

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

WRIT PETITION NO.6448 OF 2005

- 1) Satyanarayan s/o Mohanalal Rahti,
Age 56 years, Occu: Agril.
and Business, r/o. Hadgaon,
Dist. Nanded, Died per L.Rs.
- 1-a) Laxmidevi w/o Satyanarayan Rathi,
Age 60 years, Occu: Household,
R/o. Dattnagar, Surya Apartments,
Masigad, Jalna (wife).
- 1-b) Nandkishor s/o Satyanarayan Rathi,
Age: 30 years, Occu: Business,
R/o. Dattnagar, Surya Apartments,
Masigad, Jalna (son).
- 1-c) Bajrang s/o Satyanarayan Rathi,
1) Satyanarayan s/o Mohanalal Rahti,
Age 56 years, Occu: Agril.
and Business, r/o. Hadgaon,
Dist. Nanded, Died per L.Rs.
- 1-a) Laxmidevi w/o Satyanarayan Rathi,
Age 60 years, Occu: Household,
R/o. Dattnagar, Surya Apartments,
Masigad, Jalna (wife).
- 1-b) Nandkishor s/o Satyanarayan Rathi,
Age: 30 years, Occu: Business,
R/o. Dattnagar, Surya Apartments,
Masigad, Jalna (son).
- 1-c) Bajrang s/o Satyanarayan Rathi,
Age: 43 years, Occu: Business,
R/o. Tulsi Matching Centre,
Kumbharwada, Aurangabad (son).
- 1-d) Santosh s/o Satyanarayan Rathi,
Age: 38 years, Occu: Business,
R/o Aurangabad (son). As above.
- 1-e) Sow. Sarla w/o Vinod Ladda,
Age: 50 years, Occu: Household,
R/o. C/o. Vishal Provisions,
Akola.

1-f) Prema w/o Badrinarayan Bhansali,
Age: 45 years, Occu: Household,
R/o. C/o. Bank of India,
Jalna.

1-g) Sow. Shakuntala w/o Ravikumar Jaju,
Age: 38 years, Occu: Household,
R/o. Jaju Chowk,
Yeotmal.

Through GPA of Petitioner Nos.1-e to 1-g
Bajrang Satyanarayan Rathi,
Age: 43 years, Occu: Business,
R/o Kumbharwada, Aurangabad.

...Petitioners

Versus

1) Balaji s/o Dattatray Walamshetwar,
Age 23 years, Occu: Agril and Business
R/o Main Road, Hadgaon,
Dist. Nanded.

2) Ashok s/o Dattatray Walamshetwar,
Age 23 years, Occu: agril.
r/o. Kawana Tq. Hadgaon,
Dist. Nanded.

3) Bhagwan s/o Vishwanath Wallamshethwar,
Since Deceased Through L.Rs.

1a. Prashant s/o Bhagwan Walamshetwar
R/o Hadgaon, Dist. Nanded

1b. Kalpana Dipak Pattewar
R/o Balapur, Tq. Kalamnuri,
Dist. Hingoli,

1c. Archana w/o Krishana Pattewar
R/o Trimurti Nagar, Parbhani.

1d. Rachana w/o Sachin Uttarwar
R/o Yashwant Nagar, Nanded.

1e. Smt. Ratnamala w/o Bhagwan Walamshetwar
R/o Hadgaon, Dist. Nanded.

4) Shamlal s/o Shankarlal Jaiswal,
Age 45 years, Occu: Business (Wine shop)
R/o Hadgaon, Dist. Nanded.

