



**ORDER BELOW EX.82
AN APPLICATION FOR AMENDMENT
IN COUNTERCLAIM**

In Reg. C. S. No. : 30 of 2021

CNR : MHRT080004552021

Nilesh Manohar Desai Vs Suresh Janardan Bhoje etc.7

Order Dated : 5th January 2024

1. The present application is filed by defendant No.1 under order VI 17 rule of Code of Civil Procedure ('in short' C.P.C.).
2. It is the case of the defendant no. 1 that they have filed their counter claim at Exh 54. It is claimed that defendant has prayed by way of counterclaim that plaintiff or anyone through him be restrained from obstructing the possession of defendant by demolishing the compound. The cause of action mentioned in counter claim arose when plaintiff filed an application at revenue authority claiming road through suit property or counter claim property. However, it is left to be mentioned in an application. Hence, by way of this application, it is prayed that relief be granted to defendant no. 1 to amend the counter claim and insert lines mentioned in application at Exh, 82. Ld. Adv. Shri.

Dhaval argued that this being formal amendment, they be allowed to amend the counter claim. The affidavit is annexed at Exh. 83 in support of amendment application.

3. Ld. Adv. Shri kadam has filed say of plaintiff at Exh, 84 whereby he pleaded that they have already raised an application at Exh. 69 for exclusion of counterclaim of defendant. Subsequent to that application was raised. Hence, once Exh. 69 is decided, the object to raise Exh. 82 applications would frustrate. Hence, the application at Exh. 69 be decided prior to that.

4. Record shows that my Ld. Predecessor vide detailed order passed below Exh, 84 has directed parties to lead application at Exh. 82 first. Accordingly, plaintiff had filed his say at Exh, 85. It is pleaded that the cause of action has already been mentioned in counter claim. Ld. Adv. Shri Kadam argued that it appears to have arisen after filing of counter claim on 19/07/2022. Hence, counterclaim itself isn't tenable in the eyes of law. Also, it is settled position of law that right accrued in favour of one party cannot be taken away by way of amendment by other party. It is pleaded further that plaintiff obstructed allegedly possession of defendant no. 1 by demolishing the compound on 19/07/2022. However, by way of this amendment, they want to plead that when plaintiff raised an application at revenue authority, cause of action arose at that moment. This cannot

by any stretch of imagination be considered as valid ground for cause of action. Merely for escaping from the clutches of law, this application is raised. Accordingly, it is prayed that application be rejected.

5. Heard advocate Shri. Dhaval for the defendant No. 01 and advocate Shri. A. A. Kadam for the plaintiff.

6. Following points arose for my consideration. They are decided for reasons quoted therein.

Points for consideration

S. N.	Point	Finding
1	<i>Whether the proposed amendment in counterclaim is necessary for the purpose of determining the real question in controversy between the parties?</i>	YES
2	<i>What Order?</i>	Application is allowed

REASONS

7. **AS TO POINT NO. 1 AND 2 :**

I have gone through the provisions of Rule 17 of Order VI of the Code of Civil Procedure. This provision of law gives powers to the Court to allow the parties to amend their pleadings.

8. The cardinal test for deciding an application for amendment is that :

(i) Whether the amendment is necessary for the determination of the real question in controversy ?

(ii) Can the amendment be allowed without injustice to other side ?

If the first condition is satisfied that the amendment is necessary to decide the “real controversy” between the parties, the amendment should be allowed. In other words, if there is no necessity to decide the “real controversy” between the parties, the amendment should not be allowed.

