

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.3854 of 2015

ORDER:

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This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful plaintiff/respondent is directed against the orders dated 29.07.2015 of the learned VI Junior Civil Judge, City Civil Court, Hyderabad passed in I.A.no.241 of 2015 in O.S.no.2549 of 2008 filed under Order VI Rule 17 read with Order 8 Rule 6-A and Section 151 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to permit the petitioner/1st defendant to amend the written statement and include the counter claim as detailed in the affidavit filed in support of the petition and in the petition list.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff ('the plaintiff', for brevity) and the learned counsel for the 1st defendant/1st respondent herein. The 2nd defendant/2nd respondent-The Special Officer, Greater Hyderabad Municipal Corporation is stated to be not a necessary party. I have perused the material record.

3. To begin with, the introductory facts, in brief, are as follows:

The plaintiff brought the suit against the defendants 1 and 2 for grant of a decree for mandatory injunction directing the 1st defendant to demolish the illegal constructions, viz., 3rd and 4th floors in the premises bearing Municipal No.5-2-439 situated at Risala Abdullah, Hyderabad, i.e., plaint 'A' schedule property and to restrain the 1st defendant from making any openings either windows/ventilators or any other openings or from making any constructions within 1.5 meters on the Western side of 3rd and 4th floors of the above said premises, i.e., running from North to South of the 3rd and 4th floors of the aforesaid premises and for costs. The suit was filed in August 2008. In January 2009, the 1st defendant had filed written statement resisting the suit. When the suit is at the stage of cross-examination of PW1, the 1st defendant

had filed the subject application for amendment of the written statement and to permit the 1st defendant to include the counter claim. That petition was resisted by the plaintiff by filing a counter. No documents were marked at the time of hearing before the Court below. On merits, the trial Court had allowed the petition filed by the 1st defendant. Therefore, the aggrieved plaintiff has filed this revision petition.

4. In this backdrop, the case of the 1st defendant in support of his request to permit him to amend the written statement and include the counter claim is, in brief, as follows:

The suit is filed for mandatory injunction for demolition of the 3rd and 4th floors in the premises of this defendant and for a perpetual injunction to restrain this defendant from making any constructions within 1.5 meters on the Western side of 3rd and 4th floors of the above said premises, i.e., running from North to South of the 3rd and 4th floors. On the request of the plaintiff, a Commissioner was appointed to note down the physical features of the plaintiff's schedule property and to make a note of the distances that are maintained by both the parties between the respective constructions raised by them in their respective properties right from the intervening wall and from the cellar to all upper floors. The Advocate Commissioner having inspected the premises had filed his report. The report of the Commissioner discloses that on the Eastern side of the property covering an area of 22.6 feet in length from South to North, which is corresponding to the West of the property belonging to the 1st defendant, the plaintiff had made constructions without leaving any set back. At one point of time, the 1st defendant had given a proposal for settlement of the dispute amicably. While the said settlement talks were going on, the plaintiff had proceeded and raised the said illegal constructions. Thus, the constructions were made by the plaintiff without leaving any set back in gross violation of the bye-laws, building regulations and the provisions of the GHMC Act. By playing a confidence trick, the plaintiff had raised such constructions. On several occasions, both the parties had negotiated for settlement amicably. However, the plaintiff is

interested in procrastinating the matter. Further, the constructions of the plaintiff are also in gross violation of the bye-laws, building regulations and the provisions of the GHMC Act and the compromise entered into in O.S.no.3826 of 1989 on the file of the trial Court. The constructions made by the plaintiff are *per se* illegal. However, he had still chosen to proceed with the suit against this defendant and is seeking demolition of the structures raised by this defendant in his premises by alleging that the said constructions are illegal. The plaintiff's action is unjust and improper. Since the plaintiff made construction not only in violation of the bye-laws, building regulations and the provisions of the GHMC Act, but also in violation of the compromise in the aforementioned suit, the easementary rights of the 1st defendant in regard to air and light were affected. Hence, the 1st defendant is constrained to prefer a counter claim against the plaintiff and seek the following reliefs:

