

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1277 OF 2024

1. Alankar Padaji Mhatre
Age: 59 years, Occ. Agri,
2. Amar Padaji Mhatre
Age: 57 years, Occ; Agri,
3. Kamini Padaji Mhatre
Age: 55 years, Occ: Agri,

All R/o. Bamandongre,
Tq. Panvel, Dist. Raigad.

..Petitioners

Versus

1. Namdeo Narayan Naik
Since deceased thr. Legal heirs.
- 1a) Ramabai Namdeo Naik
Age: 73 years, Occ: Housewife,
- 1b) Shashikant Namdeo Naik
Age: 52 years, Occ: Agri,
- 1c) Sunita Namdeo Naik
Age: 48 years, Occ: Agri,
- 1d) Sandeep Namdeo Naik
Age: 46 years, Occ: Agri,
- 1e) Prahlad Namdeo Naik
Age: 43 years, Occ: Agri,
- 1f) Kunda Chandrakant Mundkar
Age: 50 years, Occ: Housewife,
- 1a) to 1f) are R/o. Vahal,
Tq. Panvel, Dist. Raigad.

2. Shankar Narayan Naik
Since deceased thr. Legal heirs,
- 2a) Amit Shankar Naik
Age. 42 years, Occ. Business,
- 2b) Anita Satyavan Patil
Age: 38 years, Occ. Business,
- 2a) & 2b) are R/o. Ulwe,
Tq. Panvel, Dist. Raigad.
- 2c) Aanganwati Shankar Mhatre
Age: 33 years, Occ. Housewife,
R/o. Dhutum, Tq. Uran,
Dist. Raigad.
3. Ankush Narayan Naik
Age. Adult, Occ. Agri,
4. Sadanand Narayan Naik,
Age. Adult, Occ. Agri,
R/o. Bamandongre,
Tq. Panvel, Dist. Raigad.
5. Sunil Ramesh Bhanushali
having its office at Centre Facility,
First Floor, Gala No. 153,
Opp. APMC Market, Vashi,
Navi Mumbai.
6. City & Industrial Development
Corporation (Maharashtra) Ltd.,
Having its head office at CIDCO
Bhavan, CBD Belapur,
Navi Mumbai – 400 614.
7. Lilavati Anant Thakur
Since deceased thr. Legal heirs,
- 7.1 Sadashiv Anant Thakur,
- 7.2 Bhagwan Anant Thakur,

7.3 Kamla Anant Thakur,

7.4 Tulsidas Anant Thakur
Since deceased thr. Legal heirs,

7.4.1 Pramibha Tulsidas Thakur,

7.4.2 Suhas Tulsidas Thakur,

7.4.3 Nilam Tulsidas Thakur,

7.4.1 to 7.4.3, all R/o. Nhavkhadi,
Post. Nhave, Tq. Panvel, Dist. Raigad.

7.4.4 Punam Tulsidas Thakur,
R/o. Kapur, Post. Gavhan,
Tq. Panvel, Dist. Raigad.

8. Girijabai Yashwant Patil
R/o. Ulwe, Tq. Panvel,
Dist. Raigad.

...Respondents

**WITH
WRIT PETITION NO. 1278 OF 2024**

**WITH
WRIT PETITION NO. 1297 OF 2024**

Sunil Ramesh Bhanushali
Having his office at -
Centre Facility, First Floor,
Gala No. 153, Opp. APMC Market,
Vashi, Navi Mumbai.

..Petitioner

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Tq. Panvel, Dist. Raigad.

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R/o. Bamandongre,
Tq. Panvel, Dist. Raigad.

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R/o. Bamandongre,
Tq. Panvel, Dist. Raigad.

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9.4.1 Pramibha Tulsidas Thakur,

9.4.2 Suhas Tulsidas Thakur,

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7.4.1 to 7.4.3, all R/o. Nhavkhadi,
Post. Nhane, Tq. Panvel, Dist. Raigad.

9.4.4 Punam Tulsidas Thakur,
R/o. Kapur, Post. Gavhan,

Tq. Panvel, Dist. Raigad.

