

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8001 OF 2014

1. Pradeep Kashinathrao Kalyankar,
Age 54 years, Occ. Service
R/o Mangalwarpeth, Kaij,
District Beed.

2. Sow. Pramila Pradeep Kalyankar,
Age 54 years, Occ. Service
R/o Mangalwarpeth, Kaij,
District Beed.

..Petitioners

Versus

1. Pramod Kashinathrao Kalyankar,
Age 50 years, Occ. Business,
R/o Mangalwarpeth, Kaij,
District Beed.

2. Sumitra Pramod Kalyankar,
Age 45 years, Occ. Household,
R/o Mangalwarpeth, Kaij,
District Beed.

..Respondents

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Advocate for Petitioners : Shri Shinde Prakash M.
Advocate for Respondents 1 & 2 : Shri Salunke M.V.
h/f Shri Salunke V.D.
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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 19, 2017
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ORAL JUDGMENT :-

1. Heard learned Advocates for the respective parties.
2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. The petitioners / plaintiffs are aggrieved by the order dated 27.8.2015, passed by the trial Court, by which, application Exhibit 136 seeking permission of the Court to file a counter claim / cross suit has been allowed and the plaintiffs have been permitted to file their written statement.

5. Shri Shinde, learned Advocate for the petitioners strenuously submits that they have filed RCS No. 136 of 2013 for seeking declaration of ownership and perpetual injunction. On 19.3.2013, a written partition deed was drawn on the basis of a will. The said partition deed was verified before the Notary on 25.3.2013. Since a mutation entry was not being taken by the Tahsildar on the basis of the partition deed, the petitioners preferred RCS No.136 of 2013 on 25.5.2013. The respondents / defendants filed the written statement on 13.8.2013 and the counter claim which is the subject matter at issue, was filed on 24.2.2014 along with the application Exhibit 34, seeking permission to register the complaint. These dates and sequence of events are not disputed.

6. The issue is as to whether the defendants have filed the counter claim strictly in accordance with Order VIII Rule 6A of the Code of Civil Procedure ("CPC"). For reference, Order VIII Rule 6A of the CPC is reproduced as under:-

“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.”

7. Considering the above provisions, the issue is as to whether the cause of action arose before the filing of the suit or after the filing of the suit and before the filing of the Written Statement of the defendant.

8. The plaintiffs contend on the basis of paragraph No.8 of the counter claim dated 24.2.2014, that the cause of action arose on 8.2.2014 and which is much after the filing of the written statement on 13.8.2013. Reliance is placed upon the judgment of the Honourable Apex Court in the matter of Vijay Prakash Jarath Vs. Tej Prakash Jarath [(2016) 11 SCC 800]. Shri Shinde has specifically relied upon paragraph No.9 of the said judgment, which reads as under:-

“9. 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 & Anr vs. K.M.Madapa (supra), wherein this Court observed as under:

“11. 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 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.”

9. It is, therefore, contended that considering the law laid down in the case of Vijay Prakash (supra) and Bollepanda (supra), a counter claim in relation to a cause of action which has arisen after the filing of the written statement cannot be permitted. I have no reason to reject the contention of Shri Shinde since that is based on Rule 6A and in the light of settled

law. However, the contention of Shri Shinde needs to be scrutinized in the light of what has been pleaded by the defendants in their counter claim and as to what are the prayers put forth in the counter claim, which essentially constitute the cause of action.

10. In paragraph No.8 of the counter claim, the defendants have stated that the plaintiffs were assuring them that the matter would be settled and the suit would be resolved. Therefore, the defendants did not challenge the temporary injunction granted by the trial Court under Order XXXIX Rule 1 of the CPC on 16.11.2013 and hence an appeal was not filed. It is then stated that the plaintiffs resiled from their oral assurance and did not withdraw the suit and finally declared on 8.2.2014 that they are not going to withdraw the suit. Therefore, the counter claim has been filed. In paragraph No.9, it is further stated that the plaintiffs threatened the defendants on 16.2.2014 and hence they decided to file the counter claim.

11. The above narration does not speak about what is the claim that is being put forth by the defendants in their counter claim. It speaks about the circumstances in which the defendants did not challenge the temporary injunction order and the

circumstances in which, they were left with no choice but to file a counter claim.

