



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.164 OF 2015**

Vijaymala Sidling Doijad,
Age 75 years, Occu – Household,
R/at, New Pargaon, Taluka Hatkangale,
Dist. Kolhapur

... Petitioner

versus

1. The State of Maharashtra,
through Collector of Kolhapur,
Collector Office, Kolhapur
2. Tahasildar, Taluka Hatkangale,
Dist. Kolhapur.
3. The Co-op. Housing Society Ltd.,
Pargaon, Taluka Hatkangale,
District Kolhapur
Through Chairman,
Namdeo Yaswat Deshmukh (Chougule),
Age Adult, Occu – Agri. And Social Work,
R/at, New Pargaon, Taluka Hatkangale,
Dist. Kolhapur.

... Respondents

Mr. Sandeep Koregave, for Petitioner.
Mr. Hamid Mulla, AGP for Respondent Nos.1 and 2.
Mr. Utkarsh Desai i/by Mr. P.S.Bhavake, for Respondent No.3.

CORAM: N.J.JAMADAR, J.

DATE : 28 FEBRUARY 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India calls in question the legality, propriety and correctness of an order dated 17 September 2014 passed by the learned Civil Judge, Kolhapur on an application (Exhibit 144) preferred by the Respondent-Defendant No.3 seeking permission to file Counter-Claim in Regular Civil Suit No.1056 of 2006, whereby the said application came to be allowed subject to payment of costs of Rs.2,000/- to the Plaintiff.

3. Background facts leading to this Petition can be stated, in brief, as under :

3.1 The Petitioner instituted a suit initially claiming relief of injunction against the State of Maharashtra – Respondent/Defendant No.1 and Tahasildar, Tal. Hatkangale – Respondent/Defendant No.2, to restrain them from disturbing possession of the Plaintiff over the suit property bearing Survey No.1573, forming part of the Co-op. Hsg. Soc. Ltd., Pargaon, Tal. Hatkangale – Respondent-Defendant No.3. Subsequently, the Plaintiff amended the plaint and sought relief of injunction against Defendant No.3 as well, so as to restrain the Society from constructing road or cutting trees standing on the suit property.

3.2 The substance of the Plaintiff's claim is that the Defendant No.3 Society has allotted a freehold plot to the predecessor in title of the Plaintiff. There was no restriction on the user of the said plot. The Plaintiff is entitled to

exercise all the incidents of ownership qua the suit property. Yet, the Tahasildar – Defendant No.2 addressed a notice on 1 July 2006 alleging that the Plaintiff had changed the user of the suit property. Subsequently, it was wrongfully alleged that the Plaintiff had committed encroachment over the eastern side road of the suit property, which according to the Plaintiff, does not exist. Hence, the suit for declaration that the notices addressed by the Defendants are void ab initio and to restrain Defendant Nos.1 and 2 from causing obstruction to the possession and enjoyment of the Plaintiff over the suit property and also to restrain Defendant No.3 from constructing road on the eastern side of the suit property or cutting trees standing thereon.

3.3 Issues were settled on 13 July 2009. The Plaintiff led evidence. Evidence of the two witnesses of the Plaintiff came to be recorded. Thereafter, the Plaintiff filed an application for amendment in the plaint. The said application was allowed. Defendant No.3 also filed an application for amendment in the written statement. That application was also allowed. Defendant No.3 also filed an additional written statement on 2 April 2014. It appears that, on 11 April 2014, after perusal of the amended pleadings, the trial Court made an endorsement that no additional issues arise for determination, post the amendment in the plaint and the written statement.

3.4 On 14 July 2014, Defendant No.3 filed an application seeking permission to file counter-claim contending, inter alia, that though the suit was

initially filed for the injunction simplicitor, yet, with the amendment in the pleadings, issue as to the nature of the proprietary title of the Plaintiff arises for determination. It was, therefore, necessary to file a counter-claim seeking relief to the effect that the alleged sale deed executed by the then Chairman of Defendant No.3 Society in favour of Subhash Sahakar Tel Utpadak Mandal Ltd. on 18 July 1964 and the sale deed dated 3 August 1980, executed by the latter, in favour of Hatkangale Taluka Kharedi Vikri Sangh and the sale deed dated 2 November 1998, executed by the latter, in favour of the Plaintiff and the Rectification Deed dated 8 March 2000 are null and void and the Plaintiff and the above named predecessors in title of the Plaintiff have not acquired any title over the suit property.