10. Girijabai Yashwant Patil
R/o. Ulwe, Tq. Panvel,
Dist. Raigad.

...Respondents

Mr. Suresh Sabrad a/w Mr. Amey C. Sawant, Mr. Pratik
Sabrad, Eshwaree Kudalkar, for petitioners in WP No.
1277/2024 & WP No. 1278/2024 and for Respondent
No. 5 in WP No. 1297/2024.

Mr. Jeetendra Sachhdev, a/w Neha Zanje & Abubakar Patel
i/b. J. S. Legal, for petitioner in WP No. 1297 of 2024
and for Respondent No. 5 in WP No. 1277/2024 & WP
No. 1278/2024.

Mr. S. S. Patwardhan a/w Ms. Mrinal Shelar, for Respondent
Nos. 3 & 4 in all writ petitions.

Mr. Rohit Sakhadeo, for Respondent No. 6 in WP No.
1277/2024 & WP No. 1278/2024 and for Respondent
No. 8 in WP No. 1297/2024 (CIDCO).

CORAM : N. J. JAMADAR, J.
RESERVED ON : 02nd DECEMBER 2025
PRONOUNCED ON : 06th JANUARY 2026

JUDGMENT:

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

2. These three petitions assail the legality, propriety and
correctness of a common order on applications (Exh. 76 and 89)
in Regular Civil Suit No. 16/2009, dated 18th December, 2023
passed by the learned Civil Judge, Panvel, whereby the

application (Exh. 76) preferred by the petitioners in Writ Petition No. 1277/2024 and 1278/2024 – the plaintiffs, to delete the petitioner in Writ Petition No. 1297/2024 – Defendant No. 5 from the array of the defendants, and Plot No. 73, Sector No. 03, Ulwe Node (“the suit plot”) from the suit properties, came to be rejected and the application (Exh. 89) preferred by the Respondent Nos. 1 to 4 – Defendant Nos 1 to 4 seeking amendment in the written statement so as to also file a counter-claim against the plaintiffs and Defendant No. 5, came to be allowed.

3. Though there have been multiple proceedings in respect of the suit plot, yet, the background facts necessary for the determination of these petitions can be summarized as under:

3.1 Late Narayan Hari Naik, was the father of Defendant Nos. 1 to 4, and Smt. Shakuntala Padaji Mhatre - the predecessor in title of the plaintiffs, Smt. Leelabai Tulsidas Mhatre – the predecessor in title of Defendant Nos. 7.4.2. to 7.4.4 and Smt. Girijabai Yashwant Patil – the Defendant No. 8. Late Narayan Naik was the holder of several pieces and parcels of agricultural lands, which were ancestral and joint family properties. Those parcels of land were acquired by CIDCO Limited – Defendant No.

6 and, in lieu thereof, the successor in interest of Late Narayan Naik, being project affected persons, also became entitled to a developed plot under 12.5 % scheme.

3.2 The Defendant nos. 1 to 4 – the sons of Late Narayan Naik, applied for and obtained benefits under the said 12.5% scheme allegedly without disclosing the existence and lawful shares of their above-named sisters. The Defendant Nos. 1 to 4 entered into transactions with various persons to sale, assign and transfer the plot which was to be allotted under the said scheme, leading to the institution of Regular Civil Suit No. 734/2012, by Pandharinath Shalik Bhoir, and Special Civil Suit No. 472/2008, by Smt. Jagruti Atulbhai Patel.

3.3 CIDCO – Defendant no. 6 executed an agreement to lease in favour of Defendant No. 1 to 4 in respect of plots No. 74 + 73 + 75, Sector 3, Ulwe Nod, admeasuring 3649.91 sq. mtrs. Thereafter, a tripartite agreement came to be executed between the Defendant nos. 1 to 4, Defendant No. 6 - CIDCO and Mr. Chirag Bhanushali – the Defendant No. 5.

3.4 The petitioners/plaintiffs instituted Regular Civil Suit No. 16/2019 seeking a declaration that, the plaintiffs had 1/7th

share in the suit properties including the suit Plot No. 73, for partition of their share in the suit properties and the consequential relief of injunction in respect of the suit plot.

