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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.2923 OF 2016**

|                                                        |                      |
|--------------------------------------------------------|----------------------|
| 1. Ashok Shankar Sontakke                              | ]                    |
| age: 72 years, Occn. Business                          | ]                    |
| Residing at: 2 <sup>nd</sup> floor, Sontakke Lodge     | ]                    |
| Kopari Road, Naupada, Thane                            | ]                    |
|                                                        | ] <u>Petitioners</u> |
| 2. Mrs. Vaijayanti Kantilal Jage                       | ] Original           |
| age: 74 years, Occn. Housewife                         | ] Plaintiff          |
| residing at Opp. Masjid, Wada                          | ] Nos. 1 & 2.        |
| Taluka Wada, District: Palghar                         | ]                    |
| V/s.                                                   |                      |
| 1. Sharad Shankar Sontakke                             | ]                    |
| age :61 years, Occn. Business                          | ]                    |
|                                                        | ]                    |
| 2. Suresh Shankar Sontakke                             | ]                    |
| age: 58 years, ocn. Business                           | ]                    |
|                                                        | ]                    |
| 3. Vinod Shankar Sontakke                              | ]                    |
| age: 53 years, Occn. Advocate                          | ]                    |
|                                                        | ]                    |
| Respondent Nos. 1 to 3 residing at                     | ]                    |
| House No.17/B, Sontakke House,                         | ]                    |
| Belapur Taluka, District: Thane                        | ]                    |
|                                                        | ]                    |
| 4. Rvindra Shankar Sontakke                            | ]                    |
| age: 50 yrs, Occn. Service,                            | ]                    |
| r/at Room No.8/10-2-3/2, Sector No.13                  | ]                    |
| at & post New Panvel, Tal. Panvel                      | ]                    |
| District: Raigad.                                      | ]                    |
|                                                        | ]                    |
| 5. Shrikant Shankar Sontakke                           | ] <u>Respondents</u> |
| age: 60 years, Occn. Nil, r/at Sontakke                | ] (respondent        |
| House No.173, Belapur, Tal and Dist. Thane             | ] Nos. 1 to 10       |
|                                                        | ] Original           |
| 6. Surekha Jagdish Ambavane                            | ] Defendants.        |
| Shankar Sontakke                                       | ]                    |
| Age: 63 yrs, Occn. Household,                          | ] Respondent         |
| r/at B-1/1-B 1 <sup>st</sup> floor Sector No.1, Vashi, | ] <u>No.11</u>       |
| Navi Mumbai                                            | ] Original           |

- |                                                 |              |
|-------------------------------------------------|--------------|
|                                                 | ] Plaintiff. |
| 7. Sharda Shankar Sontakke                      | ]            |
| age 83 yrs.occn.Household                       | ]            |
| r/at House No.17/B Sontakke House,              | ]            |
| Belapur Taluka and District,                    | ]            |
|                                                 | ]            |
| 8. L.I.C. of India                              | ]            |
| Murphy Towers, Eastern Express Highway]         | ]            |
| Thane 400 606                                   | ]            |
|                                                 | ]            |
| 9. City and Industrial Development Corpn.       | ]            |
| CIDCO Bhavan, CBD,Navi Mumbai, Belapur]         | ]            |
| Navi Mumbai 400 614.                            | ]            |
|                                                 | ]            |
| 10. Sanjay Tukaram Puneekar                     | ]            |
| adult,Occn.Service, r/at : G-3, Om Gayatri Apt] | ]            |
| Vijay Society, Garibacha Wada Road,             | ]            |
| Mahatma Phule Road, Vishnu Nagar                | ]            |
| Dombivali (W)                                   | ]            |
|                                                 | ]            |
| 11. Mrs. Sarala Tukaram Puneekar                | ]            |
| (since deceased through Lrs.)                   | ]            |
|                                                 | ]            |
| 11/1. Samir Tukaram Puneekar                    | ]            |
| age: 42 yrs, Occn.Service,                      | ]            |
| r/at Block No.101 1 <sup>st</sup> floor,        | ]            |
| Sector G-20, Belapur Road,                      | ]            |
| Navi Mumbai                                     | ]            |
|                                                 | ]            |
| 11/2. Sudhir Tukaram Puneekar                   | ]            |
| age:46 years, occn.Service                      | ]            |
| r/at Devkutir Bldg No.2,                        | ]            |
| Dakshini Society Opp.Good Luck Hall]            | ]            |
| Maninagar Ahmedabad, Gujarat                    | ]            |

Mr. Rajesh Sudhakar Datar a/w  
Ms. Aditi Athawale, for the Petitioners

Mr. Sachin P. Shetye, for the  
Respondents.

**CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.**

**CLOSED FOR ORDER : 14<sup>th</sup> DECEMBER, 2017.**

**JUDGMENT PRONOUNCED ON : 19<sup>th</sup> DECEMBER, 2017**

**JUDGMENT :**

1] Heard learned counsel for the petitioners and learned counsel for the respondents.

