

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8320 OF 2017

1. Shri. Maruti Vithoba Kulal
Age 62 years, Occu: Agricultural & Service,
R/o Ramnagar, Achanank Chowk,
Near Vithal Mandir, Warje,
Pune – 58.

2. Shri. Somnath Vithoba Kulal
Age 52 years, Occu: Agricultural,
R/o Jawle Baleshwar,
Taluka Sangamner,
District Ahmednagar.

... Petitioners
(Orig. Plaintiffs)

Versus

1. Shri. Nivrutti Deoram Kulal
Age 67 years, Occu: Agri,
2. Shri. Baban Deoram Kulal
Age 65 years, Occu: Agri,
3. Shri. Bhau Deoram Kulal
Age 57 years, Occu: Agri,
All R/o Takewadi, Jawle Baleshwar,
Taluka Sangamner,
District Ahmednagar.
4. Shri. Prakash Rajaram Dixit
Age 57 years, Occu: Agri,
5. Shri. Vikas Rajaram Dixit
Age 54 years, Occu: Agri,
R.No.4 & 5 both R/o
Pemgiri, Taluka Sangamner,
District Ahmednagar.

6. Ramnath Dhondiba Kulal
Age 72 years,
 7. Lahanu Dhondiba Kulal
Age 57 years,
 8. Bhausahab Dhondiba Kulal
Age 47 years,
 9. Babu Laxman Kulal
Age 37 years,
 10. Raju Laxman Kulal
Age 45 years,
Res. Nos. 6 to 10 all Occu: Agriculture
 11. Mangal Lahu Gawari,
Age 40 years, Occu: Household,
 12. Nanda Minanath Bhangre
Age 37 years, Occu: Household,
 13. Manubai Laxman Kulal
Age 62 years, Occu: Household,
Res.Nos. 6 to 13 are R/o
Takewadi, Jawle Baleshwar,
Taluka Sangamner,
District Ahmednagar.
- ... Respondents
(Orig. Defendants)

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Mr. Darshan D. Pokharkar, Advocate for the Petitioners.
Mr. R. B. Temak, Advocate for Respondent Nos.1 to 3.

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CORAM : V. K. JADHAV, J.
Reserved on : 09th MARCH, 2018
Pronounced on : 15th MARCH, 2018

ORDER :-

1. Heard finally with consent at admission stage.
2. The petitioners/plaintiffs have instituted Regular Civil Suit No. 459 of 2000 for fixation of boundaries and recovery of the encroached portion of the suit land with a decree of perpetual injunction. The respondents/defendant nos. 2, 6, 9 and 11 to 13 have strongly resisted the suit by filing their written statement at Exhibit 21. The respondent/defendant no.1 has also adopted the written statement filed by the above defendants by filing pursis Exhibit 26. In due course, after the pleadings were completed, issues were framed and the parties also led their oral and documentary evidence in support of their rival contentions. The trial court, after hearing the parties finally, reserved the matter for judgment and at this stage, respondent nos. 1 to 3 have filed application Exhibit 80 for carrying out amendment in the written statement and also for filing counter claim. The petitioners/original plaintiffs have strongly resisted the said

application by filing say at Exhibit 82. The learned 2nd Joint Civil Judge, Senior Division, Sangamner, by impugned order dated 07.04.2017, allowed the application Exhibit 80 subject to costs of Rs.300/- and permitted the aforesaid respondents/defendants to amend the written statement as prayed. Hence this Writ Petition.

3. The learned counsel for the petitioners/original plaintiffs submits that the application Exhibit 80 for carrying out amendment and for filing of counter claim at the belated stage, when the suit was reserved for pronouncing judgment, could not have been entertained by the trial court. The learned counsel submits that more than six years have lapsed after filing the original written statement and at the belated stage, respondent nos. 1 to 3 have filed the aforesaid application Exhibit 80. The learned counsel submits that in terms of the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908, application for amendment is not allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the instant matter, no satisfactory explanation has been tendered by the respondents/defendants in

the application Exhibit 80 for filing the application at such a belated stage. The learned counsel submits that even the counter claim is also not maintainable in view of Order VIII Rule 6-A of CPC as the same has been filed after the respondents/defendants have delivered their defence and the suit was posted for judgment. The learned counsel submits that filing of the application Exhibit 80 for carrying out amendment and for placing counter claim would seriously cause prejudice to the petitioners/plaintiffs. The learned counsel submits that if the suit is posted for the purpose of pronouncing judgment under order XX Rule 1, there is no adjournment of “the hearing” of the suit as there is nothing more to be heard in the suit. In terms of the ratio laid down by the Supreme Court in the case of *Arjun Singh vs Mohindra Kumar and others*, reported in *AIR 1964 SC 993*, the Civil Judge was not competent to entertain the application Exhibit 80. The learned counsel submits that the provisions of Order VIII Rule 6-A(1) enable the defendant in a suit to set up by way of a counter claim against the claim of the plaintiff. However, after expiry of the date of filing the defence, the same is not permissible.

