Supreme Court of India
Ramesh Chand Ardawatiya vs Anil Panjwani on 5 May, 2003
Equivalent citations: AIR 2003 SC 2508, 2003 (4) ALD 10 SC, 2003 (3) AWC 2511 SC, JT 2003 (4) SC 450, 2003 (4) MhLj 579, (2003) 3 MLJ 26 SC, (2003) 134 PLR 636, 2003 (4) SCALE 652, (2003) 7 SCC 350, 2003 3 SCR 1149, 2003 (2) UJ 1210 SC
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Bench: R Lahoti, B Kumar
JUDGMENT R.C. Lahoti, J.

1. The present lis, having attained the age of 15 years by this time, is one harrowing tale of laws' delays causing frustration in the mind of a suitor who deprived of his property rushed promptly to the Court for vindicating his rights and seeking protection under the arm of law. He faced adjournments and adjournments without any substantial progress at the trial in an over-burdened Trial Court, at the lowest rung of the judicial hierarchy, unable to spare such time as the individual cases demand so as to have a firm grip over the progress of each case. Several revisions taken to the High Court at interlocutory stages of the trial, too contributed to the delay, adding fuel to the fire of the plaintiff's agony. The record of tardy proceedings in the Trial Court, at least at the initial state, reflects the defendant's impunity; he felt that he as beyond the reach of the law, though fortunately such hope of the defendant proved to be only a nightmare. The case has witnessed even contempt proceedings being initiated. Criminal cases too have germinated as off-shoot branches. We have heard the learned senior counsel for the appellant and the respondent appearing in person, controlling the proceedings firmly and with patience, so as to save them from drifting away towards initiation of yet other contempt proceeding. We told the respondent and the learned counsel for the appellant that we shall do justice, as duty bound we are, notwithstanding the fact that we feel hurt by the conduct of the plaintiff respondent appearing in-person, and in our desire to do so we have not acceded to the prayer of the learned senior counsel for the appellant for withholding the hearing in the appeal until the contempt has been purged by the respondent as we felt that withholding the hearing in this appeal would only contribute to further frustration in the parties, add an undeserved length of life to an already old litigation, and may probably give rise to other off-shoot proceedings adding to the bulk of ever-mounting arrears of cases. The root cause of the dispute should first be resolved--we told the two, and that may probably, we hope, terminate the said issues as well. Happily we note, at the end of the hearing in appeal and the proceedings in contempt case that the respondent has felt genuinely repentant, withdrawn all his allegations constituting insinuation on which the contempt notice is founded and tendered an unconditional apology with folded hands craving for justice to be done in the main cause. The contempt proceedings we will deal with separately. This judgment determines the dispute as to civil rights between the parties fully and finally to the extent to which it can.

2. Anil Panjwani, the plaintiff-respondent, (hereinafter Panjwani--for short) filed a suit styled as a suit for 'declaration, possession and permanent injunction' against Ramesh Chand Ardawatiya (defendant-appellant, Ardawatiya--for short). The plaint was presented on 9.2.1987 in the Court of Additional Munsif, Class I, Jaipur City, West Jaipur. The suit property is plot No. 2, area 273.03 square yards (61'6" x 40') described by boundaries in para 3 of the plaint. Briefly stated, the gist of the plaint averments is that on 1.12.1985 Panjwani entered into an agreement for purchase of the

suit property for a consideration of Rs. 4500/- from one Shri Niwas Vaidhya, the then owner of the suit property. A document in writing was executed. Rs. 4000/- were paid by way of earnest. Rs. 500/- were to be paid at the time of registration. Original documents relating to the title of the vendor were passed on to Panjwani. On the date of agreement the plot was lying vacant. In December 1985 Panjwani constructed a boundary wall, desirous of raising construction on the plot in near future. On 8.2.1987, at about 4 p.m., when Panjwani had gone to inspect the plot, he found a mason raising a hutment and two women sitting there. On making enquiries, Panjwani learnt that some construction was proposed to be raised at the behest of Ardawatiya. Neither on that day nor on the following day Ardawatiya could be found out by Panjwani. The suit was filed post-haste on 9.2.1987 for the following reliefs : (i) declaration of plaintiff's title as owner of the suit plot; (ii) restoration of possession from the trespasser-defendant to the plaintiff; (iii) mandatory injunction for removal of the construction raised by the trespasser; (iv) permanent prohibitory injunction from raising any further construction; (v) costs, and (vi) such other relief as the Court may deem fit and proper in the facts and circumstances of the case and to which the plaintiff may be found entitled.