3.5 In the said suit, the Defendant Nos. 1 to 4 initially took a stand that they had already transferred the suit plot to Mr. Chirag Bhanushali (D5) and, thus, the suit had become infructuous *qua* Defendant Nos. 1 to 4. In their written statement, the Defendant Nos. 1 to 4 also contested the claim of the plaintiffs that, their mother had an undivided interest in the suit plot.

3.6 In the meanwhile, Girijabai Yashwant Patil – Defendant No. 8, filed Regular Civil Suit No. 396/2015 against the Defendant Nos. 1 to 4, the plaintiffs and CIDCO (D6) seeking declaration, partition and possession of her undivided share in the ancestral property including the suit plot.

3.7 It appears, the plaintiffs and Defendant No. 5 arrived at an amicable settlement of the dispute and consent terms were executed (Exh. 75). In accordance with the consent terms, the plaintiffs sought to delete the Defendant No. 5 from the array of the defendants and also delete the suit plot from the suit

properties, while seeking leave to continue the suit in regard to the rest of the properties. The plaintiffs also filed an application for amendment in the plaint so as to delete the Defendant No. 5 and the suit plot from the suit (Exh. 76).

3.8 The Defendant Nos. 1 to 4 resisted the prayer to withdraw the suit *qua* Defendant No. 5. Simultaneously, Defendant Nos. 1 to 4 filed an application for amendment in the written statement so as to file a counter-claim against Defendant No. 5 (Exh. 82) to the effect that, out of agreed consideration, the Defendant No. 5 committed default in payment of the sum of Rs. 1,61,10,000/- (Rupees One Crore Sixty One Lakhs Ten Thousand) to the Defendant Nos. 1 to 4.

3.9 The plaintiffs and Defendant No. 5 resisted the said application for amendment in the written statement.

3.10 After the said application was heard, the plaintiffs assert, the Defendant Nos. 1 to 4 having realised the fate of the said application, did not press the said application, and filed another application (Exh. 89) seeking the very same amendment in the written statement and permission to file counter-claim with the change that, the relief of declaration sought against the

plaintiffs was made to overcome the bar of non-maintainability of the counter-claim against the co-defendant only.

3.11 The second application was also resisted by the plaintiffs and Defendant No. 5, on multiple grounds.

3.12 By the impugned common order, the learned Civil Judge rejected the application for amendment filed on behalf of the plaintiffs (Exh. 76), and allowed the application to amend the written statement filed on behalf of Defendant Nos. 1 to 4 (Exh. 89). The learned Civil Judge was of the view that, the counter-claim having been filed against the Defendant No. 5, the amendment seeking deletion of Defendant No. 5 and the suit plot from the suit, cannot be permitted. The question whether, the counter-claim was barred by law of limitation and whether, the counter-claim in the present form was sustainable, were the matters of merit. At the stage of consideration of the application for amendment, the Court was not required to delve into the merits of the matter.

4. Being aggrieved, the plaintiffs and Defendant No. 5 have filed these petitions.

5. I have heard Mr. Suresh Sabrad, the learned Counsel for the petitioners/plaintiffs in WP Nos. 1277 and 1278 of 2024 and for Respondent No. 5 in WP No. 1297/2024, Mr. Jeetendra Sachhdev, the learned Counsel for petitioner in WP No. 1297/2024 and for Respondent No. 5/Defendant No. 5 in WP Nos. 1277 and 1278/2024, Mr. S. S. Patwardhan, the learned Counsel for Respondent Nos. 3 & 4/Defendant nos. 3 & 4 in all the petitions and Mr. Rohit Sakhadeo, the learned Counsel for Respondent No. 6 in WP Nos. 1277/2024 & 1278/2024 and for Respondent No. 8 (CIDCO) in WP No. 1297/2024, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record including the pleadings and the orders passed by the learned Civil Judge.

