

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.10019 OF 2017

NASIM ARSHAD KHAN AND OTHERS
VERSUS
RANA BATUL ZIYA-UR-RAHEMAN KHAN AND OTHERS

...
Advocate for Petitioners : Mrs. C.S. Deshmukh
Advocate for Respondents : Fatema Kazi h/f Kazi S.S.

...
CORAM : V. K. JADHAV, J.
Dated : February 28, 2020

PER COURT :-

1. Heard finally with the consent of the parties,
at admission stage itself.

2. The petitioners are the original defendant
nos.1 to 5. The respondents/original plaintiffs no.1 to 6
filed a suit bearing Special Civil Suit No.93 of 2015 for
declaration and a decree of perpetual injunction. In
response to the suit summons, the petitioners/original
defendants put their appearance in the suit and filed
their written statement so also the counter claim. The
respondents/plaintiffs have filed an application Exh.77
under Order 7 Rule 11(b) and (d) of the Civil Procedure

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Code contending therein that the petitioners/defendants have grossly undervalued the property in the counter claim and thus, sought directions from the Court to the petitioners/defendants to pay the deficit court fees and or in the event of non-payment of the same, the Counter claim be dismissed. The petitioners/defendants have strongly opposed the application by filing say at exh.80. By order dated 16.3.2016 below Exh.77, the Trial Court has directed the petitioners/defendants to make proper valuation of the Counterclaim and do pay the deficit Court fees stamps within twenty (20) days of passing the order. The petitioners/defendants, however, filed applications Exh.91 and 92 respectively on two different dates seeking time for filing the Court fees stamps as per the order passed below exh.77. It has been contended that the request was made to the Sub-Registrar Office, Ahmednagar for valuation of the property by application dated 22.4.2016. The said valuation was not carried out. However, by common order dated 28.7.2016 passed below Exh.91 and 92 the Trial Court has rejected the applications with the

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observations that the petitioners/defendants are avoiding to comply the order Exh.77 and there are no justifiable grounds for extension of time. Furthermore, by order dated 5.8.2016 below Exh.1 in Special Civil Suit No.93 of 2015, the Trial Court struck out the defence of the petitioners/defendants and dismissed the counterclaim. The petitioners/defendants have filed an application Exh.102 for setting aside the order of rejection of the plaint and striking out the defence. By impugned order dated 19.11.2016, the Trial Court has rejected the said application. Hence, this Writ Petition.

3. The learned counsel appearing for the petitioners/defendants submits that the petitioners have submitted the requisite deficit court fees stamps alongwith an application Exh.102 and prayed before the Court for setting aside the order of rejection of the plaint and also setting aside the order of striking out the defence. Learned counsel submits that the Trial Court should have considered the same. The learned counsel submits that on 14.9.2016 the petitioner has received

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the communication from the Joint Registrar Stamp, Ahmednagar pertaining to the valuation of the suit property and, as such, the delay was caused in submitting the deficit court fees. Learned counsel submits that while disposing off the applications Exh.91 and 92, the Trial Court has erroneously observed that inspite of the repeated demands of the gift deed from the Registrar Office, the defendants have failed to comply the same and thus on 14.9.2016 the Registrar's office has issued the letter to the petitioners/defendants for supplying the copy of the registered gift deed. However, the petitioners have already supplied the copy of the gift deed in the office of the Joint Registrar's Stamp. From the communication dated 14.9.2016 [Exh.C], the Joint Registrar Stamp has given reference to the date of the application and further the application submitted by the petitioners. However, there is no reference to the said application dated 14.9.2016. Learned counsel submits that the matter pertains to immovable property and as such when the petitioners/defendants have submitted an application Exh.102 alongwith the requisite stamp of

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the deficit Court Fees, the Trial Court should have considered the application. Learned counsel submits that, even if it is considered that the order passed on an application under Order 7 Rule 11 of the C.P.C. would be a decree, however, in terms of the provisions of the Order 7 Rule 13 of the Civil Procedure Code, the counter claim can be filed for the same cause of action. Even, the petitioners application Exh.102 can also be treated as an application under Order 7 Rule 13 of Civil Procedure Code for considering the counter claim again on the same cause of action.

4. Learned counsel for the petitioners in order to substantiate her his contentions placed her reliance on following judgments :-

- i. Munshi Ram Alias Mansa Singh Vs. Sun Life Assurance Co. Canada reported in AIR 1944 OUDH 327.
- ii. Kaderbhai Peerbhai Vs. Husenabu Chandbhai reported in AIR 1962 Gujarat 59.
- iii. S.Satnam Singh and others Vs. Surender Kaur and another reported in (2009) 2 Supreme Court Cases 562.
- iv. Mrs. Kavita Krishnamurthy Vs.Shri K.N.Krishnamurthy reported in 2015 (2) ALL MR 807.