3. The plaint was accompanied by a prayer for issuance of ad-interim injunction under Order 39 Rules 1 and 2 of the CPC preventing the defendant from raising any construction over the suit property.

4. The day on which the plaint was presented, it appears that the presiding Judge was on leave and so the matter came to be placed before an in-charge Judge, may be as per the rules or practice prevalent in the State of Rajasthan. On an application filed by the plaintiff he directed one Shri Pratap Singh, Advocate to be appointed as an Advocate Commissioner to visit the suit property and submit a report as to the factual status thereof. The learned Advocate Commissioner visited the site of dispute from 6 to 7 p.m. on 9.2.1987 itself. The plaintiff-Panjwani and his advocate were present 4 to 5 persons were present on the plot, of whom one was male and others were females. They refused to interact with the Commissioner. Rather they threatened the visitors that their heads will be broken if they entered the plot. The neighbours present apprised the Advocate-Commissioner that a house was proposed to be constructed on the plot. The Advocate Commissioner too formed the same impression by his inspection and evaluation of the site. One Advocate Mr. Mahender Singh Baghela (unconcerned with any of the parties and presumably a resident of that locality) happened to be present. The most material part of the Commissioner's report is a sketch map according to which the plot was an open place of land whereon in the north-west corner there was a hut. Some pieces of stone, of bricks and a heap of sand were lying in different parts of the plot. there was a water tap. The plot was surrounded by a boundary wall.

5. The persons present on the plot and the neighbours who had assembled there refused to sign on the report of the Commissioner though requested to do so. The plaintiff-Panjwani, his advocate--Shri Ram Nath Sharma, and Advocate Shri Mahender Singh present at the site, subscribed to the report.

6. What is significant to note in the Commissioner's report is that there was no construction at the site and certainly there was no house, and no habitation, much less any person or family having been found as residing in any manner on the plot. The grass hut was apparently for use by labourers.

7. On 10.2.1987 the defendant appeared in the Court through his counsel. However, the Presiding Officer was on leave. Though the defendant was served with summons in the suit as also with notice on the prayer for the grant of ad-interim injunction, no written statement or reply was filed on 10.2.1987. The presiding officer was on leave on this day also. The matter was placed before a Judge in-charge. He directed status quo as to the suit property to be maintained restraining the defendant not to proceed with any construction ahead. Thereafter, on 15 dates of hearing the matter was simply adjourned without the defendant having filed any written statement or reply.

8. On 24.2.1987 the plaintiff moved a second application for appointment of yet another Commissioner to carry out inspection of the suit property in the presence of both the parties. It appears that the purpose of the appointment of the second Commissioner was to have a bi-party inspection carried out as the inspection carried out on 9.2.1987 by Shri Pratap Singh, Advocate Commissioner was in the absence of the defendant, and there was some element of urgency involved in the inspection on that day so as to bring on the record of the Court the status of the property on the date of the institution of the suit. Shri S.K. Kataria, Advocate, now appointed as Advocate Commissioner, carried out inspection of the suit property on 25.2.1987 in the presence of the plaintiff and a representative of the defendant, probably his special power of attorney holder. Shri Kataria also drew up a sketch of the suit plot incorporated in his report. The identity of the plot is the same but with a little change as to its status. Building material consisting of bricks, sand and stones were lying on the plot. In the north-west corner, instead of the hut, a temporary kitchen made of bare bricks had come up and in the north-east corner covering an area of 6x12 ft. two small rooms and a platform had come up which were newly constructed. The report drawn up by the Commissioner bears the signature of the plaintiff and the representative of the defendant. Here itself we may observe that the second report by the Advocate Commissioner, the correctness whereof has not been disputed by a defendant at any stage of the proceedings, is prima facie suggestive of two inferences: firstly, that even till the date of bi-party inspection carried out by the Advocate Commissioner the plot was a vacant piece of land on which construction had just commenced and was in the process of coming up; and secondly, the defendant had proceeded with construction work in spite of the interim order of the Court directing status quo as to the suit property to be maintained and specifically restraining the defendant from proceeding with the construction ahead.

