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IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6208 of 2011

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1. Ram Pyari Devi @Ram Priya Devi wife of Jaglal Rai
2. Prabhawati Devi, wife of Sakal Rai, both are residents of village Kharauni, P.O. and P.S. Marhaura, district Saran

....Defendants-Petitioners

Versus

1. Kashi Nath Sah son of Late Kewal Sah

....Plaintiff-Respondent

2. Gyanti Devi, D/O deceased o.p.no.2, W/O Damodar Rai at Present resident of village Chainpur, P.S. Taraiya, district Saran

… …Respondents

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Appearance :
For the Petitioner/s : Mr. NAGENDRA RAI
For the Respondent/s : Mr. Krishna Kant Singh

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
ORAL JUDGMENT
Date: 16-12-2015

The defendants-petitioners aggrieved by the order dated 03.09.2007 passed by the learned 3rd Munsif, Chapra in T.S. No. 95/2004 have filed the present writ application in the following background:-

The plaintiff-respondent filed a suit for declaration of title stating that the subject/suit land belonged to Baswan Rai who had executed a conditional sale on 01.11.1980 in favour of the plaintiff. The consideration amount was Rs. 2500/-. It was contemplated that the consideration amount shall be paid within 07 years and, in default, the document shall be treated as absolute sale. Baswan Rai or his heirs did not return the amount. In the meantime, the heirs of Basawan Rai sold the property in favour of the defendant which should be declared as illegal. On notice, the written statement was filed by the writ petitioner(s) (defendant-purchaser) stating that the mortgage was redeemed but the plaintiff did not return the document. Alternatively, it was stated that if no redemption was made then the defendant, being the purchaser of the subject property/land is ready to pay off the dues. On the same date a counter-claim was filed by the defendant praying for a decree of redemption to be passed in the suit. The rejoinder to the said counter claim was filed by the plaintiff-respondent. The trial court under the impugned order rejected the said counter claim filed by the defendant-petitioner under Order 8 Rule 6-A of the Code of Civil Procedure (for short 'the Code'). The trial court gave three reasons for doing so. It was held that if the defendant had any such claim that was against the widow of Baswan Rai. The widow of Baswan Rai (one of the defendants) had not filed any written statement in the suit. In the said application, the defendant had prayed for delivery of possession also on the basis of the sale deed registered in his favour for a consideration amount of Rs. 72000/- which was beyond the pecuniary jurisdiction of the court. The defendant had also prayed for recovery of possession.

I have heard Mr. Nagendra Rai on behalf of the petitioner(s) and Mr. Krishna Kant Singh who has appeared on behalf of the plaintiff-respondent.

Counsel for the petitioner(s) has submitted that the three reasons assigned by the court for rejecting the application filed under Order 8 Rule 6-A CPC are wholly erroneous and unsustainable in law. After a wholesome amendment made in the Code in the year 1976 the scope of the provision contained in the Order has been expanded and section 6-A has been added which enables the court to pass such an order. The other reasons with regard to pecuniary jurisdiction of the court is also erroneous since the court failed to notice the relevant provisions contained in section 7 (ix) of the Court Fees Act 1870 which provides that in such matter the pecuniary jurisdiction of the court shall be considered with reference to the consideration amount of the conditional sale as claimed by the plaintiff and not by the subsequent sale of the subject/suit land by the heir of Basawan Rai in favour of the defendant. Another reason assigned by the trial court touches on the merit of the case which the court was not required to examine/consider while accepting the counter-claim filed by the defendant-petitioner in accord with the Rule 6-A of the Order 8 of the Code.

Combating the submission of the petitioners, Mr. Singh supporting the impugned order has contended that the defendant-petitioner after having purchased the suit land kept questionable silence. The suit was filed by the plaintiff in the year 2004 and nearly one year thereafter the counter-claim was filed by the defendant-petitioner seeking such relief in respect of the consideration money of the conditional sale brought in existence on 01.11.1980. This Court should therefore reject such claim of the defendant-petitioner and uphold the order of the learned trial court.

Relevant provision of the Code and the Court Fees Act, on which reliance has been placed by the counsel for the petitioner, merits to be noticed.

Order 8 Rule 6-A of the CPC reads as under:-

> **"6-A. Counter-claim by the defendant_** (1) a defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.
>
> Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court."

