

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 667 OF 2016

Shri. Rajan Nayku Kumbhar	... Petitioner
V/s.	
Shri. Vijay Nayku Kumbhar & Ors.	... Respondents

Mr. Manoj Patil for the Petitioner.
Mr. Bhushan Walimbe for the Respondent No.1

**CORAM : K. K. TATED, J.
DATED : 22/07/2016**

P.C.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of the Constitution of India the Petitioner plaintiff is challenging the order dated 27.07.2015 passed by the Civil Judge, Senior Division, Islampur below Exh. 56 in Special Civil Suit No. 43 of 2010 allowing defendants' application to file counter claim.

3 In the present proceeding, the petitioner plaintiff filed Special Civil Suit No. 43 of 2010 for partition and separate possession of HUF property. In that the respondents defendants filed their written statement on 01.04.2011. Thereafter, the defendants filed application below Exh. 32 dated 13.11.2013 and application below Exh. 41 dated 01.03.2014 for directions to the plaintiff to add some other properties in the suit belonging to HUF. Those applications were dismissed by the Trial Court by order dated 28.11.2014.

4 Thereafter, defendants filed application below Exh. 56 for allowing them to file counter claim. That application was allowed by the Trial Court by order dated 27.07.2015. Hence, the present Writ Petition.

5 The learned Counsel for the petitioner submits that in the present proceeding, the defendants filed his written statement on 01.04.2011. Thereafter, the defendants preferred application below Exh. 32 and 41 for directions to the plaintiff to add some properties in the suit. Those applications were rejected by the Trial Court on 28.11.2014. Then defendant preferred application below Exh. 56 for allowing him to take counter claim. He submits that Trial Court erred in coming to the conclusion that the respondents defendants made out case for allowing their application below Exh. 56 for filing the counter claim.

6 The learned Counsel for the petitioner submits that the plaintiff filed their affidavit of evidence on 01.04.2011. The issues were also framed by the Trial Court. After filing affidavit of evidence and framing issues, the respondents defendants filed the application for allowing them to file counter claim. He submits that the Court below failed to consider the fact that once the trial began, there is no question of allowing the parties to amend their pleadings. These facts were not considered by the Trial Court at the time of passing impugned order. In support of his contentions, the learned Counsel for the petitioner relies on the following citations:

a) *Gayatri Women Welfare Association V/s. Gowramma & Anr. 2011 (1) JT 315*

b) *Kimberley Pereira V/s. Mario Pereira, 2012 (2) Mh.L.J.*

101.

c) *Inacio Amorim V.D.Costa & Ors. V/s. Rocky Andrade & Ors., 2014(5) Bom.C.R. 679*

d) *Nagnath Jagannath Lomate & Anr. V/s. Narsing Sambha More & Ors., 2009 B.C.I. 29*

7 The learned Counsel for the petitioner submits that the Apex Court in the matter of *Gayatri Women Welfare Association (supra)* held that once the issues are framed and trial began, Court should not allow other side to file counter claim. He relies on paragraphs 33 and 34 of the said judgment. In the matter of *Kimberley Pereira (supra)* our High Court held that for filing a counter claim the limitation is three years as per Article 113 of Limitation Act, 1963. He relies on paragraph 11 of the said Judgment. In the matter of *Inacio Amorim V.D.Costa (supra)* our High Court held that there is limitation for filing the counter claim. He relies on paragraphs 9 to 15 of this authority. In the matter of *Nagnath Jagannath Lomate (supra)* our High Court held that counter claim not to be allowed after recording of evidence of plaintiff is over. He relies on paragraph 9 to 17.

8 On the basis of these submissions, the learned Counsel for the petitioner submits that the impugned order passed by the Trial Court is required to be set aside.

9 On the other hand, the learned Counsel for the Respondents defendants vehemently opposed the present Writ Petition. He submits that in the present proceeding, the petitioner plaintiff filed a suit for partition and separate possession. At the time of filing of suit, the

plaintiff failed to include all the properties of HUF. Hence, initially the defendants filed application below Exhs. 32 and 41 for directions to the plaintiff to add all the properties. Those applications were rejected by the Trial Court on 28.11.2014. Hence, immediately, the defendants filed application for allowing them to file counter claim. He submits that in a suit for partition, co-parceners can file a suit for remaining properties within 12 years from the date of declining their rights. He submits that in the present proceeding, the Trial Court has rightly considered these facts and allowed the defendants' application for filing the counter claim. Hence, there is no substance in the present petition and same is required to be set aside.

10 I heard both the sides at length. It is to be noted that in the present proceeding, the plaintiff has filed suit for partition. For filing counter claim in partition suit and other than partition suit, the principals are different under Order 8 of Code of Civil Procedure, 1908. These facts were considered by the Trial Court at the time of passing impugned order.

11 The authorities relied by the petitioner in the matter of *Gayatri Women Welfare Association (supra)* is not applicable to the facts and circumstances of the present case. In that case, the suit was filed for permanent injunction and Counter claim was filed beyond the period of limitation and also after framing of issues. In case at hand, the defendants have made out case for filing counter claim after framing of issues. If sufficient cause is pointed out, the Court can allow parties to amend their pleading even after framing of the issues.

12 In the matter of *Kimberley Pereira (supra)*, dispute was about

divorce under Section 10 of the Indian Divorce Act. Hence, that is not applicable to the facts and circumstances of the present case.

13 The authority in the matter of *Inacio Amorim V.D.Costa (supra)* the issue was under Specific Relief Act, where Counter claim filed by the defendants was beyond the period of limitation and also after framing the issues. In the case in hand, the suit filed by the plaintiff was for partition and for separate possession of HUF properties. Hence, this authority is also not applicable.

14 In the matter of *Nagnath Jagannath Lomate (supra)* our High Court held that after settlement of issues as well as after recording of evidence of plaintiff is over, court should not allow defendants to file counter claim. In that authority the dispute was about the agreement for sale of HUF properties. Whereas, the case in hand the dispute is about partition of HUF properties. Hence, that is not applicable to the facts and circumstances of the present case.

15 Considering the above mentioned facts and reasons given by the Trial Court at the time of passing the impugned order dated 27.07.2015, I do not find any substance in the present Writ Petition.

16 Hence, following order is passed:

a) Writ Petition stands rejected with cost of Rs.5000/-.

b) Cost to be paid to the respondents defendants or to be deposited in the Trial Court within four weeks from today failing which Special Civil Suit No. 43 of 2010 shall stand dismissed without

referring back to the court.

c) If cost is deposited in the Trial Court, defendant is entitle to withdraw the same without any condition.

(K.K.TATED, J.)