9. On 4.6.1988, under the administrative orders of the District Judge, the case came to be transferred to the Court of an Additional Judge. Therefore, the case was adjourned on 29 dates of hearing again without the filing of written statement or reply. At least on 3 dates of hearing the defendant was allowed adjournment on payment of costs of Rs. 40/-, Rs. 50/- and Rs. 250/-. On 29.10.1992 the defendant and his counsel absented from appearance in Court. The case proceeded ex-parte. On 24.7.1993, the date appointed for plaintiff's ex-parte evidence, the defended filed an application under Order 9 Rule 7 of the CPC seeking setting aside of the ex-parte proceedings. On 6.9.1993 the case came to be transferred to another Court under the administrative orders of the district Judge. On 11.5.1994 the Trial Court passed a detailed order holding that the defendant had completely failed in assigning any good cause for his previous non-appearance and therefore the application under Order IX Rule 7 of the CPC was liable to be dismissed. It was dismissed accordingly. The plaintiff examined three witnesses in ex-parte evidence including himself and his

vendor. Though such ex-parte evidence was recorded piecemeal on at least three dates of hearing, the defendant or his counsel were not present and did not participate in the proceedings. The arguments of the counsel for the plaintiff were heard and judgment was reserved. In-between the defendant had preferred a Civil Revision No. 1202/94 laying challenge to the order dated 11.5.1994. Vide order dated 20.3.1995, the Civil Revision filed by the defendant was directed to be dismissed by the High Court.

10. On 25.3.1995, the defendant moved an application labelled as one under Order 18 Rule 17 of the CPC submitting that the defendant had not cross-examined the plaintiff's witnesses because of the pendency of his civil revision in the High Court and as the civil revision was dismissed he may be given opportunity of cross-examining the plaintiff's witnesses. On 2.5.1995, the Court allowed defendant's application subject to payment of costs and subject to the term that before the cross-examination is commenced the plaintiff will have a right, if he so desires, to put to his witnesses additional questions by way of examination-in-chief.

11. At this stage, the In gentility of the defendant-appellant comes into play. On 2.5.1995, he moved an application proposing to place on record a 'written statement under Order 8 Rule 6A of CPC'. It was alleged therein that the plaintiff was claiming the suit premises under an agreement dated 1.12.1985 entered into by Shri Niwas Vaidhya based on letter of allotment dated 26.6.1980, issued by Sindhunagar Co-operative Society Ltd., which letter of allotment is false and forged and, therefore, it has become necessary to have declared the letter of allotment dated 26.6.1980 and the agreement dated 1.12.1985 null and void. Copies of the application seeking leave of the Court to file the written statement by way of counter claim and the accompanying counter claim, were delivered to the plaintiff's counsel, calling upon him to file a reply.

12. While the above proceedings were going on in the trial Court, the order dated 2.5.1995 was put in issue by the plaintiff-Panjwani by filing civil revision in the High Court. By order dated 16.1.1996 the revision was allowed. The order dated 02.05.1995 was set aside. However, the High Court directed the President and Secretary of the Society which had allotted the plot to be examined as court witnesses along with the relevant records of the society. A marathon race began between the Court and the Society. The Court was seeking production of the record so as to enable recording of the statements of the office-bearers of the society as court witnesses to comply with the directions of the High Court. Several past officers of the society and their successors, as were ascertainable were summoned one after other. None admitted the availability of the records with him and each one went on passing on the buck to the other. The office-bearers of the Cooperative Department and the administrator appointed in supersession of the society were also summoned but the records were just not traceable. At the end, on 21.12.2000 after making a reference to the High Court soliciting directions, the Trial Court held that the direction earlier made by the High Court was not possible of compliance for want of records. The evidence was closed as permitted by the High Court in its order dated 11.10.2000 responding to the reference, also directing the case to be decided within three months in view of the previous delay. The arguments were heard. At that stage the defendant moved an application seeking leave of the Court for examining his witnesses. In view of the peculiar facts and circumstances of the case, especially the fact that the application was highly belated, and that too in the background of the event that his application under Order 9 Rule 7 of the CPC was rejected

upto the High Court and his counter-claim was not taken on record, the Court, by order dated 4.11.2000, turned down the defendant's prayer for production of his evidence.

13. The order dated 4.11.2000 whereby the Court had refused the defendant an opportunity of adducing evidence was put in issue by the defendant by filing a revision in the High Court. The defendant failed to produce any order of stay from the High Court. The Trial Court noticed in its order dated 21.12.2000 the previous order of the High Court dated 11.10.2000 whereby the High Court had directed the case to be disposed of within a period of three months, which time-limit was coming to an end. By judgment and decree dated 8.1.2001 the Trial Court directed the suit filed by the plaintiff to be decreed. The plaintiff was declared owner of the suit plot and the defendant was directed to restore possession of the plot within a period of one month from the date of the decree failing which the plaintiff would be entitled to have the encroachment and the illegal construction whatever be of the defendant, to be demolished and removed at the cost of the defendant.

