
(2017) 04 AHC CK 0041

ALLAHABAD HIGH COURT

Case No: Matters Under Article 227 No. 2442 of 2017

Naresh Kumar

APPELLANT

Vs

Prakash Chand

RESPONDENT

Date of Decision: April 24, 2017

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, Order 8 Rule 6A (4), Section 115

Citation: (2017) 2 ARC 273

Hon'ble Judges: Manoj Misra, J.

Bench: Single Bench

Advocate: Abhishek Misra, Advocate, for the Petitioner; Hausihla Prasad Mishra, Advocate, for the Respondent

Final Decision: Allowed

Judgement

Manoj Misra, J.—Heard Sri H.R. Mishra, learned Senior Counsel, assisted by Sri Abhishek Misra, for the plaintiff-petitioner; and Sri P.K. Jain, learned Senior Counsel, assisted by Sri H.P. Mishra, for the defendant-respondent.

2. The present petition has been filed against the orders dated 06.01.2017 and 23.12.2016 passed by the District Judge, Gorakhpur in Civil Revision No.5 of 2017 and Civil Judge (Senior Division)/F.T.C., Gorakhpur in Original Suit No.946 of 2013 respectively.

3. By order dated 23.12.2016 the application of the plaintiff-petitioner to reject the counter-claim under Order 7, Rule 11 CPC was rejected and by order dated 06.01.2017 the District Judge, Gorakhpur dismissed the Civil Revision No.5 of 2017 as not maintainable by placing reliance on a decision of this Court.

4. The submission of the learned counsel for the petitioner is that since the revision of the petitioner has not been decided on merits and the same is dismissed as not maintainable,

therefore, the order passed by the revisional court in dismissing the revision as not maintainable should be set aside and the revisional court should be directed to pass a fresh order after considering the merits of the case in accordance with law inasmuch as revision would be maintainable. It has been submitted that if the application under Order 7, Rule 11 CPC had been allowed it would have disposed of the proceeding on the counter-claim, therefore, rejection of the application under Order 7, Rule 11 CPC would beget a revisable order. But the court below committed manifest error of law in rejecting the revision as not maintainable. It has also been submitted that even if suit may not be disposed of on rejection of the counterclaim but since counter-claim is to be treated as a plaint and has to be decided even if the suit is dismissed, therefore, if the counter-claim is rejected under Order 7, Rule 11 CPC, the proceeding on the counter-claim, which would be deemed separate proceeding, would be brought to its logical conclusion. Under the circumstances, rejection of an application under Order 7, Rule 11 CPC begets a revisable order.

5. The learned counsel for the petitioner has placed reliance on a decision of the Apex court in the case of **Saleem Bhai v. State of Maharashtra 2002 Law Suit (SC) 1221** where it has been observed that the power under Order 7, Rule 11 CPC is to be exercised at any stage of the proceeding before the conclusion of the trial. In that case court had entertained a challenge to an order where the court below had refused to exercise its power under Order 7, Rule 11 CPC by holding that it amounted to failure to exercise jurisdiction vested in a court.

6. It has also been submitted that in Original Suit No.946 of 2013 the Civil Judge (Senior Division), Gorakhpur had rejected the application of the defendant-respondents made under Order 7, Rule 11 CPC and against which, a revision preferred by the defendant-respondents has been entertained and the same is pending as Revision No.63 of 2017 whereas the revision preferred by the petitioner has been dismissed as not maintainable. Therefore, under the circumstances, it would be appropriate that the order passed by the court below be set aside and both the revisions are tagged together and decided by the court below after hearing both sides.

7. Sri P.K. Jain, learned Senior Counsel, who has accepted notice on behalf of the respondents, though has supported the view taken by the court below but he has not been able to dispute the contention of the learned counsel for the petitioner that if the application under Order 7, Rule 11 CPC filed by the petitioner had been allowed, then the proceeding on the counter-claim would have terminated.

8. Having considered the submissions of the learned counsel for the parties, this Court is of the view that the view taken by the court below that the revision would not be maintainable against rejection of an application under Order 7, Rule 11 CPC is not correct in law because if the application under Order 7, Rule 11 CPC is allowed, then it would terminate the proceeding on the counter-claim which is to be treated as a plaint and is governed by the rules applicable to plaints (See Order 8, Rule 6A (4) CPC). As such, the

revision would be maintainable against rejection of such an application.

9. In view of the above, the order dated 06.01.2017 is set aside. The court below is directed to restore Civil Revision No.5 of 2017 to its original number and the same shall be heard along with Civil Revision No.63 of 2017 expeditiously, in accordance with law, without entertaining unnecessary adjournments.

10. The petition stands allowed to the extent indicated above.