

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.357 OF 1993
WITH CA/11921/2003 IN SA/357/1993

1. Saibu s/o. Channappa Kelkhere,
2. Putalabai w/o. Channappa Kelkhere .. Appellants
(Original Appellants)

Versus

Saw. Laxmibai w/o. Dattatraya Gulbhele .. Respondent
(Original Respondent)

Mr. N. P. Patil, Advocate for Appellants;
Ms. Rekha Choudhari and Mr. D. B. Pokale, Advocates holding for
Mr. S. S. Choudhary, Advocate for Respondent

CORAM : S. G. MEHARE, J.

DATE : 27-09-2023

ORAL JUDGMENT :-

1. Heard the learned counsel for the appellants and the learned counsel for the respondent.
2. The appellants are the original plaintiffs. They had filed suit for declaration and perpetual injunction. They had a case in the sale deed; the suit plot was executed nominally as a security against the loan of Rs.1500/-. The suit of the plaintiffs was dismissed. The defendant had filed the counterclaim for *mesne* profits without prayer for the possession. The learned Courts awarded the *mesne* profits to the defendant.

3. In the present second appeal, the Court had formulated the following substantial question of law:-

“Whether or not the counterclaim as made out by the defendant/respondent would be sustained in the facts of the present case?”

4. The learned counsel for the appellants has vehemently argued that in the facts and circumstances of the case, the defendant cannot claim the *mesne* profits without the prayer for possession of the immovable property. He also argued that the counterclaim is maintainable only in money matters. To bolster his arguments, he relied on the case of ***Chandrakant Versus Manikrao, Laws (Bom)-1987-9-18***.

5. The learned counsel for the respondent/defendant would submit that the counterclaim is not restricted to the money matters only. Order VIII, Rule 6-A of the Code of Civil Procedure (for short, “C.P.C.”) provides for the counterclaim for any right or claim in respect of a cause of action accruing to the defendant against the plaintiff.

6. There are two concurrent judgments admitting the counterclaim for the *mesne* profits of the defendant. The defendant had proved before the trial Court that after the execution of the sale deed, he was illegally dispossessed. The possession of the plaintiffs over the suit plot after dispossessing

the defendant was unauthorized and illegal. Hence, both Courts have correctly granted the *mesne* profits as it was used unauthorizedly. She would rely upon ***Manikchand Fulchand Katariya Versus Lalchand Harakchand Katariya, [1994(1) Mh.L.J. 732]***.

7. The facts of ***Chandrakant's*** case (cited *supra*) were that the plaintiff had filed a suit for perpetual injunction not to obstruct or interfere with his actual and peaceful possession over the suit land against his cousin. The defendants in the said suit denied the plaintiff's ownership and possession over the suit land. They had come with a case of old partition. In a counterclaim, they had placed the possession of the suit land. On this fact, the Bombay High Court agreeing with a view of the Division Bench of Patna High Court in ***Jashwant Singh v. Smt. Darshan Kaur and others, A.I.R. 1983 Patna 132***, observed that it would not be open to the defendants to make prayer for possession of the land by way of counterclaim.

8. In the case of ***Jashwant Sing*** (cited *supra*), the view has been taken that Rule 6-A simply enables a defendant to set up by way of a counterclaim "any right or claim in respect of a cause of action accruing to the defendant against the plaintiff". The provisions under the amended Rule 6-F of Order VIII and Rule 19 of Order XX of the C.P.C. make it clear that the counterclaim under

the rules aforesaid can be made only in such suits in which there is a dispute in respect of money claim.

9. The Honourable Bombay High Court, in the case of **Manikchand** (*supra*), has laid down the law that it is clear from the provisions of Order VIII, Rule 6A of the C.P.C. that a counterclaim has the same effect as a cross-suit so as to enable the Court to pronounce final judgment in the suit, both on the original claim and the counterclaim. A counterclaim has to be treated as a plaint and is governed by rules applicable to a plaint. The counterclaim is, in its nature, a cross-suit. Rule 6A cannot be construed or interpreted in a limited sense.

10. The Honourable Supreme Court, in the case of **Bollepanda P. Poonacha and Anr. v. K.M.Madapa and Anr., A.I.R. 2008 Supreme Court 2003**, has laid down the law in paragraph No.10 that the provisions of Order VIII, Rule 6A must be considered having regard to the aforementioned provisions. A right to file a counterclaim is an additional right. It may be filed in respect of any right or claim; the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence.

11. The suit of the plaintiff was filed on the cause of action dated 01.02.1983 when the defendant refused to act as per his contract of executing the re-sale deed, and the suit was filed on

09.02.1983. In the counterclaim, the plaintiffs have come up with a case that the sale deed was executed on 01.09.1977, and the possession was handed over to her on the same day, and after January 1983, she was dispossessed by taking advantage of mutation entry in favour of the plaintiff. These two causes of action reveal that the counterclaim was filed on the basis of the cause of action that arose before the cause of action for the suit of the appellant.

12. The learned counsel for the appellants added that unless a case of possession exists, no *mesne* profits can be granted. The defendant had led the evidence to prove wrongful possession of the plaintiffs and also led the evidence that profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom. Both Courts have accepted the evidence led by the defendant.

13. The *mesne* profits include those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom. Wrongful possession of the defendant is the essence of a claim for mesne profits and the foundation of the defendant's liability.

14. Reading Order XX, Rule 12 of the C.P.C., it cannot be said that unless the suit for possession is filed, the *mesne* profits cannot be claimed. The defendant had a specific case that mesne

profits be awarded to her until she claimed the possession. Both Courts have considered the wrongful possession of the plaintiffs. Therefore, there is no substance in the arguments of the learned counsel for the appellants that in the absence of the claim for possession, *mesne* profits cannot be ordered.

15. In view of the discussion made above, the substantial question of law has been answered that the counterclaim of the defendant for mesne profit in the facts and circumstances of the case would sustain.

16. For the above reasons, the following order is passed.

ORDER

- i) The appeal stands dismissed.
- ii) No order as to cost.
- iii) Rule stands discharged.
- iv) R & P be sent to the learned trial Court.
- v) Pending civil application stands disposed of.

**(S. G. MEHARE)
JUDGE**

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