14. The defendant preferred First Appeal against the judgment and decree dated 8.1.2001 which was registered as FA No. 3/2001. It was heard and dismissed by Fifth Additional District Judge, Jaipur, by judgment and decree dated 7.3.2001. The defendant preferred Second Appeal which was dismissed in limine on 16.4.2001, by the High Court forming an opinion that the appeal did not involve any substantial question of law within the meaning of Section 100 of the CPC. An application under Order 41 Rule 27 of the CPC filed by the defendant before the First Appellate Court seeking production of certain documents by way of additional evidence was rejected by the First Appellate Court as in its opinion no case for admission of additional evidence was made out. The High court found no fault with the view so taken by the learned Additional District Judge.

15. This SLP by the defendant has been filed on 28.4.2001. On 16.7.2001 a two-Judges Bench of this Court directed notice in SLP to be issued. On that day the plaintiff-Panjwani too was present in-person, having filed a caveat opposing the special leave petition. The Court allowed him time to file counter-affidavit and ordered 'status quo as of that day to continue.'

16. The hearing in this court has an unpleasant flavour as there have been contempt proceedings drawn up as an off-shoot to this appeal and the case has shifted for hearing amongst different Benches.

17. We have heard the learned senior counsel for the petitioner and the respondent present in-person with the understanding that the appeal shall be heard and disposed of finally to which they have agreed.

18. The learned senior counsel for the appellant has made several submissions which can be grouped into three: (1) that the Civil Court did not have jurisdiction to try the suit and the plaintiff should have been relegated by the Trial Court to pursue his remedy before the authority/tribunal competent to adjudicate upon such dispute under the provisions of the Rajasthan Cooperative Societies Act, 1965; (2) that even if the defendant was being proceeded ex-parte his counter-claim should have been taken on record and heard and decided on merits; failure to do so has occasioned a failure of justice; and (3) that even in the proceedings ex-parte against the defendant the plaintiff

was not entitled to the decree as prayed for.

19. We find, as would be dealt with hereinafter, the first two pleas devoid of any merit, but partial merit in the last plea. As to the first submission, we find that the Civil Court does not suffer from any inherent lack of jurisdiction. Where there is a special Tribunal conferred with jurisdiction or exclusive jurisdiction to try particular class of cases even then the Civil Court can entertain a civil suit of that class on availability of a few grounds. An exclusion of jurisdiction of Civil Court is not to be readily inferred. (See Dhulabhai etc. v. State of Madhya Pradesh and Anr. - (1963) 3 SCR 662). An objection as to the exclusion of Civil Court's jurisdiction for availability of alternative forum should be taken before the Trial Court and at the earliest failing which the higher Court may refuse to entertain the plea in the absence of proof of prejudice.

20. Sections 75 and 137 of Rajasthan Cooperative Societies Act, 1965 provide as under:

75. Disputes which may be referred to arbitration. - (1) Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management, or the business of a co-operative society arises -

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society, or

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the society, or

(d) between the society and any other co-operative society,

(e) between the society and the surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society or with whom the society has or had transaction under Section 66, whether such a surety is or is not a member of a society, such dispute shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute.

(2) For the purposes of Sub-section (1), the following shall be deemed to be disputes touching the constitution, management or the business of a co-operative society, namely:-

(a) a claim by the society for any debit or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;

(b) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the

default of the principal debtor, whether such debt or demand is admitted or not;

(c) any dispute arising in connection with the election of any officer of the society.

(3) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of a co-operative society, the decision thereon the Registrar shall be final and shall not be called in question in any court.

137. Bar of jurisdiction of courts. -

(1) Save as provided in this Act, no civil or revenue court shall have any jurisdiction in respect of. -

(a) the registration of a co-operative society or of an amendment of a bye-law;

(b) the removal of a committee;

(c) any dispute required under Section 75 to be referred to the Registrar; and (2) While a co-operative society is being wound up, no suit or other legal proceedings relating to the business of such society shall be proceeded with, or instituted against, the liquidator as such or against the society or any member thereof, except by leave of the Registrar and subject to such terms as he may impose.

(3) Save as provided in this Act, no order, decision or award made under this Act shall be questioned in any court on any ground whatsoever.

