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THE HIGH COURT OF MADHYA PRADESH
M.A.No.930/2014
(Jamil Khan & Ors. vs. State of M.P. Ors.)

Gwalior, Dated : 27.02.2019

Shri N.K. Gupta, Senior Advocate with Shri S.D. Singh,
Counsel for the appellants.

Shri R.K. Soni, Government Advocate for the respondents
No.1 and 2/State.

Shri G.S. Chitnis, Counsel for the respondents No.3 to 5.

Shri V.K. Bhardwaj, Senior Advocate with Shri Rohit Batham
and Shri Ajay Raghuvanshi, Counsel for the LR's. of respondent
No.7.

This miscellaneous appeal under Order 43 Rule 1 (u) of CPC
has been filed challenging the order dated 5.9.2014 passed by First
Additional District Judge, Mungawali, District Ashoknagar in Civil
Appeal No.29A/2012 thereby setting aside the judgment and decree
passed by the Trial Court, has remanded the case.

2. The necessary facts for the disposal of the present appeal in
short are that the plaintiffs had filed a suit for declaration of title and
permanent injunction as well as for declaring the orders dated
18.1.2000 and 8.5.2000 passed by SDO, Mungawali as null and void.
The respondent No.7 namely Kaji Makbooluddin had filed a counter-
claim against the plaintiffs as well as defendant No.1. The appellants
filed an application under Order 7 Rule 11 read with Sections 94 and
151 of CPC for dismissing the counter-claim on the ground that not

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only the counter-claim has been filed by one defendant against co-defendant but it is also barred by limitation.

3. The Trial Court by order dated 26.4.2007 allowed the application filed by the appellants under Order 7 Rule 11 of CPC and dismissed the counter-claim filed by the defendant No.7. Being aggrieved by the order dated 26.4.2007, defendant No.7 had filed a miscellaneous appeal which was registered as M.A.No.3/2007. It appears that no interim order was passed in the said appeal, as a result of which, the Trial Court proceeded with the trial. Ultimately, the suit filed by the plaintiffs/respondents was dismissed.

4. Against dismissal of the suit, three regular Civil Appeals No.29A/2012, 30A/2012 and 58A/2012 were filed by appellants as well as by Kaji Makbooluddin and Khalil Ahmed. As the Miscellaneous Appeal No.3/2007 was also pending, therefore, all the four cases were clubbed together.

5. The Lower Appellate Court by impugned order dated 5.9.2014 has held that although the counter-claim filed by the defendant No.7 against defendant No.1 was rightly rejected by the Trial Court but held that the dismissal of the counter-claim filed by the defendant No.7 against the plaintiffs was not in accordance with law and, therefore, set aside the order dated 26.4.2007 passed by the Trial Court. As a consequence thereof, the judgment and decree passed by

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the Trial Court on 20.7.2009 was also set aside and the matter has been remanded back to the Trial Court and has directed that the Trial Court shall consider the counter-claim filed by the defendant No.7 after giving opportunity to the plaintiffs to file their written statement as well as after framing the additional issues would give opportunity of leading evidence and, thereafter, the Trial Court shall pass the judgment and decree afresh. It was further directed that the counter-claim shall be maintainable against the plaintiffs only.

6. Challenging the order passed by the court below, it is submitted by the counsel for the appellants that it is well established principle of law that if any cause of action has arisen after filing of the written statement, then the counter-claim is not maintainable. If the contents of the counter-claim are considered, then it is clear that for the first time the cause of action, according to the defendant No.7 himself, arose on the day when the suit was filed by the plaintiffs i.e. on 8.1.2001 and for the second time it arose on 4.12.2005 when a threat was given by the plaintiffs to dispossess the defendant No.7. It is submitted that the written statement was filed by the defendant No.7 on 24.9.2003 whereas the counter-claim was filed on 7.2.2006. In paragraph 11 of the counter-claim, defendant No.7 has explained the dates on which the cause of action has arisen. Accordingly, the court below has come to a conclusion that since the civil suit was

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filed on 8.1.2001, therefore, the cause of action for filing the counter-claim arose for the first time on 8.1.2001 and thereafter a fresh cause of action had arisen on 4.12.2005. It is submitted that since the counter-claim was filed on 7.2.2006, therefore if the period of three years is calculated from 8.1.2001, then it is clear that the counter-claim had already become barred by time. Further, it is submitted that if the subsequent cause of action as alleged by the defendant No.7 is taken into consideration, then it is clear that the written statement was filed by the defendant No.7 on 24.9.2003 whereas the second cause of action according to defendant arose on 4.12.2005 which is clearly subsequent to filing of written statement and, therefore, it is not permissible. It is further submitted by the counsel for the appellants that for treating the counter-claim within the period of limitation, the Appellate Court has given a finding that since the written statement was filed within three years from 8.1.2001, therefore, it can be said that the counter-claim filed on 7.2.2006 was nothing but it was the clarification or supplementary to the written statement and, thus, the period of limitation from 8.1.2001 has to be calculated in the light of the date of written statement i.e. 24.9.2003 and, accordingly, it has been held by the court below that the counter-claim filed on 7.2.2006 was within the period of limitation. It is submitted that the written statement and the counter-claim are two

