

(2014) 11 BOM CK 0040
In the Bombay High Court
Case No : Writ Petition No. 8936 of 2012

Ramniwas Bansilal Lakhotiya

APPELLANT

Vs

Sunil Pannalal Agrawal

RESPONDENT

Date of Decision : 25-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 18 Rule 4(1), Order 6 Rule 17, Order 8 Rule 1, Order 8 Rule 6A
Specific Relief Act, 1963 — Section 16(c), 22, 22(1), 22(2)

Citation : (2015) 1 ABR 427 : (2015) 3 MhLj 283

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : V.J. Dixit, Sr. Advocate i/b L.V. Sangeet, Advocate for the Appellant;
A.S. Bajaj, Advocate for the Respondent

Judgement

R.V. Ghuge, J.—Heard the learned Advocates for the respective parties at length.

2. The petitioners are challenging the order passed by the trial Court in Special Civil Suit No. 81 of 2008, below Exhibit 73, by which the application for amendment has been allowed and the respondents herein are permitted to carry out amendment, subject to costs of Rs. 500/-.

3. Contentions of Shri Dixit, learned Sr. Advocate appearing for the petitioners, can be summarised as follows:-

(1) CTS 159, situated at Jalna, was in the name of Rampyaribai, who is the grand-mother of petitioner No. 2 and mother of petitioner No. 1.

(2) Ramnivas, the original petitioner is the father of petitioner No. 2.

(3) There are two shops said to be in permissive possession of respondent No. 1.

(4) The three respondents are real brothers, who operated their business from the two shops taken on rent from the petitioners.

(5) They have altered the two shop premises and converted them into a single

shop.

(6) In June 1994, the petitioners' father Ramnivas was in need of approximately Rs. 6,00,000/-.

(7) He has taken a loan of Rs. 6,00,000/- from the defendants.

(8) The loan was to be repaid and until then the shops were to continue to be in possession of the defendants.

(9) By account payee cheque dated 7.6.1994, an amount of Rs. 1,50,000/- was returned to respondent No. 1.

(10) By account payee cheque, dated 7.6.1994, an amount of Rs. 3,00,000/- was returned to respondent No. 3.

(11) By account payee cheque dated 9.6.1994, an amount of Rs. 1,50,000/- was returned to respondent No. 2.

(12) A nominal isar pavati was earlier executed, since the petitioners had agreed to repay the loan.

(13) Respondents 1 to 3 later on rented the said shop to respondent No. 4, who has been served with Court notice and has chosen not to enter an appearance, either in person or through an Advocate, in this proceeding.

(14) Rampyaribai passed away on 28.12.2006, prior to which she had executed a will deed in favour of petitioner No. 2.

(15) The petitioners preferred Special Civil Suit No. 81 of 2008, seeking possession of the shop property and for mesne profits. All the respondents herein were defendants in the said proceedings in the same serial order.

(16) The amendment was sought by the petitioners and upon being permitted, they have filed the amended plaint.

(17) Written Statement has been filed by three defendants together on 29.9.2008.

(18) The said Written Statement also contains an additional Written Statement.

(19) The defendants did not choose to file a counter claim and in fact, have specifically mentioned in paragraph No. 21 of the Written Statement that they reserve their right to file a suit for specific performance of contract against the plaintiff and the legal heirs of deceased Rampyaribai separately.

(20) The petitioners were, therefore, made to believe that the defendants have neither preferred a counter claim, nor do they intend to file a counter claim.

(21) Application Exhibit 73 has been filed by the respondents under Order VI Rule 17 of the CPC on 26.7.2012, which is almost four years after they filed their written statement.

