



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

SECOND APPEAL NO. 41 OF 2014

Smt. Venutai Haribhau Khode (Dead)
through her Legal Representative
Ghanshyam Haribhau Khode
(Died on 01.01.2021) through his
Legal Representatives :

- 1) Smt. Tarabai Wd/o Ghanshyam Khode,
Aged about 77 years, Occ. – Household,
- 2) Sachin S/o Ghanshyam Khode,
Aged about 36 years, Occ. – Agriculturist,
- 3) Dhiraj S/o Ghanshyam Khode,
Aged about 37 years, Occ. – Agriculturist,
- 4) Mayur S/o Ghanshyam Khode,
Aged about 30 years, Occ. – Agriculturist,
- 5) Sau. Yogita W/o Mahesh Raut,
Aged about 32 years, Occ. - Household,

All 1 to 5 R/o. Dahiphal,
Tahsil Ner, District Yavatmal.

.... APPELLANTS

// VERSUS //

Nilkanth Laxmanrao Ghongade, (Dead)
through his Legal Representatives :

- 1) Smt. Shobha Wd/o Nilkanth Ghongade,
Aged about 54 years, Occ.- Household work,
- 2) Swapnil Nilkanth Ghongade,
Aged about 23 years, Occ.-Education,
- 3) Ku. Megha D/o Nilkanth Ghongade,
Aged about 23 years, Occ.-Education,

No.1 to 3 R/o. New Tapadiya Nagar,
Kharap Road, Akola,
Tq. and Dist. – Akola.

.... RESPONDENTS

Mr. Anil Mardikar, Senior Counsel assisted by Mr. D. I. Jain,
Counsel for Appellants.
Mr. R. M. Tiwari, Counsel for Respondent Nos.1 and 2.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 13.08.2024.
DATE OF PRONOUNCING THE JUDGMENT : 26.09.2024.

JUDGMENT.

1. This second appeal is preferred against the Judgment and Decree passed by learned Adhoc District Judge-1, Yavatmal in Regular Civil Appeal No.80/2008 dated 29.10.2013, which was preferred against the Judgment and Decree passed by the learned Civil Judge, Junior Division, Ner, District Yavatmal in Regular Civil Suit No.30/2003, dated 24.10.2008.

2. Brief facts of the plaintiff's case are as under :

(i) The plaintiff/appellant contended that agricultural land bearing Block No.307, admeasuring 4.48 HR. is owned and possessed by her. At the time of Diwali festival of year 2000 she got Rs.5000/- from the defendant on interest. That time, the defendant got her signatures on some blank papers as well as papers on which revenue stamp was affixed. Again, in the month of February 2001, the plaintiff was in need of some amount. The defendant paid

Rs.30,000/- to the plaintiff on condition to pay interest on the said amount. That time, the defendant said that he will pay that amount only on execution of nominal sale-deed of the suit property as security. Therefore, on 08.03.2001, the plaintiff executed nominal sale-deed in favour of defendant. The plaintiff could not repay the said amount, therefore, defendant sent a letter to the plaintiff on 15.05.2003 claiming Rs.87,199/- along with interest. The plaintiff sold her agricultural land to one Abdul Khalil Shaikh Karim, for repayment the amount to the defendant and paid him Rs.2000/- by assuring repayment of remaining amount till Deepawali of 2003, but due to financial difficulty, she could not repay the remaining amount as assured. The defendant claimed remaining amount with huge interest on it, which was exorbitant. The defendant threatened to the plaintiff to mutate his name to the Record of Rights of the suit property and dispossessed her from the suit property. Therefore, on 30.10.2003, the plaintiff sent her objection to the Talathi Dahifal, Tahsil Ner and Circle Office, Dahifad in respect of effecting of mutation of the name of defendant to Record of Rights of the suit property. Thereafter, the plaintiff filed suit to declare that the sale-deed is not binding upon her.