...Respondents

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Advocate for Petitioner : Mr. R.F. Totala
 Advocate for Respondent No.3 : Mr. Kedar Warad, Advocate h/f
 Mr. S.V. Warad
 Advocate for Respondent Nos.1 & 2 : Mr. Rahil Kazi, Advocate h/f
 Mr. P.R. Katneshwarkar

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WITH
WRIT PETITION NO.3760 OF 2007
WITH
CIVIL APPLICATION NO.6311 OF 2022
IN WP/3760/2007

Bhagawan s/o Vishwanath Wallamshetwar
 Died on 11.3.2021 Through his L.R's-

- 1A) Prashant s/o Bhagwan Walamshetwar
 Age 42 years, Occu. Agriculture
 R/o Hadgaon, Tq. Hadgaon
 District: Nanded.
- 1B) Kalpana w/o Dipak Damkondwar
 Age 48 years, Occu. Household
 R/o Balapur (Akhada), Tq. Kalamnuri
 Dist: Hingoli
- 1C) Archana w/o Krishna Pattewar
 Age 40 years, Occu. Household
 R/o Near Parwati Mangal Karyalay,
 Trimurtinagar, Parbhani,
 District : Parbhani
- 1D) Rachana w/o Sachin Uttarwar
 Age 35 years, Occu. Household
 R/o House No.104, Beside Post Office
 Yeshwantnagar, Nanded,
 District Nanded
- 1E) Smt. Ratnamala w/o Bhagwan Walamshetwar
 Age 70 years, Occu. Agriculture
 R/o Hadgaon, Tq. Hadgaon
 District : Nanded

... Petitioners

Versus

- 1) Satyanarayan s/o Mohanlal Rahti,
 deceased through his L.Rs.
- 1a) Laxmidevi w/o Satyanarayan Rathi,
 (Died on 9.8.2002)

- 1b) Nandkishor s/o Satyanarayan Rathi,
Age: 45 years, Occu: Business,
R/o. Dattnagar, Surya Apartments,
Masigad, Jalna, District Jalna.
- 1c) Bajrang s/o Satyanarayan Rathi,
Age: 43 years, Occu: Business,
R/o. Tulsi Matching Centre,
Kumbharwada, Aurangabad.
- 1d) Santosh s/o Satyanarayan Rathi,
Age: 38 years, Occu: Business,
R/o Aurangabad.
- 1e) Sow. Sarla w/o Vinod Ladda,
Age: 50 years, Occu: Household,
R/o. C/o. Vishal Provisions, Akola.
- 1f) Prema w/o Badrinarayan Bhansali,
Age: 45 years, Occu: Household,
R/o. C/o. Bank of India, Jalna.
- 1g) Sow. Shakuntala Jaju,
Age: 38 years, Occu: Household,
R/o. Jaju Chowk, Yeotmal.
2. Shamlal s/o Shankarlal Jaiswal,
Age 45 years, Occu: Business,
R/o Main Road, Hadgaon, Dist. Nanded.
3. Balaji s/o Dattatray Walamshetwar,
Age 23 years, Occu: Business
R/o Main Road, Hadgaon,
R/o. As above.
4. Ashok s/o Dattatray Walamshetwar,
Age 28 years, Occu: Agril.
r/o. Kawana Tq. Hadgaon,
Dist. Nanded.

...Respondents

...
Advocate for Petitioners : Mr. Kedar Warad, Advocate h/f
Mr. S.V. Warad

Advocate for Respondent No.1 : Mr. R.F. Totala
Advocate for Respondent Nos.3 & 4 : Mr. Rahil Kazi, Advocate h/f
Mr. P.R. Katneshwarkar

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CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 03rd JULY, 2023
PRONOUNCED ON : 19th AUGUST, 2023

JUDGMENT :

1. Since both these petitions raise similar question of fact and law, both were heard together and are being decided by this common judgment.
2. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.
3. In both these writ petitions order dated 08/04/2005, passed by learned Civil Judge, Senior Division, Nanded, below Exhibits- 153 and 155, in Special Civil Suit No.35/1986 (R.C.S. No.80/2000), is challenged. Original defendant No.1 has filed Writ Petition No.6448/2005, whereas original plaintiff No.3 has filed Writ Petition No.3760/2007. For the sake of convenience facts in Writ Petition No.6448/2005 are taken into consideration and the litigating parties are referred to as plaintiffs and defendants.
4. Plaintiffs/respondent Nos.1 to 3 filed Special Civil Suit No.35/1986, against defendants i.e. petitioner and respondent No.4 herein, for specific performance of contract in respect of the suit property and for recovery of possession. Defendant No.1 Satyanarayan Mohanlal Rathi expired on 27/12/1995 and his wife expired on 09/08/2002. Accordingly, petitioners/defendants Nos.1(b) to 1(g) were brought on record as legal representatives of