- (22) The issues were cast on 4.7.2009 and thereafter re-cast.
- (23) During the period 4.7.2009 till 12.3.2012, the evidence of the petitioners has been recorded and concluded. Closing purshis is filed on 12.3.2010.
- (24) From 12.3.2010, for a period of almost 2 years and 4 months, the respondents/defendants sought adjournments and did not lead evidence.
- (25) On 26.7.2012, by Exhibit 73, the respondent sought an amendment which is aimed at introducing a counter claim through the Written Statement.
- (26) Besides narrating the factual position in application Exhibit 73, it has been specifically stated in paragraph No. 4 that the amendment is being sought since the defendants inadvertently did not claim a decree for specific performance of contract against the plaintiff and also did not mention that the defendants are ready to pay the balance consideration to the plaintiff.
- (27) An amendment cannot be granted on the basis of such pleadings as the proviso to Rule 17, which was introduced in 2002 has restricted the amendment being carried out merely at askance.
- (28) Certain strict conditions have been imposed under the proviso to Rule 17 and the amendment would be permitted only if those conditions are fulfilled.
- (29) The proposed paragraphs bearing paragraph Nos. 22 to 24, in fact change the entire nature of the suit since on the one hand the defendants made the petitioners to believe that they are not filing a counter claim and have chosen to file a suit for specific performance as stated in paragraph No. 21 of the Written Statement. On the other hand, the right to file a counter claim having been given up, is now being asserted through an amendment to the Written Statement and that too after 2 years and 4 months of the closing of evidence by the petitioners.
- (30) Section 16(c) of the Specific Relief Act, 1963 ("Act of 1963") mandates certain averments in order to indicate the performance of the essential terms of the contract. In absence of such averment, the respondents cannot take refuge under Section 16(c) of the Act of 1963. Reliance is placed upon explanation (ii) below Section 16(c) of the Act of 1963.
- (31) No statements, as regards limitation and court fees, have been made in the written statement and have also not been sought to be introduced through the amendment.
- (32) The petitioners had opposed the said application Exhibit 73 and had specifically pleaded that no counter claim is permissible after filing of the written statement and framing of issues, much less, after the plaintiffs have recorded their entire evidence.
- (33) The application by way of counter claim is barred by law of limitation, which is a period of only three years from the date of the written statement and the respondents are attempting to achieve a result indirectly, which, it could not

have obtained directly from the trial Court.

(34) The respondents are seeking an amendment and the same will have to be considered within the period of limitation imposed under Order VI Rule 17 and proviso thereunder of the CPC.

(35) There is no explanation forthcoming, as to what prevented the respondents from moving Exhibit 73 at the earliest, since it is their contention that the cause of action has arisen prior to the filing of the Special Civil Suit.

(36) Reliance is placed upon Order VIII Rules 6A to 6C of the CPC to contend that the counter claim cannot be permitted to be filed after the limitation period since it has the same effect as of a cross suit.

(37) Reliance is placed upon the following judgments of the apex Court:-

(a) Vidyabai and Others Vs. Padmalatha and Another, ,

(b) Bollepanda P. Poonacha and Another Vs. K.M. Madapa, ,

(c) Ramesh Chand Ardawatiya Vs. Anil Panjwani, and

(d) Gayathri Womens Welfare Association Vs. Gowramma and Another, .

(38) The requisites under Section 16(c) of the Act of 1963 requires that an averment should be in past and present continuous tense as well as the statement in future tense, in relation to the willingness to implement the terms of the contract. Per contra, the respondents have only averred in future tense, which clearly indicates that it is a after thought, by which the application for amendment has been preferred.

(39) There is no averment as to whether the Court has the jurisdiction to try the counter claim.

(40) Proposed paragraph No. 22 clearly indicates that the respondents desire to file a counter claim and, therefore, the opening sentence in the proposed paragraph No. 22 reads as:-

"By way of counter claim, the decree of specific performance of contract, dated 6.6.1994 may be passed in favour of defendant No. 1."

(41) Directions are being sought through the amendment, which are in fact directions sought under a counter claim.

(42) The proposed paragraphs, though appear to be an addition to the written statement, are in fact, a counter claim.

(43) The impugned order is perverse and erroneous and causes great injustice to the petitioners as it comes in aid of a sleeping litigant who ought not to be assisted by the Court.

4. Shri Bajaj, learned Advocate appearing on behalf of respondents 1 to as

submitted as under:-

(1) The cause of action has arisen prior to the suit and therefore, the basic ingredient required for filing a counter claim has been fulfilled.

(2) In paragraph No. 16 of the written statement, the defendants have averred that they are ready and willing to perform their part of agreement of sale dated 6.6.1994, by way of payment of remaining consideration.

(3) The willingness to perform the agreement/contract is, therefore, available in the written statement.

(4) Eighteen issues have been cast by the trial Court and issue Nos. 12 and 15 pertain to a counter claim which is in the nature of a counter suit.

(5) Section 22 of the Act of 1963 empowers the trial Court to grant relief of possession, partition, refund of earnest money etc.