- (a) **A decree be passed in favour of the Defendant No.1 and against the plaintiff, declaring that the Eastern Portion of construction raised by the plaintiff which is within 2 Feet distance from the intervening wall, extending over an area of 22.4 Ft from South to North, from Cellar to the 5th floor in premises bearing H.No.5-2-438 and 438/1 situated at Risala Abdulla J.N.Road Hyderabad, which is more particularly described in the schedule annexed to this counter claim, as being illegal and in violation of the Building By-laws, Zoning Regulations and provisions of the GHMC Act and that of the Memorandum of Compromise entered into between the parties in OS No.3826 of 1989 on the file of IV Junior Civil Judge, City Civil Court, Hyderabad.**
- (b) **A decree for Mandatory injunction be passed in favour of the Defendant no.1 and against plaintiff directing the plaintiff to demolish the Eastern Portion of construction existing within 2 Feet distance from the intervening wall, extending over an area of 22.4 Ft from South to the North, from Cellar to the 5th floor in premises bearing H.no.5-2-438 and 438/1 situated at Risala Abdulla J.N.Road, Hyderabad which is more particularly described in the schedule annexed to this Counter claim, and on his failure to do so, the same be done through due process of law.**
- (c) **Costs of the counter claim be awarded; and**
- (d) **Any other relief or reliefs to which the plaintiff is entitled to may also be granted."**

[Reproduced verbatim]

The subject application for amendment of the written statement for inclusion of the counter claim could not be filed earlier in view of the peculiar circumstances mentioned above. The cause of action for mandatory injunction is a continuing cause of action. Hence, the subject application is filed at present. The counter claim can be filed before commencement of the

evidence of the defendant. In the circumstances, it is just and necessary to permit the 1st defendant to amend the written statement and include a counter claim with the aforementioned reliefs. No consequential amendments in the written statement of the 1st defendant are required. If the relief sought for in this subject application is denied, the petitioner/1st defendant would suffer serious and irreparable injury as the plaintiff had already raised illegal constructions and the same would continue to affect the valuable rights/rights of easement in regard to receiving air and light to the property of the petitioner/1st defendant and ultimately, such illegal constructions made by the plaintiff would stand legalized.

5. *Per contra*, the case of the plaintiff in the counter affidavit, in brief, is this:

After the issues were framed, the suit is coming up for cross-examination of PW1 (plaintiff). The affidavit in lieu of examination-in-chief was filed 1 ½ years prior to the filing of the subject application by the 1st defendant. The subject application is filed to compel the plaintiff to settle the issue. The 1st defendant made allegations that the plaintiff made illegal constructions up to 5th floor. Similar allegations have been made by the 1st defendant in the written statement already filed. The Advocate Commissioner filed his report on 17.10.2008. The subject application for amendment of the written statement is filed in the month of March, 2013. The allegations in the affidavit filed in support of the said petition are misconceived and incorrect. The 1st defendant misrepresented the facts. The allegations that on the Eastern side of the plaintiff's premises, certain constructions were made by the plaintiff without leaving the set backs are misconceived. The allegations that the said constructions were made by the plaintiff in gross violation of building bye-laws, zonal regulations, provisions of the GHMC Act and also the compromise entered into in the suit between the parties are misconceived. The constructions were made even prior to the filing of the suit even as per the admission of the 1st defendant. The 1st defendant made a reference to such constructions in his written statement.

The 1st defendant now wants to include a counter claim and seek the relief of mandatory injunction with reference to the constructions made by the plaintiff even prior to the suit. The claim in the counter claim is hopelessly barred by time. The constructions were there even as on the date of the filing of the written statement of the 1st defendant; hence, he cannot now seek permission to file a counter claim as he has not made any such claim when the written statement was filed. The 1st defendant can set up by way of counter-claim, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. A meaningful reading of the provision would show that the counter claim should be filed along with the written statement. Once the trial has begun, no application for amendment shall be entertained and allowed in view of the provision of Order VI Rule 17 of the code. There is no due diligence on the part of the 1st defendant in seeking the leave of the Court to amend the written statement. The present claim by way of a counter claim changes the entire nature of the suit and the counter claim now being sought to be introduced cannot be permitted as the suit is at the stage of cross-examination of PW1. A declaration must be sought within the period of limitation provided under the Limitation Act; and the period of limitation is three years for seeking mandatory injunction. The time barred amendment cannot be permitted to be introduced by way of counter claim. The petition is devoid of merit and is liable to be dismissed.