(ii) The defendants by statement dated 17.06.2006 denied the material contentions in the suit. Thereafter, on 22.10.2007,

the defendant filed Counter Claim alleging that though as per sale-deed dated 08.03.2001, he got possession of the suit property, the plaintiff took possession of the suit property by taking disadvantage of the long distance of his residence and dispossessed him from the suit property. The defendant claimed possession of the suit property.

(iii) The learned trial Court dismissed the suit as well as counter claim.

3. The plaintiff did not file first appeal in the District Court, however, defendant filed first appeal in the District Court, Yavatmal bearing R.C.A. No.80 of 2008 against the judgment and decree of the trial Court. The District Judge, by the impugned judgment, set aside the judgment and decree of the trial Court and Counter Claim was allowed.

4. The plaintiff has preferred this appeal challenging the maintainability of the counter claim. This Court by admitting appeal on 10th November, 2014 formed following substantial question of Law :

“The learned First Appellate Court have not taken into consideration the provision of Order VIII Rule 9 of Code of Civil Procedure, particularly when the respondents/original defendants had filed

written statement on 17/06/2006 after lapse of long period had set up counter claim on 22/10/2007 vide Exh. 57 though the same ought to have been filed along with written statement itself. Surprisingly, the respondent/original defendants have taken altogether new plea of their dispossession at the hand of present appellant in the year 2003 which was never pleaded in the written statement dated 17/06/2006, thus the counter claim set up by the respondents for possession is certainly an after thought and surrounded by embellishment and with due deliberation and this would be seen from the pleadings in the written statement and counter claim.”

5. Heard learned Senior Counsel Mr. Anil Mardikar assisted by learned Counsel Mr. D. I. Jain, for the appellants and learned Counsel Mr. R. M. Tiwari for respondent Nos.1 and 2.

6. The learned Senior Counsel Mr. Mardikar for the appellants pointed out that suit was filed on 06.11.2003, written statement was filed by the defendant on 17.07.2006 and issues were cast by the learned trial Court on 16.08.2006. The examination of chief and cross examination of the appellant/original plaintiff took place on 22.03.2007. The evidences of other witnesses were recorded. The counter claim was filed on 22.10.2007. The additional issue was cast on 03.12.2007 in view of counter claim. The learned Senior Counsel for the appellants further pointed out Order VIII

Rule 9 of the Code of Civil Procedure, 1908 (for short the, 'CPC'). He submitted that the counter claim was not filed along with the written statement, but it was filed after fifteen months, after filing the written statement. The permission of trial Court was not obtained for filing such counter claim. The cause of action as to when the defendant was dispossessed is vaguely stated in the counter claim. The learned first appellate Court did not consider that though the plaintiff did not file first appeal, the plaintiff can point out the illegality in the judgment of the trial Court. But it was not considered by the trial Court. Therefore, judgment and decree passed by the learned first appellate Court is, erroneous. Though, the plaintiff has not objected the counter claim, it is substantial question of law that counter claim is not maintainable, which was not considered by the first appellate Court. He is relying upon following authorities :

- (i) ***Mr. Guido Loyola Furtado Vs. M/s. National Insurance Co. Ltd.***, reported in ***2013(5) ALL MR 624***, para 21 reads as under :

“21. In the present matter, since the suit has been dismissed, the defendant neither could file appeal nor could he take cross-objection to the decree. It could only support the decree on the grounds decided in its favour as also on any of the grounds decided against it, by the lower Court. In view of the above, though the defendant has not filed any cross-objection, it can very well assail the finding of the trial Court, which is against it, for supporting the decree, which has been passed against the plaintiff.”

(ii) ***Rajasthan State Industrial Development & Investment Corporation Vs. Subhash Sindhi Cooperative Housing Society & Ors.***, reported in **2013(5) SCC 427**, in which law is laid down that there can be no estoppel against the law or public policy.