3.5 It was, inter alia, contended that the then Chairman and Office bearers of the Society had no authority to execute Sale deed in favour of Subhash Sahakari Tel Utpadak Mandal Ltd. and, thus, the said sale deed is void ab-initio, and, consequently, no legal title passed to the Plaintiff.

3.6 By the impugned order, the learned Civil Judge was persuaded to allow the application observing, inter alia, that the suit was at an early stage of trial. Refusal to entertain counter-claim would compel Defendant No.3 to file a fresh suit based on the contentions already narrated in the written statement. Defendant No.3 was not pleading a new case, by way of counter-claim, than the one pleaded in the original written statement.

4. I have heard Mr. Sandeep Koregave, learned Counsel for the Petitioner and Mr. Desai, learned Counsel for Respondent No.3 and the learned AGP for Respondent Nos.1 and 2 at some length. With the assistance of the learned Counsel for the parties, I have perused the pleadings before the trial Court and the material on record.

5. Mr. Koregave, learned Counsel for the Petitioner, submitted that the learned Civil Judge was not at all justified in permitting the Defendant No.3 to file a counter-claim at such a belated stage. Defendant No.3 had entered appearance and filed written statement on 13 June 2007. Moreover, Defendant No.3 had filed application for amendment in the written statement on 25 March 2014 and amended the written statement. In addition, in response to the amended plaint, Defendant No.3 filed an additional written statement on 2 April 2014. Thereafter, the court noted that no issue arose. Thus, having availed three opportunities to file the pleadings, Defendant No.3 was not entitled to file counter-claim after the settlement of the issues and the recording of the evidence of the Plaintiff.

6. Mr. Koregave further submitted that the learned Civil Judge lost sight of the fact that, by way of counter claim, Defendant No.3 was seeking declaration regarding the instruments which were executed in favour of the Plaintiff and predecessor in title of the Plaintiff as far back as 18 July 1964. The said relief was ex-facie barred by law of limitation. The said instruments were referred

to and relied upon by the Plaintiff in the plaint. Thus, it cannot be said that the Defendant No.3 was unaware of the case set up by the Plaintiff and could not have sought the said relief.

7. To buttress the aforesaid submission, Mr. Koregave placed a very strong reliance on a three Judge Bench judgment of the Supreme Court in the case of Ashok Kumar Kalra v/s. Wing Cdr. Surendra Agnihotri and Ors.¹, wherein the Supreme Court considered the questions as to whether there is an embargo on filing of the counter-claim under Order VIII Rule 6-A of the Code, after filing of the written statement, and if the answer is in the negative, what are the restrictions on the filing of the counter claim after the filing of the written statement.

8. In opposition to this, Mr. Desai, learned Counsel for Respondent No.3 would urge that the counter claim in the instant case, was necessitated on account of the amendment in the plaint, post settlement of issues and recording of evidence of two witnesses for the Plaintiff. In fact, the case which the Defendant No.3 has pleaded by way of counter claim already finds reference in the written statement. No new case was sought to be pleaded. Learned Civil Judge was, thus, justified in allowing the Defendant No.3 to file the counter-claim.

9. Mr. Desai further submitted that in the case of Ashok Kumar Kalra

¹ (2020) 2 SCC 394

(supra), the Supreme Court has enunciated that, in exceptional cases, counter-claim can be filed even after the settlement of the issues. The present case satisfies the said test of exceptionality as the Plaintiff amended the plaint after the settlement of issues and recording of evidence of two witnesses.

10. The bar of limitation to the relief claimed by way of counter claim sought to be urged on behalf of the Plaintiff, according to Mr. Desai, would be a matter for determination at the trial. Therefore, the challenge to the impugned order based on the bar of limitation is not legally sustainable, urged Mr. Desai.

11. I have given anxious consideration to the rival submissions. Narration of the facts above, would indicate that after the initial pleadings, there was a fresh round of pleadings after recording of evidence of two of the Plaintiff's witnesses: the Plaintiff amended the plaint in the year 2014; that was followed by the amendment in the written statement and also an additional written statement on behalf of Defendant No.3 in the month of April 2014. Thereafter, on 14 July 2014, Defendant No.3 filed the instant application for seeking permission to file the counter-claim.

12. In the backdrop of these facts, the question which comes to the fore is, whether the learned Civil Judge was justified in permitting Defendant No.3 to file the counter-claim ?

