

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

903 WRIT PETITION NO. 12346 OF 2015

REKHA KAILASH KAMJALGE AND ANOTHERS
VERSUS
PREMILA MADHAV WARALE AND OTHERS

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Advocate for Petitioners : Mr. H. V. Patil h/f
Mr. D. Y. Nandedkar
Advocate for Respondent No.1 : Mr. S. V. Kurundkar

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CORAM : V. K. JADHAV, J.
DATED : 14th MARCH, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. By this writ petition, the petitioners/original defendant Nos.5 & 6 have challenged the order below Exh.81 dated 28.10.2015 in Special Civil Suit No. 21 of 2013 passed by the Joint Civil Judge, Senior Division, Nanded.
3. Brief facts giving rise to the present writ petition are as follows :
 - A) Respondent No.1/original plaintiff has instituted a suit for declaration and decree of perpetual injunction in respect

of house and landed property. Declaration is sought to the effect that respondent No.1/plaintiff has got 1/7th share in the house property and in the landed property and also a declaration that the compromise decree passed in RCS No. 302 of 2004 may be set aside and cancelled and it be declared that the same is not binding on the plaintiffs and defendant Nos. 2 to 4. The present petitioners have strongly resisted the suit by filing written statement. During pendency of the suit, the petitioners have filed application Exh.81 under Order VI Rule 17 of the Code of Civil Procedure for amendment in written statement. It is the case of the petitioners that they had filed civil suit bearing RCS No. 302 of 2004 against respondents/defendant Nos. 1 & 7 before the court at Nanded for a decree of injunction. However, the said suit was ended in compromise. Respondent/plaintiff and respondent/defendant No.1 have demanded certain amount from the petitioner No.1 to settle the dispute and due to intervention of the elderly members of the community, petitioner No.1 agreed to pay amount of Rs.1,30,000/- each to the respondents/defendant Nos. 1 to 4 and also to the respondent/plaintiff. The said amount has been given by the father of petitioner No.1 to the respondent plaintiff and respondent/

defendant no.1. However, the receipt has been executed by respondents/defendant Nos. 1 to 4 only and though the plaintiff was not party to the said suit, the plaintiff's husband has signed on the said receipt executed by the respondents/defendant Nos. 1 to 4 in favour of petitioner No.1. The receipt is dated 22.03.2005. It is the further case of the petitioners that petitioner No.1 is suffering from HIV since 2002 and she is under treatment since then. Even after due diligence, she could not find the said bond/receipt of payment, which was kept with her father. However, when the trial was commenced, the said notarized bond/receipt was found. The petitioners, therefore, constrained to file application Exh.81 seeking amendment in the written statement and also for counter claim. In the application Exh.81 the amendment is proposed as para No.13-A to 13-H. In addition to the aforesaid facts, the petitioners have submitted a counter-claim in the alternate for recovery of the said amount which has been paid to the respondents/defendant Nos.1 to 4 and 7.

B) Respondent No.1/plaintiff has strongly resisted the said application by filing say at Exh.85. The learned judge of the

trial court, by impugned order dated 28.10.2015, rejected the said application. Hence, this writ petition.

4. Learned counsel for the petitioners submits that the trial court has rejected the application mainly on the ground that after commencement of trial, the application for amendment cannot be allowed. However, the trial court has not considered that even after due diligence, the petitioners could not find out the aforesaid bond/receipt, which is a notarized document. The learned counsel submits that even though the counter-claim is not separately filed, however, the petitioners are seeking amendment in the written statement along with the counter-claim. Learned counsel submits that the petitioners may be granted liberty to file a counter-claim separately in the event this court allows this writ petition. Learned counsel submits that even after filing of the written statement, in terms of Order VIII Rule 6-A of CPC, the counter-claim can be filed and the only obstacle is that the cause of action should arise before or after institution of the suit but before filing of the written statement. Learned counsel submits that in the instant case, the petitioners have shown the cause of action in the counter-claim which has

arose prior to the filing of written statement and as such, there is no bar to file the counter-claim even at belated stage i.e. after filing of the written statement.

5. Learned counsel for the respondent No.1/plaintiff submits that in terms of the proviso to Order VI Rule 17 of CPC, such amendment is not permissible after commencement of the trial. The petitioners could have pleaded in their original written statement about the aforesaid bond/receipt even though the said document was initially not found. Learned counsel submits that leave to amend the written statement should not be granted if the amendment would convert the defence in to another and of a different and inconsistent character. Learned counsel submits that even if the prayer to the extent of counter-claim is concerned, even though the said counter-claim is an alternate relief, the same is barred by limitation. Learned counsel submits that the trial court has rightly rejected application Exh-81. There is no substance in the writ petition and the same is thus liable to be dismissed.