4. The learned counsel for the petitioners/original plaintiffs, in order to substantiate his contentions, placed reliance on the decisions in the following cases:

1. *Arjun Singh vs Mohindra Kumar and others*, reported in *AIR 1964 SC 993*,
2. *Vidyabai and others vs Padmalatha and another*, reported in *2009(4) Mh.L.J. 30*,
3. *Chhabubai Haribhau Badakh vs S. H. Khatod and Sons and another*, reported in *2009 (6) Mh.L.J. 760*,
4. *Mahendra Kumar and another vs State of M.P. and others*, reported in *AIR 1987 SC 1395*,
5. *Rajasthan Financial Corporation vs Pukhraj Jain and others*, reported in *AIR 2001 Rajasthan 71*,
6. *Rabiya Bi Kassim M. vs Country-wide Consumer Financial Service Limited, Bangalore*, reported in *2004 (4) KLJ 189* and

7. *Mangulu Pirai vs Prafulla Kumar Singh and others*, reported in *AIR 1989 Orissa 50*.

5. The learned counsel for the respondents/original defendant nos.1 to 3 submits that these respondents/defendants have contended in their original written statement that they are cultivating a portion of the suit property since 1940 without obstruction by the petitioners/plaintiffs and they are still in possession. Initially, when the suit was filed, there was no need to file a counter claim. However, after the amendment in the plaint carried out by the petitioners/plaintiffs in the year 2016, it was necessary for the respondents/defendants to file a counter claim. The respondents/defendants have become owner by adverse possession in the area out of the suit land gat no. 412. The learned counsel submits that admittedly, in the year 2016, the petitioners/plaintiffs have measured the suit land and accordingly carried out amendment in the plaint in terms of the said measurement. The respondents/defendants are from Adivasi community residing in tribal area and they could not give proper information to their advocate. The learned counsel submits that the respondents/defendants could not carry out the amendment

in the written statement as proposed in the application Exhibit 80 and only after the petitioners/plaintiffs amended their plaint with permission of the court, they have filed application Exhibit 80 for carrying out amendment and also for the counter claim. In spite of due diligence, the respondents/defendants could not raise the matter before commencement of trial. The learned counsel submits that it is the convention that if a case is reserved for judgment, no application should be entertained once the trial/hearing is concluded, but the same is not a strait-jacket formula. There can always be exceptions to meet the ends of justice and to prevent abuse of the process of court. The learned counsel submits that the Supreme Court, in the case of *K. K. Velusamy vs N. Palanisamy*, reported in *(2011) 11 SCC 275*, even by referring the case of *Arjun Singh* (supra) relied upon by the learned counsel for the petitioners, observes so. The learned counsel submits that so far as the amendments in the pleadings are concerned, in terms of the language of Order VI Rule 17 of CPC, the same can be allowed at any stage of the proceedings including, where the case is reserved for judgment. The learned counsel submits that in *Arjun Singh's* case, in terms of the provisions of Order IX Rule 7, where the stage of hearing is

contemplated, the Supreme Court has observed that there is clearly no adjournment of “the hearing” of the suit, as there is nothing more to be heard in the suit when the suit is posted for the purpose of pronouncing judgment under Order XX Rule 1. The learned counsel submits that in terms of the amended provisions of Rule 6-A of Order VIII, there is no limitation for filing a counter claim and the only hurdle is that the cause of action should arise for filing the counter claim either before or after filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. The learned counsel submits that any cause of action, if arises after filing of the written statement by the defendant or after expiry of the date for filing defence, will not come within the scope of Rule 6-A(1) of Order VIII. The learned counsel submits that the restriction regarding limit of the period of accrual of the cause of action is based upon sound public policy, as otherwise, the defendant may go on filing one counter claim after another against the plaintiff in the same suit until it was disposed of and thus, the suit may be indefinitely delayed.

