

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

WRIT PETITION NO. 3103 OF 2014

VITHOBA HARCHAND CHAUDHARI
VERSUS
SAYJABAI BHATU CHAUDHARI AND OTHERS.

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Advocate for the Petitioner : Shri Deepak D. Chaudhari h/f Shri Shah J.R..

Advocate for Respondent 1 : Shri Sharad V. Natu.

Advocate for Respondent 3 : Shri Deshpande C.R..

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 19th December, 2017

Per Court:

1 The Petitioner/ original Defendant No.1 in RCS No.73/2008
has put forth his prayers at clauses (A) and (B) which read as under:-

"(A) The Hon'ble High Court may be pleased to quash and set aside the judgment and order dated 18.03.2014 passed by learned Jt. Civil Judge, Junior Division, Nandurbar below Exhibit 72 in Regular Civil Suit No.73/2008, thereby rejected the application for amendment of written statement.

(B) The Hon'ble High Court may further be pleased to allow the application Exhibit 72, filed on 07.02.2014 in Regular Civil Suit No.73/2008 for amendment of written statement."

2 I have considered the submissions of the learned Advocates
for the respective sides and have gone through the petition paper book

with their assistance.

3 The issue raised in this petition is with regard to the Petitioner seeking leave to amend his Written Statement under Order 6 Rule 17 of the Code of Civil Procedure coupled with a prayer to convert his Written Statement into a counter claim by invoking Order 8 Rule 6A of the Code of Civil Procedure.

4 Undisputed factors are as under:-

- (a) Respondent No.1/ original Plaintiff has preferred RCS No.73/2008 for seeking partition and separate possession.
- (b) The Petitioner/ original Defendant No.1 filed his Written Statement on 07.01.2009.
- (c) The step mother of the Petitioner/ Defendant No.1, who is the biological mother of Respondent No.1/ Plaintiff, passed away on 08.08.2012.
- (d) Exhibit 72 has been filed on 07.02.2014 seeking leave to amend the Written Statement and convert it into a counter claim.

5 The contention of Respondent No.1/ original Plaintiff is that the mother of the Petitioner is not his biological mother, but a step mother and is the biological mother of Respondent No.1/original Plaintiff. The registered Will Deed dated 11.05.2006 purportedly executed by the step

mother of the Petitioner/ Defendant No.1, who is the biological mother of the Plaintiff, is not the cause of action which can be said to have occurred prior to the filing of the suit or prior to the time prescribed for filing of the Written Statement. It is further contended that the said Will Deed was inconsequential as it purportedly bestows certain rights on the Petitioner with regard to the suit property pursuant to her death alone. As such, it would be inconsequential as to what is the date of the registered Will Deed since the said Will Deed would not be executable and cannot be executed until the mother of the Petitioner has passed away.

6 Shri Natu, learned Advocate for Respondent No.1/ Original Plaintiff, submits that the cause of action arose only after the step mother of the Petitioner passed away and as such, that date, which is 08.08.2012, will be the date of cause of action.

7 The Petitioner has placed reliance upon the judgment of this Court in the matter of Ramniwas Bansilal Lakhotiya and another vs. Sunil Pannalal Agrawal and others, 2015 (3) Mh.L.J. 283, in support of his contention that the Written Statement can be amended and pursuant to the amendment, it can be converted into a counter claim, if otherwise the suit independently filed would have been maintainable.

8 The law on preferring a counter claim is well settled. The Written Statement can be amended and can be converted into a counter claim. A counter claim can also be independently filed along with the

Written Statement. The Written Statement may contain a declaration that the Defendant desires to file a counter claim. However, the common foundation to all these possibilities is that the counter claim must be based on the cause of action, which has occurred either before institution of the suit or even after institution of the suit, but before the time prescribed for filing of the Written Statement. In Ramniwas Lakhotiya (supra), the cause of action admittedly was prior to the period prescribed for filing of the Written Statement.

9 In the instant case, as noted above, the registered Will Deed of the mother of the Petitioner dated 11.05.2006, was purely a document in law and which had no legal sanctity until it becomes executable. The said registered Will Deed was to come into effect only after the death of the Petitioner's step mother. Her demise on 08.08.2012 rendered the Will Deed executable and based on the said Will Deed, the Petitioner can claim to have become the owner of the suit property. For all purposes, the date of demise would, therefore, be the date of the cause of action and which is admittedly after the Petitioner filed his Written Statement. The request for converting the Written Statement into the counter claim was, therefore, rightly rejected by the Trial Court.

10 Insofar as the second prayer of the Petitioner in Exhibit-72 that leave to amend the Written Statement may be granted, is concerned, the same could have been entertained by the Trial Court for the reason

that the demise of the step mother of the Petitioner purportedly rendered him the owner of the suit property on the basis of the registered Will Deed. As the step mother passed away on 08.08.2012, which is during the pendency of the suit and after filing of the Written Statement, this subsequent event can be permitted to be brought on record by way of an amendment since a right, which may accrue to a person, cannot be taken away when it has accrued on the basis of the event, which has occurred after filing of the Written Statement. Whether, the Will is a legal document or whether, it is executable, these issues cannot be adjudicated upon in this writ petition and are to be left open obviously for the Trial Court to consider.

11 Respondent No.1 has strenuously contended that as the step mother was purportedly residing with the Petitioner, her demise on 08.08.2012 would be the date from which due diligence can be assessed. Exhibit-72 was filed on 07.02.2014, which is after 18 months from the date of death of the step mother. Sufficient reasons have not been cited by the Petitioner and as such, his case would be struck by the proviso to Rule 17 of Order 6 of the Code of Civil Procedure.

12 Considering the above contention of Respondent No.1, I am of the view that though Exhibit-72 has been filed belatedly, the delay cannot be said to be inordinate so as to deprive the Petitioner of a right of amending his Written Statement to bring the subsequent events on record.

So also, the law is well settled that the amendment to the Written Statement is to be considered more liberally in comparison to the amendment sought in the plaint.

13 As such, this Writ Petition is partly allowed. The impugned order dated 18.03.2014 passed below Exhibit-72 is sustained to the extent of rejecting the application for permitting Defendant No.1 to file the Counter Claim. The impugned order is partly set aside to the extent of refusing leave to Defendant No.1 to amend his Written Statement. As such, Exhibit-72 is partly allowed. The Petitioner/ Defendant No.1 shall amend his Written Statement to the extent of proposed paragraph 14-A, within FOUR WEEKS from today. In the event, the Plaintiff desires to counter the said amendment, liberty to file an additional affidavit is granted. Since the amendment is permitted after the recording of oral evidence of the Plaintiff is over, liberty is granted to the Plaintiff to lead further evidence if so advised.

14 The learned Advocate for the Plaintiff prays that as the suit is pending from 2008, the same may be directed to be disposed of within a year's time. This being a reasonable request, is accepted and the Trial Court shall endeavour to decide RCS No.73/2008 as expeditiously as possible and preferably on or before 31.12.2018.