

IN THE HIGH COURT AT CALCUTTA
(CIVIL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CO 3430 of 2006

ATANU MUKHERJEE & ANR.
VS.
JUTHIKA MUKHERJEE & ORS.

For the Petitioners	: Mr. Malay Kr. Ghosh, Sr. Adv. Ms. Kakali Samajpaty, Adv.
For the Opposite parties	: Mr. Bikash Kr. Chattopadhyay, Adv. Ms. Sohini Chakraborty, Adv.
Hearing concluded on	: 16 th August, 2023
Judgement on	: 24 th August, 2023

Siddhartha Roy Chowdhury, J.:

1. This application under Article 227 of the Constitution of India challenges the Order No. 66 dated 1st August, 2006 passed by learned 2nd Civil Judge (Senior Division), Barasat, North 24 Parganas in Title Suit No. 51 of 1996.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, Nirmal Mukherjee, predecessor-in-interest of the plaintiff brought a suit being Title Suit No. 51 of 1996 against the defendant for partition and permanent injunction. The defendant has been contesting the suit by filing written statement denying all material allegations made in the plaint. It is contended that the parties do have a property at Rahara which has not been brought within the hotchpotch

of the schedule of the plaint of the partition suit. The defendant also filed a counter claim which was rejected by learned Trial Court on 25th November, 2003 vide Order No. 42. While rejecting the prayer for counter claim, learned Trial Court gave liberty to the defendant to raise the points at the appropriate stage if necessary. After conclusion of the evidence of plaintiff as P.W. 1, the defendant again filed the petition for counter claim and by the order impugned learned Trial Court was pleased to allow the same, which is the order impugned.

4. Heard Mr. Malay Kr. Ghosh, learned Senior Counsel representing the petitioner. It is submitted by Mr. Ghosh that with the commencement of trial neither the provision as laid down under Order 6 Rule 17 nor the provision of Order 8 Rule 6A of the Code of Civil Procedure can be invoked. In support of his contention Mr. Ghosh places his reliance upon the decision of a Division Bench of this Court in **SREE SREE ISWAR RADHA BEHARI JEW VS. MALATI P. SONI** reported in **AIR 2019 Cal 131** wherein it is held :-

“38. The question raised in the reference is, thus, answered as follows : the expression “commencement of trial” in the proviso to Order VI, Rule 17 of the Code of Civil Procedure would imply the date when the court first applies its mind after the affidavit of evidence is filed and when the first witness proves his affidavit of evidence or such witness seeks to prove a document for it to be tendered in evidence or the cross-examination of such witness begins, whichever is earlier.”

5. It is further submitted by learned Counsel that Hon'ble Apex Court in **Ashok Kumar Karla vs. Wing CDR. Surendra Agnihotri & Anr.** reported in **(2020) 2 SCC 394**, while answering a reference was pleased

to hold that it is not mandatory to file counter claim along with the written statement, rather the restriction is only with respect to the accrual of the cause of action. However, this does not give absolute right to the defendant to file the counter claim with substantive delay. It is held that the Court is to take into consideration the outer limit for filing the counter claim, which is pegged till the issues are framed. But in any case the counter claim could not be filed after framing of the issues. Therefore, the learned Trial Court, according to Mr. Ghosh, learned Senior Counsel committed jurisdictional error in passing the order impugned.

6. Refuting such contention Ms. Sohini Chakraborty, learned Counsel for the defendant submits that the amended provision of Order 6 Rule 17 of the Code of Civil Procedure came into force in the year 2002 and Section 16 of Civil Procedure Code Amendment Act makes it clear that this amended provision cannot be made applicable to the suits instituted prior to the amendment of the Code of Civil Procedure. Therefore, the restriction imposed upon exercising the provision of Order 6 Rule 17 of Code of Civil Procedure by way of amendment cannot be pressed into service in this case. It is further contended that while considering the prayer for counter claim learned Trial Court was pleased to observe that though the counter claim at that point of time was not maintainable the defendant was given liberty to file counter claim depending upon the circumstances. The Order No. 42 passed by learned Trial Court has not been challenged by the plaintiffs and in exercise of such liberty, given by the learned Trial Court, the defendant filed the application, which was considered and allowed by learned Trial

Court. Therefore, the order impugned should be considered to be a continuation of the Order No. 42 passed by learned Trial Court on 25th November, 2003. According to Ms. Chakraborty, the order impugned is the fall out of Order No. 42 passed on 25th November, 2003 and thus the parties are bound by the said order. It is further contended by Ms. Chakraborty that while exercising the jurisdiction under Article 227 of the Constitution of India, this Court cannot look into the correctness of the order passed by learned Trial Court.

7. Upon perusal of the record, I find that in this suit the defendant submitted written statement on 25th March, 1997 and 26th May, 1997 issues were framed. 7th July, 1997 was fixed for peremptory hearing and on 28th August, 1997 the petition under Order 8 Rule 6A of the Code of Civil Procedure was filed which was rejected on 25th November, 2003.
8. In view of the decision of Hon'ble Apex Court in *Ashok Kumar Karla (supra)* the counter claim can be filed till the framing of issues for trial. Therefore, learned Trial Court could not have passed the order impugned after completion of examination of the witnesses on behalf of the plaintiff.
9. Hon'ble Apex Court in *Ashok Kumar Karla (supra)* held :-

“21. We sum up our findings, that Order VIII Rule 6A of the 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."*

10. The judgement of Hon'ble Apex Court in *Ashok Kumar Karla (supra)* is explaining the law holding the field and not laying down any law anew. Therefore, the order impugned, when is tested on the anvil of the judgement of Hon'ble Apex Court, it becomes imperative to bring it to naught. The Order No. 42 does not confer any right upon the defendant to file the counter claim. The petition was rejected with the observation that the defendant would get liberty to file counter claim if such occasion demands. Therefore, the defendant/opposite party cannot claim any right that emanates from the Order No. 42 dated 25th November, 2003. In my humble opinion, the order impugned is a manifestation of grave jurisdictional error committed by learned Trial Court and it should not be allowed to remain in force and should be set aside, which I accordingly do.

11. However, considering the rights of the litigants to have expeditious justice learned Trial Court is directed to take all possible steps for expeditious disposal of the suit in order to secure the rights of the litigants to have speedy justice. With this observation the revisional application is disposed of.
12. Let a copy of this order be sent down to the learned trial court forthwith.
13. Urgent photostat certified copy of this judgement if applied for, should be made available to the parties upon compliance of requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)