13. A bare perusal of the provisions contained in Order VIII Rule 6-A of the

Code, makes it abundantly clear that 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. Counter-claim can be in the nature of a claim for damages or otherwise. Such counter claim will have the same effect as a cross-suit. It is governed by the rules of pleading applicable to plaints. Under Order VIII Rule 6-G, rules relating to written statement by a defendant apply to the written statement filed in answer to counter-claim.

14. Evidently, from the text of the provisions contained in Order VIII Rule 6-A, a time limit for filing of the counter-claim is not discernible. On the contrary, the right to file counter-claim is inextricably connected with the accrual of the cause of action and the limitation on the filing of the counter-claim is with reference to the time at which cause of action has arisen and the outer limit for the accrual of such cause of action is the filing of the defence of the defendant.

15. In the case of Ramesh Chand Ardawatiya v/s. Anil Panjwani², the Supreme Court expounded three modes of pleadings or setting up of a

² (2003) 7 SCC 350

counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases, the counter-claim though referable to Rule 6-A cannot be brought on record as a right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in

exercising its discretion not in favour of permitting a belated counter-claim. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. (para 28)

16. In the case of Bollepanda P. Poonacha and Anr. V/s. K.M.Madapa³, the Supreme Court after adverting to the aforesaid decision, enunciated the law as under :

“11. The provision of Order VIII Rule 6A must be considered having regard to the aforementioned provisions. A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. Respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands, in question, in the summer of 1998. Cause of action for filing the counter claim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Sri Ryaz Ahmed (supra) is based on the decision of this Court in in Baldev Singh V/s. Manohar Singh and Anr.⁴

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15. A belated counter claim must be discouraged by

³ (2008) 13 SCC 179

⁴ (2006) 6 SCC 498

this Court. See Ramesh Chand Ardawatiya versus Anil Panjwani (supra). We are, however, not unmindful of the decisions of this Court where a defendant has been allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case. The Court in such matters has a wide discretion. It must, however, subserve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that joinder of several causes of action in a suit is permissible. The Court, must, however, exercise the discretionary jurisdiction in a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while undoubtedly would take into consideration the questions of serious injustice or irreparable loss, but nevertheless should bear in mind that a provision for amendment of pleadings are not available as a matter of right under all circumstances. One cause of action, cannot be allowed to be substituted by another. Ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away. See State of A.P. V/s. Pioneer Builders⁵ and Steel Authority of India Ltd. V/s. Union of India⁶ and Himmat Singh V/s. ICI India Ltd.⁷ (emphasis supplied)

17. In the case of Vijay Prakash Jarath V/s. Tej Prakash Jarath⁸, the Supreme Court set aside an order passed by the High Court declining

5 (2006) 12 SCC 119

6 (2006) 12 SCC 233

7 (2008) 3 SCC 571

8 (2016) 11 SCC 800

Defendant No.3 and 4 therein, to file counter claim after two and half years of the framing of the issues. The Supreme Court noted that the Respondents/Plaintiffs' evidence was still being recorded by the trial Court when the counter-claim was filed. Nor it could be shown that any prejudice would be caused to the Plaintiffs if counter counter-claim was to be adjudicated upon alongwith the main suit. Thus, no serious injustice or irreparable loss as expressed in para 15 of Bollepanda P. Poonacha (supra) would be suffered by the Plaintiff in that case.

18. Noticing the difference in the enunciation of law in the aforesaid cases, a reference was made to the larger bench in the case of Ashok Kumar Kalra (supra). The Supreme Court considered the following questions :

“6.1 (i) Whether Order 8 Rule 6-A CPC mandates an embargo on filing the counter-claim after filing the written statement ?

6.2 (ii) If the answer to the aforesaid question is in the negative, then what are the restrictions on filing the counter-claim after filing of the written statement ?

19. After adverting to the provisions of the Code and the precedents, the Supreme Court observed that there cannot be any hard and fast rule to say that in a particular time the counterclaim 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 counterclaim, 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. However, the defendant cannot be permitted

to file counterclaim after the issues are framed and 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 Code.

20. In the said case, the majority culled out the principles as under :

“21. We sum up our findings, that Order VIII Rule 6-A 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 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 counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counte-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)

21. It would be contextually relevant to note that Hon'ble Mr. Justice Mohan M. Shantanagoudar, in a partly dissenting judgment, held that it is not mandatory for the counter-claim to be filed along with the written statement. The Court in its discretion may allow a counter-claim to be filed after the filing of the written statement. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counterclaim till the framing of issues for trial. To that extent, His Lordship agreed with the conclusion reached by the majority. However, in exceptional circumstances, a counter-claim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the Plaintiff. His Lordship observed in paragraph No.57 as under :

"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 counter-claim 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 counter-claim 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."