6. Mr. Sabrad, the learned Counsel for petitioners/plaintiffs, would urge that, the learned Civil Judge committed a manifest error in ignoring the fundamental principle that, the plaintiff is *dominus litus*. If the plaintiffs did not wish to continue the suit against the Defendant No. 5 and in respect of the suit plot, the Trial Court had no reason to decline such amendment. Mr. Sabrad took the Court through the contentions in the written statement of Defendant nos. 1 to 4 that, the Defendant nos. 1 to

4 had already transferred their interest in the suit plot in favour of Defendant No. 5 and had, thus, completely divested their interest in the suit plot. No declaration as regards the predecessor in title of plaintiffs not being entitled to succeed to the suit properties, was ever sought. It was only after the plaintiffs and Defendant No. 5 amicably resolved the dispute, the Defendant Nos. 1 to 4 turned around with an oblique motive to extract more money from the Defendant No. 5.

7. At any rate, Mr. Sabrad would urge, the tripartite agreement having been executed in the year, 2008, the institution of the suit for claiming the outstanding consideration by way of counter-claim in the year, 2023, was clearly beyond the statutory period of limitation. The learned Civil Judge was, thus, not at all justified in rejecting the prayer of the plaintiffs to amend the plaint and delete the Defendant No. 5 from the array of the defendants and suit plot from the suit properties.

8. Mr. Sachhdev, the learned Counsel for Defendant No. 5, supplemented the submissions of Mr. Sabrad. Mr. Sachhdev laid emphasis on the fact that, the first application for amendment in the written statement and permission to file the counter-claim, was withdrawn simpliciter without reserving liberty to file

a fresh application. Yet, the instant application (Exh. 89) came to be filed with the self-same allegations by seeking a declaration *qua* the predecessor in interest of the plaintiffs so as to overcome the bar against filing of counter-claim against the co-defendant only.

9. An endeavor was made by Mr. Sachhdev to draw the home point that, to settle the dispute with the plaintiffs, the Defendant No. 5 was required to incur huge expenses. In Fact, the Defendant No. 5 has paid far more amount than the agreed consideration. There is not an iota of material to show that, the agreed consideration was more than what has been shown in the tripartite agreement, and the Defendant No. 5 had committed default in payment thereof. Emphasis was laid on the fact that though, the written statement was filed in the year, 2019 itself, yet, no grievance regarding the non-payment of the balance consideration by Defendant No. 5 was ever raised till the plaintiffs and Defendant No. 5 amicably resolved the dispute. Thus, the counter-claim in the present form is legally untenable. Therefore, the impugned order deserves to be quashed and set aside, submitted by Mr. Sachhdev.

10. In opposition to this, Mr. Patwardhan, the learned Counsel for Respondent Nos. 3 & 4/Defendant Nos. 3 & 4 stoutly supported the impugned order. The thrust of the submission of Mr. Patwardhan was that, the counter-claim of the Defendant Nos. 1 to 4 *qua* Defendant No. 5 was based on a document executed by the Defendant No. 5 acknowledging the liability to pay additional consideration (a copy of which has been annexed to the affidavit in reply filed on behalf of Defendant Nos. 3 & 4). Whether, the counter claim is sustainable or not, is a matter for adjudication at the trial.

11. Taking the court through the contentions in the application seeking amendment in the written statement, Mr. Patwardhan submitted that, the Defendant Nos. 1 to 4 have ascribed satisfactory reasons as to why the Defendant Nos. 1 to 4 did not initially file the counter-claim against Defendant No. 5. The Defendant Nos. 1 to 4 were under a bonafide belief that, the Defendant No. 5 was diligently contesting the suit filed by the plaintiffs, and the surreptitious settlement between the plaintiffs and Defendant No. 5, to the prejudice of the rights of Defendant Nos. 1 to 4 necessitated the Defendant nos. 1 to 4 to file the counter-claim against the plaintiffs and Defendant Nos. 1 to 4.

12. Mr. Patwardhan would further urge that, the learned Civil Judge had rightly exercised the discretion to permit the Defendant Nos. 1 to 4 to amend the written statement and file the counter-claim as the merits of the amendment were not required to be examined at the stage of consideration of prayer for amendment. If the amendment was not allowed, it would have led to avoidable multiplicity of the proceedings. Therefore, the impugned order does not warrant any interference as all the disputes between the parties can be adjudicated in the suit once and for all.