2] Rule.

3] By consent of the parties rule is made returnable forthwith.

4] By this petition, filed under Article of 227 of the Constitution of India, the petitioners are challenging the order dated 17.12.2015, passed by the Joint Civil Judge, Junior Division, Vashi, Navi Mumbai, below Exh.78 in R.C.S. No.489 of 2012, thereby allowing the counter-claim filed by defendant No.3 to be brought on record by way of amendment in his written statement.

5] The submission of learned counsel for the petitioners is to the effect that, the counter-claim can be permitted only if the cause of action has arisen before filing of the suit or even after

filing of the suit, but, definitely, before the written statement is filed or period for filing of written statement has expired. Here in the case, it is submitted by him that the suit is filed long back in the year 2003. Defendant No.3 has delivered written statement in the said suit in the same month. However, the amendment application to bring on record the counter-claim is filed on 25<sup>th</sup> August 2015; not only that, the cause of action for filing the counter-claim is also mentioned to be, “26.6.2015” and therefore, much after filing of the suit and even after filing of the written statement and after the expiry of the period prescribed for filing of written statement. In such situation, according to learned counsel for the petitioners, when the counter-claim was not satisfying the requisite condition laid down under Order VIII, Rule 6-A C.P.C., the trial Court should have, on this sole ground, rejected the counter-claim. However, the trial Court has confused the issue of limitation as to the cause of action raised in the counter-claim and allowed the same by holding the issue of limitation as mixed question of facts and law. Hence, according to him, the impugned order passed by the trial Court, being against the express provisions of law, is required to be quashed and set aside.

6] Per contra, learned counsel for the respondents has supported the said order by submitting that, the question as to whether the counter-claim is barred by limitation or otherwise, can be decided only after the counter-claim is allowed to be brought on record by amendment; the issue of limitation being the mixed question of facts and law, as held by the trial Court, it needs to be adjudicated on the basis of evidence on record, which will be adduced at the time of final hearing and, therefore, the trial Court has rightly permitted amendment of the written statement to bring on record the counter-claim.

7] Thus, the only issue raised for consideration in this writ petition is, *'whether the counter-claim, the cause of action for which has arisen, admittedly, as per the own case of the defendant, after filing of the written statement, can be allowed to be brought on record by way of amendment?'*

8] In order to appreciate this controversy, the factual aspects of this case, which are relevant for deciding it, can be stated to the effect that, the respondents herein have filed suit simplicitor for injunction and declaration in respect of the suit property. The said suit was filed on 15.9.2003 against, in all, four defendants. Defendant No.3 has appeared in the said suit and filed

written statement in the very same month in the year 2003 itself. Thereafter, the suit was pending for appearance of defendant No.10, who was joined in the suit as legal representative of plaintiff No.3.

9] At this stage, on 25<sup>th</sup> August, 2015, that is after the lapse of about 12 years from the date of filing of the suit and written statement, defendant No.3 filed application for amendment in the written statement in order to bring on record his counter-claim. In the application for amendment, he has stated that his father has made 'Will', bearing No.5324/90, on 11.9.1990 in favour of defendant Nos.1 to 4 and that 'Will' is registered in the office of the Sub-Registrar, Thane. On 13.2.2015, theft has taken place in the house of defendant No.1. At that time, while making panchnama in the house, son of defendant No.1 found receipt, under which 'Will' of defendant No.1's father was found to be registered. On the basis of that receipt, defendant had applied for certified copy of the 'Will' on 9.6.2015 and obtained the same on 22.6.2015. In view of the said 'Will', by way of counter-claim, he wants to claim rights in the suit property and a declaration that, defendant Nos.1 to 4 are the owners of the suit property, in view of the 'Will' of their father registered on 11.9.1990.

10] In paragraph No.30 of his application, he has categorically stated that the cause of action for filing the counter-claim has arisen on 22.6.2015, when certified copy of the 'Will' was obtained by him from the Sub-Registrar of Assurance, Thane, and the same is continued till filing of the counter-claim.

11] Thus, categorical statement is made in the application that, the cause of action has arisen on 26.6.2015, that is much after filing of the suit and also after filing of the written statement in the year 2003 itself.

12] The relevant provision of Order VIII, Rule 6-A of Code of Civil Procedure, which pertains to filing of counter-claim, reads as follows :-

“6-A 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 the 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 ;*

*[Emphasis Supplied]*

*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.”*

13] Thus, perusal of sub-rule (1) of Rule 6-A leaves no room for any doubt that the cause of action, in respect of which counter-claim can be filed, must accrue before defendant has delivered his defence, namely, before defendant has filed his written statement.

