. Whereas a set off is a ground of defense and if established it affords an answer to Plaintiffs claim wholly or pro tanto, a counter-claim is not really a defence to the Plaintiffs claim but is a weapon of offence, enabling a Defendant to enforce his right or claim against the Plaintiff as effectively as an independent action of his own. Set off which is dealt with in Rule 6 of Order VIII Code of Civil Procedure, can only be claimed in a suit for recovery of money, and since the present suit is not for recovery of money, the plea of set off does not arise.

15. Nevertheless, the Defendant can set up by way of counter-claim any right or claim against the Plaintiff which arises before the Defendant has delivered his defense or before the time limited for delivering his defense has expired. A counter-claim cannot travel beyond the scope and the limit of the suit with which it is concerned. It cannot bring out something which is completely foreign to the suit. The words "against the claim of the Plaintiff in Order VIII Rule 6-A suggest that the right of claim that may be set up by way of counter-claim should be against the claim of the Plaintiff in the sense that there must be some nexus between the claim made by the Plaintiff in his suit and the claim set up by Defendant by way of counter-claim. This nexus should be such that it may legitimately be said that the counter-claim set up by the Defendant is against the claim of the Plaintiff, the idea being that the two claims, the one set up in the suit by the Plaintiff and the other set up by way of counter-claim by the Defendant, are capable of being conveniently disposed of together. In this view of the matter, it may not be open to the Defendants in the present case to set up a claim for money spent towards maintenance of two daughters of the Plaintiff as

a counter-claim in a suit for partition and recovery of some articles, since the former has no inter-connection or nexus with the latter. In this connection, the case of Hari Mohan Gupta v. Lalit Mohan Gupta, reported in AIR 1994 NOC. 345 (Del) may be referred to where in a suit for injunction, the Defendants' plea in a counter-claim for mandatory Injunction requiring the Plaintiff to place them in peaceful possession of the mezzanine floor was held to be not maintainable. Similarly, in the case of Manick Lal Seal and Another Vs. K.P. Chowdhury, the Defendant's plea for a counter-claim for specific performance of contract to execute a lease against the Plaintiff in a suit for eviction against a tenant was held to be not maintainable. Reference may also be made to the case of T.A.M. Subramania Chettiar Vs. K.M. Shanmugham and Others, where it was held that in a suit for partition, the plea of the Defendant for value of improvements in the property cannot be construed to be a counter-claim. In the case of Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and Others, it was held that in a suit for specific performance of an agreement by which one partner agreed to convey his interest to his co-partner, there could obviously be no prayer for any relief for accounting and unless there is a prayer for accounting there is no question of a Defendant claiming the benefit of that relief in the same suit. Similarly in the present suit filed by the Plaintiff praying for partition and other relief's, there is no scope for granting the relief of counter-claim made by the Defendant for a sum of Rs. 2,22,000/- alleged to have been incurred by the Defendants towards maintenance of the two daughters of the Plaintiff.

16. In the light of the above discussion, the present suit deserves to be decreed in part on admission, and the counter-claim set up by the Defendants is to be dismissed.

17. Accordingly, the suit be decreed in part in the preliminary form. The shares of the Plaintiff and Defendant Nos. 1 and 2 in the disputed property being premises No. 9, Boys' Own Library Row, Calcutta-6, as described in schedule "A" to the plaint, to the extent of one-third each is hereby declared, and the Plaintiff do get separate possession thereof on partition by metes and bounds. The parties are allowed one month's time from date to effect partition by metes and bounds amicably according to their declared share as indicated above, failing which Shri Subhasis Chakraborty, a learned member of the Bar, stands appointed as Commissioner to effect partition by metes and bounds. The learned Commissioner shall effect the partition, keeping in view the present possession of the parties, compactness of allotment and other equitable principles of partition as far as practicable and will submit his report along with documents showing the shares of the parties within three months thereafter.

18. The learned Commissioner will be at liberty to appoint a valuer/ surveyor, the remuneration whereof, if appointed by the learned Commissioner, shall be borne by the Plaintiff and Defendant Nos. 1 and 2 in equal shares on the basis of their respective shares, and in this regard the decision of the learned Commissioner shall be final. The Commissioner of Partition will be entitled to an initial

remuneration of 1000 G. Ms. to be paid by the Plaintiff and Defendant Nos. 1 and 2 in equal shares.

19. The Plaintiff also do get a decree for recovery of gold ornaments weighing about 15 bharis, dressing table and Godrej steel almirah, in terms of prayer(m) of the plaint, from Defendant No. 1 who is directed to return the said articles to the Plaintiff within one month from date, failing which the Plaintiff will be able to recover the same in due course of law.

The counter-claim of the Defendants be dismissed.

Both the parties are directed to bear their own cost of the suit.

Learned Commissioner of partition and. all parties are to act on a signed copy of the operative part of the order on the usual undertakings.

Urgent xerox certified copy of the judgment, it applied for, be supplied to the parties as expeditiously as possible.