(6) Section 22(2) and the proviso thereunder, indicate that no relief can be granted under Section 22(1) unless it has been specifically claimed. The proviso thereunder enables the Court to allow the litigant at any stage in the proceedings, to amend the plaint on such terms as may be just, for including the claim for such a relief.

(7) Rule 6A below Order VIII of the CPC restricts the filing of a counter claim to the cause of action which ought to have arisen either before the filing of the suit or at the time of filing written statement or the period in which the said written statement can be filed.

(8) Rule 6A cannot be interpreted to mean that a counter claim cannot be filed beyond 90 days period, which is granted under the CPC.

(9) Rule 6B under Order VIII of the CPC enables the defendant to file a counter claim in the backdrop of supporting averments set out in the written statement.

(10) A cause of action, which has arisen after the filing of the written statement, cannot be a part of the counter claim and in the instant case, the same has arisen before the institution of the suit.

(11) The pleadings set out in the written statement support the counter claim and issue Nos. 12 and 15 cast by the Court are based on the said pleadings. It is only that the prayers were inadvertently left out. Therefore, the application for amendment was made.

(12) The issue of due diligence is insignificant in this proceeding since there are pleadings available and it is only that the prayers were missing.

5. Having heard the learned Advocates for the respective sides, I have gone through the petition paper book and the reported judgments relied upon.

6. The Apex Court in the case of Vidyabai (supra) has considered the scope and

ambit of Order VI Rule 17 of the CPC as well as the circumstances in which Rule 17 was restored in 2002 along with the proviso. Paragraph Nos. 10, 11, 12, 13, 15, 19 and 20 of the said judgment are germane to the cause of action and it would be of assistance to reproduce the same as under:-

"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said per-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to "commencement of proceeding".

12. Although in a different context, a Three-Judge Bench of this Court in *Union of India and others Vs. Major General Madan Lal Yadav (Retd.)*, took note of the dictionary meaning of the terms "trial" and "commence" to opine: (SCC p. 136, para 19)

"19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial."

The High Court, as noticed herein before, opined that filing of an affidavit itself would not mean that the trial has commenced.

13. Order XVIII, Rule 4(1) of the Code reads as under:

"4. Recording of evidence (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along

with affidavit shall be subject to the orders of the Court."

This aspect of the matter has been considered by this Court in Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd., in the following terms:

"15. The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which "evidence" is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

16. The aforementioned provision has been made to curtail the time taken by the court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it."

15. We may notice that in Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others, , this Court noticed the decision of this Court in Kailash (supra) to hold:

"35. By Act 46 of 1999, there was a sweeping amendment by which Rules 17 and 18 were wholly omitted so that an amendment itself was not permissible, although sometimes effort was made to rely on Section 148 for extension of time for any purpose.

36. Ultimately, to strike a balance the legislature applied its mind and reintroduced Rule 17 by Act 10 of 2002 w.e.f. 1-7-2002. It had a provision permitting amendment in the first part which said that the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration."

This Court also noticed Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), to hold:

"41. We have carefully considered the submissions made by the respective Senior Counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter-affidavit filed by Respondent 1, various dates of hearing with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.

42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be

raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

The ratio in *Kailash* (supra) was reiterated stating that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

20. In *Salem Advocate Bar Assn* (supra), this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question. Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned Trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly."

7. It is thus clear that the Apex Court while dealing with the total bar introduced by the proviso to Rule 17, has interpreted the same to mean that such an amendment shall not be allowed after the trial has commenced, unless the Court comes to a conclusion that inspite of due diligence, the concerned litigating party could not have raised the issue before the commencement of the trial and which is sought to be raised by way of an amendment. The judgment of the apex Court

in the case of Salem Advocates" Bar Association (supra), has also been considered and especially paragraph Nos. 35, 36, 41 and 43 have been relied upon by the apex Court in Vidyabai's case (supra).

8. The apex Court in the case of Bollepanda (supra), has dealt with a counter claim being filed after the written statement was brought on record. The scope and ambit of Order VIII Rule 6A and Order VI Rule 17 of the CPC have been dealt with. It is concluded that a belated counter claim must be discouraged by this Court. It is, however, noteworthy that in the facts of the said case, the written statement was filed in the year 1997 and it was an admitted position that the cause of action arose on account of the trespassing over the suit land in the Summer of 1998. The apex Court, therefore, concluded that the said case was squarely hit by the exclusion effect of Order VIII Rule 6A of the CPC. Nevertheless, the apex Court has observed in paragraph Nos. 8 to 13 that the statutory period of limitation cannot be overstepped while granting a relief of introducing a counter claim.

