

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (CAS) NO. 501 OF 2020
IN
SECOND APPEAL NO. 26 OF 2010

RAMBHAU RAJARAM GADEKAR AND OTHERS

...VERSUS...

UMABAI WD/O RAMJI RAUT (DEAD) THR LRs SMT. YAMUNABAI MADHUKARJI RAUT (DELETED) AND
OTHERS

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Shri S.P.Dharmadhikari, Senior Advocate a/b. Shri Kartik Shukla, Advocate for
appellants/applicants.

Shri Vijaykumar Paliwal, Advocate for respondent nos. 2(i)(b) to f, R2(ii), (iii) & (iv).

CORAM : SMT. M. S. JAWALKAR,J.

DATE : 10th FEBRUARY, 2023

It is informed that the Civil Application (CAS) No. 501/2020 was directed to be taken up along with the Second Appeal at the stage of final hearing vide order dated 09/10/2020.

2. By this application, the learned counsel for the appellants/ applicants is raising additional substantial questions of law. It is submitted that one substantial question of law is framed at the time of admission on 01/12/2010. The additional substantial questions of law which the appellants propose to raise, were inadvertently not raised in the memo of appeal. Those are in relation to the counter claim which was allowed to be filed after evidence was over. The cause of action itself arose after filing of Written Statement.

3. The learned counsel for the respondents vehemently opposed the application and submitted that the substantial question of law which is already framed covered the present substantial questions of law and there is no need to formulate the additional substantial questions of law.

4. I have heard both the parties.

5. In view of Order VIII, Rule 6(A) of the Civil Procedure Code, counter claim ought to be filed before delivering the defence. As such, it ought to have been filed before Written Statement is filed. If this would be the position, in the present matter, the question needs to be considered whether the counter claim can be entertained where the cause of action arose after filing of Written Statement. While framing substantial question of law, this question neither raised nor considered. It is claimed by learned counsel for the respondents that this question will be covered under substantial question of law already framed. However, in my considered opinion, the substantial question of law which is framed is in respect of defendants' rights to set up a counter claim against co-defendant is involved, whereas by this application, the substantial question of law in relation to maintainability of counter claim and decision on the basis of the same is raised which requires consideration. As such, I do not see any reason not to frame additional substantial questions of law. Accordingly, the application is allowed. The following substantial questions of law are framed which arise in the matter for consideration;

“i) Can the defendants file a counter claim on the basis of a cause of action which accrued to them subsequent to/after filing of their written statement and after completion of their evidence ?

ii) *In the light of the settled position of law that in respect of a registered sale deed, there is a presumption of it being genuine and validly executed, whether both the Courts below committed a grave error in law in setting aside the sale deed executed in favour of Appellant No. 2 only on basis of pleading and counter claim when no evidence much less sufficient one was ever adduced by Respondent No. 2(i) to 2(v) to rebut the said presumption ?*

iii) *Whether the Courts below committed a grave error in law in allowing the counter claim on the ground that in a suit for partition, all plaintiffs are defendants and vice versa though the relief of partition was sought only against deceased Defendant No. 1 i.e. Manabai and Defendant Nos. 2 to 6 were joined as defendants not for the relief of partition but only for the considering the relief of injunction on separate cause of action ?*

iv) *In light of the fact that no evidence was ever led by Respondent No. 2(i) to 2(v) in support of its counter claim, whether grave prejudice has been caused to the Appellants since the Appellants had no opportunity to cross examine Respondent No. 2(i) to 2(v) in respect of their counter claim given the fact that the counter claim was allowed and the sale deed executed in favour of Appellant No. 2 was set aside ?”*

6. The application stands disposed of.

SECOND APPEAL NO. 26 OF 2010

The appeal to be heard finally on 14/02/2023.

(Smt. M.S. Jawalkar, J.)