6. The learned counsel for the plaintiff and the 1st defendant had advanced arguments in line with their pleadings.

7. The learned counsel for the plaintiff would further contend as follows: "The trial Court did not consider the detailed pleadings in the counter affidavit and did not properly appreciate the legal position. The Court below had failed to consider the law laid down by the Supreme Court in 1987 (3) SCC page 265, wherein the Supreme Court held that the counter claim can be filed only before submission of the written statement if the cause of action is

accrued by then. The counter claim can be made by the defendant in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing the suit, but before the defendant has delivered his defence. The written statement was filed in January 2009. The facts now narrated in the proposed claim were already stated in the defence already taken in the written statement. But at that time, no counter claim was made. Since the cause of action had accrued even by the date of filing of the written statement and as a the counter claim was not made while filing the written statement, the present application seeking to amend the written statement to include the counter claim is absolutely barred and therefore, it is liable for rejection. The counter claim was taken on record by the Court below after lapse of more than five years after delivering the defence of the defendant. The relief of mandatory injunction can be granted only within three years from the date of accrual of cause of action. The trial Court exceeded the jurisdiction in granting the relief to the 1st defendant.”

8. *Per contra*, the learned counsel for the 1st defendant while supporting the order of the Court below had further contended as follows: ‘The reliefs of injunctions are equitable reliefs. The law is well settled that he who comes to equity must do equity; and the plaintiff who made illegal constructions in his property must demolish his constructions first before complaining against his neighbor, 1st defendant, and before saying that the 1st defendant made illegal constructions. If the relief of counter claim is not permitted to be included in the defence by allowing the amendment, the 1st defendant would suffer loss and injury as illegal constructions made by the plaintiff by playing a confidence trick would continue to affect the valuable rights of the 1st defendant to receive light and air to his property; and ultimately, the illegal constructions made by the plaintiff would stand legalized. Further, the cause of action is a continuing cause of action and the said fact is mentioned in the proposed counter claim cause of action. Further, where the question whether the relief sought for by way of amendment is barred by limitation or not is a mixed question of fact and law, the said issue has to be decided in the suit

but not at the stage of considering the application filed for amendment of the written statement to include the counter claim. The circumstances stated in the affidavit and the facts of the case disclose that the 1st defendant could not take this plea despite due diligence. The settled legal position empowers the Court below to permit the amendment of the written statement and include a counter claim. The Court below had properly appreciated the facts and the legal position correctly and that therefore, the impugned order does not call for interference.

9. I have given earnest consideration to the facts and the submissions.

9.1 At the outset, it would be apt to refer to the relevant provisions of law, which read as under:

Order VI, Rule 17:

17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

Order VIII, Rule 6-A:

Counter-claim by defendant:- (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

9.2 The learned counsel for the petitioner had placed reliance on the following decisions:-

(i) The decision in **Nagnath Jagannath Lomate and Anr. V. Narsing**

Sambha More and Ors.^[1] was relied upon in support of the proposition that in a case, where the cause of action for filing the counter claim arose before filing of the written statement, it would be incumbent upon the defendant to raise the counter claim at the time of filing the written statement and that the defendant cannot raise his counter claim at a belated stage long after the presentation of the written statement and after the settlement of issues and recording of evidence of the plaintiff had commenced.

(ii) In **Narbadeshwar Prasad v. Ram Kishore Mishra and Ors.**^[2], it was held that since counter claim is to be treated as an independent claim, the question whether it is barred by limitation undoubtedly falls within the jurisdiction of the court for determination at the stage when it is filed.

(iii) The decision in **Southern Ancillaries Pvt. Ltd. V. Southern Alloy Foundaries Pvt. Ltd.**^[3] is relied upon in support of the proposition that counter claim cannot be permitted to be filed when once recording of evidence commences.

(iv) The decision in **Madanapalle Municipality v. Syed Ahamad and Ors.**^[4] was relied upon in support of the contention that if counter claim is allowed after the evidence is commenced, it frustrates the very purpose and intendment of the provision contained in Rule 6A.

(v) In the decision in **L.C.Hanumanthappa v. H.B.Shivakumar**^[5], the facts of the case are as follows: 'In a suit filed for injunction, amendment was permitted to convert the suit into one for declaration of ownership of property. In the defence, the defendant urged that the said relief is barred by law of limitation. On the facts of the case, the right to sue for declaration of title first arose on 16.05.1990 when the original written statement clearly denying the plaintiff's title was filed; and, that by 16.05.1993, a suit based on declaration of title has become time barred.' Therefore, the Supreme Court held that the doctrine of relation back would not apply to the facts of the case as the court allowed the amendment expressly subject to the plea of limitation.

