

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2884 OF 2019

Hazra Bi Maan Baig	]	Petitioner
Vs.		
Parvez Darabshaw Netarwalla	]	
and others.	]	Respondents

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Mr. Mayur Khandeparkar a/w Ms. Nupur Mukherjee a/w Mr. Rahul Raut i/b
N.N. Vaishnawa & Co., Advocate for the Petitioner.
Mr. A. Desai a/w P.N. Mehta i/b PNM Legal, for Respondents No.1 to 3.

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CORAM : R.G. KETKAR, J.

DATE : 26th APRIL, 2019.

P.C.

Heard Mr. Khandeparkar, learned Counsel for the petitioner and
Mr. Desai, learned Counsel for respondents No.1 to 3, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff' has challenged the order dated 4th February, 2019 passed by the learned trial Judge below Exhibit 44 in R.A.D. Suit No.1894 of 2015. By that order, the learned trial Judge allowed the application made by respondents No.1 to 3, hereinafter referred to as 'defendants No.1 to 3' for amending the written statement subject to costs of Rs.1000/- payable to the other side on or before the next date. On payment of costs, the respondents No.1 to 3 were permitted to amend the written statement as per the schedule attached with the application within time stipulated.

3. Rule. Mr. Mehta waives service on behalf of respondents No.1 to 3. Service on rest of the respondents is dispensed with as respondents No.1 to 3 are the only contesting respondents. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. The plaintiff has instituted suit, *inter alia*, for declaration that she is tenant of Flat No.4, ground floor, Baria Building No.3, Gamadia Colony, Tardeo, Mumbai – 400 007 (for short 'suit premises'); defendants No.4 to 10, being the landlords of the suit premises be ordered and directed to transfer the rent receipt in respect of the suit premises in her name; for appointment of Court Commissioner to visit the suit premises and submit report. The plaintiff also sought interim reliefs in the suit.

5. Defendants No.1 to 3 filed written statement on 8th February, 2016 resisting the suit. Defendants No.1 to 3 contended that the plaintiff is a gratuitous licensee. She was maid servant of their Late brother Manchi Netarwalla and as such is liable to be evicted after the demise of Manchi Netarwalla. Defendants No.1 to 3 also reserved right to institute the suit for eviction against the plaintiff under section 7 of the Presidency Small Causes Courts Act, 1882. Defendants No.1 to 3 denied that the plaintiff is entitled to declaration of tenancy rights in respect of the suit premises. On the contrary, they are entitled to seek eviction of the plaintiff on the ground that she is a gratuitous licensee. No right accrued in favour of the plaintiff. Defendants No.1 to 3 also contended that they reserve right to file suit of eviction against the plaintiff as also recovery of mesne profits.

6. On the basis of the pleadings of the parties, the issues were framed on 24th March, 2017. Defendants No.1 to 3 filed application Exhibit 44 on 16th June, 2017 under Order-VI, Rule-17 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for amending the written statement by incorporating paragraphs 26 a), 26 b), 26 c) and 26 d) and adding reliefs (aa), (bb) and (cc). On 3rd July, 2017, the plaintiff filed affidavit of her examination-in-chief. By the impugned order, the learned trial Judge has allowed the application. It is against this order, the plaintiff has instituted the present Petition.

7. In support of this Petition, Mr. Khandeparkar submitted that the learned trial Judge committed serious error in allowing the application filed by defendants No.1 to 3. He submitted that Order-VIII, Rule-6A lays down that 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.

8. In the present case, defendants No.1 to 3 have filed written statement on 8th February, 2016. He has invited my attention to paragraphs 10, 24 and 27 of the written statement to contend that defendants No.1 to 3 reserved their right to institute suit against the plaintiff for recovery of possession as also mesne profits. Thus, the cause of action for filing the suit accrued to them either before or at the time of setting up their defence. At that time, defendants No.1 to 3 did not set up counter-claim. He submitted that as the cause of action had accrued to defendants No.1 to 3 either before or at the time of filing of the written statement and still they did not set up counter-

claim in the written statement, they are precluded from setting up counter-claim by filing application under Order-VI, Rule-17 of the C.P.C.