Like the first condition, the second condition is also equally important, according to which, no amendment will be allowed which will cause injustice to the opposite party. It is settled law that the amendment can be allowed if it can be made without injustice to the other side. But it is also a cardinal rule that “there is no injustice if the other side can be compensated by costs. **Following principles to be borne in mind while dealing with the applications for amendment of pleadings.**

- a) Provisions relating to amendment of pleadings must be liberally construed with a view to promote the ends of justice and not to defeat them.
- b) The purpose and object of the rules of pleadings is to decide the real controversy between the parties and not to punish them for their mistakes, negligence or shortcomings.
- c) The exercise of discretionary power must be governed by judicial considerations and the wider the discretion, the greater care and circumspection.
- d) Rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.
- e) The court should not go into correctness or falsity of the case in the amendment, while dealing with the application for amendment.

9. So far as this case is concerned, Ld. Adv. Shri Kadam for plaintiff argued that as per order VIII Rule 6A , counter claim can be set up about any right accruing to the defendant against plaintiff either before or after filling of suit but before defense delivers his defense. Here in this case, defendant no. 1 has filed his written statement at Exh. 35 on 05/01/2022. By way of this amendment, new cause of action is being inserted. Defendant no. 1 is trying

to fill up the lacuna. The amendment may change the nature of suit. It was possible for defendant no. 1 to set up independent suit. This is an attempt to bypass the provisions of law, he argued. Further, cause of action is bundle of rights accrued in favor of party.

10. He placed his reliance upon following authorities

a) AIR 1996 SC 2358, **Radhika Devi vs Bajrangi Singh & Ors.**

The ratio of the above case is that right accrued in favor of one party cannot be taken away by other party by way of amendment.

11. Ld. Adv. Dhaval for defendant no.1 argued that no new cause of action is being inserted. The said cause of action was mentioned in para no. 12 of written statement itself. It was left to be mentioned inadvertently. He relied upon following authorities

a) 2013(6) ALL MR 739, Mr. **Mr. Joao Felicio Rodrigues & Anr. Vs. Mr. Jose Maximiano Rodrigues & Anr.**

I have gone through the said authority. It was discussed in para no 6 that, merely seeking declaration in the context of the earlier relief which were already sought by the petitioner in the counter claim would not itself change either the correctness of the suit or the cause of action. Hence, Id. Judge was not justified in dismissing the application to amend the

counter claim. With all respects, amendment proposed to be made in this case was about the relief cause and not clause relating to cause of action. Hence, the authority has no applicability in this case.

12. Perusal of the written statement at Exh. 35 shows that defendant no. 1 has averred that plaintiff raised an application at revenue authority and it was decided. It was rejected. Thereafter this suit is filed. Hence, nothing new is going to be introduced by way of this amendment. The said fact has already been mentioned in written statement of defendant no. 1. Despite that, it is settled principle of law that the court should be liberal while allowing the amendment. Only caution that has to be taken is that the other side has not to be prejudiced. Here, trial is not yet commenced. Hence, at this moment, it cannot be decided whether the said cause of action is valid or not. No serious prejudice may be caused to plaintiff if the application is allowed.

13. May what be the case or negligence on the part of plaintiffs at the time of filing of suit, however, it will not be appropriate to punish them for lifetime. Valuable civil rights are involved here. The fate of order below Exh. 69 would be depend upon the amendment which defendant seeks to make. Therefore, I think it fit not to let the rules of procedure defeat the substantive rights of plaintiffs. At the same time due to the delay caused in carrying out the amendment heavy costs needs to be imposed. Hence, in

the interest of justice, I deem it fit to allow the application.
Hence, I pass following order.

ORDER

- 1) Application is allowed subject to cost of Rs. 2000/- to be deposited by defendant no. 1 in the Court and it be paid to plaintiff.
- 2) Defendant no. 1 is at liberty to carry out the proposed amendment within 14 days.
- 3) After carrying out the proposed amendment defendant no. 1 shall file amended copy of counter claim .
- 4) After filing of amended copy of counter claim plaintiff will be at liberty to file additional say to the same, if any, within stipulated period.
- 5) Parties to note and comply.

Sd/-

Place : Deorukh.

Date : 05/01/2024

[Shruti H. Patil]

Jt. CJJD, Deorukh

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