(vi) In the decision in **Rohit Singh v. State of Bihar (now State of Jharkhand)**^[6], the facts of the cited case are as follows: - “The respondent no.6 filed a suit for declaration of title and for confirmation of possession over it and that if it were to be found that the plaintiff had been dispossessed from the said property during the pendency of the suit, for grant of decree for recovery of possession through the process of the court, for perpetual injunction and other incidental reliefs. The defendants filed written statements denying the claims of the plaintiff. Subsequently, the defendants by way of amendment of written statement had reiterated their claim of acquisition of title based on long and uninterrupted possession. Though no relief in that regard was sought by way of amendment, the trial court permitted them to pay the Court fee as proposed by them. Even though they have not sought for relief of declaration specifically, the defendants had merely amended written statement by adding that they had claimed acquisition of title based on long and uninterrupted possession and that they crave leave to get their title declared in the suit for which a declaratory court fee is paid. No prayer was sought to be added seeking a declaration of their title as is the normal practice. It is, therefore, clear that on going through the original written statement and the amendment introduced, there was no counter claim in terms of Order VIII Rule 6-A of the Code.’ In this backdrop the Supreme Court held as follows: - ‘A counter claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter claim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so called counter claim of the defendants 3 to 17 by the trial court, after framing of the issues for trial, was clearly illegal and without jurisdiction. On that short ground the so called counter claim, filed by the defendants 3 to 17 has to be held to be not maintainable. As can be seen, what defendants 3 to 17 did, was to merely amend their written statement by adding a sentence to paragraph 16 of the written statement they originally filed. In paragraph 16 it was only pleaded that those defendants were claiming to be in peaceful possession of the suit lands ever since the time of their predecessors. They wanted to add that they had claimed acquisition of

title based on long and uninterrupted possession and they crave leave to get their title declared in the suit for which a declaratory court fee is paid. It may be noted that not even a prayer was sought to be added seeking a declaration of their title as is the normal practice. It is, therefore, clear that on going through the original written statement and the amendment introduced, that there was no counter-claim in terms of Order VIII Rule 6A of the Code in the case on hand, which justifies a trial of that counter-claim even assuming that such a counter-claim was maintainable even if no relief was claimed against the plaintiff in the suit but it was directed only against the co-defendants in the suit. The counter-claim so called is liable to be rejected on that ground as well.'

(vii) **M/s. Srikanth Spinners rep. by its Proprietor, K.Rajesham, Kalakal Industrial Estate, Gajwel Taluk, Medak District v. State Bank of India, Toorpran, Medak District rep. by its Branch Manager**^[7]. In this cited case, this Court held as follows: 'There is no conflict between Order VIII Rule 6-A and Order VIII Rule 8 of the Code.' 'To re-state the law on the question, under Order 8 Rule 6-A of C.P.C. a counter-claim cannot be filed after filing written statement but it can be filed, provided the cause of action for the counter-claim had accrued to the defendant before filing the written statement and that it is delivered before the time limited for delivering his defence has expired. Therefore, on such a ground, the judgment of this Court does not warrant review.' 'The simple meaning of this provision is that any ground of defence which has arisen as a subsequent event, viz., after filing of a suit or filing of the written statement, which may include claim of suit or counter-claim, may be permitted to be raised before or after filing of written statement. The law is so trite that such an opportunity is provided both to the plaintiff and the defendant. It may mean that in certain circumstances having due regard to the subsequent events, the parties may be obliged to place certain matters on record so that the Court will be able to render absolute and complete justice to the parties in the very proceedings instead of driving them to different proceedings.' Further, having regard to the facts of the case in the cited decision, this Court further held as follows: 'It cannot be forgotten that

the parties cannot be driven to unnecessary litigations at the cost of unnecessary expenditure, waste of time, labour, etc. Admittedly, the subject matter of the plaint and the counter-claim or set off for ground of defence is the same. The ground for set off which is said to have been lodged would be the subject matter for the counter claim and set off also. Although the causes of action were different which accrued due to the different events taking place at different times, the trial of such questions would involve common questions of law and fact to lead to some finality in the litigation between the parties. That is also one of the grounds of law for such a ground by way of defence under Order 8 Rule 8 of C.P.C. in favour of the defendant.'