9. In the case of Ramesh Chand (supra), the apex Court has dealt with Order VIII of the CPC and especially the limitations set out in Rules 6A, 6B and 6C, which were introduced by an Amending Act of 1976. It was held that a counter claim has the same effect of a cross suit and the judgment of the trial Court, in such a suit, is a judgment on the suit as well as the counter claim. It is also laid down that the counter claim should be a part of the written statement. Nevertheless, the apex Court has also considered three contingencies in which the counter claim could be filed.

10. Paragraph Nos. 24, 25, 26 and 28 of the case of Ramesh Chand (supra), are relevant to the present case and hence are reproduced hereinbelow:-

"24. Order VIII of the CPC deals with "written statement, set off and counter-claim". We would like to state, by way of clarification, that the provisions of CPC which are being considered herein are as amended by Act No. 104 of 1976 only, (excluding from consideration the amendments incorporated by Act No. 46 of 1999 with effect from 1.7.2002). According to Rule 1 of Order VIII the defendant shall, at or before the first hearing or within such time as the Court may permit, present a Written Statement of his defence. Under Rule 2 the defendant must raise by his pleadings inter alia all matters which show the suit not to be maintainable and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Under Rule 6 the defendant may at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off subject to certain limitations. Rules 6A, 6B and 6C (introduced by the Amendment Act, 1976) read as under:-

"6A. (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 counterclaim against the claim of the plaintiff, any right (SIC) 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 counterclaim shall not exceed the pecuniary limits of jurisdiction of the Court.

(2) Such counterclaim 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 counterclaim.

(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 counterclaim shall be treated as a plaint and governed by the rules applicable to plaints.

6B. Where any defendant seeks to rely upon any ground as sporting a right of counterclaim, shall, in his written statement, state specifically that he does so by way of counterclaim.

6C. Where a defendant sets up a counterclaim and the plaintiff contends that the claim they raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counterclaim may be excluded and the Court may, on the hearing of such application make such order as it thinks fit."

(emphasis supplied)

25. Under Rule 8 any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Under Rule 9 no pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counterclaim shall be presented except by leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

26. A perusal of the above said provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counterclaim. The relevant words of Rule 6A are-

"A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6,..... before the defendant has delivered or before the time limited for delivery of defence has expired".

These words go to show that a pleading by way of counterclaim runs with the right of filing a written statement and that such right to set up a counter claim is

in addition to the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither the written statement can be filed as of right nor a counter-claim can be allowed to be raised, for the counter-claim under Rule 6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defended, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.

28. Looking to the scheme of Order VIII as amended by Act No. 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 counterclaim which in the light of Rule 1 read with Rule 6-A would be a 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 a 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 VI 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 VIII 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 counterclaim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained 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 more so when the trial has already commenced. But certainly a counterclaim 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 to 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 counter-claim 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."

11. In the case of Ramesh Chand (supra), the apex Court has also dealt with the discretion vested in the trial Court to permit a counter claim sought to be introduced through an amendment under Order VI Rule 17 of the CPC. Order VIII Rule 6A was, therefore analyzed for the said purpose and it was concluded that such a counter claim, by way of an amendment, could be allowed in order to avoid multiplicity of judicial proceedings, to save the court time and also to avoid inconvenience to the parties, since all the disputes between the same parties could be decided in a single proceeding. Nevertheless, the apex Court has struck a note of caution that the framers of the law never intended that the pleadings, by way of a counter claim, be utilized as an instrument for forcing a reopening of the trial or pushing back the progress of the proceeding.

12. The apex Court in the case of Gayathri Women's (supra), has dealt with the similar issue wherein an amendment in the written statement at a belated stage was sought so as to enable the party to introduce a belated counter claim after the issues were framed by the trial Court. The High Court, in appeal, had allowed the respondents to amend their written statement so as to include the additional prayer in the counter claim. The order of the trial Court, rejecting the application was set aside and the High Court permitted the request for introducing the counter claim belatedly. The apex Court, while allowing the appeal, has placed reliance upon the observations made by the apex Court in paragraph No. 28 in the case of Ramesh Chand (supra).