(emphasis supplied)

22. The position in law which thus emerges is that the Code does not prescribe a definite time limit for the filing of the counter-claim. Rather the

restriction on the right to file counter-claim is with reference to the accrual of the cause of action. It is in the discretion of the court to allow a Defendant to file counter claim either by way of amendment in the written statement or a separate counter-claim, even post filing of the written statement. The considerations of avoiding multiplicity of proceedings, advancing the cause of substantive justice, likelihood of prejudice and the possibility of protraction of the trial, by permitting the filing of the counter-claim at a belated stage, principally weigh with the Court in exercise of judicious discretion. It is also required to be kept in view that, generally the question of prejudice to the defendant may not arise as the defendant would have an option to pursue his cause of action in a separate suit.

23. In the case of Ashok Kumar Kalra (supra), the majority has ruled that counter-claim shall not be permitted to be filed after framing of the issues. The minority view favours the filing of the counter-claim even after the framing of issues, in exceptional cases, till the stage of commencement of the recording of evidence on behalf of the Plaintiff. Ordinarily, the counter-claim shall not be permitted to be filed after the settlement of issues and commencement of the evidence.

24. On the anvil of aforesaid exposition of law, reverting to the facts of the case, it is imperative to note that the Plaintiff has categorically pleaded in paragraph No.2 of the plaint (as originally filed), the historical facts as to the

acquisition of title over the suit property, including the transfer of the suit property by the Defendant No.3 Society in favour of Subhash Sahakari Tel Utpadak Mandal Ltd. and the succeeding transferees. Thus, it cannot be said that the Defendant No.3 was not aware of the nature of the claim of the Plaintiff qua the suit property. The accrual of the cause of action to the Defendant No.3 to file a counter-claim is required to be appreciated through this prism.

25. Secondly, the contention on behalf of Defendant No.3 that counter-claim was necessitated on account of the amendment in the plaint, post settlement of the issues and recording of evidence of two witnesses for the Plaintiff, does not carry much substance. As noted above, post the said amendment in the plaint, Defendant No.3 not only amended its written statement, but had also filed an additional written statement thereto.

26. Thirdly, and most importantly, after the amended pleadings, the learned Civil Judge has made an endorsement that no additional issue arose consequent to the amendment in the pleadings. This factor, in my considered view, assumes critical salience. The trial Court applied its mind to the amended pleadings and then found that no additional issue was required to be framed. The said order, by implication, freezed the stage of framing of issues. Subsequent thereto, in view of the majority decision in the case of Ashok Kumar Kalra (supra), it was not permissible for the Defendant No.3 to

file the counter-claim.

27. Even if the submission of Mr. Desai that, in exceptional cases, the Court can exercise discretion to grant permission to file counter-claim, is taken at par, yet, the facts of the case at hand, do not justify the cause of the submission sought to be advanced by Mr. Desai. As noted above, the Plaintiff had asserted title over the suit property with reference to the acquisition of title by the predecessors in title of the Plaintiff since 1962 in the original plaint itself. By the counter-claim, Defendant No.3 professed to seek declarations that the sale deed executed by the then Chairman of Defendant No.3 Society in favour of Subhash Sahakari Tel Utpadak Ltd. on 18 July 1964, was illegal and void, and, consequently, the subsequent transfers were also illegal and void. Such declaration was sought almost 50 years of the execution of the Sale Deed dated 18 July 1964. By no stretch of imagination, can it be said that the cause of action to seek such declaration arose. post amendment in the plaint, or the circumstances were such that the test of exceptionality could be satisfied.

28. Lastly, the learned Civil Judge lost sight of the fact that by permitting counter-claim, the entire complexion and gamut of the proceedings would substantially alter. Therefore, the learned Civil Judge, could not have permitted Defendant No.3 to file counter-claim of the nature set up by the Defendant No.3, at such a belated stage.

29. For the foregoing reasons, I am persuaded to interfere with the impugned order and reject the application seeking permission to file counter-claim.

30. Hence, the following order :

ORDER

- (i) The Writ Petition stands allowed.
- (ii) The impugned order dated 17 September 2014 stands set aside.
- (iii) The application (Exhibit 144) seeking permission to file the Counter-Claim stands rejected.
- (iv) Rule made absolute to the aforesaid extent.
- (v) No costs.

(N.J.JAMADAR, J.)