

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6600 OF 2015

M.L. Sandbhor

Age: Adult, Occupation

R/at : Padalwadi, Post:Rajgurunagar, Tal:Khed

Since deceased through his legal heirs

1. Lata Maruti Sandbhor

Age:76 yrs., Occ. Retired, R/at: Padalwadi,
Post:Rajgurunagar, Tal:Khed, Dist.Pune.

2. Rajendra Maruti Sandbhor

Age:53 yrs., Occ. Business, R/at: Nehru
Chowk, Post: Rajgurunagar, Tal.Khed, Dist.
Pune.

3. Nirmala Dattatraya Tupe

Age:50 yrs., Occ. Household, R/at: Sonali
Sadan, Revenue Colony, Shivajinagar,
Pune- 411 005.

4. Narendra Maruti Sandbhor

Age: 48 yrs., Occ. Business, R/at: Padalwadi,
Post:Rajgurunagar, Tal. Khed, Dist.Pune.

.. Petitioners

Versus

1. ~~Sulochana Walimbe~~ (Deceased)

Through Legal Heirs

a) Sandeep Shridhar Walimbe,

Age:Adult, Occ: Business,
R/at:1591 Sadashiv Peth, Suramya
Apartment, Pune- 411 030.

b) Sachin Shridhar Walimbe

Age: Adult, Occupation, R/at : S. No.163/2,
Plot No.21, Flat No.6, Ashok Apartment,
Aundh, Pune- 411 007.

2. Prathamik Shikshak Samithi

Madhukunj Co-operative

Housing Society Ltd., Through it's Chairman

or Authorised Member having its registered

office at 856 Budhwar Peth, Pune- 411 002

(Notice to be served on M.C. Member

.. Respondents

-
- Mr. Vilas B. Tapkir for Petitioners
 - Mr. Shailendra S. Kanetkar, Advocate for Respondent Nos.1a & 1b.
-

CORAM : MILIND N. JADHAV, J.

Reserved on : February 15, 2023.

Pronounced on : February 16, 2023.

JUDGMENT:

1. The present Writ Petition was heard on 01.12.2022. On 10.12.2022, the order allowing the Petition was uploaded on the website of the High Court without pronouncing the judgment.

2. Hence, on 23.12.2022, this Court was moved by an urgent Application filed by Mr. Kanetkar appearing on behalf of Respondent Nos.1a and 1b by bringing it to the notice of the Court that the judgment was not pronounced and on 10.12.2022 the final judgment was uploaded on the High Court website. He also made a further grievance that pursuant to the submissions made by both the learned Advocates, the counter claim filed by the Petitioners before the learned Trial Court in the year 2014 could never have been allowed in any event as allowing the same would virtually extinguish the period of limitation which is available to the Respondents and permit the

Petitioners to maintain the counter claim and relate it from the date of inception of the suit / impleadment. He would submit that admittedly the suit proceedings are dispute proceedings bearing Dispute Application No.261 of 1997 filed at a much earlier point of time between the parties.

3. After considering the submissions of Mr. Kanetkar and perusing the final judgment which was uploaded inadvertently on the High Court website without being pronounced and also after hearing Mr. Tapkir on 23.12.2022, I passed the following order:-

“1. Heard Ms. Khambete, learned Advocate for Petitioners and Mr. Kanetkar, learned Advocate for Respondent Nos. 1a and 1b.

2. The present Writ Petition was heard on 29.11.2022 and reserved for orders. Record indicates that on 10.12.2022, the order has been uploaded on the High Court website. However, the date of the order is 01.12.2022. Admittedly, this Court has not pronounced the judgment.

3. Mr. Kanetkar in his usual fairness has brought this fact to the notice of the Court and has also placed a copy of the uploaded order before the Court. He submitted that the issue of permitting the Respondents to allow his counter-claim dates back to the year 1998/2002 which was heard by the learned Court and it is covered by judgments of the Supreme Court. He submitted that he would like to place on record the judgments.

4. Let the copy of the judgments be given to Mr. Tapkir, learned Advocate for Petitioners.

*5. Place the matter for fresh hearing on **10th January, 2023** at 04:30 p.m. It is clarified that till then, the order dated 01.12.2022 which was uploaded is held in abeyance.”*

4. Today, I have heard Mr. Tapkir and Mr. Kanetkar, learned Advocates appearing for the parties at length and perused the entire

record of the case. Hence, I proceed to deliver the final judgment in the present Writ Petition. However, before I do that I need to clarify that the judgment / order dated 01.12.2022 uploaded on the High Court website shall be considered as withdrawn and deleted.

