

10.08.2023
Court No. 19
Item No.16
CP

C.O. 2010 of 2021

With

CAN 1 of 2022

Sri Prahlad Roy

Vs.

Sri Asit Roy

Mr. Probal Kumar Mukherjee, Sr. Advocate
Mr. Somnath Roy Chowdhury

...for the petitioner.

Mr. Tanmoy Mukherjee
Mr. Souvik Das
Mr. Rudranil Das
Mr. K. R. Ahmed
Mr. Soumava Santra

....for the opposite party.

This revisional application has been filed by the plaintiff in Title Suit No. 293 of 2018. The order dated September 9, 2021, passed by the learned Civil Judge (Senior Division), 3rd Court at Howrah is under challenge. By the order impugned, the counter claim filed by defendant in the suit, was accepted.

Mr. Mukherjee, learned senior advocate appearing on behalf of the plaintiff, has assailed the order impugned on two grounds:

- a) The law did not provide any option to file a counter claim after the written statement had been filed.

b) The document which has been challenged in the said counter claim was executed on May 28, 2016 and the knowledge of the same was available to the defendant from February 8, 2017. Yet, the counter-claim was filed belatedly.

c) As the counter claim seeks to impugn a document which was in the knowledge of the defendant for more than three years. The cause of action was ex facie barred by the law of limitation.

Mr. Mukherjee, has taken the court through various paragraphs of the plaint, applications and the counter claim. Reliance has also been placed on the decision of this court in the matter of Serajul Alam Mondal & ors. Vs. Hafiza Bibi & ors., in C.O. 3556 of 2019, reported in 2021 (2) ICC 777. According to him, this court had held that challenge to a deed of sale executed on April 19, 1954, after almost 11 years from the date of knowledge, was ex facie barred by law. On such finding, this court had rejected a prayer for amendment of the plaint.

Mr. Mukherjee further contends that the counter claim was filed after framing of issues and, hence, even going by the law laid down by the Hon'ble Apex Court in the recent past, the said

counter claim could not have been filed at such a belated stage.

Mr. Tanmoy Mukherjee, learned advocate appearing on behalf of the defendant/opposite party, submits that the learned court below did not decide the merit of the cause of action pleaded in the counter claim. All that the learned court decided was that at the stage of admission of the counter claim, the question of limitation could not be decided. Limitation was a mixed question of law and fact. The learned court further held that the law provided ample scope for acceptance of the counter claim belatedly, even after the written statement had been filed. Referring to the counter claim, learned Advocate submits that the case of the defendant was that the impugned deed was executed in the teeth of an order of injunction. Such being the position, the deed of sale was ipso facto void and was not required to be avoided. Hence, the law of limitation would not apply while challenging such a deed. Learned Advocate submits that when an instrument is voidable, the question of avoiding the same will arise and the law of limitation would be pressed into operation. On this issue, Mr. Tanmoy Mukherjee relies on a decision of the Hon'ble Apex Court in the matter of Balvant N. Viswamitra vs. Yadav Sadashiv Mule, reported in (2004) 8 SCC 706.

In the said decision, the Hon'ble Apex Court held that a decree which was void ab initio was a nullity and was not required to be challenged. On the contrary, a decree which was irregular or erroneous would not be a nullity and its invalidity could not be set up whenever and wherever it was sought to be enforced or relied upon. The said decree would have to be challenged.

On this principle Mr. Mukherjee further relies on a decision of the Hon'ble Apex Court in the matter of Prem Singh & ors. Vs. Birbal & ors., reported in (2006) 5 SCC 353. In this case, the Hon'ble Apex Court specifically laid down the principle of law that when a transaction was void, a suit challenging such transaction could be instituted at any time and the provisions of the Limitation Act would not be attracted.

Next, it is contended that in the decision of Ranganayakamma vs. K. S. Prakash, reported in (2008) 15 SCC 673, the Hon'ble Apex Court laid down the principle that the applicability of the laws of limitation in respect of a deed or transaction which was sought to be challenged, would indisputably depend upon the question whether the deed was required to be set aside or was not required to be set aside on the ground of the same being void ab initio.

