

17.08.2023
Sl. No.694(ML)
srm

C.O. No. 2466 of 2023

Karabi Dutta

Versus

Bhaswati Banerjee & Anr.

Mr. Samir Kumamr Dhar,
Mr. Chittapriya Ghosh

...for the Petitioner.

Mr. Amitabha Ghosh,
Ms. Nabanita Chatterjee

...for the Opposite Parties.

In this revisional application, the order dated May 18, 2023 passed by the learned Additional District Judge, Fast Track (1st Court), Hooghly Sadar, in Probate Suit No.26 of 2003 is under challenge.

By the order impugned, the learned court below refused to accept the counter-claim filed by the petitioner/objector. Although the application for injunction was also disposed of by the same order, this revisional application addresses the question of non-acceptance of the counter-claim. The other part of the order remains intact.

The learned court below found that the counter-claim had been filed for cancellation of the Will on January 25, 2022

when the witness action was near completion. The court found the application to be time barred.

The High Court had allowed the objector/petitioner to file an additional written statement with better particulars by an order passed in C.O. No.2521 of 2022. However, the counter-claim was filed with a relief for cancellation and/or revocation of the registered Will of the deceased Raghupati Bandyopadhyay. The ground for seeking cancellation of the Will was co-sharership and the properties being the joint properties of the late Satish Chandra Bandopadhyay.

The counter claim is belated. Evidence has been recorded. Reference is made to the following decisions:-

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: -

‘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.

21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the

limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive: (i) Period of delay. (ii) Prescribed limitation period for the cause of action pleaded. (iii) Reason for the delay. (iv) Defendant's assertion of his right. (v) Similarity of cause of action between the main suit and the counterclaim. (vi) Cost of fresh litigation. (vii) Injustice and abuse of process. (viii) Prejudice to the opposite party. (ix) And facts and circumstances of each case. (x) In any case, not after framing of the issues."

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, counter-claim 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:-

"16. The time limitation for filing of the counterclaim, is not explicitly provided by the legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counterclaim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order 8 Rule 6-A. Having said so, this

does not mean that counterclaim can be filed at any time after filing of the written statement. As counterclaim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counterclaim just because of the fact that the cause of action arose as per the parameters of Order 8 Rule 6-A.

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."

A partition suit is pending before the learned Civil Judge (Senior Division), 2nd Court at Chinsurah. Such issues will be decided there. Moreover the issue of co-sharership of the property covered by the Will, has been raised in the additional written statement. The petitioner/objector has filed the written statement and additional written statement, challenging the genuineness of the Will on various grounds.

Thus, the genuineness of the Will will be decided in the probate case and a separate cross suit for cancellation of the Will is not required to be filed. Moreover, it is an admitted

position that the partition suit is pending and the claim of the petitioner shall be decided therein. Grant of Letters of Administration, will not be a decree with regard to title. It shall only prove the genuineness of the Will and the heirs of the alleged executor, if successful may at best, administer the property mentioned in the schedule. The issue of title shall not be decided in the probate suit. The petitioner/objector has already prayed for declaration, injunction and partition. The petitioner has challenged the Will on grounds of fraud, undue influence, coercion etc. by filing the written statement.

I do not find any merit in this application.

The revisional application is, thus, disposed of.

There shall be no order as to costs.

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

(Shampa Sarkar, J.)