(iii) ***Ashok Kumar Kalra Vs. Wing Cdr. Surendra Agnihotri & Ors.***, reported in **2020(2) SCC 394**, para 20 read as under :

“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.”*

7. The learned Senior Counsel Mr. Mardikar lastly submitted that the judgment and decree of first appellate Court are not legal and correct, counter claim is not maintainable. He, therefore, submitted to allow the appeal and dismiss the counter claim by setting aside the impugned judgment and decree.

8. The learned Counsel Mr. M. R. Tiwari for respondents submitted that though the counter claim is not filed along with written-statement, it was not objected by the plaintiff. He submitted that though the plaintiff was knowing fully that counter-claim was not filed within limitation, no such plea was raised in the trial Court, therefore, such plea cannot be raised in view of deemed waiver. He is relying upon the following authorities :

(i) ***H. V. Nirmala Vs. Karnataka State Financial Corporation & Ors.***, reported in ***(2008) 7 SCC 639***, in which it is held that the objections as to jurisdictional error must be raised at the earlier available opportunity.

(ii) ***State of A. P. and others Vs. Pioneer Builders, A.P.***, reported in ***(2006) 12 SCC 119***, para 19 reads as under :

“19.The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the

maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80 C.P.C. the State had not raised such a plea in the written statement or additional written statement filed in the suit and, therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here.”

(iii) **ARCE Polymers Private Limited Vs. Alphine**

Pharmaceuticals Private Limited & Ors., reported in **(2022) 2 SCC**

221, in which para Nos.16, 17 and 18 reads as under :

“16. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration.

17. It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action, but the present case is of repeated positive acts post the notices under Sections 13(2) and (4) of the SARFAESI Act. Not only did the Borrower not question or object to the auction of the Bank, but it by express and deliberate conduct had asked the Bank to compromise its position and alter the contractual terms. The Borrower wrote repeated request letters for restructuring of loans, which

prayers were considered by the Bank by giving indulgence, time and opportunities. The Borrower, aware and conscious of its rights, chose to abandon the statutory claim and took its chance and even procured favourable decisions. Even if we are to assume that the borrower did not waive the remedy, its conduct had put the Bank in a position where they have lost time, and suffered on account of delay and laches, which aspects are material. Auction on the subject property was delayed by more than a year as at the behest of the borrower, the Bank gave them a long rope to regularise the account. To ignore the conduct of the borrower would not be reasonable to the Bank once third-party rights have been created. In this background, the principle of equitable estoppel as a rule of evidence bars the borrower from complaining of violation.

18. The question of waiver of mandatory requirement of a statute was considered by this Court in depth in Commissioner of Customs, Mumbai v. Virgo Steels, (2002) 4 SCC 316, by referring to a catena of judgments beginning from the judgment of the Privy Council in Vellayan Chettiar v. Government of the Province of Madras, AIR 1947 PC 197 wherein it was held that though notice under Section 80 of the Code of Civil Procedure, 1908 is mandatory, the suit would not be bad if the non-issuance of notice is waived by the party for whose benefit the provision has been enacted”

(iv) ***Kalpraj Dharamshi & Anr., Vs. Kotak Investment Advisors***

Ltd. & Anr., reported in ***2021(10) SCC 401***, para 103 and 104 reads

as under :

“103. The expression ‘waiver’ may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party

making an election, for example whether or not to exercise a contractual right.

Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it.”

104. For considering, as to whether a party has waived its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established, that a party expressly or by its conduct acted in a manner, which is inconsistent with the continuance of its rights. However, the mere acts of indulgence will not amount to waiver. A party claiming waiver would also not be entitled to claim the benefit of waiver, unless it has altered its position in reliance on the same.”

9. The learned Counsel Mr. Tiwari for the respondents further pointed out that second appeal is not maintainable as the first appeal on cross objection was not filed. He submitted that now the appellant/original plaintiff has no right to file the second appeal. It is waived. He is relying upon the judgment of ***Choudhary Sahu (Dead) By Lrs., Vs. State of Bihar***, reported in ***(1982) 1 SCC 232***, para 6 and 7 reads as under :

“6. We will first refer to the provisions of order 41, rule 22. Insofar as it is material for the purposes of this case, it reads:

“22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”

7. The first part of this Rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-clause (1) of Rule 22 of Order 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellants on the strength of order 41, rule 22(1). In our opinion this he could not do.”