12. In so far as the cause of action and the prayer putforth in the counter claim are concerned, the defendants have narrated in paragraph No.6 that blank stamp papers bearing signatures were utilized by the plaintiffs for preparation of a 'smaran patra' of the 'watani patra' on 31.12.2012 and 19.3.2013. These two documents, which pertain to indicating a reminder about the partition deed is neither notarized nor is registered. The said documents dated 31.12.2012 and 19.3.2013 are bogus documents. This is the cause of action in the counter claim.

13. The defendants have then putforth a specific prayer at clause (B), which reads as under:-

“ It may kindly be declared that alleged documents brought into existence by original plaintiffs styled as Partition deed and Smaran patra of the partition deed dated 31.12.2012 and 19.3.2013 respectively to be fraudulent, bogus, unauthorized and not binding upon the present counter claimants / original defendants.”

14. It is, therefore, obvious that the prayer in the counter

claim is that the 'smaran patra' of the partition deed dated 31.12.2012 and 19.3.2013 be declared as being fraudulent, bogus, unauthorized and not binding upon the defendants. It, therefore, establishes that the cause of action is 31.12.2012 and 19.3.2013.

15. In the case of Vijay Prakash (supra), the Honourable Supreme Court, based on the facts of the case, has concluded that though two and half years have lapsed after the framing of the issues, as the cause of action set out in the counter claim has arisen before the written statement was filed, the counter claim could be permitted even at the stage when recording of evidence was half way through. Observations of the Honourable Apex Court in paragraph Nos.10 to 13 read as under:-

“10. 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-plaintiffs 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.

11. *For the reasons recorded hereinabove, we set aside the impugned order passed by the High Court dated 02.01.2008, and restore the order passed by the trial court dated 28.10.1996.*

12. *The appeals are allowed in the above terms.*

13. *Needless to mention, that it shall be open to the respondent- plaintiff to raise all pleas open to him through the written statement which is filed by the respondent-plaintiff, to the counter claim."*

16. The Honourable Apex Court in the matter of Smt. Shanti Rani Das Dewanjee Vs. Dineshchandra Day [AIR 1997 SC 3985], has also concluded that once the cause of action has occurred

prior to the filing of the written statement, as the counter claim is with regard to the said cause of action, the same would not be barred merely because the written statement had already been filed.

17. Even in the case of Ramesh Chand Ardawatiya Vs. Anil Panjwani [AIR 2003 SC 2508], the Honourable Apex Court has concluded that the purpose of allowing a counter claim even after the trial has commenced is to ensure that there is no multiplicity of litigation and all the claims and disputes between the parties could be decided in the course of the same proceedings. It would be apposite to reproduce paragraph No. 28 of the said judgment as under:-

“28. Looking to the scheme of Order VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the

counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI Rule 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim.”

18. In Sandeep Thaper Vs. SME Technologies Pvt. Ltd. [AIR 2014 SC 897 = (2014) 2 SCC 302], the Honourable Apex Court has evolved the reasons, as to why a written statement is to be permitted even beyond limitation prescribed under VIII Rule 1 of the CPC. It is observed that the purpose for providing the time schedule for filing a Written Statement is to ensure timely

disposal of the suit and to avoid delay being caused by the defendants. However, extension of time may be allowed by way of an exception and for reasons to be assigned by the defendants. Such extension of time is to be permitted if it was appropriate to be granted on the basis of circumstances, which are exceptional and have occasioned for reasons beyond the control of the defendants and to ensure that grave injustice is not caused to the defendants. As such, by imposing costs of RS.50,000/- the Honourable Apex Court has permitted the filing of the written statement beyond the period prescribed under Order VIII Rule 1 of the CPC.

19. It also cannot be ignored that the claim put forth by the defendants in the counter claim is not otherwise barred by limitation under Article 163 of the Limitation Act. If a separate suit was otherwise maintainable and could be entertained by the Court, the defendants could very well be permitted to file a counter claim keeping in view the law laid down by the Honourable Apex Court in the cases of Shanti Rani (supra) and Vijay Prakash (supra).

20. In Prem Bakshi Vs. Dharam Dev [AIR 2002 SC 559], the Honourable Apex Court has considered a similar issue.

21. In the light of the above, keeping in view, that the grievance of the defendants is with regard to the documents dated 31.12.2012 and 19.3.2013, which have been created prior to the filing of the suit, I do not find that the trial Court has committed any error in allowing Exhibit 34 and permitting the defendants to file their counter claim.

22. As such, this petition being devoid of merits is, therefore, dismissed. Rule is discharged.

(RAVINDRA V. GHUGE, J.)

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