

2 08.03.2021
&
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as

F.A.281 of 2016
With
CAN 1 of 2011(Old CAN 8150 of 2011)
With
CAN 7 of 2015 (Old CAN 2345 of 2015)
With
CAN 8 of 2019 (Old CAN 4163 of 2019)
With
CAN 9 of 2020 (Old CAN 396 of 2020)
Biswanath Paul
Vs.
Paresh Nath Paul & Ors.
With
F.A.T.73 of 2021
With
CAN 1 of 2021
Bela Paul & Ors.
Vs.
Smt. Milon Paul & Ors.

Mr. Rabindra Nath Dutta,
Mr. Sibasish Ghosh,
Mr. Hare Krishna Halder,
Mr. Koushik Bhattacharyya.

...for the Appellant in F.A.281 of 2016
& the respondents in F.A.T.73 of 2021.

Mr. Abhijit Ray.

...for the Respondent Nos.1(b) & 1(c)
in F.A.281 of 2016 and Appellants
in F.A.T.73 of 2021.

These two appeals are taken up together as they arise from a common judgement for the purpose of avoiding of prolixity of repetition of facts. A suit for partition and separation of shares is filed by the plaintiffs/respondents alleging that the property described in the suit originally belonged to the father of the plaintiffs and the defendants viz., late Madhusudan Paul and his co-

sharers Gobardhan Paul, Jagabandhu Paul and Prabhabati Paul having equal shares therein. It is further stated that the said property was allegedly partitioned between the then co-sharers amicably by executing the partition deed on 14th August, 1957 and the property which is described in the schedule was allotted to the father of the plaintiff being Madhusudan Paul. Upon the death of the father, the said property devolved upon the plaintiffs and the defendants in equal shares. It is further alleged in the plaint that feeling inconvenience in continuing with the joint possession of the said undivided property, the plaintiff asked for amicable partition and having refused to agree, the suit for partition is filed.

On the other hand, the defendant no.1 contested the suit and took a plea that the suit is bad for non-joinder of necessary parties as the heirs of Jagabandhu Paul and Gobardhan Paul having acquired right title and interest have not been impleaded as parties therein. It is further indicated that the earlier suit filed by the plaintiff for partition was dismissed on contest on 28th February, 1989 and there is a gross suppression of such material fact. A counter claim was filed seeking partition in respect of the suit property

and the other property alleged by such defendant to be the joint property. It is not in dispute that in course of the suit, an application was taken out by the defendant who filed a counter claim for impleadment of left out co-sharers and the same was allowed by the trial court.

However, while taking up of the suit for passing the preliminary decree, the court noticed that though the addition was made at the behest of the defendant who filed the counter claim but shall not reap to the benefit of the plaintiffs as it is restricted to the counter claim and not the plaint filed by the plaintiff. It is further indicated that all the properties were not included in the plaint by the plaintiffs though such properties find place in the counter claim filed by the said defendants. The trial court proceeded to dismiss the suit holding that all co-sharers were not impleaded as parties and all the joint properties were not also included in the plaint.

Though the counter claim is in the nature of a cross suit but have been incorporated under Order VIII Rule 6A of the Code of Civil Procedure to avoid two separate trials and the same set of evidence to be recorded by the court. It is to minimise the litigation and to provide a speedy

remedy to the parties. Though the provision of the plaint applies to counter claim as well but it is a nexus to the suit and, therefore, one has to understand the concept of the counter claim in the perspective of the disputes between the parties. If the addition has been allowed at the behest of either of the parties to the proceeding, such addition in fact is made in the proceeding itself and cannot be restricted either to a counter claim or the plaint as the case may be.

The object behind the incorporation of order VIII Rule 6A of the Code of Civil Procedure by an amendment of the Code of Civil Procedure despite having included the provision relating to set off was that the party should not be compelled to redress his remedy against the plaintiff in a separate suit but if the cause of action or the property being the subject matter of suit is intertwined therein, the same can be conveniently decided in one proceeding.

In view of the above, we do not feel that it was proper on the part of the court to dismiss the counter claim as well as the suit for non-joinder of necessary parties. However, in course of hearing of these appeals, application for amendment has been taken out by the defendant/appellant seeking

to incorporate a property which was not included in the suit itself. Since we have decided to set aside the judgment and decree passed in both the suit as well as the counter claim, we feel that an opportunity must be given to the parties to make an application for amendment before the trial court. We thus grant liberty to the parties to file an application before the trial court within two weeks from date and if such application is filed, the trial court shall dispose of the same within four weeks from date after affording an opportunity of hearing to the parties.

We have not gone into the merit or demerit of the application for injunction filed before us and if the defendant/appellant still intends to pursue the said application, liberty is granted to them to file an application for injunction before the trial court within the time as indicated hereinabove and the trial court should also make endeavour to dispose of the same within four weeks from date after giving an opportunity of hearing to the parties and in accordance with law.

Any observations touching upon the aforesaid application for which the liberty has been given shall not have any persuasive impact on the trial court as the same is required to be decided

independently.

Accordingly, both the appeals and the connected applications are disposed of.

In view of the findings made hereinabove, the impugned judgment and decree passed by the trial court in both the cases are set aside. The suit as well as the counter claim are restored to its original file and number and are remitted back to the trial court to decide the same.

Let the lower court records be sent down immediately through special messenger at the cost of the appellant in F.A.281 of 2016. Such cost shall be deposited in course of this week.

(Harish Tandon, J.)

(Kausik Chanda, J.)