21. In the present case there is nothing to show that the defendant is also a member of the Society or claiming under a member. The plaintiff does not have any dispute with another member of the Society or the Society itself. The question of jurisdiction is to be determined primarily on the averments made in the plaint. The plaint as framed by the plaintiff is for declaration of title as owner (and in the alternative, his possessory title) and seeking restoration of possession, as also issuance of mandatory and preventive injunctions against a recent encroachment. Neither is it a dispute between the parties referred to in Clauses (a) to (e) of Sub-section (1) of Section 75, nor does the nature of the dispute fall in Clauses (a) to (c) of Sub-section (2) of Section 75, so as to be one excluded from the domain of a Civil Court. At no stage of the proceedings has the defendant-appellant taken any objection to the jurisdiction of the Civil Court to try the suit. We are not satisfied--even prima facie--to hold that the Civil Court suffered from any jurisdictional incompetence to hear and try the suit. Several revision petitions were preferred in the High Court against the orders passed at several stages of the proceedings of the Trial Court. An objection to the jurisdiction of the Trial Court was not taken before the High Court in any of the civil revisions. It will be too late in the day to permit such an objection being taken and urged at the hearing before this Court. The plea as to want of jurisdiction in the Trial Court is devoid of any merit and is, therefore, rejected.

22. As to the second submission, placing strong reliance on two decisions of this Court, namely, Mahender Kumar and Anr. v. State of Madhya Pradesh and Ors. - and Shanti Rani Das Dewanji v. Dinesh Chandra Day - , the learned senior counsel for the appellant submitted that it is permissible to prefer a counter-claim even subsequent to the filling of the written statement and the Trial Court was, therefore, not justified in refusing to take cognizance of the counter-claim filed by the defendant and to try it on merits solely on the ground that the case had proceeded ex-parte and the counter claim was sought to be pleaded belatedly without a written statement being on record placed by the defendant.

23. The learned senior counsel for the appellant submitted that although the defendant-appellant had not filed a written statement and though the case was proceeded ex-parte against him, still, if the defendant had filed a counter-claim admissible and entertainable within the meaning of Order VIII Rule 6A of the CPC, it ought to have been entertained and tried, and failure to do so has occasioned an irreparable prejudice to the defendant-appellant. Order VIII Rule 6A does not provide for any stage for filing a counter-claim, and assuming that there was a delay yet the loss of time could been compensated for by awarding of suitable costs, but the counter-claim should not have been refused to be entertained and tried, submitted the learned senior counsel. He prayed that the least relief which should be allowed to the appellant is to direct the counter-claim being taken on record and the entire case then remanded to the Trial court for hearing and decision afresh in the light of the counter-claim filed by the defendant-appellant.

24. Order VIII of the CPC deals with 'written statement, set off and counter-claim'. We would like to state, by way of clarification, that the provisions of CPC which are being considered herein are as amended by Act No. 104 of 1976 only, (excluding from consideration the amendments incorporated by Act No. 46 of 1999 with effect from 1.7.2002). According to Rule 1 of Order VIII the defendant shall, at or before the first hearing or within such time as the Court may permit, present a Written Statement of his defence. Under Rule 2 the defendant must raise by his pleadings inter alia all matters which show the suit not to be maintainable and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Under Rule 6 the defendant may at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off subject to certain limitations. Rules 6A, 6B and 6C (introduced by the Amendment Act, 1976) read as under:-

"6A.(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 counterclaim against the claim of the plaintiff, any right (SIC) respect of a cause of action accruing to the defendant against the plaintiff either before or after the filling of the suit but before the defendant has delivered his defence of before the time limited for delivering his defence has expired whether such counterclaim is in the nature of a claim for damages or not;

Provided that such counterclaim shall not exceed the pecuniary limits of jurisdiction of the Court.

(2) Such counterclaim 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 counterclaim.

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

(4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints.

6B. Where any defendant seeks to rely upon any ground as supporting a right of counterclaim, shall, in his written statement, state specifically that he does so by way of counterclaim.

6C. Where a defendant sets up a counterclaim and the plaintiff contends that the claim they raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counterclaim may be excluded and the Court may, on the hearing of such application make such order as it thinks fit."

(emphasis supplied)

25. Under Rule 8 any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counter-claim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Under Rule 9 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 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.

26. A perusal of the abovesaid provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counter-claim. The relevant words of Rule 6A are--"A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6,.....before the defendant has delivered or before the time limited for delivery of defence has expired". These words go to show that a pleading by way of counter-claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the written statement. The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither the written statement can be filed as of right nor a counter-claim can be allowed to be raised, for the counter-claim under Rule 6A must find its place in the written statement. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defended, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.

