IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 1st OF APRIL, 2023

CIVIL REVISION No. 98 of 2021

BETWEEN:-

1. **SHRI AMBARAM S/O SHRI LAXMAN JI, AGED ABOUT 70 YEARS, PEERJHALAR, TEHSIL BADNAGAR (MADHYA PRADESH)**
2. **SHRI GANPAT S/O SHRI LAKSHMAN JI CASTE GARI, AGED ABOUT 65 YEARS, GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)**

.....PETITIONERS

(BY SHRI BRAJESH KUMAR PANDYA, ADVOCATE)

AND

1. **SHRI JADULAL S/O SHRI RATANLAL JI CHOUDHARY, AGED ABOUT 38 YEARS, OCCUPATION: AGRICULTURIST GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)**
2. **SHRI SUNDARLAL S/O SHRI RATANLAL JI CHOUDHARI CASTE GARI, AGED ABOUT 32 YEARS, OCCUPATION: AGRICULTURE GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)**
3. **SHRI GOKUL S/O SHRI RATANLAL JI CHOUDHARY, AGED ABOUT 30 YEARS, OCCUPATION: AGRICULTURE GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)**
4. **SMT. TAMMBAI S/O SHRI RATNANLAL JI W/O SHRI MUKESHJI CHOUDHARY, AGED ABOUT 34 YEARS, OCCUPATION: AGRICULTURE AND HOUSE HOLD GRAM AATYANA TEH. BADNAGAR (MADHYA PRADESH)**
5. **SHRI DULA S/O SHRI RATANLAL JI CHODHARY, AGED ABOUT 60 YEARS, GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)**

6. STATE OF M.P. THR. COLLECTOR UJJAIN (MADHYA PRADESH)

7. SMT. GANGABAI S/O SHRI RATANLAL JI CHODHARY, AGED ABOUT 62 YEARS, OCCUPATION: AGRICLTURE AND HOUSEHOLD GRAM PEERJHALARTEH. BADNAGAR (MADHYA PRADESH)

.....RESPONDENTS

(SHRI RISHIRAJ TRIVEDI, ADVOCATE FOR RESPONDENTS NO.1, 2, 3, 4 AND 7)

This revision coming on for admission this day, the court passed the following:

ORDER

1] This revision petition has been filed by the petitioners/plaintiffs against the order dated 06/03/2021, passed in Civil Suit No.58-A/2019 by the First Civil Judge, Class-I, Badnagar, District Ujjain (M.P.) whereby the petitioners/plaintiffs' application filed under Order 7 Rule 11 of CPC in respect of the counter claim filed by defendants No.1 to 4 and 7 has been rejected.

2] In brief, the facts of the case are that the plaintiffs have filed a civil suit for declaration and injunction in respect of an agricultural land situated at Village Peerjhalar, Tehsil Badnagar, District Ujjain. The suit was filed on 21/04/2017, initially against the defendants No.1 to 6 only, and subsequently, defendant no.7 was also added. The written statement was filed by defendants No.1 to 3 on 09/08/2017, and since the defendant No.4 was proceeded exparte, his application to set aside the exparte order was allowed and he was directed to file the written statement, hence, the written statement was filed by defendants No.4 and 7 on 22/01/2021, who also filed a counter claim along with defendants No.1 to 3 on the same date i.e., 22/01/2021.

3] In respect of the maintainability of the aforesaid counter claim, the plaintiffs filed an application under Order 7 Rule 11 of CPC contending that the counter claim filed by defendants is barred under Order 8 Rule 6A of CPC for the reason that the defendants No.1 to 3 had already filed their written statements and hence, they cannot be allowed to join in the counter filed by the other defendants. The aforesaid application has been rejected by the learned Judge of the Trial Court holding that since the defendants No.4 and 7 had filed the written statement and the counter claim after they were given an opportunity to file the same, it cannot be said that their counter claim is not maintainable and it would also lead to multiplicity of the litigation.

