

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.782 OF 2014

- 1 Mrs. Maria Thelma Elvira
Menezes e D'Souza,
widow of late Alcantra da
Chages Getrudes de Souza
alias Alcantra D'Souza,
major of age, Indian
National, widow, retired;
- 2 Mrs. Sharmila De Souza,
wife of Mr. Edward Joseph
Anthony Antao, daughter of
late Alcantra D'Souza,
major of age, Indian National,
married, housewife and her
husband,
- 3 Mr. Edward Joseph Antoony
Antao, son of late Mr. Manuel
Antao, major of age, Indian
National, married, service,
- 4 Ms. Safira D'Souza,
daughter of late Alcantra D'Souza,
major of age, service,

All residents of Flat
Type C, Room no.36, N.I.O.
Colony, Dona Paula, Ilhas, Goa.

- 5 Mr. Noshire D. Moddy,
resident of Salman Vaddo,
Saligao, Bardes, Goa, represented
herein by his duly constituted
Attorney, Mrs. Maria Thelma Elvira
Menezes e D'Souza, resident of
Flat no.4, First Floor, Bhatkar
vaddo, Porvorim, Bardez, Goa.

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Petitioners

Versus

1 Shri Michael Lopes
of major age, Indian National,
Resident of House no.472,
Bairro, Ambekhand, Verem,
Reis Magos, Bardez, Goa:
and his wife,

2 Smt. Milina Gracia
Santimano D'Souza Lopes;

3 Shri Maria Road Lopes Simoes;

4 Shri Domonic Simoes;

5 Miss Vita Serafina Lopes;

6 Shri Jose Ivono Rumao Lopes;

7 Smt Olivia Filomena
Cunha Souza Lopes,

Respondent Nos. 3 to 7
are legal heirs of Mrs.
Heraclina Lopes,
residing at House no.472, Bairro,
Ambekhand, Verem, Reis Magos, Respondents
Bardez, Goa.

Shri D.J. Pangam, learned Advocate for the petitioners.

CORAM : NUTAN D.SARDESSAI, J.

RESERVED ON : 10th August,2017.

PRONOUNCED ON: 21st September,2017.

JUDGMENT:

Heard Shri D.J. Pangam, learned Advocate for the petitioner.

2. Admit.

3. None appeared for the respondents despite notice of final hearing.

4. It was the contention of Shri Pangam, learned Advocate for the petitioner that the material question for consideration in this petition was whether a counterclaim can be filed at a later date in respect of the cause of action which has arisen before the filing of the written statement in defence. The suit was filed for declaration and permanent injunction on 17/04/2007 while the respondents filed the written statement claiming adverse possession in July, 2007 and right to 1/3rd of the suit property in July, 2007. An amendment was carried out to the counterclaim on 15/12/2010 challenging the Sale Deed dated 19/04/2007 and the trial continued in the case thereafter. An application was filed on 29/1/2014 claiming that the Sale Deed dated 19/10/2007 be declared null and void and which was allowed by the impugned Order. The Sale Deed dated 19/10/2007 was challenged in 2014 on a cause of action which had arisen on 19/10/2007 and the written statement was filed on July 2007. He adverted to Order VIII Rule 6 C.P.C. which was clear on the point and relied in **Ramesh Chand Ardawatiya v/s. Anil Panjwani** [(2003) 7 SCC 350], **Ganu Kisna Buradkar v/s. Manik Misna Buradkar and another** [(2003) 5 Bom.C.R. 751] and **Mahendra Kumar and another v/s. State of Madhya Pradesh and others** [(1987) 3 SCC 265]. It was his contention that no question arose on allowing the amendment to the counterclaim on a cause of action which had arisen after the

written statement and finally relied in **Rohit Singh and others v/s. State of Bihar**[(2006)12 SCC 734].

5. Order VIII CPC deals with written statement, set-off and counterclaim. Rule 6(A) in particular deals with the counterclaim by the defendants. Sub-rule 1 reads thus : A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of a counterclaim 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 counterclaim is in the nature of a claim for damages or not. Therefore, a bare reading of Section 6A of C.P.C. would take within its sweep a counterclaim in addition to the written statement which is based on a cause of action occurring to the defendants against the plaintiff either before or after filling of the suit or before the defendant has delivered his defence. In other words, no counterclaim can be raise by the defendants on a cause of action which has arisen subsequent to the filing of the written statement in defence or before the time limited for delivering the defence has expired. In this backdrop, i would adverted to the judgment relied by the learned Advocate for the petitioner and the factual matrix to

decide the fate of the petition.

