

**(1992) 03 BOM CK 0033**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 286 of 1988

Datta Bandu Sadale and others

APPELLANT

Vs

Sridhar Payagonda Patil and others

RESPONDENT

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**Date of Decision :** 10-03-1992

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 8 Rule 6, Order 8 Rule 6A, 151

Limitation Act, 1963 — Article 65

**Citation :** AIR 1992 Bom 422 : (1992) 94 BOMLR 180 : (1992) 1 MhLj 784

**Hon'ble Judges :** A.V. Savant, J

**Bench :** Single Bench

**Advocate :** A.Y. Sakhare, for the Appellant; Dilip Bagwe and S.B. Naik Advs., for the Respondent

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## **Judgement**

1. This Civil Revision Application filed by the original defendants in Special Civil Suit No. 34 of 1991, instituted by the respondents in the Court of the Civil Judge, Sr. Dn., at Kolhapur, raises two questions of law as under :

i) Whether the counter-claim under O. VIII Rule 6A of the CPC must satisfy the conditions which govern the claim in the nature of a set off under 6. VIII R. 6 of the Code of Civil Procedure;"

ii) Whether such a counter claim can be raised under O. VIII R.6A of the CPC after the written statement has been filed?

The Revision Application has been filed against the order dated 2nd December 1987 rejecting the petitioners' application for amendment of the written statement.

2. On 16th March 1981, the respondents/ plaintiffs filed a suit claiming specific performance of an agreement of sale dated 2nd April 1978 executed by the petitioners in their favour in respect of the land Gut No. 395 measuring 1 H.66 R, situated at village Rangoli, Tal. Hatkanangale, District Kolhapur. The case of the

respondents, as stated in the plaint, is very simple, viz., that there was an agreement of sale in their favour, executed on 2nd April 1978 for a consideration of Rs. 30,000/- out of which they had paid Rs. 20,000/- According to the agreement of sale, the possession was with the petitioners/ defendants. The respondents alleged that they were ready and willing to perform their part of the contract and though, the period stipulated in the said agreement for executing the sale deed was three years from 2nd April 1978, the petitioners had not fulfilled their obligations under the agreement. The respondents, therefore, gave notice on 9th February 1981 calling upon the petitioners to execute the sale deed in their favour and hand over possession. On 17th February 1981, the petitioners gave a reply denying the claim made by the respondents. The validity of the agreement and consideration thereafter was denied. It was contended that the agreement was sham and was not intended to be acted upon.

3. On 6th October 1981 the petitioners filed their written statement denying most of the contentions raised in the plaint. The petitioners further contended that the true facts about the transaction were that they were in need of the amount of Rs. 20,000 / - for repayment of certain debts and were, hence, required to execute the agreement of sale in favour of the respondent in respect of the land gut No. 395 for consideration of Rs. 30,000/- though it was agreed and understood between the parties that the said agreement would not be acted upon. The petitioners did admit the receipt for Rs. 20,000/- by way of loan but contended that another land, gut No. 893 measuring 1 H 21 R. belonging to the petitioners was already given in possession of the respondents as licensees. It was contended by the petitioners that initially on 6th April, 1975, there were two agreements entered into viz. one was purporting to be an agreement of sale in respect of land gut No. 395 and other was a licence agreement in respect of land gut No. 893 whereas gut No. 893 was given in possession of the respondents apparently as licensees, it was really meant to be a security for the loan of Rs. 20,000/- advanced by the respondents to the petitioners. The respondents were put in possession of the said land gut No. 893 for a period of six years commencing from 6th April 1975 and were to enjoy the usufruct of the said land and appropriate the same towards the repayment of Rs.20,000/-. The petitioners, therefore contended that the alleged agreement of sale dated 6th April 1975 in respect of the land gut No. 395 was merely by way of a security and was never intended to be acted upon. It was further contended that since the period of 3 years under the two agreements dated 6th April 1975 was about to expire in April 1978, two fresh agreements were entered into between the parties on 2nd April 1978. One was the alleged agreement of sale in respect of the land gut No. 395 on which the suit was based and the other was the agreement in the nature of a licence in respect of the land gut No. 693 which was in possession of the respondents. For completion of the sale under the agreement of sale dated 2nd April 1978 the period stipulated was three years and so was the period of three years stipulated under the licence agreement dated 2nd April 1978 in respect of the land gut No. 93. The petitioners have

