

(2008) 02 BOM CK 0098

In the Bombay High Court

Case No : Writ Petition No. 7037 of 2007

Maruti Zhipare (Gawali)

APPELLANT

Vs

Rahul Sarang and Vimal Arjun Sarang

RESPONDENT

Date of Decision : 28-02-2008

Acts Referred:

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

Citation : (2008) 3 ALLMR 60 : (2008) 6 BomCR 278 : (2008) 110 BOMLR 781 : (2008) 3 MhLj 821

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : N.D. Sonawane and V.D. Hon, for the Appellant; A.S. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—Rule made returnable forthwith. Heard by consent.

2. Learned Advocate appearing for respondent No. 1 waives service for the said respondent. None appears for respondent No. 2 though duly served.

3. By way of present petition, the petitioner challenges the order dated 31st August 2007 passed by the learned Civil Judge (Senior Division), Latur, below Exhibit 103 in Regular Civil Suit No. 10 of 1996, vide which the application filed by the respondents for placing on record his counter claim has been allowed.

4. The petitioner has filed a suit for declaration of ownership in respect of the suit plot. The said suit is filed in the year 1996. The suit is resisted by the respondent by filing a written statement which was filed on 22nd July 1996. In the said suit, issues are framed, evidence of the plaintiff / petitioner is also over and the suit is kept for evidence of the respondent. At that stage, an application came to be filed by the defendants / respondents for permission to file counter claim. The same is allowed. Hence, the present petition.

5. Mr. N.D. Sonawane, learned Advocate holding for learned Advocate, Mr. V.D. Hon, for the petitioner, submits that the learned trial court has grossly erred in allowing the respondent to file a counter claim. He submits that the counter claim which pertaining to a cause of action which has accrued after filing of the written statement, is not permissible in law. He further submits that the court cannot permit a counter claim to be placed on record which is filed after the issues are framed and the evidence of the plaintiff is closed. He relies on the judgment of the Apex Court in the case of Rohit Singh and Ors. v. State of Bihar (now State of Jharkhand) AIR 2006 SCW 5385.

6. Mr. A.S. Deshpande, learned Advocate for respondent No. 1 / caveator, on the contrary, submits that since the cause of action to file written statement has accrued to the petitioner only in 2005, a counter claim could be filed by the defendant after filing of written statement. He relies on the judgment of the Apex Court in the case of Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, .

7. For considering the rival submissions, it will be necessary to refer to Clause 1 of Rule 6A of Order VIII of the Code of Civil Procedure, 1908, which reads thus:

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, 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.

It can be seen from the said provision that a counter claim can be filed by the defendant against the claim of the plaintiff, with regard to 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.

8. In the case of Mahendra Kumar and Anr. (supra) , the Apex Court has held that it was permissible to file a counter claim after filing of the written statement. The Apex Court has observed thus:

What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had 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.

Reversing the order of the High Court, the Apex Court has held that the High Court has misread the provision of Rule 6A in holding that the counter claim

cannot be filed after filing of the written statement. The Apex Court has further observed as under:

As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter claim was, therefore, quite maintainable.

9. It can thus be clearly seen that though a counter claim can be filed after filing of written statement for a cause of action which has arisen before or after filing of the suit but before the defendant delivers his defence or before the time limited for delivering his defence has expired. Admittedly, the cause of action for which the counter claim has been filed has arisen in the year 2005 i.e. much after written statement was filed by the defendant. In that view of the matter, I am of the considered view that the learned trial court has erred in allowing the application of the respondent / defendant.

10. The Apex Court in the case of Rohit Singh and Ors. (supra) has also held that the counter claim could not have been permitted to be filed after issues were framed and the evidence was over. On that count also, the order passed by the learned trial court is not sustainable in law.

11. Hence, petition succeeds.

(i) Rule is made absolute in terms of prayer Clause "B".

(ii) However, it is made clear that if the respondents / defendants are entitled to take recourse to any remedy available in law, they would be at liberty to do so and the order passed in the present Writ Petition would not be considered as a restraint for the respondents / defendants to avail of the remedy if available in law.

12. In the circumstances of the case, parties are directed to bear their own costs.