(viii) **Hem Narain Thakur v. Deo Kant Mishra and others**^[8]. The facts of the case disclose that while the claim of defendant was already under adjudication, further claim was made not against the plaintiff but against another intervenor-defendant. The High Court of Patna held that the same cannot be allowed as a counter claim. It was also further held in this decision that if a cause of action had arisen for counter claim after the filing of the written statement then the same cannot be construed as a counter claim but the defendants have got the option to file a separate suit for his relief.

(ix) **Gurram Allabaksh and ors. V. Shaik Habeebullabasha and ors**^[9]. In this cited decision, a learned Single Judge of this Court while disagreeing with the earlier view of another single Judge in Sugesan and Company (P) Ltd., Madras v. KMT Ltd., [2004(3) ALD 57] held as follows: 'With great respect to the learned Judge who rendered the said judgment, it is noticed that the proposition runs contrary to Rule 6-A enacted by the Parliament. It is not as if a Defendant in a suit is without any relief, if a cause of action has arisen to him, vis-à-vis the plaintiff, at a stage subsequent to the filing of the written statement. He can file an independent suit, and the facility of filing counter-claim cannot be permitted to be used to shatter the entire progress that has taken place in the suit, on the basis of the written statement and the issues framed therein.' However, while rendering the earlier decision the learned Single Judge of this Court referred to the decision of the supreme Court in **Jagmohan Chawla v. Dera Radha Swami Satsang** [1996 (4) ALD

57] wherein it was held as follows:

".....It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the writing statement expires. The defendant may set-up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite Court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the Legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.....'

In **K. Ramachandra Rao v. P. Narayan** [MANU/AP/0275/2001] the facts, as narrated in the cited case, are as follows: - 'The petitioner-plaintiff instituted a suit in OS No.34 of 1998 seeking a decree for a sum of Rs.2,00,000/- towards civil damages with interest @ 18% per annum alleging that he rendered his technical know how and expertise to the defendant in developing his farm at Sangupet under Andole village limits. As certain disputes arose between the parties, the defendant lodged a complaint with CBCID which caused mental agony and humiliation to the plaintiff and also effected his reputation in public life as he is a respectable freedom fighter having unblemished character and narrating various facts which lead to the filing of the suit.' The defendant therein filed a written statement by setting up a counter-claim for a sum of Rs.3,00,000/- alleging that the tractor trailer and other agricultural implements, which are in the custody of the plaintiff, belong to the defendant and that the plaintiff had refused to handover the same and had used them for wrongful gain and that, therefore, he had suffered a heavy loss due to the dispute with the plaintiff and the said loss, which was assessed at Rs.3,00,000/-, has to be compensated by the plaintiff. To which the plaintiff filed a rejoinder.' In the

revision this Court while holding that the counter claim is maintainable rejected the contention of the plaintiff that the cause of action for the counter claim is different.

In **Ananta Gas Suppliers and others v. Union Bank of India** [MANU/AP/1065/2006] a learned Single Judge of this Court also took the view that a counter claim is not maintainable if the cause of action for the counter claim accrues after filing of the written statement.

9.3 The learned counsel for the 1st respondent had placed reliance on the following decisions:-

(i) In **Indian Bank, Warangal Branch v. Srinivasa Timber Depot, Warangal & ors**^[10] this Court rejected the contention of the learned counsel for the plaintiff that the words ‘ before the defendant had delivered his defence’ mean that the counter claim should be filed before the defendant filed his written statement and had further held that such a contention was considered and rejected by the Supreme Court in **Mahendar Kumar v. State of HP** [AIR 1987 SC 1395] and that it was held that on the face of Rule 6-A (I) C.P.C filing of counter claim by the defendant after he had filed the written statement is not barred and that it is therefore, to be held that counter claim can be filed before the defendant delivered his defence. The facts of the cited case would disclose that plaintiff’s evidence was completed and the defence is yet to open.