5. **Ganu Kisna Buradkar** (supra), had filed the suit for declaration and injunction against the respondents/defendants claiming a decree for declaration as the owner of the field in question. The respondents/defendants filed their written statement on 23rd February, 1995. However, having realised that some important and material defence had remained to be taken in the written statement and since the counterclaim through the written statement was already made, the respondents moved an application on 5th October, 2001 for amendment in the counterclaim and allowed by the Trial Court. The point which arose for consideration was whether the learned Judge of the Trial Court was justified and right in allowing the amendment to the counterclaim and in that context the learned Single Judge of this Court at Nagpur considered Order VIII Rule 6-A C.P.C. and observed that it was clear beyond doubt that the counterclaim can be raised at the time of filing of the written statement or if the time for filing of written statement is extended then on that day, but the cause of action has to arise on or before either filing of the suit or in any case on or before the date of filing of the written statement, if extended.

6. In **Ganu Kisna Buradkar** (supra), the learned Single Judge referred to paragraph 8A of the application which revealed that the cause of action for the relief of partition and separate possession of the fields arose on or about 18-08-2001 when the defendants received the copies of mutation entries of these fields from the Talathi concerned and came to know the facts of purchasing the fields by the plaintiff and thereafter the cause of action was continuing and subsisting. In other words, the cause of action arose to the respondents/ defendants on or about 18-08-2001 unlike the suit which was filed much earlier and followed by the written statement and the counterclaim, in the year 1995. In that view of the matter, it was held that the order passed by the Trial Court could not be sustained in the eyes of law allowed the petition at the instance of the petitioners/ plaintiffs.

7. In **Mahendra Kumar** (supra), the respondents no.2 to 5 instituted a suit in the Court of District Judge, Bhopal for declaration of their title to the treasure found by them but did not make the other claimants before the Collector including the appellants, parties to the suit who were subsequently added as a party on an application by them under Order I, Rule 10C.P.C. The appellants and respondents Nos.6 to 8 filed their written statement denying the claim of the respondents Nos.2 to 5 to the treasure

and claimed title to the treasure. After the filing of the written statement, the appellants filed a counter-claim claiming title to the treasure and the respondents Nos.2 to 5 filed an application praying that the counter-claim should be dismissed on the premise that it was barred by limitation as prescribed under Section 14 of the Act and that it was also not maintainable under Order VIII, Rule 6A(1) C.P.C. The appellants and the respondents No.6 to 8 moved the High Court in revision which upheld the Order of the learned District Judge and further held that the counter-claim having been filed after the filing of the written statement, it was not maintainable under Order VIII, Rule 6A(1) C.P.C. giving rise to the appeal by special leave.

8. In **Mahendra Kumar** (supra), the Hon'ble Apex Court considered the point whether Rule 6A(1) of Order VIII C.P.C. bars the filing of a counterclaim after the filing of a written statement. In that context, the Hon'ble Apex Court observed at Paragraph 15 thus: this point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counterclaim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his

defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter-claim after the filing of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6A(1) of the C.P.C. as the cause of action for the counterclaim had arisen before the filing of the written statement, the counterclaim was, therefore, quite maintainable and allowed the appeal by setting aside the order of the learned District Judge and the judgment of the High Court.

9. In **Ramesh Chand** (supra), the respondent/ plaintiff filed a suit for declaration, possession and permanent injunction against him on 09/02/1987 in the Court of the Additional Munsif, Class I, Jaipur City, West Jaipur alongwith a prayer for the issuance of an ad-interim injunction under Order XXXIX Rules 1 and 2 of the CPC. No Written Statement was filed despite 29 dates of hearing and ultimately the case proceeded ex-parte on 29/12/1992. On 24/7/1993, the date appointed for the plaintiff's ex-parte evidence, the defendant filed an application under Order IX Rule 7 of the CPC seeking to set aside the ex-parte proceedings which came to be dismissed on 11/5/1994. On 25/3/1995, he moved an application

under Order XVIII Rule 17 CPC carving a case that he had not cross-examined the plaintiff's witnesses because of the pendency of the civil revision in the High Court which was granted subject to the payment of costs. On 02/05/1995, he moved an application proposing to place on record a written statement under Order VIII Rule 6A CPC alleging therein that the plaintiff was claiming the suit premises under an agreement dated 01/12/1985 based on a letter of allotment dated 26/06/1980, issued by Sindhunagar Co-operative Society Ltd., which was false and forged and, therefore, it could necessary to have declared the letter of allotment dated 26/6/1980 and the agreement dated 1/12/1985 null and void. During the pendency of the proceedings, the respondent/ plaintiff filed a civil revision in the High Court putting in issue the order dated 2/5/1995 which was allowed by the High Court by the Order dated 16/1/1996 setting aside the Order dated 02/05/1995. However, directed the President and the Secretary of the Society which had allotted the plot to be examined as court witnesses alongwith the relevant records of the society.