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 consequence entailed under Order VIII Rule 10. The view taken in Sangram Singh (supra) by two-Judges Bench was reiterated and re-affirmed by three-Judges Bench in Arjun Singh v. Mohinder Kumar and Ors. - . Certain observations made by this Court in Laxmidas Dayabhai Kabrawala v. Nandbhai Chunilal Kabrawala and Ors. - , 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 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 VI Rule 17 of the CPC.

28. Looking to the scheme of Order VIII 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 CPC 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 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 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 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 felled to file any written statement and also having forfeited his right to 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.

29. The purpose of the defendant which was sought to be achieved by moving the application dated 2.5.1995 under Order VIII Rule 6A of the CPC was clearly mala fide and an attempt to reopen the proceedings, including that part too as had stood concluded against him consequent upon rejection of his application under Order IX Rule 7 of the CPC. Fortunately, the Trial Court did not fall into the defendant's trap. If only the Trial Court would have fallen into the error of entertaining the counter-claim the defendant would have succeeded in indirectly achieving the reopening of the trial in which effort, when made directly, he had already failed. There being no written statement of the defendant available on record and the right of the defendant to file the written statement having been closed, finally and conclusively, he could not have filed a counter-claim.

30. In Mahender Kumar and Anr's case (supra) counter- claim was sought to be brought on record after the filling of a written statement which was turned down by the Trial Court upon a misreading of Rule 6-A(1) that the counter-claim filed after the filing of the written statement was ipso facto not maintainable. This Curt upset such erroneous view by clarifying the legal position, apparent on a bare reading of the relevant provision that the only requirement of Rule 6-A(1) was that the cause of action for the counter-claim should have arisen before the filing of the written statement and if that was so, the counter-claim was not simply excluded. In Shanti Rani Das Dewanji's case (supra), the brief order of this Court deals with the situation that the right to file a counter-claim does not come to an end by filing of the written statement once. None of the two decisions deals with a situation as before us and the question of law arising therefrom namely whether it is permissible to raise and plead a counter-claim though the defendant has not filed a written statement and has also lost his right to file the same. On the contrary, in both the cases cited by the learned senior counsel for the appellant, there was a written statement filed by the defendant available on record and the counter-claim was sought to be pleaded in addition to the defence taken in the written statement. It is difficult to conceive the defendant being conferred with a right to attack the plaintiff by way of a counter-claim in that very suit in which he has been held entitled not even to defend himself by filing a written statement and pleading a positive defence to defend himself against the relief sought for by the plaintiff.

31. We may, however, hasten to observe that the averments made in the counter-claim were prima facie false. As we have already noticed that on the date of the institution of suit on 9.2.1987 an independent Local Commissioner, who was also an officer of the Court being an Advocate, had carried out inspection of the suit property and had found nothing built-up thereon. Surprisingly one of the pleas raised in the counter-claim is that the defendant had got the plot allotted to him in the

year 1980 and soon thereafter a house was constructed on the plot and his family was living therein which story is a blatant lie in view of the reports dated 9.2.1987 and 25.2.1987 filed by two different Advocate Commissioners, the later one being bi-party and none having been disputed so far as the correctness of facts found and recorded therein is concerned.

32. The third and the last submission of the learned senior counsel for the appellant is that even if the suit proceeds for hearing ex-parte, the Court is not absolved of its duty of deciding the case in accordance with law; rather an additional obligation is cast on the Court to act with caution and be watchful to see that in the absence of any opponent, the plaintiff does not succeed in achieving what he is not entitled to or which he does not deserve, and that in no case he succeeds in over- reaching the Court. On two counts the Trial Court has unwittingly fallen into error, submitted the learned senior counsel for the appellant; firstly, that the plaintiff being entitled to further relief of specific performance his suit for mere declaration of title, recovery of possession and injunction was not maintainable, and secondly, that on the averments made in the plaint the appropriate remedy of the plaintiff was to have filed a suit for specific performance of the contract for sale in his favour entered into by Shri Niwas Vaidhya and unless and until he had perfected his title by execution of sale deed he could not have been declared the owner of the property.