6. The learned counsel for the respondents/defendants, in order to substantiate his contention, placed his reliance on the decisions in the following cases:

1. *K. K. Velusamy vs N. Palanisamy*, reported in (2011) 11 SCC 275,
2. *Gurbachan Singh vs Bhag Singh and others*, reported in (1996) 1 SCC 770,
3. *Shanti Rani Das Dewanjee (Smt) vs. Dinesh Chandra Day (Dead) by LRs.*, reported in (1997) 8 SCC 174,
4. *Sajjan Kumar vs Ram Kishan*, reported in (2005) 13 SCC 89 and
5. *Baburao s/o Sahebrao Deshmukh vs Maharashtra Insecticides Limited, Akola and others*, reported in 2004(2) Mh.L.J. 719.

7. The petitioners/plaintiffs have instituted the suit with a specific pleading that the Surveyor Mr. Sanjay Dolas of the office of TILR, Sangamner, had carried out measurement of the suit land on 27.11.2006 and fixed the boundaries and shown the

same in the map dated 25.04.2007. The petitioners/plaintiffs have approached the court with the specific pleading that in the said measurement map, the aforesaid Surveyor has incorrectly shown the boundaries and even though some portion of the suit land is not barren, shown it as barren in the map. Further, the said Surveyor has not shown the carved common *bandh* and the marks of the existing *bandh* in the map and as such, by taking undue advantage of the same, the respondents/defendants have started encroaching upon the portion of the suit land. It has been specifically pleaded that respondents/defendant nos. 1 to 3 have carved out the *bandh* from the western side and also the respondents/defendant nos. 6 to 10 from the eastern side and encroached upon the portion of the suit land. According to the petitioners/plaintiffs, they have been constrained to institute the suit for fixation of boundaries and for removal of encroachment, if any. During pendency of the said suit, the petitioners/plaintiffs have filed an application Exhibit 58 for carrying out amendment in the plaint. It has been contended in the said application Exhibit 58 that as per the court orders, the TILR has again measured the land and it is thus clear that the respondents/defendants 1 to 3 have encroached upon the portion of the suit

land from the eastern side, which is shown in orange colour in the map to the extent of 0.26R, and the respondents/defendants 6 to 13 have encroached upon the portion of the suit land from the western side, which is shown in blue colour in the map to the extent of 0.07R. Respondents/defendants 4 and 5 have encroached upon the portion of the suit land from the southern side, which is shown in red colour in the map to the extent of 0.31R. The petitioners/plaintiffs have sought permission in the application Exhibit 58 to carry out amendment in the light of the above measurement report in the year 2016 and accordingly carried out the amendment to the extent as aforesaid by the amended para (6A) in the plaint and also incorporated a specific relief to that extent by way of para 11. The said amendment has been carried out on 26.07.2016. Admittedly, in terms of the original pleadings, the respondents/defendants have filed their written statement in the year 2011 itself. On 27.02.2017, the respondents/defendants have filed application Exhibit 80 pointing out to the court that in terms of the amendment carried out by the petitioners/plaintiffs, it is necessary for them to carry out amendment in the written statement and also to file a counter claim even though the suit is posted for judgment.

8. It is manifest that before carrying out the amendment in the plaint, despite due diligence, the respondents/defendants could not have carried out the amendment as proposed in the application Exhibit 80 and also the counter claim. In the year 2016, by order of the trial court, the suit land was measured by the Surveyor and in terms of the measurement report submitted before the court, the petitioners/plaintiffs have carried out the amendment at the end of the year 2016. The petitioners/plaintiffs have specifically pleaded in the plaint by way of amendment about the removal of encroachment to the extent of the specified portion as shown by the Surveyor in the measurement map.

9. In view of the above, the question thus arises to the limited extent that, whether the application Exhibit 80 for carrying out amendment in the written statement and also for counter claim at the belated state, when the suit was fixed for pronouncing judgment, could have been entertained by the trial court?

10. In the case of **Arjun Singh** (supra), relied upon by the learned counsel for the petitioners/original plaintiffs, the Supreme Court, in para 17, has made the following observations:

“17. So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O.IX R.7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O.IX R.13. This is because it is not disputed that in order to operate as res judicata, the Court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present appeal, this would primarily turn upon the proper construction of the terms of O.IX R.7. The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean? Obviously they assume that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the “hearing” of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for

the purpose of pronouncing judgment under O.XX R.1, there is clearly no adjournment of “the hearing” of the suit, for, there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil Judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to hear the judgment pronounced and that on the terms of rules 6 and 7 he would permit him to do that. If, therefore the hearing was completed and the suit was not “adjourned for hearing”, O.IX R.7 could have no application and the matter would stand at the stage of O.IX R.6 to be followed up by the passing of an ex parte decree making R.13 the only provision in order IX applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under O.IX R.7, or pass any order thereon the merits. This in its turn would lead to the result that the application under O.IX R.13 was not only competent but had to be heard on the merits without reference to the findings contained in the previous order.”