pleaded all these facts in the written statement filed on 6th October 1981. In fact, there are extensive pleadings on the real nature of the transaction between the parties as reflected in the two agreements initially entered into on 6th April 1975 followed by the two agreements entered into on 2nd April 1978. The petitioners have contended that the respondents were indulging in money lending business but since they did not hold the requisite licence, these agreements were devised to circumvent the provisions of the Bombay Money Lenders Act, 1946. The petitioners further contended that since they were in dire need of the amount of Rs. 25,000/- for repayment of debts, they had no other alternative but to submit to the dictates of the respondents and to execute the two agreements.

4. On the basis of these pleadings, the issues were framed on 24th January 1985. It is true that the examination-in chief of the plaintiff had commenced on 2nd April, 1985. On 16th April 1985 the petitioners presented an application under Order VI Rule 17 read with Section 151 of the CPC for leave to amend the written statement by inserting para 8-A(1) to 8-A(7) in the written statement after para 8 and before para 9. The petitioner also prayed for leave to insert para 10-A(1) and 10-A(2) claiming the necessary reliefs in respect of the land gut No. 893. The petitioners set out, in details, the true nature of the transactions between the parties in April 1975 and in April 1978 and what has been sought to be inserted by way of para 8-A(1) to 8-A(7) is really the precise counter-claim based on the averments made by the petitioners in paras 3 to 8 of the written statement. Though, therefore, the necessary facts were pleaded in paras 3 to 8 of the written statement, the petitioners had not specifically raised a counter claim which is now sought to be done by seeking to amend the written statement. By para 10-A(1) and 10-A (2) which are now sought to be inserted, the petitioners have prayed for the relief of possession of land gut No. 893 on the ground that the loan of Rs. 20000/- must be deemed to have been repaid since the respondents had enjoyed the income from the said land gut No. 893 from 6th April 1975. The petitioners have also prayed for mesne profits in respect of the land gut No. 893.

5. The learned Trial Judge has, however, by the impugned order dated 2nd December 1987 rejected the amendment application. It was contended by the respondents before the learned Trial Judge that it would not be permissible to make a counter claim under O.VIII Rule 6A of the CPC after the written statement was filed. It was further contended by the respondents that the counter-claim arose out of the transaction which was not the subject-matter of the suit. The learned Trial Judge came to the conclusion that the counter claim can be made in respect of the same subject-matter even though the cause of action may be different. This conclusion is to be found in para 3 of the impugned order. The attention of the learned Judge was invited to the decision of the Supreme Court in the case of Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, wherein it has been held that Rule 6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the

written statement. In view of this decision, the learned Trial Judge held that the petitioners can make a counter claim even after the filing of the written statement but it should be within limitation. The learned Trial Judge did not hold that the counter claim was barred by limitation but held that the subject-matter shown in the counter claim was different than the subject-matter in the suit. This conclusion is also to be found in para 3 of the impugned order. Finally, the learned Trial Judge came to the conclusion that though the defendants had a right to file the counter claim even after they had filed the written statement, it should have been in respect of the same subject-matter. Holding that if the defendants had got any right in respect of the land gut No. 693, they could file separate proceedings, the learned Trial Judge rejected the application for amendment. It is this order which is being challenged before me in this Civil Revision Application.