33. So far as the plea of bar as to maintainability of suit for failure to seek further relief is concerned, we cannot find fault with the plaint as framed. The defendant was alleged to be a rank trespasser who was in the process of committing a trespass and was allegedly raising unauthorized construction over the property neither owned nor legally possessed by him. The relief of specific performance is not a further relief to which the plaintiff is entitled or which he could have sought for against this defendant. Thus, from the point of view of the present defendant, we cannot find any such defect or infirmity in the relief sought for by the plaintiff as would render the suit not maintainable and liable to be thrown out at the threshold. But there is substance in the other limb of this submission made by the learned senior counsel for the defendant-appellant. Even if the suit proceeds ex-parte and in the absence of a written statement, unless the applicability of Order VIII Rule 10 of the CPC is attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex-parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX Rule 5. Yet the Trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex-parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

34. A contract for sale does not confer title in immovable property. Section 54 of the Transfer of Property Act provides that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties; it does not of itself, create any interest in or charge on such immovable property. However still, if a person has entered into

possession over immovable property under a contract for sale and is in peaceful and settled possession of the property with the consent of the person in whom vests the title, he is entitled to protect his possession against the whole world, excepting a person having a title better than what he or his vendor possesses. If he is in possession of the property in part performance of contract for sale and the requirements of Section 53A of the Transfer of Property Act are satisfied, he may protect his possession even against the true owner. (See - Shrimant Shamrao Suryavanshi and Anr. v. Pralhad Bhairoma Suryavanshi (dead) by LRs and Ors.,). Section 6 of the Specific Relief Act, 1963, provides for any person dispossessed without his consent of immovable property otherwise than in due course of law being entitled to claim and successfully sue for recovery of possession thereof, notwithstanding any other title that may be set up in such suit if the suit is brought before the expiry of six months from the date of dispossession except against the Government. Article 64 of Limitation Act 1963 contemplates a suit for possession of immovable property based on previous possession, and not on title, being brought within twelve years from the date of dispossession. Such a suit is known in law as a suit based on possessory title as distinguished from proprietary title. The law discourages people from taking the law into their own hands, howsoever good and sound their title may be. Possession is nine points in law and law respects peaceful and settled possession. Salmond states in Jurisprudence (12th Edition)-

"These two concepts of ownership and possession, therefore, may be used to distinguish between the de facto possessor of an object and its de jure owner, between the man who actually has it and the man who ought to have it. They serve also to contract the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature." (P.59) "In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law. Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)." (P.60)

35. The law in India is not different. In Nair Service Society Ltd. v. K.C. Alexander and Ors. - , the Court held--"the uniform view of the courts is that if Section 9 of the Specific Relief Act is utilized the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one.

The present amended Article 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. (Para 14) The Court further held-- "When the facts disclose no title in either party, possession along decides." The submission that a suit on bare possession cannot be maintained after the expiry of 6 months was termed by the Court as 'unsubstantial' and the plea that a trespasser has a right to plead jus tertii was branded as 'equally unfounded' by this Court (vide para 15). M. Hidayatullah, J., as His Lordship then was, speaking for the Court quoted with approval the maxim "Possessio contra omnes valet praeter eu cul lus sit possessionis (He that hath possession hath right against all but him that hath the very right). (Para 20) Taking stock of English decisions and having noted what appeared to be a title divergence in jurisprudential thoughts, His Lordship opined that the controversy must be taken to have been finally resolved by Perry v. Clissold, 1907 AC 73 wherein the principle was stated quite clearly as under:- "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for every extinguished and the possessory owner acquires an absolute title." (p.1174) The conclusion in that case was summed up by this Court by holding that the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him (in whom vested the ultimate title); the action of the defendant was a violent invasion of his possession and in the law as it stands in India the plaintiff could maintain a possessory suit under the provisions of the Specific Relief Act, in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. Any view to the contrary, in the opinion of this Court, would be detrimental to the rule of law as the Court, borrowing from Erl J. in Burling v. Read (1848) 11 QB 904, held that where none has title and both the parties are trespasses, the title must be outstanding in a third party and then the defendant will be placed in a position of dominance. He is only to evict the prior trespasser and sit pretty pleading that the title is in someone else. "Parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning." This will be subversive of the fundamental doctrine which has always been accepted and re-affirmed in 1907 AC 73. The law does not countenance the doctrine of "findings keepings".

36. So, the person in possession may not have title to the property yet if he has been inducted into possession by the rightful owner and is in peaceful and settled possession of such property he is entitled in law to protect the possession until dispossessed by due process of law by a person having a title better than what he has. A person in possession of the property cannot be forcibly dispossessed by another rank trespasser and even if the latter does so, the former may be entitled to restoration of possession, because the law respects peaceful possession and frowns upon the person who takes the law in his own hands.

