

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

WRIT PETITION NO. 8331 OF 2016

Sow. Kalabai w/o Yeshwant Dalvi
and another ...Petitioners

VERSUS

Sow. Sushila w/o Kondiba Bargaje
and another ...Respondents

.....
Shri N.V.Gaware, advocate for petitioners
Shri S.R.Andhale, advocate for respondent no.2
.....

CORAM : S.V.GANGAPURWALA, J.

DATED : 16th January, 2017

O R D E R :-

The present petitioners are original plaintiffs. The plaintiffs filed suit bearing Regular Civil Suit No.549 of 2013 for injunction in respect of the suit property bearing Gat No.31/2 admeasuring 70 Ares. It appears that the order on temporary injunction application was passed in favour of the plaintiffs.

2. The defendants/present respondents filed written statement on 20.10.2013. Thereafter the defendants filed an application seeking amendment under Order 6 Rule 17 of the Civil Procedure Code. By way of amendment application, the respondents sought to introduce counter claim seeking possession on the ground that on the strength of injunction order the defendants were dispossessed in December, 2014. The said application is allowed. Aggrieved thereby, the plaintiffs have filed the present Writ Petition.

3. Mr. Gaware, learned counsel for the petitioners submits that the Court could not have entertained the application for amendment, more particularly, that of the counter claim, as the cause of action stated in the counter claim has arisen after filing the written statement.

4. Learned counsel relied on the judgment of the Apex Court in the case of **Mahendra Kumar vs State of Madhya Pradesh**, reported in 1987 (3) SCC

265 and another judgment of the Apex Court in the case of **Bollepanda P. Poonacha and anr. Vs K.M.Madapa**, reported in **2008 (13) SCC 179**.

5. Mr. Andhale, learned counsel for the respondents submits that on the strength of temporary injunction order the plaintiffs dispossessed the defendants. As such, by way of amendment sought possession by filing counter claim. The same is perfectly permissible as per the provisions of Order 8 Rule 6A of the Civil Procedure Code. Learned counsel further submits that even after filing of the written statement, by way of amendment, counter claim can be filed. The same is the purport of Order 8 Rule 6A of the Civil Procedure Code.

6. To substantiate his contention, the learned counsel for the respondents relies on the judgment of the Apex Court in the case of **Gurbachan Singh vs Bhag Singh and others**, reported in **(1996) 1 SCC 770**, so also on the judgment of

the Apex Court in the case of **Mahesh Kumar**, referred to supra. He further relies on the judgment of the learned Single Judge of this Court in the case of **Sharad Dinkar Padalkar and others vs Sugandha Balasaheb Jadhav and another**, reported in 2014 (7) Bom.C.R. 209.

The learned counsel in the alternate submits that if this Court is not inclined to allow the counter claim then the said counter claim be returned along with the court fee deposited, with liberty to the respondents to file appropriate proceedings for the said relief.

7. I have considered the submissions canvassed by the learned counsel for the respective parties.

8. There cannot be any dispute about the proposition that counter claim can be filed after written statement has been filed by the defendants. In fact, counter claim can be filed by three modes; (1) along with written statement

(2) by filing an application for amendment under Order 8 Rule 6A of Civil Procedure Code and (3) by filing additional written statement under Order 8 Rule 9 of the Civil Procedure Code.

9. While considering the application for inclusion of counter claim, provisions of Order 8 Rule 6A r/w Order 8 Rule 13 (Bombay Amendment) will have to be considered. The said provision reads thus : -

**" ORDER VIII : Written Statement,
Set-off,
and Counter – Claim**

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 to 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

**ORDER VIII : Written Statement,
Rule 13 (Bombay Set-off,
Amendment Counter – Claim**

13. Defendant may set up counter-claim against the claims of the plaintiff in addition to set-off.— A defendant in a Suit, in addition to his right of pleading a set-off under Order VIII. Rule 6 of the Code of Civil Procedure, 1908, may set up by way of counter-claim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit, but before the defendant has delivered his defence and before the time limited for delivering his defence has expired, whether such counter-claim sounds in damages or not, and 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 and on the counter-claim, and the plaintiff (if so advised) shall be at liberty to file a written statement in answer to the counter-claim of the defendant within four weeks after service upon him or his pleader of a copy of the defendant's

counter-claim; and the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such counter-claim cannot be disposed of in the pending suit or ought not to be allowed, refuse permission to the defendant to avail himself thereof, and require him to file a separate suit in respect thereof. "

10. On perusal of the afore said Rules, it is manifest that the defendants are allowed to file counter claim even after the defence is delivered or before the time limit for delivering the defence has expired. However, the caution is that the cause of action should have been arisen before the written statement has been filed.

11. Useful reference can be had to the judgment of the Apex Court in the case of **Bollepanda**, referred to supra. The Apex Court in an unequivocal terms has held that the counter claim may be filed in respect of any right or claim, however, the cause of action must accrue either before or after filing of the suit but before defence is raised. In the present case, the

defendants have raised their defence on 28.10.2013 and cause of action for filing the counter claim even as per the pleadings of the defendants has accrued in December, 2014. Such a counter claim could not be allowed. On that count the order of the Trial Court allowing inclusion of counter claim is required to be set aside and is hereby set aside.

12. The petitioners have raised objection to the counter claim. The same can be treated as an objection under Order 8 Rule 19 (Bombay Amendment) of the Civil Procedure Code, wherein the Court can pass an order to exclude the counter claim. In the present matter, it appears that the defendants along with counter claim also have deposited the court fee. As the counter claim could not be entertained in view of the fact that cause of action has arisen after filing the written statement, the said counter claim is required to be excluded. However, that would not come in the way of the defendants in filing appropriate

proceedings or application for the relief as is claimed in the counter claim. As the counter claim is being excluded, the Court would refund the court fee to the defendants as per rules.

13. With the above observations, the impugned order is quashed and set aside.

Writ Petition is accordingly allowed. No costs.

(S.V.GANGAPURWALA, J.)

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