(ii) **C.Ramesh Chander v. C.A.Hanumantha Rao**^[11]. In this cited case, this Court after referring to the ratios in the decisions in **Jag Mohan Chawla** (supra) and **Mahendra Kumar** (supra) and **Shanti Rani Das v. Dinesh Chander De** [MANU/SC/0979/1997] held that counter claim filed by the defendant after filing written statement seeking mandatory injunction against plaintiff for demolition of illegal structures made over suit schedule site is maintainable as the cause of action for the counter claim had arisen before the filing of the written statement by the defendant. In **Shanti Rani** (supra), the question that arose for consideration, the factual background and the contentions as stated in the cited case are as follows: ‘The short question

that arises for decision in this appeal is whether the application filed under Order VIII Rule 6 A of the CPC on 22.6.85 by the defendant-respondents in Civil Case No. 248/82 pending in the Court of learned Munsiff at Serampore was barred by the provision of Order VIII, Rule 6A of the CPC. By the impugned order, it has been held that such application was not barred under Order VIII Rule 6 A of the CPC because even after filing the written statement, such an application can be presented provided the cause of action for filing the counter claim had arisen before or after the institution of the said suit and such cause of action had continued till the filing of the written statement. It was sought to be contended by the appellant that once the written statement is filed, such application for counter-claim under Order VIII Rule 6 A is ex facie barred.' While interpreting the provision of Order VIII Rule 6 - A (1) of the CPC it was held as under: 'In our view, the impugned decision does not warrant interference. Such question was specifically raised before this Court in **Mahendra Kumar and Ors. V. [State of Madhya Pradesh and Ors \[1987 \(3\) SCR 155\]](#)**. It has been held by this Court that right to file a counter claim under Order VIII Rule 6 A of the CPC is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued upto the date of filing written statement or extended date of filing written statement, such counter claim can be filed even after filing the written statement." The ratio in the decision is as follows: 'The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the CPC bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter-claim after the filing of the written statement, the counter-claim was not maintainable. The finding of the High

Court does not get any support from R.6-A (I) of the Code of Civil Procedure. As the cause of action for the counter claim had arisen before filing of the written statement, the counter-claim was, therefore, quite maintainable.'

The learned counsel for the 1st respondent had filed a memo dated 11.03.2016 while enclosing a copy of the judgment of National Consumer Disputes Redressal Commission, New Delhi in Revision Petition no.478 of 2011 dated 14.10.2011 between **B.Venu Madhav. V. Ch.Mohana Rao** ^[12] in support of the contention that the right of the purchaser of a flat in a residential Apartment Complex to enjoy and use along with the other co-owners the open land, roadways, approaches and other common amenities including car parking facility is a continuous cause of action and that therefore, the complaint is not barred by limitation.

In **Vijay Prakash Jarath v. Tej Prakash Jarath** [MANU/SC/0300/2016] the facts and ratio are as follows: "A perusal of Sub-clause (1) of Section 6A of Order VIII, leaves no room for any doubt, that the cause of action in respect of which a counter claim can be filed, should accrue before the Defendant has delivered his defence, namely, before the Defendant has filed a written statement. The instant determination of ours is supported by the conclusions drawn in *Bollepanda P. Poonacha and Anr. v. K.M. Madapa* (supra), wherein this Court observed as under:

The provision of Order 8 Rule 6-A must be considered having regard to the aforementioned provisions. A right to file counterclaim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the Defendant has raised his defence. The Respondent in his application for amendment of written statement categorically raised the plea that the Appellants had trespassed on the lands in question in the summer of 1998. Cause of action for filing the counterclaim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of *Ryaz Ahmed* (supra) is based on the decision of this Court in *Baldev Singh v. Manohar Singh* [(2006) 6 SCC 498]. (Emphasis is ours)

It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the Respondent-Plaintiff filed the suit (out of which these petitions/appeals have arisen). It is therefore apparent that the Appellants before this Court were well within their right to file the counter-claim.

It is quite apparent from the factual position noticed hereinabove, that after the issues were framed on 18.10.1993, the counter claim was filed by the Appellants before this Court (i.e. by Defendant Nos. 3 and 4 before the trial court) almost two and a half years after the framing of the issues. Having given our thoughtful consideration to the provisions relating to the filing of counter claim, we are satisfied, that there was no justification whatsoever for the High Court to have declined, the Appellant before this Court from filing his counter claim on 17.06.1996, specially because, it is not a matter of dispute, that the cause of action, on the basis of which the counter claim was filed by Defendant Nos. 3 and 4, accrued before their written statement was filed on 11.11.1992. In the present case, the Respondent-Plaintiff's evidence was still being recorded by the trial court, when the counter-claim was filed. It has also not been shown to us that any prejudice would be caused to the Respondent-Plaintiff before the trial court, if the counter-claim was to be adjudicated upon, along with the main suit. We are of the view, that no serious injustice or irreparable loss (as expressed in paragraph 15 of Bollepanda P. Pooncha's case), would be suffered by the Respondent-Plaintiff in this case."