9. Mr. Khandeparkar relied on the decision in

[1] **Nagnath s/o Jagannath Lomate Vs. Narsingh s/o Sambha More, 2009 (3) Mh. L.J, 564 and in particular paragraphs 10 to 13 thereof.**

[2] **Bollepanda P. Pooncha Vs. K.M. Madapa, (2008) 13 Supreme Court Cases 179.**

He invited my attention to the operative part of the impugned order where the learned trial Judge permitted defendants No.1 to 3 to amend the written statement as per schedule attached with the application. In other words, the operative part of the order shows that the learned trial Judge treated application filed by defendants No.1 to 3 under Order-VI, Rule-17 of the C.P.C for amending the written statement. The learned trial Judge did not direct defendants No.1 to 3 to pay Court fees as also did not provide for the plaintiff to file written statement to the counter claim set up by defendants No.1 to 3. He submitted that even in the application for amendment, defendants No.1 to 3 have proposed to incorporate reliefs (aa), (bb) and (cc) without narrating the facts.

10. On the other hand, Mr. Desai supported the impugned order. He relied on the decision of **Vijay Prakash Jarath Vs. Tej Prakash Jarath, (2016) 11 Supreme Court Cases 800**. He submitted that in the present case, defendants No.1 to 3 had filed application Exhibit 44 on 16th June, 2017 and thereafter, the plaintiff has filed her affidavit of examination-in-chief on 3rd July, 2017. He submitted that from perusal of paragraphs 10, 24 and 27 of the written statement, it is evident that cause of action for setting up counter-claim

accrued to defendants No.1 to 3 before filing the written statement. He submitted that no prejudice is shown to have been caused to the plaintiff if the counter-claim is to be adjudicated upon along with the main suit. No serious injustice or irreparable loss will be caused to the plaintiff if the counter-claim is allowed. However, if the counter-claim is not allowed to be set up, defendants No.1 to 3 will be required to file separate suit for eviction of the plaintiff. This will lead to multiplicity of the proceedings. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submission advanced by learned Counsel for the parties. I have also perused the material on record. Order-VIII, Rule-6A of the C.P.C reads thus;

Order-VIII, Rule-6A reads thus;

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:
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 plaint and governed by the rules applicable to the plaints.”

The Apex Court in **Ramesh Chand Ardawatiay Vs. Anil Panjwani, (2003) 7 SCC 350**, referred to amendment Act of 1976 and extracted Rule-6A. In paragraphs 26 to 28, it was observed thus;

26. A perusal of the abovesaid provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counter-claim. The relevant words of Rule 6A are--

"A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6,.....before the defendant has delivered his defence or before the time limited for delivering his defence has expired...".

These words go to show that a pleading by way of counter-claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither can the written statement be filed as of right nor a counter-claim can be allowed to be raised, for the counter-claim under Rule 6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defendant, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.

27. We have already noticed that the defendant was being proceeded ex-parte. His application for setting aside the ex-parte proceedings was rejected by the Trial Court as also by the High Court in revision. In ***Sangram Singh v. Election Tribunal Kotah, AIR 1955 SC 425***, this Court held that in

spite of the suit having been proceeded ex-parte the defendant has a right to appear at any subsequent stage of the proceedings and to participate in the subsequent hearings from the time of his appearance. If he wishes to be relegated to the position which he would have occupied had he appeared during those proceedings which have been held ex-parte, he is obliged to show good cause for his previous non-appearance. It was clearly held that unless good cause is shown and the defendant relegated to the position backwards by setting aside the proceedings held ex-parte, he cannot put in a written statement. If the case is one in which the Court considers that a written statement should have been put in and yet was not done, the defendant is condemned to suffer the consequence entailed under Order VIII Rule 10. The view taken in *Sangram Singh* (supra) by two-Judges Bench was reiterated and re-affirmed by three-Judges Bench in *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 1993. Certain observations made by this Court in *Laxmidas Dayabhai Kabrawala v. nanabhai Chunilal Kabrawala*, AIR 1964 SC 11 are apposite. It was held that a right to make a counter-claim is statutory and a counter-claim is not admissible in a case which is admittedly not within the statutory provisions. The crucial date for the purpose of determining when the counter-claim can be said to have been filed and pleaded as on a par with a plaint in a cross suit is the date on which the written statement containing the counter-claim is filed. Save in exceptional cases a counter-claim may not be permitted to be incorporated by way of amendment under Order VI Rule 17 of the CPC.

28. Looking to the scheme of Order VIII as amended by Act 104 of 1976, we are of the opinion, 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 legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading 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 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling 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, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim".

