

MHKO050037992021



Anjana Khandu Bhandare
Vs.
Dhondiram Shiva alais Shivaji Bhandare &
Ors.

RCS No. 273/2021

ORDER BELOW EXH.38

The present application has been made by the plaintiff seeking exclusion of counter claim made by defendant nos. 1,6,7,8,9 and 10. The present application is made on 15/06/2024. On the same day the defendant's receive copy of the application, however, they did not file say to it till today. Hence, the application be decided without their say.

02. Perused the application and heard Ld. Advocate for the plaintiff.

03. It is submitted that the present suit is instituted for partition, declaration and injunction. Defendant nos. 1,6,7,9, and 10 received suit summons on 02/12/2021 and the suit has been proceeded ex-parte against defendant no.8. It is further submitted that on 05/01/2023 issues has been framed and accordingly on 26/04/2023 the plaintiff has filed affidavit of chief examination on record. Ld. Advocate for the plaintiff submitted that defendant nos. 1,6,7,8,9 and 10 filed their WS alongwith counter claim after the delay of approx One year and Seven month's. He prayed that such delayed counter claim is not tenable as per the provisions of Code of Civil Procedure, it is not within limitation and made with an intention to prolong the matter. Ld. Advocate for the plaintiff relied on the judgment of Hon'ble Apex Court in **Ashok Kumar Kalra Vs. Wing Cdr. Surendra Agnihotri (2020)**. It is prayed that such delayed counter claim be excluded.

04. The present application is made on 15/06/2024 and it is pending since then. Despite giving several opportunities, the defendant's could not file their say on the application. Perused the record, it appears that the present suit has been instituted for partition, declaration and perpetual injunction. Issues has been framed at Exh.31/B. The matter is listed for evidence and accordingly plaintiff filed his evidence affidavit at Exh.35 on 26/04/2023.

05. Ld. Advocate for the plaintiff submitted that there is delay of One year and Seven month's by the defendant's to make counter claim. As per the provision of O.VIII R.6-A of Code of Civil Procedure, the counter claim by defendant is expected to be made within limitation. In the present case, certainly the defendant's have made counter claim with huge delay. I have gone through the judgment of the Hon'ble Apex Court in **Ashok Kumar Kalra Vs. Wing Cdr. Surendra Agnihotri [(2020) 2 SCC 394]**, wherein the Hon'ble Apex Court explained the scope of O.VIII R.6-A of Code of Civil Procedure. It provided parameters which are only illustrative in nature and not exhaustive, which should be taken into consideration while exercising discretion to entertain delayed counter claim. These parameters are as below;

- a) Period of delay,
- b) Prescribed limitation period for the cause of action pleaded,
- c) Reason for the delay,
- d) Defendant's assertion of his right,
- e) Similarity of cause of action between the main suit and the counter claim,
- f) Cost of fresh litigation,
- g) Prejudiced to be opposite party,
- h) Fact's and circumstances of each case, etc.

The judgment in Ashok Kumar Kalra (Supra) is further followed in by Hon'ble Bombay High Court in **Venutai Haribhau Khode (Dead) through her LR's. Vs. Nikanth Lamanrao Ghongade through LR's. & Ors.[2024 SCC OnLine Bom 3453]**.

06. The above mentioned parameters are not exhaustive and each case be decided on it's own merits, facts and circumstances before the Court. In a suit like partition, etc. plaintiff and defendant may share same cause of action and their claims are mutually maintainable against each other. Furthermore, whether to allow or not delayed counter claims is left to the discretion of the Court. In civil cases, strict pleading's and proof without any mistake is not expected. Importance is given to prove existence of the rights, liabilities and mischief.

07. In the light of above discussion, it appears that the counter claim by the defendant's may be allowed, which may help in final adjudication of rights of the parties in the present suit. Hence, the following order;

ORDER

The application at Exh.38 stands rejected.

Date: 22/08/2025.
Place: Ichalkaranji.

Sd/-
(M.S. Gawade)
5th Jt. Civil Judge Junior Division,
Ichalkaranji.