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5. Learned counsel appearing for respondents/ plaintiffs submits that in terms of the provisions of Section 2(2) of the Civil Procedure Code the rejection of the plaint would also amount to decree and, as such, the petitioners/defendants ought to have preferred an appeal. Learned counsel submits the writ petition as against the orders impugned is not at all maintainable. Learned counsel, in the alternate submits that, if this Court is inclined to allow this writ petition, then heavy costs may be imposed on the petitioners/defendants. Learned counsel further submits that in a case **Western Coalfields Ltd., and others Vs. Chandraprakash w/o Krishnalal Khare reported in [2010 (4) Mh.L.J. 34]** relied upon by the learned counsel for respondents though this Court (Coram: C.L.Pangarkar, J.) has considered that rejection of plaint does not prohibit a party from filing a fresh suit as envisaged by Rule 13 of Order 7, however, considering that when once Court records a finding that suit is barred by limitation and dismisses it, the lis comes to an end while a plaint is

rejected the lis does not come to an end.

6. In my considered opinion, three course are open to the petitioners/defendants in such a contingency. The petitioners/defendants may file Appeal against order of rejection of the plaint or review or an application under Order 7 Rule 13 of the Civil Procedure Code.

In the instant case, the petitioners/defendants have also filed an application at Exh.102 for review of the order. The petitioners/defendants have also submitted alongwith the said application deficit court fees. On perusal of the communication received from the Joint Registrar (Stamp) dated Exh.C, it appears that on 14.9.2016 the valuation in respect of the suit property was communicated to the petitioners /defendants. It thus appears that for a justifiable reason, the petitioners/defendants were prevented from furnishing the deficit court fees as directed by the Trial Court by order below exh.77.

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7. In a case Kaderbhai Peerbhai Vs. Husenbu Chandbhai (supra) relied upon by the learned counsel for the petitioners, in an identical facts, it is observed that the plaintiffs remedy is by way of an appeal or review or to present a fresh plaint in respect of the same cause of action as provided by Order 7 Rule 13 of the Civil Procedure Code. High Court of Gujarat has referred the Judgment of the Full Bench of Allahabad High Court in case of Muhammad Sadik Vs. Muhammad Jan, reported in ILR 11 ALL 91, wherein it has been observed that once the order of dismissal of the suit amounted to a decree two courses were open to the plaintiff, she could have either gone in appeal or review or on proper grounds made out against the order of rejection of the plaint on the basis that it was a decree or she could have filed a fresh plaint on the same cause of action under the provisions of Order VII, Rule 13.

8. In the instant case, the Trial Court should have considered the application Exh.102 as an

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application filed under Order 7 Rule 13 of the Civil Procedure Code and considered the counter claim on the same cause of action.

9. In the instant case, the application came to be filed under Order 7 Rule 11 (b) of the Civil Procedure Code. Though (d) is mentioned, however, the application Exh.77 is simply under Order 7 Rule 11 (b) contending therein that the relief claimed in the counterclaim is undervalued and as such the observations made by this Court in the case of Western Coalfields Ltd. and others Vs. Chandraprakash w/o Krishnalal Khare (supra) are not applicable to the facts and circumstances of the present case.

10. Thus, considering the entire aspect of the case, I am inclined to allow this writ petition, however, the petitioners/plaintiffs are required to be saddled with certain costs. Furthermore, since the suit is also pending since the year 2015, it is also necessary to give directions to the Trial Court for expeditious disposal of

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the case. Hence, I proceed to pass the following order.

ORDER

- i] Writ Petition is hereby allowed.
- ii] The impugned order dated 19.11.2016 passed below Exh.102 and the order passed below Exh.1 dated 5.8.2016 by the 4th Civil Judge S.D. Ahmednagar in Special Civil Suit No.93 of 2015 are hereby quashed and set aside.
- iii] Application Exh.102 in Special Civil Suit No.93 of 2015 is hereby allowed subject to costs of Rs.5,000/- (Rs. Five Thousand) to be paid by the petitioners/defendants to the Respondents/plaintiffs within a period of two (02) weeks from the date of this order.
- iv] The Trial Court shall dispose off the suit as expeditiously as possible, preferably within a period of ONE YEAR from the date of this order.
- v] Writ Petition is accordingly disposed off.

(V.K. JADHAV, J.)

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