
(2009) 01 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 1238 of 2008

Nagnath Jagannath Lomate and Another

APPELLANT

Vs

Narsing Sambha More and Others

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 8 Rule 1, Order 8 Rule 6A,
Order 8 Rule 9
Limitation Act, 1963 — Article 58

Citation : AIR 2009 Bom 133 : (2009) 3 CivCC 14 : (2010) 7 RCR(Civil) 2597

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : B.A. Shinde, for the Appellant; B.R. Sontakke Patil, for the Respondent

Final Decision : Allowed

Judgement

R.M. Borde, J.—Heard Shri B.A. Shinde, learned Counsel for petitioners and Shri B.R. Sontakke Patil, learned Counsel for Respondent Nos. 1 to 6. Respondent No. 7 served.

2. Rule, made returnable forthwith and heard finally by consent of the parties.

3. Petitioners are raising exception to the common order dated 2-1-2008, passed by Civil Judge, Junior Division, Tuljapur, below Exhibit-100 in R.C.S. No. 79/2002 and below Exhibit-92 in R.C.S. No. 81/2002, whereby amendment application to the written statement presented by original defendant No. 6-Respondent No. 6 herein, raising counter claim, has been allowed.

4. Petitioners are husband and wife inter se. Petitioner No. 1, who is original plaintiff in R.C.S. No. 81/2002, whereas petitioner No. 2, who is plaintiff in R.C.S. No. 79/2002, have presented suits claiming decree of perpetual injunction against defendants-Respondents herein. It is the contention of plaintiffs in both the suits that they have purchased agricultural property from Respondent No. 1-

original defendant No. 1 by getting separate sale deeds executed. However, defendants, who are members of joint Hindu family, are trying to interfere in plaintiffs' possession. As such, decree of perpetual injunction is claimed against them.

5. In R.C.S. No. 81/2002, defendant No. 1 has filed written statement, whereas in R.C.S. No. 79/2002, defendant Nos. 1 and 7 have filed written statement. Defendant No. 6 has adopted the written statement filed by respective defendants in both the suits and has preferred not to file his separate written statement. Defendant No. 6-Respondent No. 6 herein presented applications claiming amendment to written statement. By way of amendment, defendant No. 6 wants to raise a counter claim. Defendant No. 6 has claimed, by way of counter-claim, to the effect that suit property is belonging to joint Hindu family consisting of defendants. He has also prayed for a declaration that sale deeds executed by defendant No. 1 in favour of plaintiffs in both the suits be declared as null and void. Defendant-No.6 has also claimed perpetual injunction against plaintiffs in both the suits.

6. The applications for Amendment, tendered by defendant No. 6 in both the suits, have been opposed by plaintiffs by filing say. According to the plaintiffs, there is no written statement presented by defendant No. 6 and as such, he is not entitled to raise a counter claim. It is also contended that as per defendant No. 6's own showing, cause of action for presenting counter-claim has arisen on 2-5-2002, whereas counter-claim is raised on 16-10-2007. As such, relief claimed by way of counter claim is beyond prescribed period of limitation. It is also further contended that defendant No. 6 cannot raise counter-claim against co-defendants. Objection is also raised for entertaining the applications on the ground that after issues in the matter are settled as well as evidence of the plaintiffs and part evidence of defendants is already over, counter-claim cannot be entertained. It is contended that at this belated stage, it is not open for concerned defendant to raise a counter-claim and the Court ought not to allow same.

7. The trial Court, after hearing both the parties, was pleased to allow the applications tendered in both the matters by passing a common order on 2-1-2008. Said order, passed by the trial Court permitting defendant No. 6 to raise counter-claim in both the suits presented by plaintiffs, is subject matter of challenge in this writ petition.

8. Learned Counsel for petitioners has contended that the counter-claim raised by defendant No. 6 ought not to be considered for the following reasons:

(a) There is no separate written statement presented by defendant No. 6, as such, he is not entitled to claim amendment to the written statement presented by other defendants and set up a counter claim against plaintiffs.

(b) Defendant No. 6 cannot be permitted to raise counter-claim essentially against defendant No. 1 seeking a declaration that sale deeds executed by

concerned defendant (defendant No. 1) do not bind him.

(c) The counter-claim presented on consideration of the date of accrual of cause of action for raising counter-claim given in the applications itself makes it clear that the claim raised is barred by limitation.

(d) The applications cannot be entertained after issues are framed and evidence of plaintiffs as well as part of the evidence of defendants is over.

9. It would be appropriate to refer to provisions of Order VIII, Rule 6A of the Code of Civil Procedure, which reads thus:

6A. 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 but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim 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 counterclaim 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.

10. The defendant can raise counterclaim against the plaintiff in respect of cause of action accruing to the defendant either before or after filing of the suit, but before the defendant has delivered his defence. The phrase "delivering defence" is with reference to presentation of written statement. It is true that technically defendant No. 6 has not presented his written statement, however, he has adopted written statement presented by defendant No. 1 and defendant Nos. 1 and 7, respectively. In these circumstances, it would not be plausible to contend that there is no defence raised by defendant No. 6. Technically speaking, there is no written statement presented by defendant No. 6, however, he is entitled to adopt written statement presented by other defendants. It would, therefore, be too technical to contend that there is no defence raised by defendant No. 6 and as such he cannot raise counter-claim.