4] Counsel for the petitioners has submitted that the aforesaid finding recorded by the learned Judge of the Trial Court is erroneous for the reason that the issues in the present case were framed on 09/10/2017 and even in their counter claim, the defendants have stated the date of cause of action to be 15/01/2021. Thus, it is submitted that since the defendants did not seek any leave to file the counter claim as provided under Order 8 Rule 9 of CPC, it ought to have been rejected. In support of his submissions, Shri Pandya has relied upon the decision passed by this court in the case of ***Prem Narayan Vs. Ram Vilash reported in AIR 1992 MP 29*** and in the case of ***Sainik Mining Allied Services Ltd. Vs. Northern Coal Fields Ltd. and others, passed in WP No.12016/2017 dated 03/07/2018.***

5] Counsel appearing for the respondents, on the other hand, has opposed the prayer and it is submitted that no illegality has been

committed by the learned Judge of the Trial Court in rejecting the aforesaid application. It is also submitted that even assuming that the defendants No.1 to 3 were not entitled to file their counter claim along with defendants No.4 and 7 on 22/01/2021 as they had already filed their written statement on 09/08/2017, the counter claim would still survive in respect of defendants No.4 and 7 who had filed the same along with their written statement as they were directed to file the same by the Trial Court. In support of his submission, Shri Trivedi, learned counsel for the respondents has relied upon para No.35 to 37 of the decision of the Supreme Court in the case of ***Mahesh Govindji Trivedi Vs. Bakul Maganlal Vyas and others reported as 2022 SCC Online SC 1390.***

6] Heard learned counsel for the parties and perused the record.

7] From the record, the chronology which can be made out is as follows:-

21/04/2017	The Civil Suit was filed
09/08/2017	Defendant No.1 to 3 filed the written statement
09/10/2017	The issues were framed by the Trial Court
22/01/2021	The written statement filed by defendants No.4 and 7 with the leave of the court.
22/01/2021	In the Counter claim filed by defendants No. 4 and 7, defendants no.1 to 3 also joined.

8] The record also reveals that in between, the defendant No.4 was proceeded exparte which order was also set aside. And, the defendant No.7 was also impleaded as a party defendant and thus, both the defendants No.4 and 7 were also given an opportunity to file their written statement. Admittedly, a joint written statement was filed by

defendants No.4 and 7, whereas in their counter claim, the defendants No.1 to 3 have also joined. Thus, this Court is required to see the validity of the counter claim filed by defendants no.4 and 7 in which the defendants no.1 to 3 also joined despite the fact that they had already filed their written statement way back on 09.08.2017. In this regard, the relevant provisions of Civil Procedure Code, 1908 viz., ***Order 8 Rule 6A and 9 of CPC*** would be worth mentioning here which reads as under:

> "**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 applicable to plaints.
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> **9. Subsequent pleading-**
> No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same. "
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> (emphasis supplied)

9] At this juncture, it would also be fruitful to refer to the decision rendered by the Supreme Court in the case of ***Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350*****,** the relevant para of which reads as under:-

> **"27.** We have already noticed that the defendant was being proceeded ex parte. His application for setting aside the ex parte proceedings was rejected by the trial court as also by the High Court in revision. In *Sangram Singh* v. *Election Tribunal, Kotah* this Court held that in spite of the suit having been proceeded ex parte the defendant has a right to appear at any subsequent stage of the proceedings and to participate in the subsequent hearings from the time of his appearance. If he wishes to be relegated to the position which he would have occupied had he appeared during those proceedings which have been held ex parte, he is obliged to show good cause for his previous non-appearance. It was clearly held that unless good cause is shown and the defendant relegated to the position backwards by setting aside the proceedings held ex parte, he cannot put in a written statement. If the case is one in which the court considers that a written statement should have been put in and yet was not done, the defendant is condemned to suffer the consequences entailed under Order 8 Rule 10. The view taken in *Sangram Singh* by a two-Judge Bench was reiterated and reaffirmed by a three-Judge Bench in *Arjun Singh* v. *Mohindra Kumar*. Certain observations made by this Court in *Laxmidas Dayabhai Kabrawala* v. *Nanabhai Chunilal Kabrawala* are apposite. It was held that a right to make a counter-claim is statutory and a counter-claim is not admissible in a case which is admittedly not within the statutory provisions. The crucial date for the purpose of determining when the counter-claim can be said to have been filed and pleaded as on a par with a plaint in a cross-suit is the date on which the written statement containing the counter-claim is filed. Save in exceptional cases a counter-claim may not be permitted to be incorporated by way of amendment under Order 6 Rule 17 CPC.
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> **28.** Looking to the scheme of Order 8 as amended by Act 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 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC 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 reopening 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 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 filed 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. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the trial court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim."