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different things. The counter-claim is a separate claim/suit whereas the written statement by no stretch of imagination can be treated as a separate claim/suit. Even otherwise, no relief was sought against the plaintiffs in the written statement. No court fees was paid. Therefore, the court below has committed material illegality by holding that since the written statement was filed on 24.9.2003 and, therefore, the counter-claim filed on 7.2.2006 can be said to be clarification/supplementary to the written statement. Therefore, the findings given by the lower appellate court for holding the counterclaim within the period of limitation are erroneous.

7. *Per contra*, it is submitted by the counsel for the respondents that so far as the question of limitation is concerned, it is a mixed question of facts and law and, therefore, the Trial Court could not have entertained the application filed under Order 7 Rule 112 of CPC. The counter-claim after filing of written statement can be filed and it is maintainable.

8. Heard the learned counsel for the parties.

9. The dates in the present case are not in dispute which can be summarised as under:-

"i- The suit was filed by the appellants on 8.1.2001.

ii- Written statement was filed by the defendant No.7
on 24.9.2003.

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- iii- Counter-claim was filed by the defendant No.7 on 7.2.2006.
- iv- In paragraph 11 of counter-claim, it was pleaded that the cause of action had arisen for the first time on the date of filing of the suit and for the second time on 4.12.2005."

10. If the period of limitation is calculated from 8.1.2001, then it is clear that since the counter-claim was filed after expiry of three years, therefore, it was clearly barred by time and if the contention that cause of action has arisen on 4.12.2005 is considered, then it is clear that the said cause of action had arisen after delivering the defence. The Supreme Court in the case of **Bollepanda P. Poonacha and another vs. K.M. Madapa** reported in **2008 (3) MPHT 110** has held as under:-

"11. In *Gurbachan Singh vs. Bhag Singh and others* [(1996) 1 SCC 770], this Court clearly held:-

"..... the limitation was that the counter-claim or set-off must be pleaded by way of defence in the written statement before the defendant filed his written statement or before time limit for delivering the written statement has expired, whether such counter-claim is in the nature of the claim

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for damages or not."

A belated counter-claim must be discouraged by this Court. See Ramesh Chand vs. Anil Panjwani [(2003) 7 SCC 350]."

11. The Supreme Court in the case of **Vijay Prakash Jarath Vs. Tej Prakash Jarath** by judgment dated 1/3/2016 passed in CA No.2308-2309 of 2016 has held as under:-

"8. It is in these circumstances, that we advert to Order VIII Rule 6A of the Code of Civil Procedure, which is being reproduced below:

"6A. Counter-claim by defendant - (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 counter-claim against the claim of the plaintiff, any right or claim in 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 counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim 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 counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules

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applicable to plaints.”

A perusal of Sub-clause (1) of Section 6A of Order VIII, leaves no room for any doubt, t“8. It is in these circumstances, that we advert to Order VIII Rule 6A of the Code of Civil Procedure, which is being reproduced below:

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Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

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(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.”

A perusal of Sub-clause (1) of Section 6A of Order VIII, leaves no room for any doubt, that the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement. The instant determination of ours is supported by the conclusions drawn in *Bollepanda P. Poonacha & Anr vs. K.M.Madapa (supra)*, wherein this Court observed as under:

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“11. The provision of Order 8 Rule 6-A must be considered having regard to the aforementioned provisions. A right to file counterclaim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. The respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands in question in the summer of 1998. Cause of action for filing the counterclaim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Ryaz Ahmed (supra) is based on the decision of this Court in Baldev Singh Vs. Manohar Singh [(2006) 6 SCC 498].”

(emphasis is ours)

It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the respondent-plaintiff filed the suit (out of which these petitions/appeals have arisen). It is therefore apparent that the appellants before this Court were well within their right to file the counter-claim.”hat the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement. The instant determination of ours is supported by the conclusions drawn in Bollepanda P. Poonacha & Anr vs. K.M.Madapa (supra), wherein this Court observed as under:

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suit but before the defendant has raised his defence. The respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands in question in the summer of 1998. Cause of action for filing the counterclaim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Ryaz Ahmed (supra) is based on the decision of this Court in Baldev Singh Vs. Manohar Singh [(2006) 6 SCC 498].”

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It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the respondent-plaintiff filed the suit (out of which these petitions/appeals have arisen). It is therefore apparent that the appellants before this Court were well within their right to file the counter-claim.”

12. Accordingly, this Court is of the considered opinion that if 4.12.2005 is considered as a cause of action for filing counterclaim, then it is clear that the said cause of action had arisen after 24.9.2003 i.e. when the written statement was filed. Under these circumstances, the counter-claim was not maintainable. If 8.1.2001 is taken to be the crucial date for considering the cause of action, then it is clear that the counter-claim was filed after five years of the same and thus it was barred by limitation.

