

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3660 OF 2022

M/s. Binesh Realtors and Hoteliers Pvt.
Ltd. through its Director and Anr.

..... Petitioners

Vs.

Smt. Ramilaben Dhirubhai Damani
and Ors.

....Respondents

....

Mr. Pradeep Thorat with Mr. Rupesh Mandhare i/by Sean Wassoodew for the Petitioners.

Mr. Siddarth Wakankar with Ms. Vaniti Pandit for the Respondent Nos.1 to 3.

Mr. Rupesh Kenjalkar for Respondent No.4.

**CORAM: SANDEEP K. SHINDE, J.
RESERVED ON : SEPTEMBER 22, 2022.
PRONOUNCED ON: OCTOBER 12 , 2022.**

P.C.

1. **Rule.** Rule made returnable forthwith. With consent of the learned counsel for the parties, petition is taken up for final hearing.

2. Petitioners have challenged, order dated 3rd February, 2022 by which their application to file counter-claim under Order VIII Rule 6A of the Code of Civil Procedure, 1908 ('Code' for short) has been rejected by the 2nd Joint Civil Judge, Senior Division, Vadgaon-Maval, Pune.

3. Briefly stated facts of the case are that, the respondent nos.1, 2 and 3 instituted Special Civil Suit No.1434 of 2018, against the Petitioner for possession of the Suit Land, described in paragraph 3 of the plaint and for declaration that the sale deed dated 3rd January, 2007 in respect of Suit Property is void, illegal and not binding on them. The suit was instituted on 12th July, 2018. Defendant no.2 filed its Written Statement on 27th November, 2019. Application to file counter-claim under Order VIII Rule 6A of the Code was filed on 20th January, 2022. It is not in dispute that counter-claim was filed within limitation and it does not exceed pecuniary jurisdiction of the Court. In the counter-claim, petitioners were seeking declaration that, their title to the Suit Land has matured and perfected by adverse possession and for injunction to restrain the plaintiffs from disturbing their open, peaceful and hostile possession over the Suit Land. The trial Court refused to accept the counter-claim, on the ground that, cause of action arose, in filing the Regular Civil Suit No.140 of 2018 ('First Suit' for short) filed by Petitioners against the respondents (Defendants therein) for injunction relating to the Suit Property furnished cause of action for relief of adverse possession. Thus, held that while instituting the First

Suit, since Petitioners omitted leave of the Court under Order 2 Rule 2(3) of the Code, petitioners could not have raised the counter-claim, in this suit, instituted by the respondents.

4. Heard counsel for the Parties.

5. The First Suit, i.e., Regular Civil Suit No.140 of 2018 instituted by the Petitioners for relief of perpetual injunction, against the Respondent No.1, 2 and 3 was decreed on 1st January, 2020. Pleadings in the plaint of the First Suit reveals that, Police complaints filed by the defendants therein (respondents herein) and the order dated 13th June, 2018 passed by the Tehsildar in respect of the Suit Land constituted cause of action, for instituting suit; as petitioners were apprehending dispossession from the Suit Land at the hands of the defendants. The First Suit was decreed in January, 2020. Thereafter, respondents instituted suit in question, on 12th July, 2018 for possession. Thus, 'cause of action', for filing counter-claim arose on 12th July, 2018 when suit in question was instituted. Provisions of Order VIII Rule 6A of the Code, provides that defendant in a civil suit may set-up a counter-claim, involving any claim in respect of 'cause of action' accruing to defendant

against the plaintiffs. The only limitation is that Court should be competent to dispose of the counter-claim and the main purpose of setting up counter-claim is to prevent multiplicity of proceedings between the parties. Herein, institution of suit by the Respondent Nos. 1 to 3 for possession, itself furnishes 'cause of action' and, therefore, petitioners were within their rights and thus, correctly made the counter-claim in respect of 'cause of action', accrued to them against the plaintiffs. However, the learned trial Court was of the view that plaintiffs ought to have claimed relief of adverse possession in the First Suit and since had omitted to obtain the leave under Order 2 Rule 2(2) of the Code, upon instituting First Suit by itself would hinder petitioners from raising the counter-claim in this suit. On this premise, the learned trial Court refused to entertain counter-claim raised by the petitioners.

6. The impugned order calls for interference. Reasons are; Order 2 Rule 1 of the Code requires every suit to include the whole of the claim to which the plaintiff is entitled with respect to any cause of action. However, plaintiff has an option to relinquish any part of his claim if he chooses to do so. Thus, to be noted that, plaintiff may relinquish any part of the claim arising from a

‘particular cause of action’. Order 2 Rule 2 of the Code, contemplates a situation where plaintiff omits to sue or intentionally relinquishes any portion of the claim, which is entitled to. If the plaintiff so acts, Order 2 Rule 2 of the Code makes it clear that he shall not afterwards sue for which part or portion of the claim that has been omitted or relinquished. Leave of the Court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such situation, plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. In the case of **Virgo Industries Private Limited v. Venturetech Solutions Private Limited (2013) 1 Supreme Court Cases 625**, Hon’ble Supreme Court has held, *‘The object behind the enactment of Order 2 Rules 2(2) and (3) of the Code discourages /prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons.’* In the case

at hand, First Suit instituted by the Petitioners, simply for injunction, was maintainable in law. The Said Suit was decreed ex-parte against the respondents (defendants therein). The cause of action, arose in the First Suit, was distinct from the cause of action arose in the suit, in question. These two 'cause of actions' are distinct and do not overlap. Here institution of suit for possession, itself furnished, cause, to file counter-claim. Therefore, though the counter-claim has the same effect as the cross-suit, main purpose of setting up counter-claim and object of under Order 2 Rules 2(2),(3) of the Code are different and operate in distinct situation. Therefore, the order impugned, refusing the defendant to raise the counter-claim by taking recourse to Order 2 Rules 2 and 3 of the Code is not sustainable in law. For these reasons, impugned order is quashed and set aside.

7. Rule is made absolute, in above terms.

(SANDEEP K. SHINDE J.)