12. Applying the principles laid down in the case of **Ramesh Chand Ardawatiya** (supra) to the facts of the present case, it is necessary to find out whether the learned trial Judge has exercised the discretion arbitrarily, capriciously or perversely. It is also necessary to find out whether by allowing defendants No.1 to 3 to set up counter-claim, it would prolong the trial complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court.

13. As mentioned earlier, in paragraphs 10, 24 and 27, defendants No.1 to 3 have already reiterated that they have reserved right to institute suit for eviction of the plaintiff. It is also not disputed and cannot be disputed that defendants No.1 to 3 can file separate suit for eviction of the plaintiff from the suit premises. The purpose of the provision enabling 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 being decided in the course of the same proceeding.

14. The learned trial Judge has allowed the application thereby permitting defendants No.1 to 3 to set up counter-claim, no prejudice is shown to have been caused to the plaintiff if the counter-claim is to be adjudicated upon along with the main suit. In the present case, cause of action is accrued to defendants No.1 to 3 before filing of the written statement and that is evident from paragraphs 10,24 and 27 of the written statement. Thus, it cannot be said that the application is contrary to the provisions of Order-VIII, Rule-6A of the C.P.C. In view thereof, I do not find that the learned trial Judge has committed any error in allowing defendants No.1 to 3 to set up the counter-claim. It also can't be said that the learned trial Judge exercised the discretion arbitrarily, capriciously or perversely.

15. Mr. Khandeparkar relied on the decision of this Court in **Nagnath s/o Jagannath Lomate** (supra). In that case, Counter-claim was raised long after settlement of issues as well as after recording of evidence of plaintiffs was over. The learned Single Judge, therefore, held that the trial Court ought not to have permitted defendant No.6 to raise counter-claim at belated stage.

16. In the present case, immediately after framing of the issues on 24th March, 2017, defendants No.1 to 3 filed application on 16th June, 2017 for amending the written statement. Thus, the application is filed before the evidence was adduced. Therefore, this decision is not applicable to the facts and circumstances of the present case.

17. Mr. Khandeparkar relied on the decision of **Bollepanda P. Pooacha** (supra) and in particular paragraph 18. In paragraph 15, the Apex Court referred to the decision of **Ramesh Chand Ardawatiya** (supra) and observed that the Court in such matters has a wide discretion. It must, however, subserve 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 a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while 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.

18. In the case of **Abdul Rehman Vs. Mohd. Ruldu**, (2012) 11 SCC 341, the Apex Court has observed in paragraph 13 as under;

“13. Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the unamended plaint. As rightly pointed out by Ms. Manmeet Arora, learned counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the unamended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the unamended plaint and, therefore, the relief of cancellation of sale deeds as sought by the amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the contrary view expressed by the trial court and the High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment on the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should (sic would) have been caused to Respondents 13 (Defendants 13 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation.

19. In the present case, necessary factual basis for amendment is already contained in the written statement. Making clear and explicit what was already implicit in the written statement will not cause any prejudice to the plaintiff. It will also avoid multiplicity of the proceedings.

20. That brings me to the operative part of the order passed by the learned trial Judge. The learned trial Judge has merely permitted defendants No.1 to 3 to amend the written statement as per the schedule attached to the application within the time stipulated. Mr. Desai submitted that in paragraph 26, the learned trial Judge observed that defendants No.1 to 3 filed application for amendment in the written statement and counter-claim on 16th June, 2017.

In other words, defendants No. 1 to 3 have filed application for amendment in the written statement as also have set up counter-claim. In view thereof, impugned order deserves to be modified thereby, directing defendants No.1 to 3 to pay necessary Court fees on the counter-claim as also permit the plaintiff to file written statement to the counter-claim set up by defendants No.1 to 3. Defendants No.1 to 3 shall pay necessary Court fees within three weeks from today. Amendment in the written statement shall be carried out within two weeks from today. Thereafter, within one week, amended written statement shall be served on the other side. The plaintiff shall file written statement to the counter-claim within two weeks after service of the amended written statement.

21. In view of the controversy raised in this case, the learned trial Judge is requested to dispose of the suit within one year from production of the authenticated copy of this order. Rule is partly made absolute with no order as to costs.

22. At this stage, Mr. Khandeparkar orally applies for stay to this order for a period of 8 weeks. As the plaintiff desires to challenge this order in the higher Court, I find that his request is reasonable. Hence, this order shall remain stayed for a period of 8 weeks from today with express understanding that no application for extension of interim relief shall be sought by the plaintiff and entertained by this Court. Order accordingly.

[R.G. KETKAR, J.]