

26.6.2023
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Ct. no. 652
sb

CO 3718 of 2016

Sri Padma Kinar Chatterjee
Vs.
Mr. Srinivas Singh

Mr. Probal Kumar Mukherjee
Mr. Sukanta Chakraborty
Mr. Anindya Halder ...for the Petitioner

Ms. Sutapa Sanyal
Mr. Deepak Kumar Singh
Mr. Ayush Jain ...for the opposite party

Affidavit of service filed by the petitioner is taken on record.

This is an application under Article 227 of the Constitution of India against the order dated 2.8.2016 passed by learned Civil Judge, Senior Division, 5th Court, Alipore, South 24 parganas in Title Suit no. 279 of 2012.

The petitioner as plaintiff filed aforesaid suit inter alia praying for a decree of eviction against the defendant and recovery of possession along with mesne profit and other reliefs. The petitioner herein as defendant appeared in the said suit and filed written statement controverting the allegations made in the plaint. The said written statement was filed on 5th June, 2013 but suddenly, after a period of two and half years, the opposite party herein/defendant preferred an application for leave under Order VIII rule 9 of the Code of Civil Procedure before the court below praying for granting leave to file additional

written statement along with counter-claim. After hearing, learned court below allowed the said application and granted leave to the opposite party to file an additional written statement and a counter-claim. Petitioner's contention is opposite party filed additional written statement along with a counter-claim thereby taking a completely different stand from the averment made by him in his original written statement filed on 5th June, 2013.

Learned counsel for the petitioner further submits that the case made out by opposite party herein in the counter-claim was within his knowledge when he filed the original written statement and the same could have been disclosed at that early stage but the opposite party restrained himself from disclosing the same and as such it may be presumed that the opposite party has waived his right to bring such fact on record and thus the counter-claim of the petitioner should not have been accepted by the learned Trial Court. He further submits that the counter-claim filed by the opposite party is imaginary, false and frivolous and is barred by limitation. He further contended that prayer portion of the counter-claim reveals that such contract was entered into sometimes in the year 2009, which is evidently more than three years prior to filing of the counter-claim and as such the counter-claim ex facie appears to be barred by

limitation and as such is liable to be rejected under Order VII rule 11(d) of the Code.

Furthermore, the defendant/opposite party herein nowhere explained as to what prevented him earlier from filing the counter-claim along with written statement. However, by the impugned order, learned court below accepted the counter-claim filed by the defendant. In fact, the learned court below has acted illegally with material irregularity in accepting the counter-claim which is ex facie barred by limitation. If such counter-claim is allowed to be accepted, it would result in protracting the trial and would defeat the very object of treating the counter-claim as a cross suit and trying the same arising in the suit. Accordingly, he has prayed for setting aside the impugned order.

In this context, the learned counsel for the petitioner has relied upon a judgment of the Supreme Court in the case of **Vijay Prakash Jarath Vs. Tej Prakash Jarath** reported in **(2016) 11 SCC 800**.

Learned counsel for the opposite party submits that from the counter-claim, it appears that the defendant has specifically mentioned that the cause of action of the counter-claim arose in favour of the defendant on several dates and lastly arose on institution of the suit at the suit property within the jurisdiction of the learned court. Moreover, in paragraph 5, the defendant in its counter-claim has mentioned various instances to show that

cause of action for the counter-claim arose on different dates and as such the counter-claim is not barred by limitation as it is within the statutory period.

I have considered the submissions made by the both the parties. The sole issue raised by the petitioner herein is that the court below has committed mistake in accepting the counter-claim, since from the averments made in the counter-claim, it appears that the counter-claim *ex facie* is barred by limitation.

The question as to whether a counter-claim is barred by limitation or not depends upon facts and circumstances of each case. Only the averments made in the counter-claim are relevant for the present purpose. From the averment of counter-claim, it does not appear that counter-claim is *ex-facie* barred by law of limitation. Question of limitation is a mixed question of law and fact which can only be adjudicated through trial as the issue of limitation is not confined herein to the point of law only.

In view of above, I find nothing to interfere with the observations made by the court below. Accordingly, C.O. 3718 of 2016 is dismissed. However this order will not preclude the petitioner herein to agitate before the court below, if any issue is framed for adjudication on the point of limitation, during trial.

As the suit is pending since 2012, the court below is directed to expedite the hearing of the suit as well as

the counter-claim and to make every endeavour to dispose of the suit as well as counter-claim, preferably within a period of twelve months from the date of communication of the order.

Urgent photostat certified copy of the order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)