On this principle, Mr. Mukherjee argued that in the present case the deed of sale was executed in the teeth of an order of injunction. The law is well-settled that any transaction or transfer of property in violation of the order of injunction was a nullity and did not have any existence in the eye of law. Such being the facts, the defendant was not required to challenge the deed within three years from the date of knowledge. According to Mr. Mukherjee, the question of limitation would arise only when the learned court would come to a finding that the impugned deed of sale or the transaction by virtue of the deed of sale was a void transaction. Reference has been made to the decision of Surjit Singh & ors. Vs. Harbans Singh & ors. , reported in (1995) 6 SCC 50.

Reference is made to a decision of the Hon'ble Madras High Court in the matter of Natarajan vs. Paramasivam, in SA No. 215 of 2003, wherein the High Court has held that the Exhibit A1 being a void document was not required to be challenged within the period of limitation. In the case before the Madras High Court, the challenge to the said document was brought after 12 years

Having heard learned counsel for the respective parties, this court is of the view that in the facts pleaded and the law which have been referred

to in different judgments placed by Mr. Mukherjee, the learned court below was right in holding that limitation, in this case, was a mixed question of law and fact and could only be adjudicated at the trial. The learned court rightly accepted the counter claim and decided to proceed with the suit by directing the plaintiff to file a written statement to the same.

Having considered the relevant law laid down by the Hon'ble Apex Court and the Madras High Court, this court is of the view that as a positive statement has been made with regard to the validity of the instrument which was executed sometime on May 28, 2016, i.e., during the pendency of an injunction, such issue has to be decided first by the learned court. The same can only be decided on evidence. The pleadings in the counter claim cannot be said to be ex facie barred by law. Once such issue as to whether the deed was void or voidable is decided, only then will the next issue be considered as to whether the law of limitation would apply and whether the reliefs claimed in the counter claim as also the cause of action pleaded therein were barred by limitation. Both the issues are interlinked and are required to be decided on evidence.

The question whether a counter claim can be filed at any time, even after the filing of the written statement, is no more res integra. It has been held by

the Hon'ble Apex Court that in exceptional cases the counter claim can be filed even after framing of issues, but before evidence has started.

Reference is made to the decision of ***Mahesh Govindji Trivedi vs. Bakul Maganlal Vyas & Ors.*** decided in ***Civil Appeal No.- 7203 of 2022***. The Hon'ble Apex Court held as follows:-

“**13.** In Ashok Kumar Kalra (supra), the 3-Judge Bench of this Court essentially considered the question on reference as to whether it is mandatory for a counter-claim of the defendant to be filed along with the written statement. While answering this question, this Court underscored the basic principles that procedural law should not be construed in such a way that it would leave court helpless; and that a wide discretion had been given to the Civil Court regarding the procedural elements of a suit. Having said so, this Court observed that a counter-claim is designed to avoid multiplicity of proceedings; that time limit for filing a counter-claim is not explicitly provided for but there is limitation as to the accrual of the cause of action. However, the majority opinion has been that the defendant cannot be permitted to file counter-claim after the issues are framed and the suit has proceeded substantially. It was observed and held in the lead judgment, inter alia, as under:

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‘**18.** As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach

that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC.”

In the matter of ***Ashok Kumar Kalra vs. Wing Cdr. Surendra Agnihotri & Ors.*** reported in **(2020) 2 SCC 394**, one of the Hon’ble Judges of the bench held that though the normal rule was that subsequent to filing of written statement, counterclaim could not be filed after issues have been framed, but under exceptional circumstances, counter-claim could be permitted to be filed even after issues had been framed, but before commencement of recording of plaintiff’s evidence.

The Hon’ble Judge observed, inter alia, as follows:-

“**25.** Having considered the previous judgments of this Court on counterclaims, the language employed in the rules related thereto, as well

as the intention of the Legislature, I conclude that it is not mandatory for a counterclaim to be filed along with the written statement. The Court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counter claim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.”

Thus, this court upholds the order of the learned trial court with the following modifications:

- a) The cause of action pleaded in the counter claim shall not relate back to the date of the filing of the written statement.
- b) An issue will be framed as to whether the deed of sale dated May 28, 2016 is a void document or a voidable document.
- c) Further issue will be framed as to whether the reliefs claimed in the counter claim and the cause of action pleaded were barred by the laws of limitation, and shall be answered on the findings of issue (b) above.

With the above order, the revisional application is disposed of.

Time to file the written statement is extended by a period of two weeks from date.

With the disposal of the revisional application, connected application, if any, is also disposed of.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)