37. In the present case, in the ex-parte proceedings the plaintiff examined himself as PW1. He proved the contract for sale dated 1.12.1985 (Exhibit P/1) entered into between Shri Niwas Vaidhya

and himself. The original letter of allotment from Society (Exhibit P/2) handed over to him by his predecessor-in-title was tendered in evidence. He deposed to having been inducted into possession of the plot by Shri Niwas Vaidhya and having constructed the boundary wall in December 1985. He stated that he was the person rightfully entitled to the plot and yet was sought to be dispossessed by the defendant otherwise than in due course of law. Narinder Singh Rathore, PW2 proved the notorization of the agreement (Exhibit P.1). Late Kishanlal, the father-in-law of Narinder Singh Rathore, PW2 was the Notary Public who had expired on 7.12.1993, sometime before the date of recording of ex-parte evidence. He brought with him the Notary Register Exhibit P/B maintained by late Kishan Lal and proved the same, also tendered the copy thereof in the Court. Shri Niwas Vaidhya, PW3 proved the allotment of plot in his favour by the Society and his having entered into agreement for sale of the plot with the plaintiff followed by delivery of possession pursuant to the agreement. He further deposed that till the date of agreement he was in possession of the plot and ever since the date of the agreement the plot was in possession of the vendee (the plaintiff), the actual possession having been delivered by him. Shri Krishan Chand Kataria, Advocate, appeared as PW4 and proved his inspection report dated 25.2.1987 based on the inspection carried out by him in the presence of both the parties. There is no reason to doubt the correctness of this report.

38. From the above evidence it is proved that the title of the plot vests in Shri Niwas Vaidhya. He has entered into contract for sale for consideration in favour of the plaintiff. Upto 1.12.1985 he was in possession of the property. Or and after 1.12.1985 the plaintiff remained in possession of the plot. He raised a boundary wall to protect the possession as a prospective vendee. The contract for sale was acted upon. The defendant has not been able to prove any right to possess the suit property--a right better than that of the plaintiff--much less a title in himself. This is an appropriate case where the plaintiff must be held to have been in peaceful and lawful possession of the suit property invaded upon by the defendant otherwise than by due process of law and hence the status quo ante by reference to the date of accrual of cause of action must be restored followed by incidental and consequential reliefs of injunctions. The defendant may then seek recovery of possession but only by establishing his title therefore in duly constituted legal proceedings before a competent forum. The plaintiff had rushed to the Court without any loss of time. His averments made in the plaint and the evidence have remained uncontroverted and unrebutted.

39. On the proven facts stated hereinabove the plaintiff is not entitled to a declaration that he is owner of the property. It will not be out of place of mention that it was conceded at the Bar during the course of hearing that the plaintiff has filed as suit for specific performance of agreement to sell dated 1.12.1985 against Shri Niwas Vaidhya which is pending in the Civil Court. The suit had to be filed because Shri Niwas Vaidhya fully supporting the plaintiff upto the date of his being examined in the Court seems to have changed his mind subsequently. There is no pleading and no proof of the defendant having any title - much less a title better than that of the plaintiff - to the suit property. He could not have dispossessed the plaintiff nor interfered with the peaceful possession and enjoyment of the plot by the plaintiff. The plaintiff is, therefore, entitled to a declaration of his possessory title that he was in peaceful possession and enjoyment of the property until 8.2.1987 on which date his possession was threatened by the defendant by attempting to raise unauthorized construction over the property. The judgment and decree passed by the Trial Court and maintained by the First Appellate Court and the High Court need to be modified suitably to bring it in

conformity with the finding arrived at by us herein.

40. The appeal filed by the defendant is partly allowed. The decree of declaration that the plaintiff-respondent is owner of the suit property is set aside. Instead it is declared that from 1.12.1985 to 8.2.1987 the plaintiff was in peaceful possession of the suit plot pursuant to agreement dated 1.12.1985 entered into by Shri Niwas Vaidhya, the allottee of the plot from the Society, in favour of the plaintiff. The plaintiff is also entitled for mandatory and permanent preventive injunctions. It is ordered and decreed that the construction, if any, raised by the defendant on the plot and the hutment raised by his labourers shall be removed by him and the possession over the plot shall be restored to the plaintiff. The defendant is permanently restrained from interfering with the possession of the plaintiff over the suit plot except by due process of law. The suit filed by the plaintiff shall be deemed to have been decreed by the Trial Court in the abovesaid terms. The Trial Court shall draw up a decree consistency with this judgment. The costs shall be borne by the defendant-appellant upto the High Court. The costs in this Court shall be borne as incurred.