

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.5688 OF 2022

(SAU. LATA UMESH MHATURKAR..VS.. AMITKUMAR KISHORKUMAR GOYANKA & OTH.)

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

Court's or Judge's orders

Shri Vipul B.Bhise, Advocate for the Petitioner.
Shri R.N.Malviya, Advocate for Respondent Nos.1 to 4.

CORAM : ANIL S. KILOR, J.
DATED : JULY 31, 2023.

1. Heard.
2. The order dated 27/07/2022 passed below Exh.75 allowing the application moved by the defendant Nos. 1 to 4 for leave to file counter claim, is under challenge in this writ petition.
3. Before examining the matter on merits it would be appropriate to reiterate the law in respect of the same.
4. The Hon'ble Supreme Court of India in the case of *Ashok Kumar Kalra ..vs.. Surendra Agnihotri*, reported in **(2020) 2 SCC 394** has held that the defendant cannot be permitted to file counter claim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the speedy justice as enshrined in the objects and reasons for the particular amendment to the Code of Civil Procedure.

5. In the present matter, admittedly, the issues were framed and the affidavit is filed by the plaintiff in lieu of the oral evidence and at this stage the application for leave to file counter claim was filed.

6. The Hon'ble Supreme Court of India in the case of *Ashok Kumar*(supra) has held thus :

“21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- i. Period of delay.*
- ii. Prescribed limitation period for the cause of action pleaded.*
- iii. Reason for the delay.*
- iv. Defendant's assertion of his right.*
- v. Similarity of cause of action between the main suit and the counterclaim.*
- vi. Cost of fresh litigation.*
- vii. Injustice and abuse of process.*
- viii. Prejudice to the opposite party.*
- ix. And facts and circumstances of each case.*
- x. In any case, not after framing of the issues.”*

7. It is apparent on the face of the impugned order that the factors which need to be considered and stated in the above referred para of the judgment in the case of *Ashok Kumar* (supra) have not been taken into consideration by the trial Court while passing the impugned order.

8. In the circumstances, I am of the opinion that the matter needs to be remanded back to the trial Court for fresh consideration. Accordingly, I pass the following order:

- i) The Writ Petition is partly allowed.
- ii) The impugned order dated 27/07/2022 passed below Exh.75 by Civil Judge Senior Division, Akot is hereby quashed and set aside.
- iii) The matter is remanded back to the Civil Judge Senior Division, Akot to decide the application Exh.75 afresh.

The Writ Petition is **disposed of** accordingly.
No order as to costs.

JUDGE

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