(emphasis supplied)

10] A perusal of the said provisions of Order 8 of CPC, coupled with the aforesaid decision of the Supreme Court, leaves no manner of doubt that after the written statement has been filed by a defendant,

such defendant cannot be allowed to file the counter claim separately, except with the permission of the court. However, in the present case, it is an admitted fact that defendants No.4 and 7 have filed their written statement jointly on 22/01/2021, whereas in their counter claim, they have also joined the defendants No.1 to 3. Such joining of the defendants no.1 to 3 in the counter claim of the defendants No.4 and 7, when the defendants no.1 to 3 had already forfeited their right to file counterclaim, without the permission of the court, in the considered opinion of this Court is nothing but a back door entry of defendants No.1 to 3 to join in such cause indirectly for which they were precluded to act directly.

11] In such facts and circumstances of the case, this Court has no hesitation to hold that the counter claim so far as it relates to defendants No.1 to 3 is concerned, cannot be countenanced in the eyes of law and is liable to be rejected.

12] So far as the decision of the Supreme Court in the case of ***Mahesh Govindji Trivedi*** (supra) is concerned, on which the counsel for the petitioner has relied upon, the relevant para of the same reads as under:-

> "29. In a conspectus of the aforesaid and while proceeding on the fundamental principles that the rules of procedure are intended to subserve the cause of justice rather than to punish the parties in conduct of their case, we are clearly of the view that the counter-claim in question could not have been removed out of consideration merely because it was presented after a long time since after filing of the written statement. Indisputably, the counter-claim was filed on 07.09.2018 and until that date, issues had not been framed in the suit. In fact, the issues were framed only on 05.12.2018, the very date on which the learned Single Judge in the first round of these proceedings took the counter-claim off the record for no permission/leave having been sought for its

presentation. In appeal against the order dated 05.12.2018, the Division Bench permitted filing of the requisite application seeking permission to file the counter-claim, while taking note of the submissions of the plaintiffs-respondents that they will not raise an objection to such application on the ground that the issues had already been framed and documentary evidence had been presented; and the Division Bench expected the learned Single Judge to deal with such an application on its own merits. Pursuant to the liberty so granted by the Division Bench, the appellant moved the application seeking permission to place the counter- claim on record and in support thereof, filed a detailed affidavit stating specific reasons for which the counter-claim was sought to be filed, including that of avoiding the multiplicity of proceedings. The appellant also pointed out the fact that he was earlier engaged in the dispute concerning succession to the property, which came to be settled in his favour only in the year 2017. The learned Single Judge, while passing the order dated 02.05.2019, did not elaborate much on the other aspects but pointed out the reason for accepting the prayer of the appellant that it would avoid multiplicity of proceedings; and in all fairness to the plaintiffs- respondents, kept all their defences, including as to limitation, specifically open. The said order dated 02.05.2019, even if passed by the learned Single Judge on the very first day of consideration of the application moved by the appellant, had been a just and proper order which was conducive to the proper progression of the proceedings while avoiding multiplicity of litigation. There was no justified reason for the Division Bench to have interfered with the order so passed by the learned Single Judge.

30. In the totality of the facts and circumstances of the present case, we are clearly of the view that neither the requirements of Order VIII Rule 6-A CPC or Rule 95 of the Rules nor the principles enunciated and explained in Ashok Kumar Kalra (supra) operate as a bar over the prayer of the appellant for taking the belatedly filed counter-claim on record, which was indeed filed before framing of issues."

(emphasis supplied)

13] The facts of the aforesaid decision are distinguishable from the case on hand as in the present case the issues were already framed when the defendants no.1 to 3 joined in the counter-claim submitted by the defendants no.4 and 7, as the issues were framed in the year 2017 whereas the counter-claim was filed in the year 2021.

14] However, so far as the counter claim filed by defendants No.4 and 7 is concerned, this Court finds force in the submissions as

advanced by the counsel for the respondents that their counter claim would still survive as it was filed along with their written statement, for which the Trial Court had already permitted.

15] In such circumstances, the revision petition is ***partly allowed*** and the impugned order dated 06/03/2021 is hereby partly set aside so far as it relates to the counter claim filed by defendants No.1 to 3 is concerned, however, the counter claim shall survive so far as it relates to defendants No.4 and 7 only. This Court is of the considered opinion that merely because the issues have been framed and defendants No.1 to 3 have also filed their written statement, it would not bar the other defendants who are filing the written statement for the first time in the Court with the permission of the court, and even subsequent to framing of the issues, their right to file the counter claim as provided under Order 8 Rule 6A of CPC shall survive.

16] Resultantly, the revision petition stands ***partly allowed*** to the extent as herein above.

(SUBODH ABHYANKAR)
JUDGE

krjoshi