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C.O. 68 of 2015

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***Hiralal Prosad***  
***Vs.***  
***Satya Narayan Singh & Ors.***

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**Mr. Diptendu Majumdar,**  
**Mr. Tapabrata Bhattacharya.**  
**... for the petitioner.**  
**Mr. J. K. Mondal.**  
**... for the opposite parties.**

This revisional application is directed against an order dated 20<sup>th</sup> November, 2014 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Serampore in Civil Revision No. 7 of 2014 affirming the order no. 31 dated 8<sup>th</sup> January, 2010 passed by the learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Serampore, by which an application for amendment seeking incorporation of the counter-claim is rejected.

In a suit for recovery of possession on the ground of revocation of licence, the petitioner took a plea of better title than the licensee. The suit was posted at trial, when an application for amendment of the written statement incorporating the counter-claim to the effect that he is a tenant in respect of the suit premises is taken out.

The Trial Court rejected the said application as an earlier suit filed by the petitioner, being Title Suit No. 95 of 2005, praying for declaration of his tenancy right in respect of the suit premises, having dismissed, the relief by way of a counter-claim, which

in effect is a cross-suit, is impermissible.

The Trial Court appears to have applied the provisions contained in Order IX Rule 8 & Rule 9 of the Code of Civil Procedure and dismissed the said application.

I am astonished and surprised to see that an application under Section 115 A of the Code of Civil Procedure is filed and entertained by the learned Additional District Judge, 1<sup>st</sup> Court, Serampore.

After the amendment having brought into the Code of Civil Procedure, unless the order is of such nature, which ends the proceeding finally, the same is not capable of being revised under the aforesaid provisions. It is unfortunate that the learned Additional District Judge, 1<sup>st</sup> Court, Serampore entertained the revisional application and decided the same on merit.

Be that as it may, since both the orders, i.e. the order passed by the learned Civil Judge (Junior Division), 2<sup>nd</sup> Court and the order passed by the Revisional Court below, are assailed in this revisional application, this Court permitted the learned advocate for the petitioner to address on merit.

Learned advocate for the petitioner is very much vocal in contending that both the Courts below have applied wrong provisions in dismissing the application for amendment. According to him, the suit filed by his client seeking declaration of tenancy right in respect of the suit-property was not dismissed under Order IX Rule 8 of the Code of Civil Procedure and, therefore,

Order IX Rule 9 of the Code cannot be pressed in action. It is further submitted that the court below applied the wrong provision in dismissing the said application for amendment and, therefore, both the orders are liable to be set aside and the matter should be remanded to the Trial Court for fresh consideration.

This Court has an occasion to go into the certified copy of the order sheets of Title Suit No. 95 of 2005.

It is not in dispute that the said suit filed by the petitioner relates to a decree for declaration of tenancy right in respect of the suit-premises. During the pendency of the said suit, the original defendant no. 4 died and the substitution application was not taken out within the statutory period. Subsequently an application under Order XXII Rule 9 of the Code of Civil Procedure along with an application under Section 5 of the Limitation Act was filed, which gave rise to the registration of Miscellaneous Case No. 63 of 2007 and the Court upon hearing the petitioner herein did not find any cogent reasons or grounds for condonation of delay and, in fact, rejected the said application. As a consequence of rejection of an application for condonation of delay, the main application under Order XXII Rule 9 of the Code also stood dismissed.

The suit was thereafter posted for hearing and an order was passed against the petitioner herein to file an affidavit as to examination-in-chief. Since the

compliance was not done, the Court issued the show cause notice as to why the suit should not be dismissed.

Though the petitioner showed the cause, but the Court did not find the same to be sufficient and satisfactory and, therefore, proceeded to dismiss the said suit for non-compliance of the Court's order.

In strict sense, Order IX Rule 8 of the Code is not attracted in such an eventuality and, therefore, the applicability of Order IX Rule 9 does not arise. The Revisional Court can substitute the finding, if the same is found to be incorrect provided the ultimate conclusion taken by the Trial Court is correct.

Even if this Court accepts the submission of the petitioner that both the Courts below have wrongly applied the provisions contained in Order IX Rule 9 of the Code, but do not find any fault in the ultimate decision, by which the amendment application was dismissed. There are several instances, when the suit can be dismissed by the Court.

Order IX of the Code is not exhaustive and does not contain all the eventualities for dismissal of the suit for non-compliance of the Court's order or non-appearance of any of the parties or both of them.

Order XVII Rule 2 of the Code postulates that in the event the parties do not participate in the proceeding or suit, the choice is left to the Court either to take recourse under Order IX of the Code or to pass any other order, as it may think it proper.

Even if Order IX does not apply in strict sense, it is after all a dismissal in presence of the parties and, therefore, the party, who suffered the said order, cannot re-agitate the same issue in an independent proceeding.

Learned advocate for the petitioner submits that the counter-claim cannot be treated as an independent suit. He took an exception to the observations recorded by the Court of first instance that the counter-claim is in effect a cross-suit.

Learned advocate for the petitioner might have overlooked the provisions contained under Order VIII Rue 6A (2) of the Code of Civil Procedure, which explicitly says that the counter-claim has the same effect as a cross-suit and shall be treated as a plaint.

Once the relief is denied by the Court in presence of both the parties, such relief cannot be allowed to be re-agitated either by instituting a fresh suit or by way of a counter-claim, which partakes the character of a plaint.

The Court of first instance has not committed any error in dismissing the application for amendment, by which the petitioner seeks to incorporate the counter-claim.

However, this Court must record its dissent that the Additional District Judge, 1<sup>st</sup> Court, Serampore ought not to have entertained the revisional application on merit.

This Court, therefore, does not find any ground to interfere with the impugned order.

The revisional application is devoid of merit. The same is hereby dismissed.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied on priority basis.

**(HARISH TANDON, J.)**