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Court : Kolkata

Decided On : Jul-11-2011

Judge : Harish Tandon, J.

Acts : Code of Civil Procedure (CPC) - Order 8, 41 Rule 6C, A, 27

Appeal No. : C.O. 2386 of 2009

Appellant : Bimanta Biswas and anr.

Respondent : Monoranjan Kha and anr.

Advocate for Def. : Mr. Sudhakar Biswas, Adv

Advocate for Pet/Ap. : Mr. Biswarup Biswas, Adv

Judgement :

1. This revisional application is directed against order no. 102 dated 17.4.2009 passed by the Civil Judge (Junior Division) 1 st Court, Krishnagar, Nadia in Title Suit No. 116 of 1995 by which the counter-claim filed by the defendant/opposite party was accepted and an application for taking off the said counter-claim from the record was rejected.

2. This is suit for recovery of possession from a licensee. The defendant/opposite party claimed that they are the owner in respect of the property in question and are possessing the same on the strength of such right. The suit was ultimately

decreed by the trial court.

3. Before the appellate court the defendant/opposite party filed an application for amendment seeking to incorporate the factum of sale of the property by the plaintiff/petitioner and also creating an obstruction in cultivation. Further application under Order 41 Rule 27 was filed by the defendant/opposite party for production of the additional evidence.

4. The appellate court on the basis of application for amendment and an application for production of the additional evidence remanded the matter back to the trial court after giving an opportunity to amend the pleadings in the light of observations made in the said judgment.

5. After the remand the defendant/opposite party filed counter-claim alleging that they were illegally and wrongfully dispossessed on the date when the trial court decreed the suit and sought for recovery of possession. The plaintiff/petitioner filed an application under Order 8 Rule 6 C of the Code for exclusion of the said counterclaim.

6. By the impugned order the trial court held that the counter-claim of the defendant/opposite party is maintainable and accepted the same.

7. According to the plaintiff/petitioner the counter-claim is entertainable in respect of the cause of action which accrued before or after the filing of the suit but before the defendant has delivered his defence or the time limited for delivering a defence has expired. Thus he contends that the counter-claim filed by the defendant/opposite party is not maintainable. Reliance is placed upon a judgment of the apex court in case of Bollepanda P. Poonacha & Anr v. K.M. Madapa reported in AIR 2008 SC 2003.

8. The defendant/opposite party submits that he was dispossessed on the date of the decree passed by the trial court and being a subsequent event the court should allow the counter-claim to be put on record and the said counter-claim is maintainable.

9. Having heard the submissions of the respective counsels, admittedly the suit was decreed on 23.8.2004. It is alleged by the defendant/opposite party that he was dispossessed on the same day by the plaintiff/petitioner. Order 8 Rule 6A of the Code of Civil Procedure provides that the defendant while filing the written statement has an additional right to set up by way of counter-claim any right in respect of cause of action arisen either before or after the filing of the suit but before the delivery of the defence by the defendant. There is no dispute that the counter-claim has been filed in respect of the cause of action arose after the filing of the suit. The court shall take in consideration a subsequent event but such event must be of such nature which has a bearing upon the ultimate decision of the suit or the proceeding.

10. The defendant/opposite party alleged that he has been dispossessed forcibly on the day when the trial court decreed the said suit but there is no whisper by him before the appellate court about the alleged dispossession. Before the appellate court the defendant/opposite party did not disclose such fact in an application for amendment nor disclose the said fact in an application under Order 41 Rule 27 of the Code. The first appellate court on the basis of proposed amendment sought to be made by the defendant/opposite party and the production of additional evidence under Order 41 Rule 27 of the Code remanded the matter back to the trial court for reconsideration after giving an opportunity to the defendant/opposite party to amend his pleading. The appellate court while remanding the said matter observed that the trial court shall consider the said suit afresh in the light of the direction and/or observation made therein.

11. The defendant has not whispered before the appellate court alleging such dispossession on the date when the suit was decreed. The scope of the remand cannot be enlarged by the trial court but has to decide the matter within the parameters of the order of remand.

12. The court below without adverting to Order 8 Rule 6A of the Code had accepted the counter-claim treating the same as subsequent event. The apex court in case of Bolepanda (supra) observed that the court should exercise its jurisdiction within the statutory bounds created by the legislature and should not

travelled beyond the same. Thus, I find that the counter-claim which was filed by the defendant/opposite party is not maintainable.

13. The order impugned is hereby set aside.

14. The revisional application is allowed.

15. The trial court is requested to dispose of the suit as expeditiously as possible without granting unnecessary adjournments to either of the parties.

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

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