14] The Hon'ble Supreme Court has, in the case of **Vijay Prakash Jarath -vs- Tej Prakash Jarath 2016 0 AIR (SC) 1304**, confirmed this legal position by supporting itself on the

conclusions drawn in **Bollepanda P. Poonacha and anr -vs. K.M. Madapa (2208) 13 SCC 179**; wherein it was observed, in paragraph No.11, as follows :-

*“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.”* [Emphasis Supplied]

15] Thus, it is clear that, the right to file counter-claim is an additional right. It may be filed in respect of any right or claim. However, the cause of action therefor must accrue either before or after filing of the suit, but before the defendant has raised his defence. In this reported case, in the application for amendment of written statement, it was categorically stated that, the appellant has trespassed on the land in question in Summer of 1998 and, therefore, the cause of action for filing counter-claim, *inter alia*, was stated to have arisen at that time and hence, the said application was held to be clearly not maintainable, in view of cause of action having arisen after the written statement was filed.

16] In the instant case in the hand also, defendant No.3 has explicitly stated in the amendment application that, the cause of action for filing counter-claim has arisen on 26.06.2015, that is much after defendant No.3 has delivered his defence or filed his written statement on 15.09.2003. In such circumstances, requisite condition laid down in sub-rule (1) of Rule 6-A C.P.C. is not at all satisfied. In such situation, needless to state that, the counter-claim cannot be maintainable at all.

17] As held in the judgment of *Vijay Prakash Jarath -vs- Tej Prakash Jarath (supra)*, the counter-claim, no doubt, could be filed even after the written statement is filed; however, for that purpose, the cause of action for filing written statement must have accrued before filing of the written statement or before the date fixed for filing such written statement has expired. In the present case, on own showing of defendant No.3, the cause of action has accrued after the written statement was filed. Hence, it was not maintainable.

18] As to the judgments relied upon by learned counsel for the respondents in the case of **Pradeep Kashinathrao Kalyankar -vs- Pramod Kashinathrao Kalyankar (2017) 0 SC**

(Mah), 963 and in the case of **Ramniwas Bansilal Lakhotiya** (died) through Lrs, and anr -vs- **Sunil Pannalal Agrawal and others**, (2015) (3) Mh. L.J. 283, the facts of both the cases reveal that, the cause of action therein for filing counter-claim was stated to have arisen before the written statement was filed and much before institution of the suit and on that ground, it was held that, the discretion exercised by the Trial Court in allowing amendment to bring on record the counter-claim was justified. The question, *'whether such counter-claim is barred by limitation?'*, was left open to be considered in accordance with law.

19] In the instant case, the own statement made by defendant No.3 in the application, at his own peril, is that, the cause of action for filing written statement has accrued on 26.6.2015, that is much after the written statement was filed in the year 2003. Hence, the requisite condition laid down in sub-rule (1) of Rule 6-A of Order VIII C.P.C., is not satisfied and hence, the counter-claim is not tenable.

20] As rightly submitted by learned counsel for the Petitioners, in this case, the question is not whether the counter-claim raised by defendant No.3 is barred by Law of Limitation, but

the question is, '*whether the cause of action for filing counter-claim has accrued before the statutory period, as provided by sub-rule (1) of Rule 6-A of Order VIII of CPC*', which stipulates that, the cause of action should have accrued before filing of written statement or before the period prescribed for filing of written statement has expired. In this respect, the trial Court has confused itself and, therefore, the impugned order passed by the trial Court cannot be sustainable in law.

21] As observed by the Apex Court in the case of ***Vijay Prakash Jarath (Supra)***, belated counter claim must be discouraged by the Court.

*“Though the Court has, in such matters, wide discretion, it must, however, sub-serve the ultimate cause of justice. It may be true that, further litigation should be endeavoured to be avoided; it may also be true that, joinder of several causes of action in a suit is permissible, the Court must, however, exercise the discretionary jurisdiction in judicious manner. While considering that subservance of justice is the ultimate goal, statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, undoubtedly, would take into consideration the questions of serious injustice or irreparable loss, but, nevertheless, should bear in mind that a provision for amendment of pleadings is not available as a*

*matter of right under all circumstances.”*

22] Here in the case, not only that the requisite condition laid down in sub-rule (1) of Rule 6-A of Order VIII C.P.C. is not satisfied, but, even the amendment in the written statement, sought by way of counter-claim, is sought after a period of more than 12 years. Issues are already framed in the suit on 5<sup>th</sup> September 2013. Hence, the bar of Proviso to Order 6 Rule 17 C.P.C., which is of a mandatory nature, is also clearly applicable in the present case.

23] In such situation, on this additional ground also, amendment in the written statement cannot be allowed; even on the ground that, it will avoid multiplicity of proceedings. If the condition laid down in sub-rule (1) of Rule 6-A of Order VIII and in Proviso to Order 6 Rule 17 C.P.C. is of a mandatory nature, it must be followed, which the trial Court has not done. Hence, the impugned order passed by the trial Court needs to be quashed and set aside.

24] Accordingly, the Writ petition is allowed.

25] The impugned order passed by the trial Court below Exh.72 stands quashed and set aside.

26] Rule is made absolute in the above terms.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**