



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

WRIT PETITION NO. 3221 OF 2024

Gopal Kashinath Palod,
Age 67 years, Occup.Business,
R/o Flat No.9 and 10, 3rd Floor,
11, City Square Apartments,
Opposite Bank of Baroda,
Hareshwar Nagar, Ring Road,
Jalgaon.

...Petitioner

(Original Defendant No.1)

~ versus ~

1. Anand Manakchand Palod,
Age 51 years, occup.Business,
R/o Flat No.10, Ganapati Residency,
Plot No.46-47-48, Ganpati Nagar,
Jalgaon.

2. Indian Oil Corporation Ltd.,
Registered office – Indian Oil Bhawan,
G-9, Ali Yavar Jung Marg,
Bandra East, Mumbai.

...Respondents

(Original plaintiff and defendants
No.2 respectively)

APPEARANCE :

Advocate for the Petitioner : Mr. Bora Satyajit S.

Advocate for Respondent No.1 : Mr. G. V. Wani

CORAM : ARUN R. PEDNEKER, J.

Dated : May 06, 2024

JUDGMENT :

1. Rule. Rule made returnable. With consent of the parties, heard finally.

2. The petitioner is challenging the order dated 09/02/2024 passed on Exhibit 40, by the Civil Judge Senior Division, Jalgaon in Special Civil Suit

No.7/2021. In suit filed by the plaintiff for partition, the defendant filed a counter claim, praying for partition and separate possession of all the joint family properties. Opposing the counter-claim, application is filed by the plaintiff at Exhibit 28 under Order VIII Rule 6-C of the Code of Civil Procedure for exclusion of the counter claim contending therein that the counter-claim be tried as an independent suit and not as a counter claim. During the pendency of the application filed by the plaintiff for exclusion of the counter claim, application is filed at Exhibit 40 by the defendant contending therein that the plaintiff be directed to file written statement to the counter-claim before deciding the application for exclusion of the counter claim filed by the plaintiff. The said application filed by the defendant is dismissed by the Trial Court by the impugned order, against which the present petition is filed.

3. The petitioner/ defendant submits that in view of Order VIII Rule 6-A (3) of the Code of Civil Procedure, the plaintiff shall answer the counter claim by filing a written statement. It is only thereafter, the application for exclusion of the counter claim can be considered and the application of the plaintiff for exclusion of counter-claim cannot be considered before filing of the written statement. Filing of the written statement is mandatory for the Court to consider the exclusion of the counter claim

4. The learned Advocate for the petitioner relies upon the Judgment of

in ***East India Rubber Works (P) Ltd. vs. Allahabad Bank and Ors., reported in (1993) 2 Callt 1 (HC)***, more particularly paragraph 3 wherein the it is observed as under : -

"3. From the impugned order, it appears that the Court rejected the application, which is really in the nature of a counter-claim, on the ground that, that was sought to be filed without any leave of the Court, overlooking the statutory provision of Order 8 Rule 9 of the Code of Civil Procedure, which clearly excluded 'set off' and 'counter claim' from the matters in which leave of the Court was required. On consideration of the provisions of Order 8 Rule 6A, 6B and 6C of the Code of Civil Procedure we are of the view that the counter-claim, once filed, becomes a plaint and continues on the records of the suit until the conclusion of the trial, **save and except the occasion where the plaintiff, after filing of his written statement to the counter-claim can convince the Court that the counter-claim ought to constitute the cause of action of different suit (Vide Order 8 Rule 6C, C.P.C.)**. Accordingly, the impugned order cannot be sustained. It is vitiated by the misconception on the part of the Court that before filing counter-claim, leave of the Court was necessary. The purported application should be treated as a counter-claim of the defendant and dealt with a conformity with the provisions of Order 8 Rule 6C onwards."

5. Relying upon the above observation, the learned Advocate submits that the Division Bench of Calcutta High Court has observed that the perusal of Order VIII Rule 6A, 6B and 6C of the Code of Civil Procedure has

to be interpreted in the manner that once a counter-claim is filed, it becomes a plaint and continues on the records of the suit until the conclusion of trial, save and except the occasion where the plaintiff, after filing of his written statement to the counter-claim can convince the Court that the counter-claim ought to constitute the cause of action of different suit. Relying upon this observation of the Division Bench of the Calcutta High Court, the learned Advocate submits that the counter claim is to be with a conformity with the provisions of Order VIII Rule 6-C of the code of Civil Procedure, and can be excluded only after filing of written statement by the plaintiff to the counter-claim.

6. The learned Advocate for the original plaintiff/respondent submits that the application for exclusion of the counter claim in terms of order VIII Rule 6 of the Code can be filed at any time before the issues are settled in relation to the counter claim and would be also filed before the filing of the written statement. He submits that the Division Bench of the Calcutta High Court does not deal with this aspect. There is mere narration of events that the counter claim is a part of the suit and that it can be excluded at any time after filing of the written statement.

7. Having considered the rival submissions, the question that arises for determination is that, whether it is mandatory to file a written statement to the counter claim before filing the application under Order VIII Rule 6C

of the Code of Civil Procedure for exclusion of the counter claim contending that the same be tried as an independent suit and not as counter claim. Order VIII Rule 6-A and 6-C of the Code of Civil Procedure are relevant for our purpose.

8. Order VIII Rule 6-A, 6-B, 6-C of the Code of Civil Procedure reads as under : -

"6-A. Counter-claim by defendant. – (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim of damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court."

"6-B. Counter-claim to be stated.-- Where any defendant

seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim."

*"6-C. Exclusion of counter-claim.- Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, **the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded**, and the Court may, on the hearing of such application make such order as it thinks fit."*

9. In terms of the Order VIII Rule 6-A of the Code of Civil Procedure, a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, such a counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. Clause No.(3) of Rule 6-A provides that, the plaintiff shall be at liberty to file written statement in answer to the counter-claim of the defendant.

10. Order VIII Rule 6-C of the Code of Civil Procedure provides that where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

11. A bare reading of Clause 6-C provides that plaintiff may, at any time before the issues are settled in relation to the counter-claim, apply for exclusion of counter-claim under Order VIII Rule 6C and the application would be even before filing of the written statement. There is no bar to apply under Order VIII Rule 6-C of the C.P.C. for exclusion of counter-claim before filing of the written statement.

12. It is also required to be noted that Clause (3) of Order VIII Rule 6-A provides that the plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant. There is no provision that to invoke Clause 6-C that the plaintiff has to necessarily file written statement to the counter-claim. The plaintiff is not bound to file a written statement to the counter-claim.

13. Perusal of the Judgment in case of ***East India Rubber Works (P)***

Ltd. (Supra), the Calcutta High Court has held that the counter claim becomes a plaint and continues on the records of the suit until the conclusion of the trial, save and except the occasion where the plaintiff, after filing of his written statement to the counter-claim can convince the Court that the counter-claim ought to constitute and cause of action of a different suit.

14. The Calcutta High Court in the above Judgment of **East India Rubber Works (P) Ltd.** was dealing with an issue that whether to file a counter-claim leave of the Court is necessary and the High Court was not dealing with the issue as to whether a written statement to the counter-claim is necessary before filing an application under Order VIII Rule 6-C of the Code of Civil Procedure. So also, it is nowhere provided in the rules that the written statement is to be filed to the counter claim before application for exclusion of counter-claim is filed under Order VIII Rule 6-C of the C.P.C. In view of the same, nothing survives in the petition and the same is dismissed. Rule is discharged.

(ARUN R. PEDNEKER, J.)

vj gawade/-.