

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1272 of 2016**

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Rajeshwari Prasad

.... Appellant/s

Versus

Jogendra Rai @ Jogendra Prasad & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ram Naresh Ray

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

ORAL ORDER

2 08-12-2016

Heard learned counsel for the petitioner.

2. Perused the impugned order dated 27.06.2015 and order dated 29.06.2016 passed by Subordinate Judge-IV, Patna by which learned court below has rejected the application filed by the petitioner under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the counter claim being barred under Order 8 Rule 6-A and 6-C of the Code of Civil Procedure.

3. It appears that the plaintiff-petitioner filed the suit for declaration of title with respect to the suit property. The defendants-respondents filed written statement. Issues were framed and at this stage counter claim has been filed by defendants praying for partition of the suit property. It appears that earlier on 27.06.2015 the prayer made by the plaintiff for rejection of the counter claim has been rejected. The order was never challenged. After expiry of more than one year this application has



been filed challenging that order also because subsequent application filed by the petitioner on the same ground for rejection of counter claim has been rejected by order dated 29.06.2016.

4. The grievance of the petitioner is that after filing written statement the counter claim could not have been filed because there is no mention in the written statement. Order 8 Rule 6-A CPC provides that 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 a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence. This provision, therefore, clearly shows that the cause of action should arise before or after filing the suit but it must be before filing the written statement. This is not the intention of the legislature that the counter claim must be filed prior to filing the written statement or along with written statement. The cause of action should arise prior to deliver his defence. This will always be subject to limitation.

5. So far prayer for partition is concerned, it is recurring cause of action, therefore, there is no question of limitation arises. The counter claim has been filed by the defendants praying for partition of the suit property. The Hon'ble Supreme Court in **A.I.R. 1996 Supreme Court 2222 (Jag Mohan**



Chawla and another Vs. Dera Radha Swami, Satsang and others) has held that a defendant can claim any right by way of a counter claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. In sub-rule (1) of Rule 6A 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 that would be the subject matter of an independent suit. The words “any right or claim in respect of a cause 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.

6. In view of the settled proposition of law the counter claim can be filed by the defendant, if the independent suit for which counter claim is filed is not barred by law of limitation. Here, as stated above the defendant has got recurring cause of action to demand partition and, therefore, the counter claim cannot be said to be barred by law of limitation.

7. It further appears that the same prayer has already been rejected by order dated 27.06.2015. The said order was never challenged by the petitioner. Only after rejection of second prayer



on the same ground the petitioner is filing this civil miscellaneous application challenging the order dated 27.06.2015. So far the order dated 27.06.2015 is concerned, after such a long period i.e. more than one and half years the petitioner cannot be allowed to challenge the order in equitable jurisdiction under Article 227 of the Constitution of India.

8. The Supreme Court in the case of **U.P. State Road Transport Corporation Vs. State of U.P. and another, A.I.R. 2005 Supreme Court 446** has held that *res judicata* applies also as between two stages in the same litigation to this extent that a Court whether the trial court or higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding. Therefore, the learned court below has rightly rejected the second application filed for rejection of the plaint by order dated 29.06.2016.

9. Thus, I find no reason to interfere with the impugned order in exercise of supervisory jurisdiction. Accordingly, this civil miscellaneous application is dismissed.

Harish/-

(Mungeshwar Sahoo, J)

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