

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3471 OF 2015

NIRMALABAI NEMICHAND BAKLIWAL, DIED
THROUGH L.RS. JITENDRAKUMAR AND ANOTHER
VERSUS
NANDED EDUCATION SOCIETY, NANDED

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Advocate for Petitioners : Mr G R Syed
Advocate for Respondents : Mr S V Natu

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CORAM : V.K. JADHAV, J.

Dated: December 12, 2017

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PER COURT :-

1. Aggrieved by the order passed below exh.66 in Regular Civil Suit No.441/2010, original plaintiffs have approached this Court by filing present writ petition.

2. Brief facts, giving rise to the present writ petition are as follows :-

a] The petitioners/plaintiffs have instituted a suit for simplicitor injunction on 27.10.2010 and, thereafter, by filing an application carried out the amendment in the plaint under the orders of Court on 19.7.2011. After carrying out said amendment, respondent/defendant has filed written statement and on 25.9.2013 vide

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Exh.66 respondent/defendant sought to submit the counter-claim. Petitioners/plaintiffs have strongly resisted the said application by filing say below exh.79. The learned 7th Jt. Civil Judge J.D. Nanded by order dated 16.1.2015 below exh.66 in R.C.S. No.441/2010 observed that, his predecessor has already accepted the counter claim and there is no need to pass any speaking order as such. Hence, this writ petition.

3. Learned counsel for the petitioners submits that, respondent/defendant has not submitted its written statement and their application for accepting the written statement after the petitioners/plaintiffs have carried out the amendment in the plaint is still pending. Learned counsel submits that, in absence of the written statement, counter claim of respondent/defendant came to be accepted by the trial court. At this juncture, learned counsel appearing for respondent/defendant pointed out that by order dated 25.9.2013 itself, trial court has observed below Exh.1 in the suit that the defendant has already filed written statement on record

on 9.9.2011 and same was "Read and Recorded", however, inadvertently, subsequent thereof, order of 'NO W.S.' came to be passed. Consequently, trial court has set aside the order dated 3.8.2011 passed below Exh.1/A. Learned counsel for the petitioners/original plaintiffs, though, pointed out Roznama particularly Exh.102 given to the written statement, in the year 2015, however, considering the order passed below Exh.1 dated 25.9.2013 as aforesaid, not pressed his submission on this point.

4. Learned counsel for the petitioners submits that, as per paragraph no.11 of the counter claim, respondent/defendant has shown that cause of action arose to file the counter claim on 8.9.2013 and, as such, the counter-claim cannot be accepted for a simple reason that cause of action shown to have been arises after rendering the defence by way of written statement dated 9.9.2011. Learned counsel submits that, further trial court has not decided the application exh.66 on its merits, but, simply recorded the observations that his

predecessor has passed an order other side to say on the counter claim and as such, counter claim has been accepted long back by his predecessor and there is no any reason to pass any speaking order accepting the counter claim exh.66. Learned counsel submits that, entire approach of the trial court is erroneous. The predecessor of the learned judge has called upon the other side to file say and it does not mean that court has accepted the counter claim.

5. Learned counsel for respondent/original defendant submits that, in paragraph no.11 of the counter claim respondent/defendant has specifically pleaded that cause of action arose to file the counter claim on receiving information in respect of the sale deed when the plaintiff filed certified copy of the sale deed on record through amended plaint. It is the part of the record that petitioners/plaintiffs have filed application for amendment of the plaint on 19.7.2011 and produced said sale deed alongwith said application. Learned counsel submits that, it is well settled that counter

claim can be filed even after filing of the written statement provided that cause of action should arise before rendering the defence by way of written statement. Learned counsel submits that, though trial court has not passed any speaking order, counter claim has been submitted within four corners of the provisions of Order 8 Rule 6A of Civil Procedure Code.

6. Rule 6-A of Order VIII of C.P.C. is reproduced herein below :-

“6A. 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.”

7. A perusal of Sub-Rule (1) of Rule 6A of Order VIII, it leaves no room to doubt that cause of action in respect of which counter claim can be filed, has to be accrued before the defendant has delivered his defence i.e. before the defendant has filed his written statement. It is well settled that the counter claim, being suit in status subject to law of limitation can be entertained even after the written statement is filed by defendant and however, subject to condition that such cause of action arises either before or after filing of the suit, upper limit of which, is filing of the written statement.

8. On careful perusal of the plaint, written statement and counter claim, it appears that, petitioners/plaintiffs have not given details of his title nor produced the alleged sale deed alongwith the plaint. Subsequently, petitioners/plaintiffs have filed an application for amendment in the plaint and under the orders of court on 19.7.2011 said amendment was carried out. It is a

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part of record that, respondents/defendants are not party to the alleged sale deed. In paragraph no.11 of the counter claim, respondent/defendant has shown that cause of action arose to file the counter claim only after receiving information in respect of the sale deed when the plaintiffs filed certified copy of the sale deed through amended plaint. It is well settled that, defendant can file the counter claim on a cause of action shown to have been arises either before or after filing of the written statement/suit, but certainly before the defendant has delivered his defence. In the instant case, counter claim has been submitted in terms of Order 8 Rule 6A of the Civil Procedure Code. Though, in the counter claim, cause of action shown to have been arises continuously, however, relevant date would be when the petitioners/plaintiffs have filed an application seeking amendment in the plaint alongwith the copy of the alleged sale deed. Though, trial court has not passed any speaking order to that effect, and relied upon the endorsement made by his predecessor to the effect that, "O.S. to say" treating it as acceptance to

the counter claim, I am not inclined to remand the matter for deciding the point that counter claim has been correctly accepted or not. There is no reason to remand the matter on such a technical ground. When otherwise counter claim has been submitted as per the Order 8 Rule 6A of Civil Procedure Code. In view of the same, I do not find any reason to interfere in the impugned order. Writ Petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

9. At this stage, Mr. Sayed, learned counsel for the petitioners requests to stay the effect of this order. Request stands refused. I find no reason to stay the effect of this order. In the circumstances, the trial court is directed to dispose off the suit as expeditiously as possible and preferably within a period of ONE YEAR from the date of this order.

10. Writ Petition accordingly dismissed. No costs.

(V.K. JADHAV, J.)

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