Satyanarayan. On failure of defendants to file written statement in time, 'no written statement' order was passed against them. By order passed below Exhibit-125, 'no written statement' order passed against defendant No.2 was set aside. Since defendant Nos.1(e) to 1(g) did not appear pursuant to the paper proclamation, the Trial Court passed *ex parte* order against them. Defendant Nos.1(b) to 1(d) filed application Exhibit-153 for setting aside 'no written statement' order and application Exhibit-155 is filed by defendant Nos.1(e) to 1(g) for setting aside *ex parte* order passed against them and permission to file counter claim is also sought. Plaintiff Nos.1 and 2 had no objection to allow application Exhibits- 153 and 155 and gave their say accordingly. Plaintiff No.3 objected both the applicants by filing say at Exhibit-160. Defendants/petitioners submitted their written statement along with counter claim at Exhibit-161. By the common order dated 08/04/2005, impugned in present petition, Trial Court allowed the prayer of defendants and set aside *ex parte* order against defendant Nos.1(e) to 1(g) and also set aside 'no written statement' order against defendant Nos.1(b) to 1(d), but the prayer of defendants for filing counter claim is rejected. Defendants have challenged this order in Writ Petition No.6448/2005 and plaintiff No.3 has impugned the said order in Writ Petition No.3760/2007.

5. Heard learned advocate for defendants No.1(a) to 1(g),

learned advocate for plaintiff No.3 and learned advocate for plaintiff Nos.1 and 2. Perused the memo of writ petitions, annexures thereto, the impugned order and affidavit-in-reply of plaintiff No.3.

6. It is evident from the documents placed on record that father of defendant Nos.1(b) to 1(g) has filed his written statement at Exhibit-20 on 29/11/1986. After his death on 27/12/1995, his legal representatives defendant Nos.1(a) to 1(g) are brought on record. Legal representatives of defendant No.1 executed sale deed in favour of plaintiff Nos.1 and 2 to the extent of 2/3rd portion of the suit property from Eastern side. Now, they do not want to contest the suit. It further appears that remaining 1/3rd portion is in possession of plaintiff No.3, who did not agree for sale deed. Legal heirs of defendant No.1 want to file counter claim to recover possession of 1/3rd share on Southern side of the suit property from plaintiff No.3. Accordingly, they sought permission from the Trial Court.

7. Admittedly, defendant No.1 has delivered his defence on 29/11/1986. Written statement filed by defendant No.1 is binding on his legal representatives. At the time of filing of written statement at Exhibit-20, defendant No.1 was entitled to claim recovery of possession of the suit property from plaintiffs. However, he has not set up a counter claim. Defendants have stepped into the shoes of their father, after they were brought on record as legal

representatives of defendant No.1.

As per the scheme of Order 8 Rule 6(A), counter claim can be set up only in respect of cause of action accrued to defendant against plaintiff either before or after filing of the suit, but before the defendant has delivered his defence.