The defendant is required to raise counter-claim along with his written statement in relation to the cause of action arisen before presentation of written statement. Defendant is not precluded from raising a counter-claim in respect of cause of action accruing to him after presentation of written statement by way of

tendering an application seeking amendment to the pleadings. However, in the instant matter, cause of action for presentation of counter-claim is stated to have accrued on 2-5-2002, whereas suits were presented by plaintiffs on 30-4-2002 and 19-11-2002, respectively. Thus, it is clear that, date of accrual of cause of action for presentation of counter claim is stated to be 2-5-2002, which is certainly prior to presentation of defence i.e. filing of written statement by defendant No. 6. Defendant No. 6 has filed a *pursis*, in that regard, after September 2002. The accrual of cause of action for filing counter claim has arisen prior to presentation of written statement by defendant No. 6. As such, it was incumbent upon him to raise his counter claim in the written statement presented by him earlier. Reliance is placed on the judgment in the matter of *Shaikh Ibrahim and Anr. v. Shahida Bi and Ors.* reported in 2002 (3) All MR 809. In para 13 of the said judgment, it has been observed by this Court:

The provision further contemplates that the defendant can make a counter-claim but then he has to prefer the counter-claim at the time of filing of the written statement if the cause of action for claiming the counterclaim arises before the filing of the written statement. That further means that the defendant can make a counter-claim if in certain cases the cause of action has arisen after filing of written statement, even after filing of the written statement. The learned Civil Judge has totally misinterpreted this provision and has held that as the defendant had not led the evidence in this matter, he could amend the written statement by claiming counter-claim. The counter claim has to be made only with respect to the cause of action as explained above.

11. Considering the observations made by this Court, it was incumbent upon defendant No. 6 to raise claim at the time of filing written statement, as the cause of action has arisen before filing of the written statement. Defendant No. 6 could not have raised counter-claim at belated stage long after presentation" of written statement and after settlement of issues and recording of evidence of plaintiffs is over.

12. Reliance is also placed on the judgment in the case of *Ramesh Chand Ardawatiya Vs. Anil Panjwani*, . The Apex Court, in the said judgment, has observed that, raising a counter-claim, which results in prolonging the trial or complicating the otherwise smooth flow of proceedings or causing delay in the progress of the suit, should not be permitted. The counter-claim not contained in original written statement may be refused to be taken on record if issues have already been framed and the case set down for trial, and *moreso* when the trial has already commenced. Relevant observations are made in para 28 of the judgment, which is reproduced thus:

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 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 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 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 of right but shall be governed by the discretion vesting in the Court, either under Order 6, Rule 17 of the 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 of the 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. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not obtained 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 moreso when the, trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no previous pleading on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counterclaim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

(Underline supplied)

13. In the instant matter, counter-claim is being raised long after settlement of issues as well as after recording of evidence of plaintiffs is over. The trial Court, therefore, ought not to have permitted defendant No. 6 to raise counter-claim at belated stage.

14. Another objection raised by petitioners also deserves consideration. It is

contended that by way of raising counter claim, defendant No. 6 is seeking a declaratory decree to the effect that the sale deeds executed by defendant No. 1 on 18-3-1996 and 20-3-1995 respectively, in favour of plaintiffs-petitioners be declared as illegal and not binding on him. It is not permissible to claim relief against co-defendant by raising counter claim. The main relief claimed by way of counter claim presented by defendant No. 6 is against defendant No. 1. For this reason also, the trial Court ought not to have permitted defendant No. 6 to raise counter claim by way of presenting an amendment application to the pleadings. In this respect, a decision rendered by the Apex Court In the matter of Rohit Singh and Ors. v. State of Bihar (now State of Jharkhand) reported in AIR 2007 SC 10, can be relied upon. It is observed by the Apex Court, that:

A counter-claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter claim can be raised after issues are framed and the evidence is closed.

It is also observed in para 8:

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 co-defendants in the suit. But a counterclaim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into some sort of an inter-pleader's suit.

15. On perusal of the amended pleadings, it appears that defendant No. 6 is essentially raising a declaratory claim in respect of sale deeds executed by defendant No. 1 in favour of plaintiffs. Unless defendant No. 6 secures relief in respect of cancellation of sale deeds executed by defendant No. 1, he is not entitled to other reliefs in terms of prayer clauses (A) and (C) stated in the prayer clause of the counter-claim. It is, thus, clear that defendant No. 6 is essentially claiming relief against defendant No. 1 by way of raising counter-claim. The net result of permission granted by trial Court in favour of defendant No. 6 for raising a counter-claim by way of amendment to the written statement, has an effect of converting the suit into inter-pleader's suit.

16. That, so far as objection relating to limitation raised by petitioners, also requires to be taken into account. In the amended written statement, by which counter-claim is raised, it is stated that as cause of action for presenting the claim accrued on 2-5-2002, claim is raised by defendant No. 6 in respect of declaration of the sale deeds dated 18-3-1996 and 20-3-1995 to be illegal and not binding on him. In view of provisions of Article 58 of the Limitation Act, relief In respect of declaration can be raised within a period of three years when the right to sue accrues first. In the instant matter, even as per his own showing, cause of action accrued to defendant No. 6 for raising counter claim on 2-5-2002, whereas counter claim is presented on 16-10-2007. The counter claim

itself is beyond prescribed period of limitation on his own showing and, therefore, claim raised is barred by time. The trial Court, therefore, ought not to have entertained the applications permitting amendment to the written statement thereby permitting to introduce counter claim in respect of claim raised by plaintiffs.

17. For the reasons set out above, I am of the opinion that impugned order passed by the trial Court shall have to be set aside. Writ Petition is thus allowed. The common order passed by Civil Judge, Junior Division, Tuljapur, dated 2-1-2008, below Ex-hibit-100 in R.C.S. No. 79/2002 and below Exhibit-92 in R.C.S. No. 81/2002, is quashed and set aside.

18. Rule is accordingly made absolute. In the facts and circumstances of the case, there shall be no order as to costs.