

ORDER BELOW EXH.42**(Passed on 26.09.2017)**

1. This is an application filed by the defendant under Order 6 Rule 17 of the Civil Procedure Code for the amendment in the written statement.
2. By way of proposed amendment, the defendant wants to add counter claim in his written statement. The defendant wants to add prayer of decree for possession and inquiry for mesne profits in his counter claim.
3. The defendant submitted that the plaintiff has filed present suit against the defendant sansthan for the relief of declaration and permanent injunction in respect of field survey no.59 now new gut no.272, area 9 Hector 11 R. land of village Gadegaon. It is further submitted that it is contended by the defendant that the plaintiff had obtained possession of disputed field by making collusion with revenue authority and without showing any valid document for tressing his title over the disputed land. The defendant also submitted that the defendant sansthan preferred an appeal before S.D.O., Mangrulpir for quashing the entry of plaintiff's ownership from the mutation register. Said appeal was came to be allowed infavour of him. Therefore, the plaintiff preferred the appeal before Additional Collector, Washim. The Additional Collector, Washim allowed the appeal of present plaintiff.
4. Thereafter, the present defendant went in Appeal before Revenue Commissioner, Amravati. While adjudicating the appeal, the Commissioner, Amravati reached to the conclusion that the dispute appears to be regarding the title and ownership of the disputed field and further observed that one civil suit is pending before the Civil Judge Junior Division, Manora and the Commissioner directed to the parties to get decide the issue of ownership by the hands of the Civil Judge Junior Division, Manora. In view of the order of the Commissioner, Amravati the defendant is moving present application for granting permission to make proposed amendment in written statement which was already filed by the defendant. Hence, prayed for allowing the proposed amendment application.

5. Per contra, the plaintiffs opposed the application on the ground that the reasons mentioned in the application are not genuine. They submitted that the defendant was well known about the suit. Therefore, he has not filed the counter claim along with the written statement. Now only to pressurize the plaintiff, the defendant filed this counter claim. Hence, the suit is not well within limitation and further more, there is no cause of action arose to file the counter claim. Therefore, prayed for rejection of the application with cost.

6. I have given thoughtful consideration to submissions of both the side. Through this application the defendant intends to amend his written statement by adding counter claim in it. The present application is filed after near about 4 years from filing of the written statement. The defendant through this application contending that cause of action arose to him after filing of the written statement.

7. The learned advocate for the plaintiff opposed this application on the ground that the defendant even having knowledge of the present suit, filed this application after lapse of time only to pressurize the plaintiff. It is further contended that the application is filed after limitation is over. In such case I am guided by the **Hon'ble Apex Court in Ramesh Chand Aradawatiya Vs. Anil Panjwani AIR 2003 SC 2508** wherein the Hon'ble Court has held in para no.28 as under:-

Para-28. Looking to the scheme of Order VII 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 counter-claim 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 Civil Procedure Code 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 C.P.C. 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 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 been already been framed and the case set down for trial and more so 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 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.

8. With most due respect to the Hon'ble Apex Court's authority in the above cited authority I would like to submit that in the present case only the issues are framed but trial is yet to commenced. The evidence of the plaintiff is yet to begin. Hence, considering the facts of the case and in view of above authority I am of the view that rejection of application of the defendant might result in the multiplicity of proceeding.

9. Moreover, as per the **Hon'ble Division Bench of Bombay High Court in Mahadeo S/o. Maroti Bhanje Vs. Balaji S/o. Shivaji Pathade reported in 2012 (7) All.M.R. 564** held that the trial in a civil suit commences from the date of filing of affidavit in lieu of the examination in chief of the witness and the proviso to Order 6 Rule 17 of the Civil Procedure Code will come into play after stage of filing of affidavit in lieu of examination in chief of witnesses. Perusal of the record shows that in the present suit only issues are framed and no evidence in the form of affidavit or otherwise is tendered on record. Thus, the evidence of the plaintiff is yet to be started.

10. It is important to note here that after filing of this application the present plaintiffs filed their written statement to the counter claim of the defendant. Moreover, my learned predecessor has also framed the issues on the basis of pleadings of respective parties i.e. on the basis of proposed amendment and its written statement.

11. Looking towards the said contention as well as contention in the present amendment application, it can be said that the proposed amendment is within limitation as Article 137 of the Limitation Act provides that the period of limitation for making of an application is to be computed from "when the right to apply accrues". It is further seen that the proposed amendment appears to be outcome of the subsequent event happened during the pendency of the suit. Thus, if such amendment will be allowed to be taken on record then, it would certainly curtail multiplicity of litigation. The amendment sought appears to be necessary for proper adjudication of controversy between the parties. It is settled principle of law that the merit of proposed amendment cannot be gone into while deciding the amendment application. The same can be decided only during the trial.

12. The learned advocate for the defendant shri. R.D. Thakre opposed the application on the ground that the cause of action to file is lapse as it was started from the date of filing of the written statement but

the defendant is claiming that cause of action arose on 24.06.2011 when the Revenue Commissioner, Amravati had ordered and directed to the party. Hence, this application is well within limitation. The application of the defendant is filed after near about 3 months from the said order. It is important to note here that where there is no limitation period provided in the statute then the period of limitation will be 3 years from the cause of action arose. Hence, I am of the view that the application of the defendant is within limitation.

13. Further it is argued by the advocate for the plaintiffs that if the defendant wants to amend his written statement by adding counter claim then there is option of filing fresh suit. But as per my view if fresh suit can be entertained for the said relief then it will certainly caused multiplicity of proceedings.

14. Perusal of the record shows that there is delay caused in filing the present application. But only on the said ground, the application of the defendant cannot be rejected which is otherwise liable to be allowed. In my view other side can be compensated in terms of costs for the said reason. Hence, in view of the above discussion, I am of the opinion that the present amendment application needs to be allowed. Hence, I pass the following order.

OPERATIVE ORDER

1. The application at Exh.42 is hereby allowed subject to cost of Rs.800/- payable to the plaintiffs.

Date:- 26/09/2017

(R.M. Shaikh)
2nd Jt.Civil Judge Junior Division,
Manora.