6. I have heard both the learned Counsel Shri Sakhare for the petitioners and Shri Bagwe for the respondents. There is no controversy about the facts set out above. Shri Sakhare, firstly contended that having regard to the scheme of the amended provisions of O. VIII R. 6A of the Code of Civil Procedure, the reasoning of the learned Trial Judge that the counter claim must relate to the memo subject-matter is wholly erroneous. He has invited my attention to the judgment of this Court in the case of Barthels and Luders GmbH Vs. M.V. "Dominique", in support of his first contention. Secondly Shri Sakhare invited my attention to the Supreme Court decision in the case of Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, and contended that it was not necessary for the petitioners to have raised the counter claim before the written statement was filed and it is clearly permissible in law to file the counter claim after the written statement had been filed. Thirdly, Shri Sakhare contended that having accepted the ratio of the above Supreme Court decision the learned Trial Judge has not held that the petitioners' claim was barred by limitation and hence the impugned order was liable to be set aside.

7. On the other hand Shri Bagwe, the learned Counsel for the respondents has invited my attention/ to the provisions of R.6-C of O. VIII of the CPC and has contended that in view of the conduct of the petitioners, this was a fit case where the Trial Court ought to have excused and has rightly excluded the counter claim. Shri Bagwe has invited my attention to the fact that the respondents had given the notice on 9th February 1981 demanding the specific performance; the petitioners had given a wholly-un-tenable reply on 17th February, 1981, the suit was filed on 16th March 1981, the written statement was filed on 6th October 1981, the issues were framed on 24th January 1985; and even recording of the plaintiffs' evidence had commenced on 2nd April 1985. Shri Bagwe, the learned Counsel, therefore, contended that the application for amendment made as late as on 16th April 1985 was belated and mala fide and ought not to be entertained under O. VI Rule 17 of the Code of Civil Procedure. Shri Bagwe then contended that since the nature of the two claims was different, the counter claim ought not to be allowed and in support of his contention Shri Bagwe placed Reliance on the

decision of the Calcutta High Court in the case of Manick Lal Seal and Another Vs. K.P. Chowdhury, . Shri Bagwe also contended that having regard to the scheme of the provisions of O. VIII Rule 6(1) read with O. VIII Rule 6A a counter claim must be of the same nature as a set off falling under R. 6 in the sense that both the parties must fill the same character as they fill in the plaintiffs' suit. Shri Bagwe wants to contend that the conditions governing the claim in the nature of a set off will also control the claim by way of counter claim falling under O. VIII Rule 6A of the Code of Civil Procedure. Finally, Shri Bagwe contended that in the exercise of my revisional powers u/s 115 of the CPC this was not a fit case where this Court should interfere in favour of the petitioners.

8. Having considered the arguments of both the learned Counsel, I am inclined to accept the contentions raised by Shri Sakhare and reject the contentions of Shri Bagwe. In the first place it is clear from the impugned order that in view of the Supreme Court decision in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, the learned Trial Judge has himself held that the petitioners can make a counter claim even after filing of the written statement. All that the learned Trial Judge has said is that this is subject to the law of limitation. There can be no controversy about the issue and it is not even contended by Shri Bagwe as indeed it could not be that the petitioners' counter claim is barred by the law of limitation. In a suit of this nature where the petitioners are seeking the relief of possession in respect of Immovable property, viz., land gut No. 893 the period of limitation would be 12 years. Shri Sakhare has contended that the suit would be governed by Article 65 of the Limitation Act 1963, and hence the application made on 16th April 1985 is clearly within the said period of 12 years as much as the licence was for a period of three years commencing from 2nd April 1978 and ending with 1st April 1981. Indeed, the learned Trial Judge himself has not come to the conclusion that the counter claim was barred by limitation. The only ground that the learned Trial Judge has assigned for rejecting the application for amendment is that the counter claim is not in respect of the same subject-matter. I do not think it is so necessary in law. In Barthels and Luders GmbH Vs. M.V. "Dominique", , Mrs. Sujata Manohar J. has considered the scheme of the amended provisions of O. VIII Rule 6 A and 6C and has come to the conclusion that under O. VIII R. 6A the defendants may set off by way of a counter claim against the claim of the plaintiff, any right or claim in respect of the cause of action accruing to the defendants against the plaintiffs either before or after the filing of the suit but before the defendant has delivered his defence or before the time limit for delivering his defence has expired. O. VIII R. 6A reads as under :

O.XVII, R.6A :

(1) A defendant in a suit may, in addition to his right or 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, 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.

