

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7674 OF 2014

Balkrishna P. Sadafule .. Petitioner

vs.

Smt. Sakhubai S. Rajput .. Respondent

Mr. Ashok B. Tajane for the Petitioner.

CORAM : M. S. SONAK, J.

DATE : 08 SEPTEMBER 2015.

P.C. :-

1] This Court, by order dated 2 July 2015 read with order dated 6 July 2015 had made it clear that this matter may be heard and disposed of finally at the stage of admission.

2] Mr. Tajane, learned counsel for the petitioner, states that the service has been duly effected upon the respondent and necessary affidavit of service has also been filed. Accordingly, Rule. Rule is made returnable forthwith.

3] The challenge in this petition is to the order dated 15 April 2014 by which the Trial Court has declined the petitioner leave to amend the written statement and introduce thereby a counterclaim seeking refund of an amount of Rs.40,000/- allegedly paid by the petitioner to the respondent as and by way of earnest money deposit.

4] The leave to amend has been rejected primarily on the following two grounds:

- a] That it is impermissible to introduce a counterclaim, once written statement has already been filed; and
- b] That the proposed counterclaim is apparently time barred.

5] In the peculiar facts and circumstances of the present case, the impugned order declining leave to amend the written statement and introduce counterclaim is required to be set aside. This is because leave to amend was applied for on 2 February 2013, i.e., much prior to the commencement of trial in the suit. Besides, both the reasons which persuaded the Trial Court to decline leave to amend, in the peculiar facts and circumstances of the present case, were not reasons enough to decline leave to amend.

6] The Hon'ble Apex Court in case of *Ramesh Chand Ardawatiya vs. Anil Panjwani*¹ as well as this Court in case of *Seshrao, Bhaurao Sable Vs. Ganesh M. Sable*², have held that there is no absolute bar to introduction of a counterclaim, once the written

1 (2003) 7 SCC 350

2 2006(6) BCR 549

statement has already been filed. The counterclaim can always be filed even after filing of written statement before commencement of trial in the suit. Similarly, unless a claim is *ex-facie* barred by limitation, there is no reason to deny leave to amend. Leave to amend can always be granted by leaving open the issue of limitation, which can always be decided after the trial is complete and the parties have occasion and opportunity to lead their evidence on all issues, including the issue of limitation. Such approach has been commended by the Apex Court in case of *Pankaja and anr. Vs. Yellappa (dead) by Lrs. & ors.*³ and *Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. & anr.*⁴ and other decisions.

7] Accordingly, in the peculiar facts and circumstances of the present case, the impugned order is set aside. Leave to amend as prayed for in Exhibit-30 is granted. Amendment to be carried out within a period of two weeks from today. The respondent-plaintiff to file written statement to the counterclaim within a period of four weeks from the date of service of amended written statement. The respondent-plaintiff shall have opportunity to file an additional affidavit in lieu of examination-in-chief, in the light of leave to

3 (2004) 6 SCC 415

4 (2000) 10 SCC 130

amend now granted. All this will be subject to payment of costs by the petitioner, which are assessed at Rs.7500/-. The costs to be deposited before the Trial Court within a period of two weeks prior to carrying out amendment to the written statement. Once such costs are deposited, the respondent-plaintiff shall be entitled to withdraw the same unconditionally.

8] It is made clear that the issue of limitation to raise the counterclaim is specifically kept open and the Trial Court to decide the same alongwith the rest of the issues, in accordance with law and on its own merits.

9] The petitioner is directed to appear before the Trial Court on 15 September 2015 at 11.00 a.m. and produce the authenticated copy of this order.

10] Rule is made absolute to the aforesaid extent.

11] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

CERTIFICATE

“I certify that this Order uploaded is a true
and correct copy of original signed Order.”