8. Trial Court has rightly interpreted Rule 6(A) of Order 8 and is justified in rejecting the application filed by defendants seeking permission to file counter-claim, by relying on ***Datta Bandu Sadale Vs. Sridhar Payagonda Patil, 1992 Mh.L.J. 784.***

9. In ***Mr. Manguesh Rajaram Wagle and Another Vs. Mr. Suresh D. Naik and Others, 2008 (4) ALL MR 873***, learned Single Judge of this Court has observed;

"9. Admittedly, the title suit for the eviction of the present Plaintiffs filed by the said daughters of deceased Respondent No.2, namely, (iii), (iv) and (vi) is pending for trial. The legal representatives of deceased Respondent No.2 could have taken a plea which was appropriate to their character as legal representatives and certainly could not have taken a fresh plea, derogatory to the plea already taken in the light of Sub-rule(2) of Rule 4 of Order 22, C.P.C. It is well settled that though the legal representatives can file a written statement and are entitled to take all the defences available to a deceased Defendant, they can take a plea appropriate to their character only and not contrary to a plea already taken by the deceased Defendant. Allowing the plea taken by the said legal representatives will also unnecessarily widen the scope of this suit when another suit is pending before the Court. The learned trial Court by his Order dated 10-12-2003 could not have given the legal representatives any right to take any plea beyond what is contemplated

by Sub-rule(2) of Rule 4 of Order 22, C.P.C. and in fact the said Order dated 10-12-2003, when read as a whole does not help the said legal representatives at all. The only reason assigned by the trial Court to dismiss the application dated 9-10-2007 was the delay in filing the said application dated 9-10-2007 which delay otherwise could have been compensated by imposing costs. Allowing the said legal representatives to take the said plea based on their title, a plea which was not taken by deceased Respondent No.2 will certainly result in prolonging of the lis between the parties and more so because another suit based on the said plea is also pending.

10. Considering the aforesaid, the learned trial Court ought not to have allowed the said legal representatives to file additional written statement and take a plea which was not in consonance with the plea already taken by deceased Defendant No.2 and therefore ought to have allowed the application of the Plaintiffs. "

These observations support the case of plaintiffs.

10. Learned advocate for respondents relied on ***Mahendra Kumar Vs. State of Madhya Pradesh, (1987) 3 SCC 265***, in support of his arguments. In that case, the Hon'ble Apex Court has observed that "*What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of the claim for damages or not*" and "*....as the cause of action for counter-claim had arisen before filing of written statement, the counter-claim*

was, therefore, quite maintainable".

11. This decision is rendered by the Two Judges Bench and the same is referred by the Three Judges Bench of the Hon'ble Supreme Court in ***Ashok Kumar Kalra Vs. Wing CDR. Surendra Agnihotri and Others, (2020) 2 SCC 394***, by observing that,

"17. The time limitation for filing of the counterclaim, is not explicitly provided by the Legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counterclaim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order VIII Rule 6A. Having said so, this does not mean that counterclaim can be filed at any time after filing of the written statement. As counterclaim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counterclaim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.

18. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filling of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that,

the Court has no power. The Courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC.

19. In this regard having clarified the law, we may note that the Mahendra Kumar Case (supra) needs to be understood and restricted to the facts of that case. We may note that even if a counterclaim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counterclaim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counterclaim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which needs to be taken into consideration before admitting counterclaim."

12. These observations are applicable to the facts of the present case. Hence, in this view of the matter also, Trial Court is justified in rejecting prayer of defendants to set up counter claim.

13. So far as the challenge raised by plaintiff No.3 to the

order dated 08/04/2005 passed by the Trial Court, thereby setting aside *ex parte* order passed against defendant Nos.1(e) to 1(g), and 'no written statement' order passed against defendant Nos.1(b) to 1(d), this Court is of the considered view that there is no merit in the same. Trial Court has rightly set aside the *ex parte* order and 'no written statement' order passed against defendants, so as to give them opportunity of hearing and has rightly permitted them to contest their matter on merits.

14. There is no illegality or perversity in the order impugned in present petitions. No jurisdictional error or error of law is committed by the Trial Court while passing the impugned order. No case is made out by the petitioners to exercise extraordinary writ jurisdiction. Both the writ petitions being devoid of merit, are dismissed. Rule is discharged.

15. Civil application stands disposed of.

(NITIN B. SURYAWANSHI, J.)