6. On careful perusal of the contents of application Exh.81 and also the written statement filed by defendant No. 5 & 6, the petitioners had specifically pleaded about the institution of civil suit bearing RCS No. 302 of 2004 and the said suit was compromised on 22.03.2005. It has been specifically pleaded that in terms of the compromise, certain properties came to be allotted to the share of petitioner No.1/defendant No.5. It further appears from the contents of application Exh.81 and also from the pleadings that the respondent No.1/plaintiff is the daughter of defendant no.1. Defendant Nos. 2 to 4 and 7 are the children of defendant No.1. Defendant No.6 is daughter of defendant No.5. It is also not disputed that the petitioner/defendant No.5 is daughter-in-law of defendant No.1 and her husband died on 08.10.2003. The husband of the petitioner/defendant no.5 was the elder son of defendant No.1. It is the specific pleading of petitioners that after the death of petitioner No.1's husband, defendant Nos.1 and 7 were intending to dispose of properties as detailed in the suit. Consequently, petitioners have filed civil suit bearing RCS No. 302 of 2004 against the defendant Nos. 1 & 7 for a decree of perpetual injunction. Since the relatives of the parties intervened in the

dispute, the said suit ended in compromise. Respondent/plaintiff has instituted the suit for declaration that the compromise decree passed in that suit is not binding on her share. The petitioners have specifically contended in application Exh.81 that at the time of compromise of the said suit bearing RCS No. 302 of 2004, petitioner No.1 has paid certain amount to the other family members and since the document pertaining to the said payment in the form of bond/receipt was not traced out initially, the petitioners have not specifically pleaded to that effect in the original written statement. It is also a part of record that the said bond/receipt is a notarized document, wherein the husband of the respondent/plaintiff was one of the signatory, though the plaintiff was not a party to the suit. I do not think that the petitioners have come with entirely new story so as to cause prejudice to the respondent no.1 /plaintiff in her suit. It is also part of the record that the said suit bearing RCS No. 302 of 2004 ended in compromise. Even though there is no specific pleading about the circumstances which led for effecting the compromise in the said suit, if those circumstances are brought on record after a particular document in the form of bond/receipt is found, I do not think that the petitioners/original defendant Nos. 5 & 6

are introducing certain new facts causing prejudice entirely to respondent No.1/plaintiff for claiming the relief in the suit.

7. So far as the counter-claim is concerned, it is well settled that in terms of provisions of Order VIII Rule 6-A of CPC, even after filing of the written statement, counter-claim can be filed provided that the cause of action should arise before institution of the suit or before tendering of the defence by the defendants or before the statutory time is expired for filing the written statement. After going through the proposed amendment carefully, I find that the cause of action is shown to have arisen prior to the filing of the written statement and as such, there is no bar to accept the counter-claim. However, it appears that though the petitioners filed an application seeking amendment in the written statement including counter-claim, they have not filed a separate counter-claim in the format. The learned Judge of the trial court has not observed anything with regard to the prayer about the counter-claim. If the proposed amendment is allowed, in my considered opinion, the petitioners can be granted liberty to file counter-claim in the format so the respondent No.1/plaintiff can file a written statement to the said

counter-claim and also the other defendants, if needed. So far as the prayer made in the counter-claim about the refund of the money which is alleged to have been paid by the petitioners, such amendment cannot go back to the time of the institution of the proceedings. In the circumstances, the said claim has to be taken as on the date of making application for amendment and not earlier to that.

8. In view of above discussion, I proceed to pass the following order.

ORDER

- I) The writ petition is hereby allowed.
- II) The impugned order below Exh.81 dated 28.10.2015 in Spl. C. S. No. 21 of 2013 passed by the Joint Civil Judge, Senior Division, Nanded is hereby quashed and set aside.
- III) Application Exh.81 is allowed in terms of its prayer clause, subject to costs of Rs.5,000/- (Rs. Five thousand only) to be paid to the respondent No.1 / plaintiff, within a period of four weeks from today, before the trial court.

IV) The petitioners are at liberty to file counter-claim in the format and the trial court shall accept the same.

V) Needless to say that the point of limitation is kept open and the trial court may decide the said point of limitation in the full-fledge trial of the suit.

VI) The writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

vsm/