Section 7 (ix) of the Court Fees is extracted herienbelow:-

> **"to redeem._ (ix)** In suits against a mortgagee for recovery of the property mortgaged;
>
> to foreclose._ and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute_
>
> According to the principal money expressed to be secured by the instrument of mortgage……"

Mr. Rai has also relied on section 59(A) of the T.P. Act which is reproduced herienbelow:-

> "59-A. **Reference to mortgagors and mortgagees to include persons deriving title from them._** Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively."

On going through the provision under Order 8 Rule 6-A CPC, it is manifest that a defendant of the suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired.

Indisputably, such counter-claim was filed by the defendant along with the written statement. Such claim could have been filed in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit. There is no controversy that such claim is in respect of the cause of action which accrued to the defendant against the plaintiff after the filing of the suit.

Proviso to Rule 6-A is another rider to such claim. The counter-claim should not exceed the pecuniary limits of the jurisdiction of the court. This is one of the reasons assigned in the order. I shall touch upon this a little later.

In **Jagmohan Chawla vs. Dera RAdha Swami Satsang [(1996) 4 SCC 699)** the Hon'ble Supreme Court examining the scope and ambit of the Order 8 Rule 6-A in paragraph 5 observed as under:-

> "…..In sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim what would be the subject matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected

> with the original cause of action or the matter pleaded by the plaintiff. The words "any right or claim in respect of a action of action accruing with the defendant" would show that the cause of action from which the counter claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which as accrued to him even after the institution for the suit. The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit to avert multiplicity of the proceeding and needless protection (sic protraction) the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial…."

Such being the ambit of the provision which was invoked by the defendant-petitioner and turned down by the court under the impugned order without appreciating that the same was fit to be allowed in order to avoid multiplicity of the proceedings and needless protraction.

Adverting to the next reason assigned by the trial court that the pecuniary jurisdiction of the court shall exceed if the counter claim is allowed it is seen that section 7 (ix) of the Court Fees Act provides that in suits against a mortgagee for the recovery of the property mortgaged the court fees shall be payable according to the principal money expressed to be secured by the instrument of mortgage. The expression 'instrument of mortgage' has relevance. What the defendant prayed by way of counter-claim is a decree of redemption. The Mortgage cum conditional sale document is the document which was created on 01.11.1980. The sale deed through which the defendant purchased the subject land from the heirs of Basawan Rai shall have no relevance/impact. In my view, the learned trial court erred in not noticing the relevant provision of the Court Fees Act. In **1968 PLJR NUC**, a division Bench of this Court held to the same effect in fact situation akin to the present case.

It has been argued that another reason for rejecting the application filed under Order 8 rule 6-A of the Code that in case the same is allowed the inescapable fall out would be to direct to hand over the possession of the subject/suit land as the defendant was not in possession thereof. The aforesaid logic of the court, in my view, is also not sustainable in law. Firstly, it touches on the merit of the claim which the court was yet to examine after granting the prayer. Secondly, the position in law is very clear on this aspect.

Section 60 of the T.P.Act provides right to mortgagor to redeem. The relevant part thereof is extracted herienbelow:-

> "60. **Right to mortgagor to redeem_** At any time after the principal money has become [duel], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee (a) to deliver [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished…"

On scrutiny, it is seen that the law itself provides a right to mortgagor, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such is the mandate of law. The said reasoning of the trial court is therefore also erroneous.

Noticing the submissions of the parties, the provisions of the Court Fees Act, the T.P. Act and the Code, this Court finds incurable defect(s) in the order passed by the learned trial court.

The only contention of the respondent that the plaintiff(s) delayed the matter in raising such claim disentitling him to the relief, is also not supported from the record. The suit was filed by the plaintiff(s) in 2004. The defendant appeared and filed written statement on 10.03.2005. On the same day the counter-claim was filed by the defendant.

For the foregoing reasons, I find merit in the writ application questioning the legality of the order passed by the learned trial court. The writ application is allowed. The order dated 03.09.2007 passed by the learned 3rd Munsif, Chapra in T.S. No.

95/2004 is set aside.

There shall be no order as to cost(s).

(Kishore Kumar Mandal, J)

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