



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 12067 OF 2024

Pandit Anna Gaikwad And Another
VERSUS
Kantilal Mishrilal Kothari

Mr. G. L. Deshpande, Advocate for the petitioners
Mr. P. P. Patni, Advocate for the respondent

CORAM : R. M. JOSHI, J.
DATE 12th NOVEMBER, 2024

PER COURT :-

1. At the outset it needs to be recorded that when this petition was heard, this Court has shown its disinclination to grant relief to the petitioners and at that time, on instructions, learned counsel for the petitioners has shown his inclination to withdraw the petition. Thus, accordingly an order came to be dictated in the open Court about withdrawal of the petition. However, thereafter learned counsel for the petitioners, on instructions, mentioned this matter during the course of the day and it was requested to pass order on merit. Since the order of withdrawal of petition as dictated, inadvertently the same was signed and uploaded. Hence, the order of withdrawal of the petition stands cancelled. Uploaded order be deleted. Instead present order be uploaded.

2. This petition takes exception to common order passed below Exhibits 36 and 37 in R.C.S. No. 1630/2022. The petitioners are defendants therein and had moved an application Exhibit 36 under Order 6 Rule 17 in the Code of Civil Procedure (for short 'CPC'). Similarly application Exhibit 37 came to be filed for permission to file counter claim in the suit. Both applications were rejected, hence, this petition.

3. Respondents are plaintiffs in R.C.S. No. 1630/2022 and filed suit for declaration and possession of the suit property. Defendants filed written statement on 23/12/2022. Thereafter issues were framed vide Exhibit 14 on 13/02/2023. Thereafter plaintiffs filed affidavit of evidence vide Exhibit 17. When the matter was at the stage of cross-examination, application Exhibit 37 came to be filed.

4. Plaintiffs opposed the said application on the ground that the applications are filed after commencement of trial without justifying the delay caused in making application for amendment. It is also claimed by the plaintiffs that no subsequent event is sought to be introduced by the defendants in order to allow the amendment to the written statement. Counter claim is also opposed on the ground that the same is not filed within limitation and it is filed after commencement of the trial.

5. Learned counsel for the petitioners placed reliance on the

judgment of Hon'ble Supreme Court in case of ***Ashok Kumar Kalra V. Wing CDR. Surendra Agnihotri, AIROline 2019 SC 1525*** to contended that Order VIII Rule 6A does not put embargo after filing counter claim after filing written statement and the restriction is only with respect to the actual cause of action. He also placed reliance on the judgment of Hon'ble Supreme Court in case of ***Vijay Prakash Jarath Vs. Tej Prakash Jarath, AIR 2016 Supreme Court 1304*** to contend that counter claim can be filed on the basis of cause of action accrued before filing of written statement and where no serious injustice or irreparable loss would be suffered by the respondents, counter claim needs to be allowed. He took supports of the judgment of Hon'ble Supreme Court in case of ***J. Samuel and Others Vs. Gattu Mahesh and Others, 2012 STPL 5349 SC***. Reliance is also placed on the judgment of this Court in case of ***Pradeep Kashinathrao Kalyankar and Anr Vs. Pramod Kashinathrao Kalyankar and Anr., 2018(3) All MR 405***.

6. Application Exhibit 36 is filed under Order VI Rule 17 of the CPC for seeking amendment to the written statement. No doubt the amendment to the written statement needs to be allowed liberally as compared to the amendment to the plaint, however, at the same time proviso to the Order VI Rule 17 of the CPC cannot be given complete go bye. For the sake convenience the said provision is produced as under:-

"Order VI – Pleadings Generally

Rule 17 – Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

7. Perusal of this provision shows that there is embargo for the Court to allow any application after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. Thus it unless there is sufficient to reason put forth by a party and due diligence is shown that in spite of the same, the party could not have raised the matter before the commencement of trial, amendment cannot be allowed.

8. Application of defendants (Exhibit 36) does not show due diligence on the part of the defendants in bringing the pleadings on record before commencement of trial. Needless to say that sufficient reason cannot be substituted by a created or imaginary one. The application shows that defendant noticed while preparing for cross-examination of plaintiff that certain facts are not brought on record. Permitting such defence would lead to frustrate the provision of Order VI

Rule 17 of CPC and such stand cannot be permitted to be taken in order to overcome the embargo the created by law.

9. Apparently the amendment sought by the defendants is not subsequent event but the alleged fact which existed prior to filing of written statement. In such circumstances due diligence is mandatory to have been shown by the defendants, in order to enable the defendants to avail the provisions of Order VI Rule 17 of CPC. Learned Trial Court in the impugned order has dealt with the said issue and has recorded category finding that the defendants have failed to satisfy the test of due diligence. This Court in exercise of writ jurisdiction is not justified to cause interference therein for want of any perversity.

10. As far as application Exhibit 37 filed by the defendants for counter claim is concerned, the same has not been filed along with written statement and till the stage of commencement of recording of evidence of plaintiffs. In this regard reference can be made to the judgment cited suprain case of ***Ashok Kumar Kalra*** wherein the Hon'ble Supreme Court has held in paragraph nos. 16 to 20 as under:

"16. The time limitation for filing of the counter-claim, 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 counter-claim 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 counter-claim can be filed at any time after filing of the written statement. As counter-claim 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 counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.

17. 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 filing of the counter claim, 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 counter-claim 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 counter- claim, should adopt a balanced approach keeping in mind the object behind the amendment and to sub-serve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counter-claim 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 counter-claim, 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 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 principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC.

18. 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 counter– claim 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 counter–claim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counter– claim 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 counter–claim.

19. We may note that any contrary interpretation would lead to unnecessary curtailment of the right of a defendant to file counter–claim. This Court needs to recognize the practical difficulties faced by the litigants across the country. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, need to be recognized as well [refer to Salem Advocate Bar Association Case (supra)].

20. We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counter–claim 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 counter–claim 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 counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, 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 counter-claim.

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"

(emphasis supplied)

11. The paragraph 20 of the judgment in no uncertain terms lays down that in appropriate cases the Court may use its discretion to entertain the filing of the counter claim after filing of written statement but in any case not after framing of issues. It is thus clear from the aforesaid dictum of the Hon'ble Supreme Court that the application Exhibit 37 filed after framing of issues and after plaintiffs led evidence is not tenable.

12. As a result of above discussion, petition stands dismissed, since it sans merits.

(R. M. JOSHI, J.)

ssp