5. After according fresh hearing to both the parties, hearing them at length and considering their pleadings, I proceed to determine the present Writ Petition as under:-

6. Rule. By consent taken up for final hearing.

7. By the present Petition, Petitioners have prayed for the following relief:-

“B) This Hon’ble Court by virtue of appropriate writ, order or direction be pleased to examine the legality, validity and propriety of the impugned judgment and order Dt. 13/3/2015 passed by the Maharashtra State Cooperative Appellate Court, Mumbai Bench at Pune in Revision Application No. 28 of 2014, which is arising out of judgment and order Dt. 19/3/2014 passed the below Exhibit 152 by the Ld. Cooperative judge, Cooperative Court No.2, Pune in Dispute bearing No. 261 of 1997 and after examining the same further be pleased to quash and set aside;”

8. Petitioner is a member of Respondent No.2 – Cooperative Housing society. Original Respondent No.1 Smt. Sulochana Walimbe (since deceased) filed Dispute Application No.261 of 1997 against Respondent No.2 – Society. This Dispute Application was filed for seeking declaration and allotment of plot admeasuring 1800 sq.ft. In 2001, Petitioner was impleaded as opponent in the Dispute

Application. Petitioner was impleaded as he was the then Chairman of the Society and it was alleged that it was at his behest and collusion with the Society, that Respondent No.1 was not allotted the plot of land. Written statement was filed by the Petitioner before the Co-operative Court (for short '**Trial Court**'). Issues were framed and parties led their respective evidence. Thereafter, before decision and completion of trial, Respondent No.1 filed Application for Amendment of the Dispute Application and introduced a relief in the alternative to the principal prayer seeking compensation of Rs.50,00,000/- from the Petitioner and the Society.

9. By order dated 25.07.2013 the learned Trial Court allowed the Amendment Application which was confirmed and upheld by Order dated 05.09.2013 passed by the Appellate Court.

10. Pursuant to the above orders, amendment was carried out in the original Dispute Application. Petitioner and Respondent No.2 - Society filed their respective written statements to the amended Dispute Application. In addition, Petitioner also filed counter claim against Respondent No.1.

11. Being aggrieved with the counter claim, Respondent No.1 filed Application dated 03.12.2013 below Exhibit-152 under Order 7 Rule 11 of Civil Procedure Code, 1908 (for short '**CPC**') for rejection of counter claim, *inter alia*, contending that Petitioner's counter claim

was time barred and without any cause of action. Petitioner filed his reply thereto, claiming that the counter claim was based upon and in response to the amended claim in Dispute application and the cause of action had arisen only after the amendment to the Dispute Application.

12. By order dated 19.03.2014 the learned Trial Court rejected the Application below Exhibit-152. Hence, Respondent No.1 being aggrieved, filed Revision Application No.28 of 2014 before the Appellate Court. The Appellate Court by its order dated 13.03.2015 allowed the Revision Application and quashed and set aside the order dated 19.03.2014 passed by the Trial Court.

13. Hence, Petitioner being aggrieved challenged the legality and validity of the Order dated 13.03.2015 passed in Revision Application in the present Petition.

14. I have heard Mr. Tapkir, learned Advocate for Petitioner and Mr. Kanetkar, learned Advocate for Respondent No.1A and 1B and perused the record.

15. Before I advert to adjudicate the dispute, certain relevant facts are required to be noted. Respondent No.2 – Society had laid out plots on its land bearing Survey No.36, Hissa No.2/1-A and Survey No.37 Hissa 1/1-A, Taluka Hawali, Dist. Pune. By Application No.67 of 1987 Original Respondent No.1 (Sulochana Walimbe) sought

allotment of plot and members of Respondent No.2 – Society. On 25.02.1987, she was admitted as a member of Society and was also conveyed approval for the offer of allotment and a demand of Rs.9,749/- was raised. It is Respondent No.1's case that by this letter she was allotted a plot admeasuring 1800 sq. fts. Thereafter, as per resolution dated 17.10.1993 of the Society, she was directed to deposit the demanded amount which was deposited in Account No.398 of the Society maintained with Pune District Central Cooperative Bank.

16. Original Petitioner (M. L. Sandbhor) since deceased was the Chairman of the Respondent No.2 - Society and was looking after its day to day affairs.

17. In April 1997, original Respondent No.1 learnt about construction of a multi- storeyed building on the said plot. Since the Society had denied membership and allotment of the said plot to her the Dispute Application came to be filed.

18. In the above background, Respondent No.1 filed Amendment Application under Order 6 Rule 17 which came to be allowed for seeking alternative relief of damages since the said plot was developed. However, since the alternate relief was allowed against all opponents i.e. Petitioner and Society and it was in the nature of a monetary claim of damages after a lapse of 18 years, Petitioner (Opponent No.2 in Dispute Application) filed a counter

claim in the form of a monetary claim of Rs.33,50,000/- under 4 specific heads. This counter claim came to be challenged by Respondent No.1 under Order 7 Rule 11. The learned Trial Court considered the submissions of both the sides and passed Order 19.03.2014 and held as follows:-

“Upon considering the rival submissions, the right to file counter claim is referable to the date of accrual of cause of action. Counter claim can be filed after filing W.S. O 8 R 6A of CPC suggest that the right or claim that, may be set up by way of counter claim should be against the claim of the disputants in the sense that there must be some nexus between the claim by the disputants in the dispute and the claim set up by the opponent by way of counter claim.