13. So far as the question that whether the question of limitation is a mixed question of fact and law and whether a suit can be rejected

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under Order 7 Rule 11 of CPC on the ground of limitation are concerned, this Court is of the considered opinion that under a given set of circumstances the question of limitation can be a mixed question of fact and law and under some set of circumstances, it can be a pure question of law. A suit can also be dismissed under Order 7 Rule 11 of CPC on the ground that it is barred by limitation.

14. The Supreme Court in the case of **Hardesh Ores Pvt. Ltd. v. M/s. Hede & Co.** reported in **2007 AIR SCW 3456** has held as under:-

“21. The language of Order VII Rule 11, CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order VII Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint if taken to be correct in their entirety a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed

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earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this court in *Liverpool & London S.P. & I. Association Ltd. Vs. M.V. Sea Success I and another* : (2004) 9 SCC 512 and *Popat and Kotecha Property Vs. State Bank of India Staff Association* : (2005) 7 SCC 510.”

15. Now the only question for determination in the present case is that whether under the present facts and circumstances of the case, the question of limitation can be said to be a mixed question of fact or law or is a pure question of law.

Paragraph 11 of the counter-claim reads as under:-

“11. यह कि प्रतिवादी क्रं.7 को वादकारण वादीगण द्वारा प्रस्तुत वादपत्र से तथा प्रतिवादी क्रं.2 के विरुद्ध वादकारण दिनांक 10.9.2005 को नीलामी का आदेश कर देने से और वादीगण द्वारा प्रतिवादी क्रं. 7 को चने की फसल ना बोने व जबरन कब्जा करने की धमकी दिनांक 4.12.2005 को वमुकाम मुँगावली उत्पन्न है।”

16. Thus, the defendant No.7 himself had claimed that the cause of action had arisen for the first time on the day when the suit was filed i.e. 8.1.2001 and for the second time arose on 4.12.2005 when a threat was extended. In the present case, it is not the case of defendant No.7 that the cause of action is recurring in nature. If 8.1.2001 is considered to be the date for ascertaining the cause of action, then it is clear that the counter-claim was filed after the period of limitation and if the contentions of defendant No.7 that

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another cause of action arose on 4.12.2005 is taken into consideration, then it is clear that the said cause of action had arisen after the defendant No.7 had delivered his defence. Thus, no facts are required to be decided to ascertain that whether the counter-claim is within the period of limitation or not. Under these circumstances, this Court is of the considered opinion that the question of limitation is a pure question of law and is not a mixed question of facts and law.

17. Under these circumstances, this Court is of the considered opinion that the Trial Court did not commit any mistake in dismissing the counter-claim being barred by limitation and not maintainable.

18. So far as the reasoning given by the court below that the counter-claim was nothing but it was a mere clarification/supplementary to the written statement because the contents of both the documents are identical is concerned, the same cannot be accepted. The counter-claim is always treated as a suit and even if the suit filed by the plaintiffs is dismissed because of any default or even if it is withdrawn, then the counter-claim is still required to be adjudicated, whereas, the written statement cannot be treated as a plaint under any circumstance. Furthermore, in the counter-claim the defendant is also required to seek relief and he is also required to make payment of court fees. Counterclaim is a claim opposing the claim of the plaintiff and also seeking further relief

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against the plaintiff. Merely by refuting the claim of the plaintiff, it cannot be said that the defendant has filed his counterclaim. Whenever, a relief is sought against the plaintiff, only then it can be said that the defendant has filed his counterclaim. Written statement containing the similar pleadings without any claim cannot be termed as counterclaim. Thus, unless and until, a claim is made against the plaintiff, the written statement cannot be equated with counterclaim. It is well established principle of law that if the court fees is not paid, then the suit is not maintainable. Under these circumstances, the reason assigned by the court below that the counter-claim can be treated as clarificatory or supplementary in nature to the written statement and since the written statement was filed within the period of three years from the date of first cause of action, therefore, the counter-claim was also within limitation, cannot be allowed to stand. Accordingly, it is held that the counterclaim filed by defendant no.7 was barred by time and if the subsequent cause of action is taken into consideration, then it is clear that counterclaim was not maintainable as the cause of action had arisen after the written statement was filed.

19. Consequently, the order dated 5.9.2014 passed by the First Additional District Judge, Mungawali, District Ashok Nagar in Civil Appeal No.29A/2012 is hereby set aside. The Misc. Appeal No.3/2007 filed by respondent No.7/defendant no.7 Kazi

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Maqbooluddin is hereby dismissed. It is held that the Trial Court had rightly dismissed the counterclaim as barred by time and not maintainable. The matter is remanded back to the Appellate Court to decide the regular civil appeals filed by the plaintiffs as well as defendants on their own merits.

20. The appeal succeeds and is hereby **allowed**.

Arun*

(G.S. Ahluwalia)
Judge