

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.7978 /2019

Smt. Prabha Balabhau Kelkar Vs. Shri Ramesh Battulal Gondya and others.

Office notes Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri Amit A. Choube, Advocate for petitioner.
Shri R.S.Dhore, Advocate for respondent no. 4.

CORAM : A.S.CHANDURKAR, J.

DATED : DECEMBER 17, 2019.

The challenge raised in the present writ petition is to the order dated 04.10.2019 passed by the trial Court below Exhibit 137 by which permission to file a counter claim as sought by the petitioner-defendant no.6 has been refused.

The respondents are the original plaintiffs who had filed suit for declaration of their title bearing R.C.S.No.1496/2000. In that suit the defendant no.6 filed her written statement on 27.12.2007. After the evidence of the plaintiffs and one of the defendants was recorded, the defendant no.6 sought permission to file a counter claim. The relief sought was for grant of possession. In the application it was pleaded that though the possession was lost long back, the cause of action was continuous. The trial Court after noticing that the suit was pending for almost 19 years and the fact that evidence had also been recorded refused to grant any permission. It observed that the option of filing a separate suit was available to the defendant no.6. Being aggrieved, the aforesaid order is challenged in the present writ petition.

Shri A.A.Choube, learned counsel for the petitioner submits that since the cause of action is continuous in nature, the trial Court ought to have permitted filing of the counter claim. Instead of calling upon the defendant no.6 to file a separate suit, his rights could have been determined in the present suit itself. He submits that since the relief of declaration as to the valid possession was sought by the plaintiffs, adjudication of the prayer for possession in this suit itself ought to be permitted. He thus submitted that the impugned order was liable to be set aside.

Shri A.S.Dhore, learned counsel for the respondent no.4 supported the impugned order. He disputed that the counter claim was filed within the period of limitation. A suit in question was filed in the year 1997 and though the defendant no.6 was subsequently joined as a party, her written statement was filed on 27.12.2007. After the evidence was recorded the present application came to be moved. He sought to place reliance on the decision in ***Anna Parisa Chougule Vs. Sulochana Nabhiraj Chougule 2017 (6) Mh.L.J. 693*** in that regard. He thus submitted that no interference with the impugned order was called for.

Heard learned counsel for the parties and perused the respective pleadings. The record indicates that the suit for declaration as filed is in the year 1997. After the defendant no.6 was added as a party, she filed her written statement in the year 2007. In the meanwhile, evidence of the parties has been recorded. At that stage, the defendant no.6 sought to raise counter claim. As held by this Court in ***Nagnath Jagannath Lomate and another Vs. Narsingh s/o Sambha More and others 2009 (3) Mh.L.J. 564*** (supra) normally a counter claim should not be permitted to be raised long after the issues are framed and the evidence has commenced. In the present case, it is informed that

the entire evidence stands recorded. It is therefore found that the present case is not an appropriate one in which the defendant no.6 can be permitted to file a counter claim.

The trial Court has observed that the defendant had the remedy of filing an independent suit. At the same time, it has observed that the counter claim was barred by limitation. The question as to bar of limitation is a mixed question of fact and the law. Hence by maintaining the rejection of the application filed below Exhibit 137, it is clarified that if the defendant no.6 chooses to file a separate suit for redressal of her grievances, the observations as made by the trial Court with regard to limitation shall not come in her way.

With these directions, the writ petition stands disposed of. No costs.

JUDGE

Andurkar.