Whether the counter claim is barred by law of limitation, this issue being mixed question of law and fact needs adjudication on merits. Now a question would crop up as to whether the provisions of O 7 R 11 of CPC would attract to the case at hand. Now let us see the scheme of the provisions of O 7 R 11 of CPC which speaks that, where the plain does not disclose cause of action, where claimed is undervalued, where proper court fee stamp has not been affixed, where the statement of the dispute is barred by any law then the plaint is liable to be rejected. The disputant failed to establish, under which clause of O 7 R 11 of CPC, the counter claim is liable to be rejected. The cause of action to file counter claim stated by the opp. no.2 is correct or not is a matter of adjudication on merits. It is not the contention of the disputant that the counter claim is not properly valued and proper court fee stamp is not affixed. The disputants failed to show, which statements of the counter claim is barred & by which law. As regards the issue of limitation is concerned, that issue will be framed at the relevant time. Hence, I do not find merits in this application. Hence, I answer to point no.1 in the negative and I pass the following order.

Order

- 1] Application stands rejected.
- 2] No Order as to cost.”

19. Thus, it is seen that a categorical finding was given that Respondent No.1 had failed to show which statement to the counter

claim was barred by any law and under which specific clause of Order 7 Rule 11 of CPC. The rejection of counter claim was sought but it was seen that there was a clear nexus between the counter claim sought by the Petitioner with the amended Dispute Application. Appellate Court in the impugned order framed the following two issues:

“Considering the Pleadings of parties, I find, the root question goes to the fact that,

“Whether merely by way of amendment as sought for by the disputant, the nature of dispute is changed?”

“Whether an alternative relief as sought for by the disputant gives entitlement to the respondent No.2 to file counter claim at belated stage of 17 years?”

Here the answer to these questions has to be “In Negative.”

20. After considering the pleadings, the Appellate Court rejected the counter claim on the ground that the cause had arisen at the time of service of summons to the Petitioner and thus it was barred by limitation and on that ground alone it deserved to be rejected. It may be noted that the issue of limitation cannot be strictly held and decided as a pure question of law as is done by the learned Appellate Court. That it is a mixed question of facts and law. That it is the case of Respondent No.1 that Society and Petitioner has acted in collusion with each other to deny her membership of the Society and hence after 18 years when she realised that the alleged plot was already developed by the Society, she sought damages in the form of monetary claim against the Petitioner and Society. It is pertinent to note that the

initial dispute was filed only against the Society and only after a lapse of 4 years thereafter Petitioner was impleaded in the Dispute Application. After a considerable time period Respondent No.1 sought damages for non allotment of the plot in the alternative not only against the Society but also against the Petitioner who was the Chairman of the Society at the then time jointly and severally. The counter claim filed by the Petitioner thus, had a direct nexus with the amended alternative relief in Dispute Application. Rights of parties are required to be adjudicated on the basis of issues to be framed which would emanate from the specific averments in the pleadings. Counter claim can be filed after filing written statement.

21. Mr. Kanetkar has referred to and relied upon the decision of the Supreme Court in the case of *Ashok Kumar Kalra Vs. Wing CDR. Surendra Agnihotri and Ors.*¹ and has contended that once the issue have been framed, the Court cannot entertain a belated counter claim filed after submission of the written statement. I have perused the said decision and the ratio in the said decision as expressed by the Supreme Court in the said decision applies to the facts and circumstances of the present case.

22. In the present case, it is seen that the counter claim has been filed much after the framing of the issues as well as filing of the additional written statement. Allowing the counter claim at this stage

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which was filed in the year 2014 would allow the Petitioners to relate back to the date of filing of the Dispute Application and/or the date of impleadment of the Petitioners as opponent No.2 in Dispute Application i.e. in the year 2003. If the counter claim stands allowed certainly the issue of limitation would be tampered with and this cannot be permitted. In that view of the matter, the impugned order dated 13.03.2015 passed in Revision Application No.28 of 2015 cannot be interfered with. The said order is therefore upheld.

23. In view of the above on the basis of the observations and findings given herein, the impugned order dated 19.03.2014 passed below Exhibit-152 does not survive.

24. Needless to state that the Petitioners are at liberty to take out appropriate proceedings if they desire to pursue the relief and remedy stated in their counter claim in the appropriate Civil Court of Original Jurisdiction and if any such claim is filed, the same shall be decided on its own merits and strictly in accordance with law.

25. All contentions of the parties in respect of the above issue shall thus expressly be kept open.

26. Considering the long standing dispute between the parties, the learned Trial Court is directed to decide the pending Dispute Application No. 261 of 1997 as expeditiously as possible and in any case within a period of 8 months from the date of the present

judgment without being influenced by any of the observations passed in the interim order or this judgment.

27. With the above directions, Writ Petition disposed. Rule is discharged.

28. Writ petition is disposed of.

[MILIND N. JADHAV, J.]

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