The Supreme Court, at the end of para 19 of the judgment in the above case, has observed as under:

“19. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit : (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O.XX R.1 permits, judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O.IX, R.7 is passed the next stage is only the passing of a decree which on the terms of O.IX R.6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O.IX R.13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O.IX R.7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under O.IX R.7; and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petitioner under O.IX R.13 filed by the appellant.”

11. Order IX Rule 7 of the Code of Civil Procedure reads as under:

“Order IX Rule 7.

procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. - Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

12. In terms of the provisions of Order IX Rule 7 of CPC, the Supreme Court in the aforesaid case of **Arjun Sing**, has observed that there is to be a hearing on the date to which the suit stands adjourned and if the entirety of the “hearing” of the suit has been completed and the court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order XX Rule 1, there is clearly no adjournment of “the hearing” of the suit, for there is nothing more to be heard in the suit. The Supreme Court has thus observed that in such case, Order IX Rule 7 could have no

application and the matter would stand at the stage of Order IX Rule 6 to be followed up by the passing of an *ex parte* decree making Rule 13 the only provision in Order IX applicable.

13. Order VI Rule 17 of Civil Procedure Code reads as under:

“Order VI Rule 17

Amendment of pleadings.- *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

14. In terms of the provisions of Order VI Rule 17, the pleadings can be allowed to be amended in accordance with law at any stage of the proceedings. This Court (Coram : S. A. Bobade, J) in the case of ***Baburao s/o Sahebrao Deshmukh vs***

Maharashtra Insecticides Limited (supra), distinguished ***Arjun Singh***'s case, and in para 11 of the judgment, has observed that the Supreme Court in ***Arjun Singh***'s case has laid down a ratio in a completely different context and particularly in view of the phraseology of the Order IX Rule 7 of CPC which deals with what is to be done when a suit is adjourned for hearing. In para 15 of the said judgment this Court has made the following observations:

“15. I am therefore, of the view that the pleadings can be allowed to be amended in accordance with law at any stage of proceedings, including when the case is reserved for judgment. Indeed, there are several situations in which such an amendment might become necessary such as addition due to the death of a party which requires averments to be added in respect of the status of the legal representative or some other relevant subsequent events which has taken place subsequent to the closing of the case for judgment. Indeed the law provides for such amendments, in appropriate cases even at the appellate stage.”

15. In the case of *Wasudeo Babasaheb Sonone vs Agananath Ramlalji Jugele*, reported in *1985 Mh.L.J. 565*, the learned Single Judge of this Court had an occasion to deal with order XVIII Rule 2 of CPC and the learned Single Judge construed the similar words which enable the court to direct the parties to examine any witness “at any stage”. The learned Single Judge, in the aforesaid case, observed that the phrase “at any state” in Order XVIII Rule 2 of CPC to mean only till the stage of hearing of the suit. The same is obvious because, the learned Single Judge of this Court has considered the question of examination of witnesses which is obviously a part of the hearing of the suit.

16. In view of the matter, it can be safely concluded that because of the expression “at any stage of the proceedings” employed in Order VI Rule 17 of CPC, the court is competent to allow either party to alter or amend his pleadings any time before the judgment is pronounced.

17. So far as the counter claim filed by respondents/defendants is concerned, Order VIII Rule 6-A(1) does not, on the face of it, bars the filing of the counter claim by a defendant

after he had filed the written statement. What is laid down under Rule 6-A(1) is that a counter claim 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. Therefore, the counter claim filed by the respondents/defendants after filing of the written statement is maintainable. In the facts of the present case, the cause of action shown to have been arisen before filing of the written statement.

18. In the case of ***Mahendra Kumar and another vs State of M.P. and others*** (supra), relied upon by the learned counsel for the petitioners/plaintiffs, it is clearly laid down that Rule 6-A(1) of Order VIII of CPC does not bar the filing of a counter claim by the defendant after filing of his written statement. It only provides with respect to the cause of action regarding which the defendant could file a counter claim and the cause of action must have accrued to the defendant before he delivered his defence or before the time limited for delivering his defence has expired. In view of the same, I do not find any substance in the submissions made on behalf of the petitioners/plaintiffs that

filing of a counter claim after filing of the written statement is not permissible.

19. In view of the above discussion, I do not find any fault in the impugned order passed by the trial court. Hence the following order:

The Writ Petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

vre/