10. In **Ramesh Chand** (supra), the Hon'ble Apex Court opined looking to the scheme of Order VIII as amended by Act No.104 of 1976, 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 a legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of an amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counterclaim may be filed by way of a subsequent pleadings 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 CPC if sought to be introduced by way of an amendment, or, subject to the exercise of discretion conferred on the Court under Order VIII Rule 9 CPC. The purpose of the provision enabling the 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, i.e., all disputes between the same parties being decided in the course of the same proceedings. The Hon'ble Apex Court found that the purpose of the defendant which was sought to be achieved by moving the application dated 2.5.1995 under Order VIII Rule 6A of the CPC was clearly mala fide and an attempt to reopen the proceedings, including that part too as had stood concluded against him consequent upon rejection of his application under Order IX Rule 7

of the CPC.

11. In **Ramesh Chand** (supra), the Hon'ble Apex Court considered the judgment in **Mahender Kumar** (supra) where the counter-claim was sought to be brought on record after the filing of a written statement which was turned down by the Trial Court upon a misreading of Rule 6-A(1) that the counter-claim filed after the filing of the written statement was ipso facto not maintainable. The Apex Court upset such erroneous view by clarifying the legal position, apparent on a bare reading of the relevant provision that the only requirement of Rule 6-A(1) was that the cause of action for the counter-claim should have arisen before the filing of the written statement and if that was so, the counter-claim was not simply excluded.

12. In **Rohit Singh** (supra), the respondent No.6 as the Plaintiff filed a suit for a declaration of his title to the suit property, for confirmation of his possession over it and if it were to be found that the plaintiff had been dispossessed from the plaint schedule property during the pendency of the suit, for the grant of a decree for recovery of possession through the process of court, for a perpetual injunction restraining the defendants from interfering with his peaceful possession of the plaint schedule property and for

other incidental reliefs. The Defendants 1 and 2 who were the respondents No.1 and 2 filed a written statement denying the claim of title and possession by the plaintiff and pleaded that the property was vested in forest having been notified as such under Section 29 of the Forest Act, 1927, which remained vested in the State; that the plaintiff had no cause of action and that the suit was not maintainable for want of notice under Section 80 C.P.C. While the Judgment was reserved, the appellants who were third parties, filed an application under Order I Rule 10(2) C.P.C. claiming that they are in possession of the properties including the suit property as owners apart from the right, title, interest and khas possession over the suit land. Their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit and they were joined as the defendants No.3 to 17 in the suit on the application being allowed by the Trial Court. A written statement was filed on behalf of the defendants No.3 to 12 disputing the plaintiff's claim and pleading that the suit properties were held by them as descendants of one Tikait Maharaj Singh and they were in khas possession of the land.

12. In **Rohit Singh** (supra), some other persons claiming to be lessees of portions of the land filed applications for getting

themselves impleaded in the suit and were ranked as the defendants No.18 to 20. Again, after some delay and during the pendency of the suit, an application was made on behalf of the defendants no.12 to 17 seeking an amendment of the written statement earlier filed and reiterating their claim of acquisition of title based on long and uninterrupted possession which was allowed by the Trial Court. Ultimately, the Trial Court held that the suit by the Plaintiff was not maintainable, that he had failed to prove his possession and proceeded as if the defendants No. 3 to 17 had made a counter-claim against the defendants no.1 and 2, and the defendants no.18 to 20 and that it had to adjudicate on such a counter-claim. The Trial Court then proceeded to grant a decree to the defendants no.3 to 17 on the ground of non-traverse and decreed their counter-claim. The defendants No.1 and 2 challenged the decree of the Trial Court and so too the defendants No.18 to 20 and the learned Additional District Judge rejected the initial prayer of the defendants no.18 to 20 that the suit should be remanded to the trial court and they be given an opportunity to file a written statement in the suit or an answer to the alleged counter-claim. The Court did not consider whether there was in fact a counter-claim in law, whether such a counter-claim was maintainable and whether a counterclaim could be entertained after closure of evidence, that too at the instance of some strangers who sought to

get themselves impleaded so as to assert their right, not against the plaintiff, but against the State. The defendants No.1 and 2 filed Second Appeal in the High Court and the defendants no.18 to 20 also filed Second Appeal, which were admitted on the substantial questions of law. The questions related to the jurisdiction to entertain and decide the counter-claim of a set of defendants made against another set of defendants, whether the court had jurisdiction to decide the dispute inter se between the defendants after dismissing the suit, whether the scope of a counter-claim in terms of Order VIII Rule 6A of the Code had not been totally misunderstood and whether on the pleadings and the evidence in the case, the courts below were justified in passing the decree on the counter-claim that was challenged in the Second Appeal.

