

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11586 OF 2014

JAMSHER HARUNKHAN PATHAN AND OTHERS
VERSUS
TAMIJBEE BABAN PATHAN AND OTHERS

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Advocate for Petitioners : Shri More Abhijit S.
Advocate for Respondent 2 : Shri Syed G.R.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: December 13, 2017

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PER COURT :-

1. While issuing notice, this Court had passed an order on 24.12.2014, which reads as under:-

"1 Issue notice before admission to the respondents, returnable on 3.2.2015.

2 The petitioner contends that, a counter claim was filed on 1.3.2014 in RCS No.86/2006. The same was beyond limitation. Order 8 rule 6-A has not been properly considered by the Trial Court. By order dated 6.9.2014, the counter claim was not permitted to be filed and the application was rejected.

3 The respondent defendants moved an application below Exh.104, seeking review of the order dated 6.9.2014. By the impugned order dated 13.11.2014, the trial Court has

condoned the delay caused in the filing of the Review Application and has allowed the same by passing a cryptic order. As such, counter claim is permitted to be filed, practically after seven years from the date of filing of the Written Statement.

4 The grievance of the petitioner is that, the limitation aspect, which is of only three years, cannot be overlooked and since a counter claim is in the nature of counter suit, the law of limitation applies.

5 The petitioner has relied upon the division bench Judgment of this Court in the matter of Gulf Oil India Limited V/s Tube Investment of India Limited reported at 2013(2)Mh.L.J.758.

6 In the light of the above, the impugned order dated 14.11.2014 shall stand stayed till the next date of hearing in the matter."

2. All the respondents have been served. It is only respondent No.2, who has entered an appearance through Advocate Shri Syed, who is a non-contesting respondent.

3. Issue in this petition is with regard to filing of a counter claim under Order VIII Rule 6A of the Code of Civil Procedure

(CPC). The Written Statement was filed by the concerned defendant No.3 on 1.3.2014. An application was filed on 6.9.2014 praying for leave to file the counter claim. The same was rejected by order dated 6.9.2014. The said defendant preferred a Review Application EXhibit No.104 under Section 114 of the CPC praying for reviewing the earlier order dated 6.9.2014. By the impugned order dated 13.11.2014, the order dated 6.9.2014 was reviewed.

4. Defendant No.3 has, therefore, filed a counter claim by virtue of the application dated 6.9.2014 within six months from the filing of the Written Statement. The Written Statement itself was permitted to be filed on 1.3.2014 in RCS No.86 of 2006, which is after about 8 years. The cause of action set out in the counter claim, according to the petitioner, is with regard to the partition on 23.7.1985 and hence the limitation with regard to the said cause of action with reference to defendant No.3 will begin, not from the date of filing of the application on 6.9.2014, but from the date of the cause of action. It is vehemently submitted by the petitioner that this issue of limitation with regard to the said cause of action will have to be kept open.

5. Considering the above and taking into account the fact that the Written Statement was permitted to be filed after about 8 years of the filing of the suit and since that order to file the Written Statement has attained finality, I do not find that the impugned order to the extent of condoning the delay and reviewing the order dated 6.9.2014 can be set aside. This petition, therefore, would stand dismissed to this extent.

6. However, it cannot be ignored that the permission to file the Written Statement and Counter Claim, after about 8 years from the filing of the suit, which, delay can be attributed to the conduct of defendant No.3, cannot operate to the prejudice to the petitioners. The delay caused by defendant No.3 cannot give a leverage to her to take advantage of the delay caused. The cause of action set out in the counter claim will, therefore, have to be kept in view and the limitation for preferring a counter claim, which is in the nature of a suit, will have to be calculated from the date of the cause of action mentioned in the present case.

7. This petition is, therefore, allowed only to the extent of modifying the impugned order dated 13.11.2014 with reference to the limitation aspect. For clarity, the limitation with regard to

the cause of action set out in the counter claim, will be calculated from the date of the cause of action so mentioned and not from the date of the filing of the application on 6.9.2014. The trial Court shall, therefore, frame an appropriate issue with regard to this aspect considering these directions.

(RAVINDRA V. GHUGE, J.)

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