13. I have given careful consideration to the rival submissions canvassed across the bar.

14. To begin with, the position in law as regards the abandonment of the suit as a whole or a part of the claim is absolutely clear. Under the provisions of Order XXIII Rule 1(1) of the Civil Procedure Code, 1908 ("the Code"), at any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim. The unconditional withdrawal of the suit or abandonment of a suit against one of the defendants or in respect of a part of the

claim does not require the permission of the Court. In the case of an unconditional withdrawal or abandonment of a part of the claim, ordinarily, the Court does not have any discretion in the matter. The Court cannot compel a plaintiff to continue to prosecute a suit against his wish. The principle of *dominus litus* finds its application in the provisions contained in Order XXIII Rule 1(1) of the Code.

15. From a plain reading of the provisions contained in Order XXIII Rule 1, it becomes abundantly clear that the plaintiff may withdraw or abandon the suit under sub-rule (1) of rule 1 of Order XXIII, at any stage. The right of the plaintiff to withdraw the suit under sub-rule (1) of Rule 1 of Order XXIII is not circumscribed by any restrictions, save and except where the plaintiff happens to be a minor or a person to whom the provisions contained in Rule 1 to 14 of Order XXXII extend. In the later case, covered by the proviso to sub-rule (1) of Rule 1 of Order XXIII, the leave of the court is necessary. It, therefore, implies that if the case is not covered by the proviso to sub-rule (1) of Rule 1 of Order XXIII, the Code does not envisage any fetters on the choice of the plaintiff not to prosecute or abandon the suit.

16. Sub rule (3) of Rule 1 of Order XXIII, on the contrary, operates in different sphere, it addresses a situation where the plaintiff seeks leave to withdraw the suit with liberty to file a fresh suit. A discretion is vested in the Court to grant the plaintiff permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit, where the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient ground for allowing the plaintiff to institute a fresh suit.

17. The provisions contained in sub-rule (4) of Rule 1 of Order XXIII also throw light on the legislative policy of permitting the plaintiff to withdraw the suit unconditionally, if he so chooses. Sub rule (4) precludes the plaintiff from instituting any fresh suit in respect of the subject matter of the suit where the plaintiff abandons any suit or part of claim under sub-rule (1), or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3). However, if the plaintiff withdraws the suit with liberty to institute a fresh suit under sub-rule (3), the bar to the institution of a fresh suit, envisaged by sub-rule (4) does not operate. Thus, it becomes abundantly clear that for the simplicitor or unconditional withdrawal of the suit, the permission of the Court is not peremptory.

18. A profitable reference in this context can be made to a decision of the Supreme Court in the case of **K. S. Bhoopathy & Ors. Vs. Kokila & Ors**¹., wherein the import of the amendment to Order XXIII, under the Amendment Act, 1976, was expounded as under:-

“11. The present Rule which was introduced in place of the old Rule 1 by the Amendment Act of 1976 makes a distinction between absolute withdrawal which is termed as “abandonment” and withdrawal with the permission of the court. This clear distinction is maintained throughout in the substituted Rule by making appropriate changes in the wording of various sub-rules of Rule 1.

12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in the case he will be precluded from suing again o the same cause of action Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.”

19. In the case of **Anurag Mittal Vs. Shaily Mishra Mittal**², the Supreme Court emphasized that, in the aforesaid judgment in the case of **K. S. Bhoopathy & Ors. Vs. Kokila & Ors** (supra),

¹ (2000) 5 SCC 458

²

the Supreme Court has enunciated that the word 'abandonment' in Order XXIII Rule 1(1) of CPC is "absolute withdrawal", which is different from the withdrawal after taking the permission of the Court as envisaged under sub-rule (3) of Order XXIII Rule 1(1) of CPC. It was reiterated that Order XXIII Rule 1(1) of CPC, gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim.

20. In view of the aforesaid exposition of law, the prayer for deletion of Defendant No. 5 from the array of the defendants, and the deletion of the suit plot from the suit properties, essentially constituted the abandonment of the suit *qua* Defendant no. 5 and a part of the suit claim (in respect of the suit plot). In the ordinary course, the Defendant Nos. 1 to 4 could not have been permitted to raise any objection to the said prayer for abandonment. The circumstance of the Defendant Nos. 1 to 4 seeking permission to amend the written statement and file a counter-claim to recover balance consideration in respect of suit plot from Defendant No. 5, seems to have weighed with the trial Court.