13. In **Rohit Singh** (supra), a learned judge of the High Court on a consideration of the relevant aspects, held that the courts below without advertng to the requirements of Order VIII Rule 6A C.P.C. and without following the correct procedure of law had treated the amendment petition as a counter-claim and had passed a decree in favour of the defendants no.3 to 17 which was unsustainable. The courts had totally ignored the correct procedure of law and the rules of evidence while deciding the issue raised. Hence, the judgment could not be sustained. It was contented on

his behalf that a counterclaim was maintainable even if the cause of action put forward by the defendants in the suit did not arise out of the cause of action put in the suit by the Plaintiff and that under such circumstances, the trial court and the first appellate court rightly considered the claim put forward by the appellants as a counter-claim and were justified in adjudicating it in the manner in which it was done. It was also contended that Order VIII Rule 6A of the Code did not preclude the filing of a counter-claim by one defendant against a co-defendant even though no relief was claimed as against the plaintiff. The High Court was therefore not justified in interfering with the decision of the First Appellate Court by relying in **Ramesh Chand** (supra). The Hon'ble Apex Court considered whether there was a counterclaim in the suit in terms of Order VIII Rule 6A C.P.C. The suit was filed against the defendants no.1 and 2 i.e. the Divisional Forest Officer and the State of Bihar by the respondent No.6. After the written statement was filed by the defendants issues were framed and the suit went to trial. The evidence on the side of the plaintiff was concluded on 06.06.1996 and the evidence on the side of the defendants was completed on 14.06.1996. Arguments were concluded on 24.06.1996 and the judgment was reserved. However arguments were heard again as the judge was transferred and arguments were again heard by the successor Judge on 20/08/1996 and the judgment was again

reserved. It is only thereafter that the defendants no. 3 to 17 filed an application for intervention in the suit on 11.9.1996. which was allowed on 19.9.1996 and a written statement was filed by defendant Nos.3 to 12 on 30.09.1996.

14. In **Rohit Singh** (supra), the witnesses of the plaintiff were recalled and permitted to be cross-examined by the defendants and followed by recalling by the defendants No. 1 and 2 and permitted to be cross-examined on behalf of the newly added defendants. The suit was thereafter on conclusion of the hearing dismissed for default of the plaintiff. It was restored and thereafter the defendants no.3 to 17 filed an application for amending the written statement. There was no order treating the amended written statement as a counter-claim or directing either the plaintiff or the defendants no.1 and 2 to file a written statement or an answer thereto. In that backdrop, it was observed that a counterclaim, no doubt, could be filed even after the written statement was filed, but that did not mean that a counter-claim can be raised after issues are framed and the evidence is closed and therefore, the entertaining of the so called counter-claim of the defendants no.3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction and in that view of the matter the so called counterclaim had to be held as not maintainable. The

High court had thus committed an error in remanding the suit to the trial court for proceeding with it afresh which was dismissed by the trial Court and no appeal had been filed against it by the plaintiff thereby attaining finality.

15. Coming to the facts of the case, the suit was filed by the plaintiff for declaration and permanent injunction on 17/04/2007. The written statement was filed by the defendant in July, 2007 claiming adverse possession and a counter-claim filed alongwith it claiming 1/3rd right by adverse possession. An amendment was made to the counterclaim on **15/10/2010** challenging the Sale Deed dated 19/04/2007 and the trial continued in the case thereafter. An application for amendment of the counterclaim was moved on **29/01/2014** claiming that the Sale Deed dated 19/10/2007 be declared null and void and which was allowed by the impugned Order. The cause of action for filing the counterclaim had arisen on 19/10/2007 though the written statement was filed in 2007. On a bare reading of Order VIII Rule 6A C.P.C., the counterclaim could have been filed on a cause of action occurring to the defendants either before or after the filing of the suit but before the defendant had delivered his defence or before the time limited for delivering his defence had expired. In the instant case, the counterclaim which was sought to be raised was on the cause

of action which had arisen after the defendant had entered his defence and was strictly beyond the predicates of Order VIII Rule 6(A)(I) CPC and, therefore, the Trial Court could not have allowed the same. The learned Trial Court did not at all appreciate the predicates of Order VIII Rule 6(A)(1) C.P.C. and allowed the amendment to the written statement to incorporate the additional pleadings on the counterclaim in respect of the cause of action which had arisen subsequent to the filing of the written statement and allowed the amendment. The impugned order was an outcome clearly of an exercise of jurisdiction not vested in the Trial Court and, therefore, it cannot be allowed to stand. In the result, therefore, the petition is allowed and the impugned order is quashed and set aside.

NUTAN D. SARDESSAI, J.

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