A perusal of the above provisions makes it clear that there is no requirement that the counter claim must be of the same nature as the claim of the plaintiff or that it must be arising out of the same transaction. In fact the words "any right or claim in respect of the cause of action accruing to the defendant against the plaintiff make it very clear that the counter-claim is not subjected to the same restriction as a set off is under O. VIII R. 6 of the Code of Civil Procedure. Shri Bagwe, the learned Counsel did contend that even a counter claim falling under Rule 6A must be of the same nature as a set off falling under Rule 6. On a plain reading of the provisions of Rule 6A it is not possible to accept this contention of Shri Bagwe. Further the concluding words of sub-rule (1) of Rule 6A reading "whether such counter claim is in the nature of a claim for damages or not" make it abundantly clear that the counter claim may be a claim in the nature of damages or may not be so. All that the proviso to sub-rule (1) of Rule 6A says is that the counter claim should not exceed the pecuniary limits of the jurisdiction of the Court. There is no restriction regarding the territorial jurisdiction of the Court. Thus the only ground on which the impugned order is based is clearly erroneous in law. Having regard to the scheme of the grounded provisions of O. VIII Rule 6A of the CPC and in view of the decision of this Court in *Barthels and Luders GmbH Vs. M.V. "Dominique"*, it is not possible to uphold the reasoning of the learned Trial Judge rejecting the counter claim on the ground that it must be in respect of the same subject-matter as the claim in the suit. As stated earlier, there is neither a bar of limitation nor any other plea raised in the way of the application for amendment being granted.

9. Shri Bagwe did try to rely upon the observations of a learned single Judge of the Calcutta High Court in the case of *Manick Lal Seal and Another Vs. K.P. Chowdhury*, which do support the reasoning of the learned Trial Judge. However, suffice it to say that the Calcutta case was decided under the un-amended provisions of the Code of Civil Procedure. The decision in *Manick Lal Seal's* case was rendered on 23rd September 1975 in Second Appeal No. 2030 of 1968 whereas the amendments in the nature of Rule 6A onwards have come into force

with effect from 1st February 1977. It is thus not possible to accept Shri Bagwe's contention based on the said Calcutta decision. Shri Bagwe's next contention that in the facts of this case, it would be proper to resort to the powers under Rule 6C of O. VIII has also no merit. In fact to avoid multiplicity of proceedings in the facts of this case interests of justice would require that powers under rule 6A should be exercised in favour of the petitioners and not the powers under Rule 6C in favour of the respondents. There is thus no merit in this contention of Shri Bagwe. It is clear that the learned Trial Judge erred in the exercise of his jurisdiction and having regard to the law declared by the Supreme Court in Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, and the decision of this Court reported in Barthels and Luders GmbH Vs. M.V. "Dominique", , Barthel and Luders GmbH's case, in the facts of this case the amendment ought to have been granted. Refusal to grant the amendment is clearly a case of failure to exercise the jurisdiction vested in him or a case of acting in the exercise of the jurisdiction illegally or with material irregularity. Hence in my view the contention of Shri Bagwe that the powers u/s 115 of the CPC need not be exercised cannot be accepted.

10. For the reasons stated above my answers to the two questions framed in the opening para of this judgment are as under :

- i) It is not necessary that the counter claim under O. VIII R. 6A of the CPC must satisfy the conditions which govern the claim in the nature of a set off under O. VIII R. 6 of the Code of Civil Procedure;
- ii) A counter claim can be raised under O. VIII R. 6A of the CPC even after the written statement is filed.

11. In this view of the matter the Revision Application succeeds. The impugned order dated 21st December 1987 is set aside. The petitioners' application dated 16th April, 1985 seeking leave to amend their written statement is granted. The petitioners shall carry out the amendment within a period of four weeks from the date of receipt of writ of this Court in the Trial Court. Since the suit is of 1981 the Trial Court is directed to hear and dispose of the suit as expeditiously as possible and preferably by the end of this year. Accordingly, the rule is made absolute. In the circumstances of the case, there shall, how ever be no order as to costs.

Rule made absolute.