

05.04.2022
Item No.17
Court No.18
AJ.

C.O. 435 of 2022

Alok Kumar Saraogi & Anr.
-Vs-
Dipankar Bakuly & Ors.

Mr. Pratyush Patwari.
....for the petitioners.

Ms. Anyasha Das.
....for the opposite party nos.2 & 3.

The revisional application under Article 227 of the Constitution of India is at the instance of the plaintiffs in a suit for specific performance of agreement for sale and is directed against order dated February 17, 2022 passed by the learned Civil Judge (Senior Division), Sealdah in the said suit being Title Suit No. 151 of 2018.

The suit is for specific performance of an alleged agreement for sale of the suit property dated October 08, 2013 allegedly executed by one Jayanti Paul (since deceased) through her constituted attorney, the defendant no.1 of the said suit, the other heirs and legal representatives of the said Jayanti Paul have also been arrayed as the defendants in the said suit.

The defendant nos. 2 and 3 in the said suit filed an application under Order VI Rule 17 read with Order VIII Rule 6A of the Code of Civil Procedure thereby praying *inter alia* by way of counter-claim decree of declaration of the right,

title, interest and possession of the defendant nos. 2 to 5 over the suit property and also for a decree of declaration that the said alleged agreement for sale is void *ab initio*.

The learned Trial Judge by the order impugned has allowed the said application holding that the amendment sought for is necessary to determine real controversy between the parties.

Mr. Pratyush Patwari, learned advocate appearing on behalf of the petitioners submits that the defendant nos. 2 and 3 are the witness of the development agreement but they have falsely claimed at paragraph 3 of the application for amendment that when the photocopy of those documents were supplied, they came to learn about the said documents for the first time. He further submits that the defendants in the list of documents appended to their written statement filed way back on March 20, 2019, have referred to the said documents, he therefore submits that the application for amendment is based on false statement and moreover, it has been filed at the stage when the trial of the suit has commenced and the plaintiff has already tendered their evidence-in-chief, as such, at this stage, the learned Trial Judge should not have allowed the said amendment to incorporate the said counter-

claim in the written statement. He refers to a decision of the Hon'ble Supreme Court reported in **2020(1) Indian Civil Cases 18 (S.C.)** in the case of ***Ashok Kumar Kalra vs. Wing Cdr. Surendra Agnihotri & Ors.*** to contend that counter-claim should not be entertained after framing of issues in the suit.

On the other hand, Ms. Anyasha Das, learned advocate for the opposite party nos. 2 and 3 submits that delay is not an absolute bar in seeking a relief by way of counter-claim. In support of her such contention, she refers to an unreported decision passed by the Co-ordinate Bench of this Court in **C.O. 3835 of 2019** on February 09, 2021 in the case of ***Gour Saha & Ors. vs. Ashok Kumar Roy & Ors.***

Having heard the learned advocate for the parties and on perusal of the materials-on-record, it appears that in the application for amendment of the written statement, the defendant nos. 2 and 3 have alleged that the cause of action of the counter-claim sought to be incorporated by the proposed amendment arose on different dates, lastly on November 18, 2021 i.e. long after filing of the written statement by the defendants which squarely comes within the restriction of Order VIII Rules 6A of the Code.

That apart, the defendant no. 2 and 3 by the proposed amendment is praying a decree by way of counter-claim against the defendant no. 1 also, which is not permissible under the law.

Ms. Das, learned advocate for the opposite party is right in her submission that delay is not an absolute bar in seeking counter-claim as has been held by the Co-ordinate Bench in the decision relied on by her in the case of **Gour Saha & Ors. vs. Ashok Kumar Roy & Ors**(supra) but the Hon'ble Supreme Court in the case of **Ashok Kumar Kalra vs. Wing Cdr. Surendra Agnihotri & Ors.**(supra) relied on by Mr. Patwari, learned advocate for the petitioners has held that Order VIII Rules 6A of the Code does not put embargo on filing counter-claim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action, that does not give absolute right to the defendant to file counter-claim with substantive delay, even if limitation period prescribed has not elapsed, Court has to take into consideration outer limit for filing the counter-claim, which is pegged till the issues are framed.

In the present case, the defendant nos. 2 and 3 were well aware that the plaintiffs are seeking specific performance of the agreement for sale allegedly executed by the power of attorney

holder of their mother and they were also well aware of the execution of said power of attorney at least on the date of filing of their written statement as they have mentioned about the said document in the list of documents appended to the written statement. Their knowledge about the development agreement executed by the defendant no. 1 being the power of attorney of their mother is also within the knowledge as they were witnesses of the said document.

Therefore, when the suit has reached to the stage of peremptory hearing, a counter-claim based on a cause of action accruing subsequent to the filing of the written statement should not be allowed only on the ground that such amendment to incorporate the counter-claim in the written statement is necessary to decide the real controversy between the parties.

This order impugned therefore is not sustainable and is accordingly set aside.

C.O. 435 of 2022 is disposed of without any order as to costs.

The learned Trial Judge is requested to expedite the disposal of the suit in accordance with law.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)