21. Whether, the approach of the Trial Court in declining permission to amend the plaint so as to abandon the suit *qua* Defendant No. 5 and the suit plot, in view of the counter-claim proposed to be filed on behalf of the Defendant Nos. 1 to 4 is justifiable?

22. To begin with, it would be relevant to note, the initial objection of the Defendant Nos.1 to 4 to the plaintiffs application for amendment (Exh. 76). The Defendant Nos. 1 to 4, *inter alia*, contended that, they had no objection to withdraw the suit as a whole. But the plaintiffs cannot be permitted to withdraw the suit *qua* the suit plot as there was collusion between the plaintiffs and Defendant No. 5.

23. It is trite, the prayer for amendment in the written statement is considered more liberally than the prayer for amendment in the plaint. The potentiality of prejudice and the propensity of alteration in the nature and character of the claim is a relatively less in the case of amendment in the written statement. In the case of **B. K. Narayan Pillai Vs. Parameswaran Pillai & Anr.**³, the Supreme Court enunciated that, though the principles applicable to the amendments of the plaint are

3 (2000) 1 SCC 712

equally applicable to the amendments of the written statements, yet, the Courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event.

24. In the case of **Usha Balasaheb Swami & Ors. Vs. Kiran Appaso Swami & Ors.**⁴, the distinction in the matter of amendment in the plaint and the written statement was elucidated as under:

“19. It is equally well-settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”

25. In the case at hand, in addition to the amendment in the written statement, the Defendant Nos. 1 to 4 sought permission to file the counter-claim. As noted above, initially the counter-

4 (2007) 5 SCC 602

claim was proposed to be filed against the Defendant No. 5 – the co-defendant alone. However, the said application was withdrawn and instead the instant application (Exh. 89) was filed seeking permission to file the counter-claim against plaintiffs as well as Defendant No. 5. Whether, this endeavor on the part of the Defendant Nos. 1 to 4 salvages the position?

26. Order VIII Rule 6-A of the Code, 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 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 for 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.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.”

27. Order VIII Rule 6-A enables the defendant to set up a counter-claim. A defendant may assert any right or claim in respect of a cause of action which has accrued to the defendant against the plaintiff either before or after filing of the suit, whether such counter-claim is in the nature of a claim for damages or not. The only limitation is that, the counter-claim must not exceed the pecuniary limits of the jurisdiction of the Court. Once counter-claim is filed, it is treated as a cross-suit and is governed by the rules applicable to the plaint. The enabling provision under Order VIII Rule 6-A is incorporated with a view to avoid the multiplicity of proceedings by allowing the original suit and the counter-claim to be tried and disposed off in a single trial.

28. From the phraseology of Order VIII Rule 6-A it, however, becomes abundantly clear that the counter-claim has necessarily to be directed against the plaintiff in the suit. The Defendant can assert his right or claim primarily in respect of a

cause of action that has accrued to him against the Plaintiff. The provisions contained in Order VIII Rule 6-A cannot be resorted to by one defendant to file a counter-claim directed against the co-defendant.

29. In the case of **Rahul Singh & Ors. Vs. State of Bihar & Ors.**⁵, the Supreme Court enunciated the law as under:

“21. Normally, a counter-claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counter-claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But a counterclaim directed solely against the co-defendants cannot be maintained. By filing a counterclaim the litigation cannot be converted into some sort of an interpleader suit. Here, Defendants 3 to 17 had no claim as against the plaintiff except that they were denying the right put forward by the plaintiff and the validity of the document relied on by the plaintiff and were asserting a right in themselves. They had no case even that the plaintiff was trying to interfere with their claimed possession. Their whole case was directed against Defendants 1 and 2 in the suit and they were trying to put forward a claim as against the State and were challenging the claim of the State that the land involved was a notified forest in the possession of the State. Such a counterclaim, in our view, should not have been entertained by the trial Court.

