

(2002) 09 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 1323 of 1990

Appanna Bala Koregave since deceased through LRs. Smt.
Chandrabai Appanna Koregave and Others

APPELLANT

Vs

Shripal Bandu Koregave since deceased through LRs. Smt.
Vilasamati Shripal Koregave and Others

RESPONDENT

Date of Decision : 24-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 8 Rule 6A, 149

Citation : (2003) 2 ALLMR 276 : (2003) 2 BomCR 355 : (2003) 1 MhLj 366

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

**Advocate : A.V. Bandiwadekar, for the Appellant; N.B. Rajure, For respondent
Nos. 1A to 1C, for the Respondent**

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This writ petition, under Article 227 of the Constitution of India, takes exception to the order passed by the Civil Judge, J.D., Wadgaon dated 9th February 1990 below Exh. 171 in RCS No. 158 of 1983. The respondents filed above numbered suit for declaration and possession of the suit land on the basis of title bearing RS No. 244 Hissa No. 8, 9, 3 and 5 totally admeasuring OH 76 Ares situated at Village Here, Taluka Hatkangale, District Kolhapur. That suit was filed on 18-4-1983. After the suit summons was served upon the petitioner, the petitioner filed written statement dated 3-1-1984. What is relevant to note is the plea specifically taken in para 13 of the written statement, which reads thus:--

^e;r caMw ckyk dksjsxkao ;kaps dMwu nkok feydrhps iz- oknhps d:u ?ksrsysy
[kjsnh i= gs ;ksX; o dk;ns"khj ?valid? vly;keqys oknhapk nkok feydr e?;s vlysyk
csdk;ns"khj o (Tresspasser) Lo:ikpk dCtk iz- oknhl nsofo.ksckcr o oknhuh nkok
feydrh xSj gDdkus o csdk;ns"khji.ks okijY;keqys oknhdMwu ;ksX; rs njE;kups
mRiUU fey.ksckcr ;kp dkeh gqdwe Ogtkok- R;klkBh fu;ekizek.ks tksM+kok

ykx.kkjk dksVZ Qh LVWEi esa- dksVkZpk gqdwe gksrkp iz- oknh Hkj.ksl r;kj vkgs-

t#j rj iz- oknh nkok feydrhps dCtk djhrk o nIE;kups mRiUukdjhrka iz- oknhl rls (Recurring cause of action) vIY;keqys osxyk nkok djhy- R;kckcrsp gDd iz- oknh jk[kwu Bsohr vkags- R;kckcr t#j rj esa- dksVkZph ijokuxh vlkoh-**

2. According to the petitioner this averment was in the nature of raising counter claim in the suit filed by the respondent, in the written statement itself. It is the case of the petitioner that in spite of the above stand; and when the petitioner was willing to deposit the necessary court fees no order in that behalf was passed by the Court and for which reason the petitioner filed subject application Exh. 171 praying for permission to affix necessary court fee with regard to counter claim set up in the written statement.

3. The relevant portion of this application, in particular, para 6 reads thus:--

iz- oknhus vkiys dSfQ;r dye 13 e/s oknhapk ojhy izek.ks nkok feydrhe/khy dCtk gk csdk;ns"khj vIwu xSjgDdkpk vkgs o nkok feydrhpk dCtk ;k dkeh oknhdMwu dk<wu iz- oknhl feykok rlsp nJE;kups mRiiUu ckckr ;ksX; rs gqdwe Ogkok- R;klkBh fu;ekizek.ks tksMkok ykx.kkjk dksVZ Qh LVWEi esa- dksVZpk gqdwe gksrkp iz- oknh Hkj.ksl r;kj vkgs- vls Li"V EgVys vkgs- R;keqys nkok tehupk vkdkj #- 6&06 iSlS vkgs- dCtkps dkj.kkdjhrk dksVZ Qh djhrk vkdkj.khps 12 1@2 iV Eg.kts #- 75&75 iSlS gksrs- R;koy fu;ekizek.ks dksVZ Qh LVWEi #- 8@ pk dksVZ Qh LVWEi ykxrks rks ;k vtkZI tksMr vkgs- U;k;kps gsrqLro rks tek d:u ? ks.ksr ;kok esa- dksVkZps vf/kdkjkdjhrk vkdkjkps 2000 iV Eg.kts #- 1212@& gksrs Eg.kts esa- dksVkZps vf/kdkjkdjhrk gh ekx.kh clrs-

4. The court allowed the petitioner to affix court fee stamp on 8-2-1990 by passing the following order :--

"The Court fee stamp (illegible) is allowed, to be affixed and is taken into consideration subject to orders."

However, in view of the objection raised by the respondent-plaintiff, by the impugned by order dated 9-2-1990 the trial Court rejected the subject application (Exh. 171) taking the view that the Defendant's prayer for permission to raise counter claim or to treat the written statement as a counter claim would be barred by limitation and impermissible in law. This decision is the subject matter of challenge in the present writ petition.

5. After considering the rival submissions I have no hesitation in taking the view that the approach of the trial Court in rejecting the subject application is manifestly wrong. To my mind, the petitioner had set up the counter claim in the written statement itself as can be discerned from the averments in para 13 thereof reproduced above. No doubt in the subject application (Exh. 171) the petitioner has given further particulars. It is another matter that the petitioner cannot be allowed to introduce new facts or case by way of this application but it will not be possible to take the view that counter claim was not raised by the

petitioner in the written statement. In the circumstances, there is substance in the argument of Mr. Bandiwadekar that by the subject application Exh. 171, the petitioner had in substance only prayed for permitting the petitioner to pay necessary court fees. It cannot be disputed that if the counter claim was already raised in the written statement then the court would have power to extend the time for paying necessary court fees stamp by invoking the provision of Section 149 read with Order 7 Rule 11 of Civil Procedure Code. In other words, to my mind, the subject application neither raises counter claim for the first time or for the relief that written statement be treated as counter claim as held by the trial Court. On the other hand, as observed earlier, the counter claim was set up in the written statement itself, vide para 13 thereof. In view of the subject application, the petitioner will have to be permitted time to pay the necessary court fee stamp in respect of that counter claim and that is being allowed by this order. In fact the trial Court had already allowed the petitioner to affix necessary court fee stamp subject to further orders. In the circumstances, this petition will have to be allowed to that extent only without examining any other aspect including the correctness or otherwise of the counter claim set up in the written statement. All those questions are left open, to be decided by the trial Court in accordance with law.

6. In the circumstances writ petition succeeds. Impugned order dated 8-2-1990 is set aside and rule is made absolute in the above terms. No order as to costs. Since the suit has been filed as back as in 1983 but because of the stay granted by this court on 26-3-1990 is stated to be pending, the trial court shall now expedite the hearing of the same and preferably finally dispose of within six months from the receipt of writ of this Court.

Parties to act on the copy of this order duly authenticated by Sheristedar of the Court.