



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11466 OF 2023

Suresh Basappa Uplanchi And Another

VERSUS

The Commissioner Through Construction Division
Ahmednagar Municipal Corporation And Others

...

Mr. N. C. Garud, Advocate for the Petitioners

Mr. L. B. Palod, Advocate for Respondent Nos. 3 to 5

...

CORAM : R.M. JOSHI, J

DATE : JUNE 10, 2024

PER COURT :

1. This Petition takes exception to order below Exh. 69 dated 06.07.2023 passed in RCS No. 371/2018, whereby application filed by defendant nos. 3 to 5 under Order VI, Rule 17 of Code of Civil Procedure (CPC) is allowed subject to cost of Rs. 3,000/-.

2. Petitioners are original plaintiffs who have filed RCS No. 371/2018 against Respondents/original defendants. It is the case of the Petitioners that the suit property described in paragraph 1 of the plaint requires regularization to the extent of excess construction made by them. Defendants appeared in the suit and Defendant Nos. 3 to 5 filed written statement

at Exh. 28 on 21.11.2018. These defendants in the written statement have specifically alleged that the plaintiffs are encroaching upon the property of these defendants by carrying out additional construction. On 05.12.2022 defendant nos. 3 to 5 filed application Exh. 69 under Order VI, Rule 17 of the CPC seeking incorporation of the averments in the written statement in the form of counter claim with prayer seeking possession of the encroached portion from plaintiff.

3. Plaintiff by filing say at Exh. 73 opposed application contending that the same is not filed within limitation. Objection is also raised with regard to the tenability of the said application under Order VII, Rule 11 of CPC. Learned Trial Court by passing impugned order allowed application.

4. Learned Counsel for Petitioners submits that learned trial Court has essentially allowed the application with observations that the subsequent events are sought to be incorporated by the defendants. By drawing attention of the Court to the documents placed on record it is contented that there is no

subsequent event which is sought to be included in the written statement by the defendants and the said observations are contrary to the record. It is his further submission that the written statement is filed in the year 2018 and that at the most the application for counter claim could have been filed within three years therefrom but not thereafter. To support his submissions, he placed reliance on Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508.

5. Learned Counsel for contesting Respondents / Defendant Nos. 3 to 5 supported the impugned order with the contention that these defendants have already raised specific plea in the written statement about encroachment being done by the plaintiff over the property of these defendants. It is his further submission that the prayer for the possession of the encroached portion is within limitation and as such, there would be no justification to cause any interference in the impugned order. To support his submissions that the amendment can be carried out till the framing of the issues by incorporating counter claim, he places reliance on Ashok Kumar Kalra vs. Wing

CDR. Surendra Agnihotri and Others, (2020) 2 SCC 394.

6. Before dwelling upon factual matrix of the present case, it would be relevant to refer to certain observations in case of Ashok Kumar Kalra (supra) as under:

56. The above discussion lends support to the conclusion that even though Rule 6-A permits the filing of a counterclaim after the written statement, the court has the discretion to refuse such filing if it is done at a highly belated stage. However, in my considered opinion, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing of issues for trial. Allowing counterclaims beyond this stage would not only prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

57. At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the court may entertain a counterclaim even after the framing of issues, so long as the court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counterclaim is brought during such period, a new issue can still be framed by the court, if needed, and

evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

58. At this juncture, I would like to address the observation in Rohit Singh that a counterclaim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counterclaims after the commencement of recording of evidence is not illegal per se. However, I hasten to add that permitting such a counterclaim would be improper, as the court's discretion has to be exercised wisely and pragmatically.

7. Order VI, Rule 17 provides for discretionary power to the trial Court to permit amendment to the pleading. Pleading is plaint and written statement. Thus, there was no impediment for the trial Court to entertain the application for amendment to the written statement. Perusal of the record indicates that the plaintiff has filed suit with specific averments that additional construction has been carried out and they have sought regularization of the same. Written statement of the defendant nos. 3 to 5 indicates that specific stand was taken with regard to the alleged encroachment caused by plaintiff over the property of

these defendants. Thus, it is not the case that the written statement of these defendants lack pleadings to that effect. Now the question arises whether these defendants would be permitted to make prayer for the possession. The period of limitation for seeking possession of the encroached property is 12 years and undisputedly, the claim of these defendants is within limitation. There is no bar for seeking such relief and resultantly the case would not be covered by rigors of Order VII, Rule 11 of CPC.

8. The second aspect requires consideration is as to whether there could be a separate suit filed by these defendants for seeking possession of the encroached portion by the plaintiffs. The pleadings of the plaint and the written statement indicate that the prayers sought by the plaintiff and the relief asked by the defendants are inseparable and the same has to be decided in same suit. Therefore, it would not be in the interest of justice as well as in the interest of the parties that these issues are adjudicated in two independent proceedings. Hon'ble Supreme Court in case of Ashok Kumar Kalra (supra) has held that to prevent

multiplicity of proceedings, counterclaim may be entertained even after framing of issues. Instant case stands even on better footing.

9. Having regard to the peculiarity of facts of present case and considering relevant provisions of law for amendment of pleadings and filing counter claim, this Court, therefore, finds no perversity in the order passed by the learned trial Court. Pertinently, delay caused in making application has been duly taken care by trial Court by directing cost of Rs. 3,000/-.

10. In view of the above observations, Petition stands dismissed.

(R. M. JOSHI, J.)

Malani