22. The observations of this Court in Ramesh Chand Ardawatiya that: (SCC p. 367, para 28)

“28. Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counterclaim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a

5 (2006) 12 SCC 734

counterclaim which in the light of Rule 1 read with Rule 6-A would be a counterclaim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counterclaim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counterclaim may be filed by way of a subsequent pleading under Rule 9."

are of no avail to Defendants 3 to 17 on the facts and in the circumstances of this case. In the reported decision, this Court did not have to consider whether a counterclaim can be filed after the trial is concluded and whether it could be solely directed against a co-defendant. The Court was also not dealing with an inchoate counterclaim in that case.

23. We also find that there was no prayer as such by way of counterclaim. A mere plea that prescriptive title may be declared and payment of court fee for a declaratory relief would not suffice. Even assuming that this could be treated as a prayer for declaration of title by Defendants 3 to 17, there was no warrant for granting a decree to Defendants 3 to 17 for recovery of possession as was done by the trial court by way of counterclaim or a decree for permanent injunction as was granted by the first appellate court. Even the requisite court fees were not paid. Since the reliefs granted by those courts are not reliefs prayed for, that part of the decree, in any event, could not be sustained.

30. The aforesaid decision in the case of **Rahul Singh & Ors. Vs. State of Bihar & Ors.** (supra), was followed by the Supreme court in the case of **Damodhar Narayan Sawale (Dead) through Legal Representatives Vs. Tejrao Bajirao Mhaske & Ors.,⁶** in the following words:

"39. The decision of this Court in Rohit Singh V. State of Bihar also assumes relevance in the above

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context. This Court held that a defendant could not be permitted to raise counterclaim against co-defendant because by virtue of Order 8 Rule 6-A CPC, it could be raised by the defendant against the claim of the plaintiff.

31. Following the aforesaid pronouncements, in a recent decision in the case of **Rajul Manoj Shah @ Rajeshwari Rasiklal Sheth Vs. Kiranbhai Shakrabhai Patel & Anr.**⁷, the Supreme Court held that, a counter-claim filed primarily against a co-defendant was not maintainable. The observations of the Supreme Court read as under:

“22. In the present case, defendant No. 2 sought to raise a counter-claim primarily for the relief of specific performance of agreement dated 21.10.2011 executed in his favour by deceased original defendant No. 1 with respect to her undivided share in the suit property, by a direction to the Nazir, the substituted representative of defendant No. 1, to execute a sale deed in pursuance of the agreement to sell. The relief of specific performance as sought to be raised by defendant No. 2 cannot be set up by way of a counter-claim since the same is not directed against the appellant/plaintiff, but is instead directed solely against the co-defendant. In view of this, defendant No. 2 is held to be disentitled to raise prayer of specific performance by way of counter-claim. This is simply not permissible, and this position is no more res-

*integra in view of the decision of this Court in Rohit
Singh (supra). (emphasis supplied)*

32. The legal position is, thus, well settled that, a defendant cannot be permitted to raise a counter-claim against the co-defendant. The provisions contained in Order VIII Rule 6-A only enable the defendant to raise a counter-claim against the plaintiff. Whether, this statutory scheme can be circumvented by filing a counter-claim against the plaintiff as well as the co-defendant ?

33. As a matter of principle, in a given situation, one of the defendants may be in a position to raise a counter-claim against the plaintiff as well as co-defendant. However, a careful examination of the case sought to be set up by way of counter-claim against the plaintiff as well as the co-defendant, is necessary, lest, the counter-claim against the plaintiff may turn out to be a subterfuge to prosecute the claim against the co-defendant and thereby defeat the legislative object of the provisions contained in Order VIII Rule 6-A of the Code.

34. A meaningful reading of the proposed counter-claim would, thus, be warranted. If upon a meaningful and not a formalistic reading, the Court finds that, the counter-claim

against the plaintiff is a mere cloak for prosecuting the claim against the co-defendant, then the Court would be justified in declining to permit a defendant to amend the written statement so as to incorporate the counter-claim against the plaintiff and the co-defendant. The true test in such a situation would be whether, the claim against the co-defendant stems from the claim against the plaintiff. There ought to be some co-relation between the claim against the plaintiff and the co-defendant. As enunciated in the case of **Rahul Singh (supra)**, a mere prayer of declaration without anything more against the plaintiffs is not by itself sufficient to sustain a counter-claim against the co-defendant.

