

08.02.2022
Ct. 21
D/L 24
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C.O. 1363 of 2020
(Via Video Conference)

Amit Kumar Jana
-Vs-
Asit Jana

Mr. Asish Chandra Bagchi, Ld. Sr. Advocate,
Miss. Malyasree Maity, Advocate,
... for the petitioner

Mr. Pinaki Ranjan Mitra, Advocate,
... for the opposite party

This application under Article 227 of the Constitution of India is at the instance of plaintiff challenging the order of rejection of his application under Order 8 Rule 9 of C.P.C. by Learned Civil Judge (Junior Division), 2nd Court, Tamluk in Title Suit No. 112 of 2018 on 07.03.2020.

The facts of this case in gist are that the parties to the present proceeding are two brothers and two sons of one Sri Syam Sundar Jana. That Sri Syam Sundar Jana owned the property in question and he gifted the same in favour of the plaintiff by executing a deed of gift on 27.12.2016. That defendant/opposite party being one of the sons of Sri Syam Sundar Jana had allowed him to reside in the disputed property as a licensee. The

plaintiff after becoming owner by virtue of gift deed dated 27.12.2016, issued notice of termination of license upon his own brother/opposite party on 08.12.2017. When the opposite party failed to vacate and deliver the possession of the disputed property to the plaintiff, then plaintiff has brought Title Suit No. 112 of 2018 for eviction of the defendant/opposite party.

In such suit the defendant filed Written Statement and where he has also made counter claim against the plaintiff. Accordingly, the plaintiff has filed W.S. against the said counter claim. Later, it was found that there was some mistake in the gift deed executed by their father in favour of the plaintiff in the year 2016 and as such the father executed a deed of rectification on 02.09.2019.

It has been submitted by learned Advocate for petitioner, that the plaintiff intend to bring on record about the inclusion of the structure which is under the occupation of the defendant in the gift deed of the plaintiff dated 2016 by executing a deed of rectification by their father in the year 2019 and such fact having developed after the institution of the suit by filing additional W.S. under Order 8 Rule 9 of C.P.C. against the counter claim of the defendant and which the Court below has rejected by passing the impugned order with the finding that the provision of Order 8 Rule 9 of

C.P.C. is applicable only to the defendant and not to the plaintiff.

Learned Advocate for the opposite party contended that the learned Court below has rightly rejected the application of the plaintiff/petitioner and if allowed it is likely to prejudice the counter claim of the defendant.

Let see whether the learned Court below is justified in rejecting the application of the plaintiff with the finding that provision of Order 8 Rule 9 of C.P.C. is applicable only to the defendant and not to the plaintiff in a counter claim.

In order to appreciate the provision of Order 8 Rule 9 of C.P.C. it needs to be read along with Order 8 Rule 6A (3) (4) of C.P.C. and Order 8 Rule 6-G of C.P.C. Order 8 Rule 6A (3) (4) of C.P.C. reads as follow : “*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 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.

Order 8 Rule 6A (3) of C.P.C. read as *the plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.*

Order 8 Rule 6A (4) of C.P.C. read as *the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.*

Order 8 Rule 6G of C.P.C. read as the rules relating to a written statement by defendant shall apply to a written statement filed in answer to a counter-claim.

Order 8 Rule 9 of C.P.C. read as *no pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same."*

In view of Order 8 Rule 6A (3) (4) and 6-G of C.P.C. it become clear in a suit if a defendant files a counter claim then plaintiff shall be at liberty to file W.S. in answer to the counter claim and the counter claim shall be treated as a plaint and will be governed by the rules applicable to the plaints. Order 8 Rule 6 G

provides the rule relating to a W.S. by defendant shall apply to a statement filed in answer to a counter claim.

Therefore, in view of the provision of Order 8 Rule 6A (3) (4) and Order 8 Rule 6-G in a counter claim the position of plaintiff will be like that of a defendant and is governed by the rules relating to a W.S. by a defendant. Plaintiff being a defendant in a counter claim filed by the defendant against him and who has right to file written statement against counter claim is entitled to invoke the provision of order 8 Rule 9 of C.P.C. and can file subsequent pleading..

In the present case the plaintiff by filling the petition under Order 8 Rule 9 of C.P.C. has prayed leave of the Court to permit him to file additional W.S. to bring on record the facts which has developed during the pendency of the suit and relating to execution of a deed of rectification by the donor in respect of the disputed structure under the possession of the defendant. Since there exist a deed of rectification concerning disputed structure such fact needs to be brought on record for proper adjudication of the dispute and if the plaintiff is not allowed to bring such fact on record then he would be deprived of his valuable right of defence against the counter claim set by the defendant. It should be noted here that the father of the parties that Sri Syam Sundar Jana is still alive. Sri Syam Sundar Jana has not only two sons namely the plaintiff

and the defendant but also two other sons Sudarshan and Sekhar. The father being the owner of the property has every right to make gift of his property to anyone of his children as per his wish and desire and may deprive any of his children from his property. In the present case it is seen the father has no intention to make gift of the disputed property in favour of the defendant/opposite party namely Sri Asit Jana and as such it appears that he has made gift of not only the land on which the disputed structure is standing subsequently but also the structure under the occupation of the defendant in favour of the plaintiff by executing a gift deed on 27.12.2016 and subsequently another deed on 02.09.2019. Therefore, such facts being vital for proper determination of the dispute between the parties need to be brought on record. Therefore, the plaintiff's/petitioner's application under order 8 Rule 9 of C.P.C. is hereby allowed. The impugned order is hereby set aside.

Accordingly **C.O. No. 1363 of 2020 is allowed.**

Interim order, if any, stands discharged.

In view of the order made above Affidavits are not invited. Allegations made shall be deemed to be denied.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Kesang Doma Bhutia, J.**)