
(2001) 02 BOM CK 0105

In the Bombay High Court

Case No : Writ Petition No. 4730 of 1993

Suglabai Ravayya Jangam and Others

APPELLANT

Vs

Gurusidhya Basayya Jangam

RESPONDENT

Date of Decision : 07-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A
Constitution of India, 1950 — Article 227

Citation : (2001) 2 ALLMR 581 : (2001) 3 BomCR 52 : (2001) 2 BOMLR 388

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

Bench : Single Bench

Advocate : Shri A.A. Kumbhakoni, for the Appellant; Shri G.S. Godbole, for the Respondent

Judgement

A.M. Khanwilkar, J.—This writ petition, under Article 227 of the Constitution of India, is directed against the order passed by the 5th Additional District Judge, Solapur below Exh. 29 in Civil Appeal No. 203 of 1990 dated 24.9.1993.

2. Briefly stated, the Respondent filed suit against the petitioners for permanent injunction. The said suit was decreed by the Trial Court on 31.3.1990. Against the said decree the petitioners preferred an appeal before the District Court, Solapur, being Civil Appeal No. 203 of 1990. During the pendency of the said appeal the Petitioners filed an application below Exh. 29 praying for amendment of their written statement. The nature of amendment prayed by the Petitioners was in effect for setting up a counter-claim against the Respondent - original plaintiff. By the said amendment the Petitioners prayed for declaration against the Respondent-original plaintiff that the Petitioners have right of way from the suit property by easement of necessity and incidentally prayed for injunction. The Court below rejected the said application mainly on the ground that the amendment sought by the Petitioners was barred by limitation. For recording this conclusion the Court has taken into account the fact that the decree passed by the Trial Court was dated 31.3.1990 whereas the proposed amendment

application was moved on 16.6.1993, viz. after 3 years.

3. Mr. Kumbhakoni, learned Counsel for the Petitioners strenuously contends that the cause of action for the proposed amendment is a continuing one; and, therefore, the view taken by the Court below that the proposed amendment was barred by limitation is Inappropriate.

4. After having examined the rival pleadings and the submissions made across the bar, I have no hesitation in upholding the order passed by the District Court of rejecting the amendment application. The Court below, in my view, was justified in observing that even assuming the cause of action had arisen upon passing of the decree dated 31.3.1990, however, the amendment application was moved on 16.6.1993, therefore, the same was barred by limitation.

5. Insofar as the contention advanced on behalf of the Petitioners that the cause of action was a continuing one, the same, in my view, is totally ill founded. In the first place no such relief could be entertained by the Appellate Court; inasmuch as the Appellate Court has no authority to, permit the defendant to raise a counter-claim against the plaintiff at the appellate stage. The counter-claim, if at all, could be permitted, by virtue of Order 8 Rule 6A of the Code of Civil Procedure, before the first hearing of the suit. Reliance has been placed on the reported judgment of the Apex Court in Mahendra Kumar v. State of Madhya Pradesh, to contend that the mandate of law is that the cause of action should arise before the delivery of the defence or before the time limited for delivering of defence has expired. If the petitioners are right in contending that the cause of action had already arisen before the filing of their defence or is a continuing one, in that case they ought to have filed the counter-claim before they had delivered their defence or before the time limit for delivering their defence had expired. On the other hand, the present counter-claim is being pressed into service at the appellate stage, which cannot be permitted in law. Unquestionably, a counter-claim is a substantive remedy available to the defendant; and is not a procedural one, so as to be permitted at any stage of the proceedings, including at the appellate stage, as it is sought to be contended on behalf of the petitioners.

6. Mr. Godbole, learned Counsel for the Respondent relied on judgment in Smt. Parvathamma v. K.R.Lokanath and Ors., [para8] to contend that the counter-claim can be set up before recording of evidence commences and the same cannot be pressed into service after recording of the evidence has already commenced. He also relied on the judgment in Kashi Biswanath Dew. Paramananda Routrai and Ors. to contend that there is bar for preferring a counter-claim long after the filing of the written statement and after closing of evidence in the suit. Reliance is also placed on the decision of this Court in Latitude Shamsuddin v. Pandurang Krishnaji Hole,. In the said decision this Court has held that the application was preferred after expiry of limitation the Court was justified in rejecting the same.

7. Taking any view of the matter It is not open for the Petitioners to amend the pleadings so as to set up a counter-claim against the Respondent -plaintiff at the appellate stage. In the circumstances, I find no reason to interfere with the conclusion reached by the Appellate Court in rejecting the application below Exh. 29.

Petition dismissed. Rule stands discharged. No order as to costs.