35. Reverting to the facts of the case, by way of the proposed counter-claim, the Defendant Nos. 1 to 4 sought a mere declaration that, the mother of the plaintiffs had never asserted any claim in the suit properties and, therefore, she had no right, title and interest in the suit properties.

36. In contrast, *qua* the Defendant No. 5, the Defendant Nos. 1 to 4 claimed that, the Defendant No. 5 had committed default in the payment of balance consideration of Rs.1,61,10,000/- (Rupees One Crore Sixty One Lakhs Ten Thousand) and,

therefore, sought a decree in the said amount along with interest at the rate of 18% p.a. The said claim arose out of the contract between the Defendant Nos. 1 to 4 and Defendant No. 5.

37. *Prima facie*, there was no co-relation between the claim made against the plaintiffs and Defendant No. 5. It was not the case of the plaintiffs that, the Defendant No. 5 had paid the said balance consideration of Rs.1,61,10,000/- (Rupees One Crore Sixty One Lakhs Ten Thousand) to the plaintiffs. The two prayers by way of counter-claim, were premised on two totally distinct causes of action and there was no nexus between those two prayers.

38. As noted above, the counter-claim can only be in prosecution of any right or claim in respect of a cause of action accruing to the defendant against the plaintiff. Where a counter-claim is sought to be filed against both the plaintiff and co-defendant, the counter-claim against the plaintiff must be such that, it clearly falls within the ambit of Order VIII Rule 6-A of the Code and must independently sustain itself as a counter-claim proper against the plaintiff, *de hors* the claim against the co-defendant. A counter-claim against the plaintiff cannot be a

mere adjunct and a subterfuge for sustaining the counter-claim against the co-defendant.

39. If the contentions in the application seeking amendment in the written statement and the permission to file the counter-claim are appraised through the aforesaid prism, it becomes evident that, the prayer of declaration regarding the right and interest of the mother of the plaintiffs in the suit properties is bald in the sense that, neither was it alleged that, the predecessor in title of the plaintiffs had obtained an undue advantage by asserting such right nor any consequential relief has been sought in relation to the said declaratory relief. The said declaratory relief also has no nexus with the relief sought against the Defendant No. 5 which appears to arise from the tripartite agreement executed between the Defendant nos. 1 to 4, the Defendant No. 5 and Defendant No. 6 (CIDCO). The counter-claim against Defendant No. 5 was in the nature of enforcement of contractual obligations of Defendant No. 5. Admittedly, the plaintiffs were not a party to the said contract. The counter-claim against the plaintiff, thus, appears to be a subterfuge to sustain the counter-claim against the Defendant No. 5, which would not have been otherwise tenable.

40. The learned Civil Judge did not examine the issues which cropped up for consideration in a correct perspective and proceeded on the general premise that, the merits of the contentions sought to be introduced by way of amendment were not required to be examined while considering the prayer for amendment. As the primary object of the proposed amendment in the written statement was to set up a counter-claim against the co-defendant, which is not tenable in law, the learned Civil Judge could not have permitted the amendment in the written statement so as to raise such counter-claim against the co-defendant, on the premise that the counter-claim was also filed against the plaintiffs.

41. Resultantly, the impugned order declining the permission to amend the plaint so as to abandon the suit *qua* Defendant No. 5 and the suit plot, on the ground that, such deletion would defeat the counter-claim of the Defendant nos. 1 to 4 and would lead to multiplicity of the proceedings, also deserves to be quashed and set aside.

42. Hence, the following Order:-

:: O R D E R ::

i) The Writ Petitions stand allowed in the following terms :

(a) The impugned common order on the applications (Exh. 76 and 89) stands quashed and set aside.

(b) The application for amendment in the plaint (Exh.76) stands allowed.

(c) The plaintiffs shall carry out the necessary amendment so as to delete the Defendant No. 5 and suit plot from the plaint, within a period of three weeks from the date of uploading of this order.

(d) The application seeking amendment in the written statement and permission to file counter-claim (Exh. 89) stands rejected.

ii) Rule made absolute to the aforesaid extent.

iii) In the circumstances, there shall be no order as to costs.

[N. J. JAMADAR, J.]