10. I have carefully gone through the decisions relied upon by both the learned counsel. The question involved need not detain this Court for any longer in view of the ratio in the latest decision of the Supreme Court and also the facts of the instant case. In the case on hand, admittedly, and even according to the case of the plaintiff, the cause of action for the defendant's counter claim had arisen even before the suit and the written statement is filed. By way of proposed counter claim, the defendant is claiming easementary right to receive light and air and it is also the contention of the defendant that the cause of action for such right is a continuing cause of action. Though the leave to file the counter claim by way of amendment to written statement is being sought long after the filing of the written statement, the cause of action for such counter claim had accrued before the filing of the suit and continued even after the filing of the suit and was available to the defendant before the defendant has raised his defence. Therefore, the ratio in the decision of the Supreme Court squarely applies to the facts of the present case and hence, the contention of the plaintiff that the counter claim filed by the defendant after the filing of the written statement is not maintainable is devoid of merit. Further, since the counter claim is a plaint and as it is the case of the defendant that the cause of action for the counter claim is a continuing cause of action and as it does not appear from a reading of the counter claim that the claim is barred, the claim cannot be rejected at

this stage. Further, the contention in regard to bar of limitation being a mixed question of fact and law has to be considered at an appropriate later stage, after full-fledged trial. It is also trite to note that the law is well settled that an amendment of written statement that too to enable the defendant to make a counter claim cannot be refused merely on the ground of delay and that an amendment can be permitted if it is intended to determine the real question in controversy; and, all amendments, which are necessary for the purpose of determining the real questions of controversy between the parties, should be allowed if such amendments sought for do not change the basic nature of the defence. Change of the relief cannot be treated as change of nature of the suit or defence. Seeking counter claim also cannot be considered as change of nature of defence as counter claim is a plaint. Further, if granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed and the court has also to consider whether the proposed amendment is intended to determine the real dispute between the parties. No right accrued to the plaintiff would get defeated and no prejudice would be caused to the plaintiff, if the amendment to introduce counter claim is permitted as in my considered view, the claim of the defendant is based on statutory and common law rights and also equity. I am of the view that no serious injustice or irreparable loss would be suffered by the plaintiff in this case if the defendant is permitted to amend the written statement to include the counter claim. It has also not been shown that any prejudice would be caused to the plaintiff before the trial Court if the counter claim was to be adjudicated upon along with the main suit. Further, the defendant can by way of an amendment to the written statement add a new ground of defence or substitute or alter a defence or take an inconsistent plea and the same is not objectionable. From the ratios in the decisions, it also emerges that the defendant can be permitted, in the facts and circumstances of the case, to make a counter claim even though evidence on the side of the plaintiff is in progress. In order to avoid multiplicity of suit, it would be a sound exercise of discretion to permit the amendment being sought for in the pending suit. As per settled law, the well settled rule of practice is not to dismiss the counter claim automatically but to allow the defendant to make

necessary amendment and then allow it to be decided on merits after proper adjudication. In view of the ratios in the decisions which are squarely applicable to the facts of the case, this Court is of the considered view that the amendment sought for by the defendant to enable him to make a counter claim can be permitted in the facts and circumstances of the case and that, therefore, the order of the court below, which is justified, brooks no interference.

11. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this revision shall stand closed.

JUSTICE M. SEETHARAMA MURTI

1st June, 2016
RAR

[\[1\]](#) AIR 2009 BOMBAY 133

[\[2\]](#) AIR 2011 JHARKHAND 15

[\[3\]](#) AIR 2003 MADRAS 416

[\[4\]](#) 2003 (1) ALD 729

[\[5\]](#) AIR 2015 SC 3364=2015(6) ALD 14 (SC)

[\[6\]](#) (2006) 12 Supreme Court Cases 734

[\[7\]](#) 1995 (2) ALT 746

[\[8\]](#) 2000 A I H C 945

[\[9\]](#) 2011 (3) ALT 9

[\[10\]](#) 1992 (1) ALT 535

[\[11\]](#) 1999 (1) ALT 497

[\[12\]](#) IV (2011) CPJ343 (NC)