13. In the case of Gayathri Women's (supra), the apex Court has summarised its conclusions in paragraph No. 44 by observing as follows:-

"44. The matter herein symbolizes the concern highlighted by this Court in Ramesh Chand. Permitting a counterclaim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial Court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial Court."

14. So far as the hardship being caused to the litigating parties is concerned, the learned Advocate for respondents 1 to 3 has canvassed that no prejudice of any

nature is likely to be caused to the petitioners since they have led their evidence only to the extent of their complaint. By introducing the counter claim through the amendment, the respondents are willing to lead evidence and the petitioners would then be at liberty to lead the evidence as if they stand in the shoes of the defendants in the counter claim filed by the respondents. It is submitted that this is the procedure followed by the trial Court when it comes to dealing with a suit in which a counter claim has been raised. From this angle, no prejudice would be caused to the petitioners.

...

Dated: November 25th, 2014

15. The learned Advocate for the respondents has also placed reliance upon the judgment of the Apex Court in the case of *Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others*, . In the said judgment, the Apex Court, while dealing with Order VI Rule 17 of the CPC has observed that the consideration of truth is a matter which needs to be looked into and the amendment which assists the Court in determining the real question in controversy needs to be allowed. If the proposed amendment would not cause an irreparable harm and grave injustice to the other side, the amendment could be allowed subject to certain conditions.

16. In the instant matter, as has also been held by the Apex Court in the case of *Rajesh Kumar Aggarwal (supra)* and in the case of *Bhollepanda (supra)*, the valuable right of the respondent of raising a counter claim is at issue. As noted hereinabove, the pleadings are available in the plaint, notwithstanding the fact that the respondents, through their Written Statement had made the petitioners believe that the defendants did not intend to raise a counter claim and wished to pursue the remedy of seeking specific performance of contract.

17. Now, that the application has been allowed by the trial Court exercising discretion and which, in the light of the above referred judgments of the Apex Court, would result in ensuring that the valuable right of the respondent is not defeated, any inconvenience or prejudice caused to the petitioner can be compensated with costs.

18. The respondent has also relied upon the judgment of the Punjab and Haryana High Court in the case of *Mst. Lakshmi Vs. Dr. Ajay Kumar and Others*, . In the said judgment, the Punjab and Haryana High Court has placed reliance upon its earlier judgment in the case of *Dinesh Kumar Vs. State of Haryana and Others*, , wherein, it was concluded that the plaintiff should be allowed to produce evidence to rebut the evidence led by the defendants.

19. In *Naranjan Singh's* case (*supra*), the Court arrived at a conclusion that a counter claim has to be treated as a cross suit or a separate suit. Therefore, after the defendants lead their evidence on the basis of their cross suit, the presumption is that the evidence has been led by the plaintiff. In that situation, the plaintiff in the said suit would, by fiction of law, step into the shoes of the

defendants and, therefore, will have to be given the right to lead evidence to refute the counter claim.

20. In the light of the above, this petition is partly allowed and the impugned order dated 05-09-2012 passed by the Trial Court below Exhibit 73 in Special Civil Suit No. 81 of 2008 stands modified as under :-

[A] After the respondent herein amends the written statement as permitted by the Trial Court, the petitioners shall be at liberty to file an affidavit to counter the amended written statement.

[B] The trial Court while deciding the Special Civil Suit No. 81 of 2008 shall consider the question of limitation which may arise in view of the counter claim being raised through the amendment. The said issue of limitation shall be dealt with by the trial Court strictly in accordance with law.

[C] The trial Court is expected to frame an additional issue as regards the limitation aspect and pursuant thereto, each of the parties may be permitted to lead evidence.

[D] After the respondents herein have concluded recording of their evidence, the petitioners shall be permitted to lead evidence to controvert the counter suit preferred by the respondents, in the light of the judgment of the Punjab and Haryana High Court in the case of Dinesh Kumar (supra) and Naranjan Singh (supra).

[E] The respondents herein shall deposit costs of Rs. 10,000/- (Rs. Ten thousand only) before the III Civil Judge (Senior Division), Jalna within a period of four weeks from today and the petitioners will be at liberty to withdraw the same without any conditions.