10. Nobody will dispute the *ratio* laid down in the authorities cited on behalf of the both sides. However, facts of the case are decisive.

11. As far as substantial question of law as to the maintainability of the counter claim is concerned, an admitted fact is that written statement was filed on 17.06.2006 and counter claim was not filed along with it. Thereafter, the counter claim filed on 22.10.2007. Additional issues were cast in view of the counter claim on 03.12.2007. Meanwhile, evidences of some witnesses were recorded. After giving full opportunity to both sides, the learned trial Court dismissed the suit as well as counter claim. Admittedly, the maintainability of counter claim was not challenged. No such issue was cast. An appeal was not preferred by the plaintiff against the judgment and decree of the learned trial Court. The issue of maintainability of counter claim was not raised in the first appellate Court. After hearing both the sides, the learned first appellate Court allowed the appeal and decreed the counter claim. The first appellate Court held that defendant is having title to the suit property and, therefore, he is entitled for possession of it.

12. No doubt, maintainability of the counter claim is a question of law, but said defence was not raised in the Court of first instance and also in the first appeal. The essential ingredients of waiver of right are that there must be knowledge to take defence as to the maintainability of the counter claim after filing of written-

statement. There is presumption of law that everybody knows law. Additional issues were cast after the evidence was adduced by both sides and filing of counter claim by the defendant. The suit and counter claim were decided on merit. No any objection was raised when there was opportunity at the first instance to raise it. Taking objection as to the maintainability of the counter claim is statutory/procedural right of the plaintiff and it can be waived. Thus, by conduct of the defendant as held in the case of **ARCE Polymers Private Limited** cited *supra* on behalf of respondents, the objection as to the maintainability of counter claim is waived. Thus, the waiver of right to challenge the counter claim on the point of maintainability is clearly established.

13. In case of **Mr. Guido Loyola Furtado** cited *supra* by the appellants, it was first appeal. This is second appeal. Therefore, such ground was not raised in the first appeal. Hence, this authority is not helpful to the appellants. It is therefore not relied upon.

14. The findings of the first appeal on fact, cannot be interfered in second appeal. It is because right to file appeal or cross-objection by the plaintiff is not exercised, it is waived in view of judgment of **Choudhary Sahu** cited *supra* on behalf of the

respondents. As far as case law cited by learned Senior Counsel for the appellants in ***Rajasthan State Industrial Development & Investment Corporation*** cited *supra* is concerned, there can not be estoppel against law and public policy. However, the facts of this case are that it was about the land acquisition and there was no such issue of implied conduct of waiver of objection as to any maintainability. Therefore, said case laws are not helpful to the appellants. Similarly, the case law of ***Ashok Kumar Kalra*** cited *supra* is also not helpful to the appellants, because objection was not raised in the trial Court as well as first appellate Court regarding maintainability of the counter-claim.

15. As far as inconsistent plea as to the dispossession is concerned, same is permissible as per law, finally the party raising inconsistent plea has to elect one out of it. It appears that in the case in hand, the defendant has lastly elected his plea that he was dispossessed from the suit property. In civil cases, strict pleadings and proof without any mistake is not expected. Importance is given to prove existence of the rights, liability and mischief. The defendants raised their defence and claimed possession of suit property in the trial Court and judgment of the trial Court was not challenged by the appellants. The waiver of right taking objection as to maintainability

of counter claim is conclusively established by the conduct of the appellant/plaintiff. For all the above reasons, the substantial question of law is answered in the 'Negative'. The argument of learned Senior Counsel for the appellants is not acceptable. There is no substance in the appeal. The appeal therefore, deserves to be dismissed. The appeal is **dismissed**. No costs.

(SANJAY A. DESHMUKH, J.)

Kirtak