

MAHESH GOVINDJI TRIVEDI

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v.

BAKUL MAGANLAL VYAS & ORS.

(Civil Appeal No. 7203 of 2022)

OCTOBER 12, 2022

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[DINESH MAHESHWARI AND ANIRUDDHA BOSE, JJ.]

Code of Civil Procedure, 1908 – Or.VIII, r.6-A – Counter-claim by defendant – Bombay High Court Rules – r.95 – Suit for specific performance filed by respondent-plaintiff – Notice of motion moved by the appellant-defendant to take the belatedly filed counter-claim on record, allowed by Single Judge – Order set aside by Division Bench – On appeal, held: Rules of procedure are intended to subserve the cause of justice rather than to punish the parties in conduct of their case – 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 – On facts, neither the requirements of Or.VIII, r.6-A or r.95 of the Rules nor the principles enunciated and explained in Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri and Ors. reported as [2019] 17 SCR 214 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 – Further, impact of the order dtd.26.02.21 passed by Supreme Court (in relation to the incidental proceedings pertaining to the suit) on the procedural aspect concerning pleadings has clearly been that existence of the counter-claim on record was taken by this Court as a fait accompli, and this order left a little, rather nil, scope for upsetting the existing pleadings – Also, in this order, Supreme Court emphasised for expeditious proceedings – There was no reason for re-opening of the question relating to the filing of counter-claim after the said order – Even when the said order was placed before the Division Bench, it did not consider its purport and meaning as also its impact on the suit proceedings and on the question of filing of counter-claim and proceeded in a rather cursory manner in directing reconsideration of the prayer of the appellant for taking the counter-claim on record – It did not consider the relevant aspects of the proceedings in the suit and the law applicable thereto as also without considering the likely impact of

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- A *its order on the proceedings, which had already taken place and which were under progress – Order passed by the Division Bench is set aside while that of the Single Judge is restored – Pleadings.*

Allowing the appeal, the Court

- B **HELD: 1.1** In order dated 26.02.2021, this Court took note of the submissions made by the parties, including the anxiety of the appellant to dispose of the property in view of his advanced age as also the undertaking of the prospective purchasers to abide by the outcome of the suit. After interacting with the learned counsel for the concerned parties, this Court passed the order
- C delineating the conditions agreed upon by the appellant and the prospective purchasers. This Court also took note of the apprehension expressed on behalf of the plaintiffs-respondents about the legal heirs of the appellant later on claiming rights in the property and counter submissions in this regard on behalf of the appellant. Thus, having settled the matter relating to the
- D prayer of the appellant for leave to transfer the right, title and interest in the property in question, this Court expected all the parties to extend the co-operation in early disposal of the suit as already directed by the Division Bench of the High Court. [Para 6][578-E-H; 579-A]
- E **1.2** The rules of procedure are intended to subserve the cause of justice rather than to punish the parties in conduct of their case. 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.
- F 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
- G 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
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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 counterclaim 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. In the totality of the facts and circumstances of the present case, 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* 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. [Paras 14, 14.1][589-D-H; 590-A-D]

Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri and Ors. (2020) 2 SCC 394 : [2019] 17 SCR 214 – relied on.

1.3 Apart from the above, there are a few other reasons, for which the impugned order of the Division Bench to be wholly unjustified. In the order dated 26.02.2021, this Court had provided for expeditious proceedings while taking note of the submissions of the parties and while ensuring that even if the appellant shall

- A transfer his right, title and interest to third parties, such transferees will not seek filing of further pleadings and shall remain bound by the proceedings of the suit in question. In that context, it was provided that the proposed purchasers shall be impleaded in the suit; and their undertaking was also recorded that they will adopt the written statement and counter-claim filed by the appellant and will not make any request for filing further written statements or independent written statement as such. This Court further provided that the suit shall proceed from the stage where it was pending and the proposed purchasers will not move any application for filing independent evidence/document.
- C [Paras 15, 15.1][590-E-H]

- 1.4 True it is, as contended on behalf of the respondents, that the subject matter of the said SLP before this Court was of the proposition of the appellant to transfer the suit property to a third party and not regarding the permissibility to file counter-claim but, for this reason alone the substance and impact of the order passed by this Court is not whittled down. Even when the subject matter of the said SLP related to the proposition of the appellant to transfer the suit property to a third party and even when the arrangement provided by the order dated 26.02.2021 was essentially concerning the defendant-appellant and the prospective transferees, fact of the matter remains that the said order was passed in the presence of the plaintiffs-respondents, whose apprehension of a different nature, about the likely claims in future by the legal heirs of the appellant, was also taken note of with its response on behalf of the appellant. This Court, thereafter, re-emphasised the requirements of expeditious proceedings. When construed on its pith and substance, the impact of the said order dated 26.02.2021 on the procedural aspect concerning pleadings has clearly been that existence of the counter-claim on record was taken by this Court as a fait accompli; and this order left a little, rather nil, scope for upsetting the existing pleadings. The expectations had been that the proceedings in the suit coupled with the counter-claim shall be taken forward from the given stage onwards. [Paras 15.2 and 15.3][590-H; 591-A-D]

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1.5 Even when this Court's order dated 26.02.2021 was placed before it, the Division Bench of the High Court did not consider its purport and meaning as also its impact on the suit proceedings and on the question of filing of counter-claim. There was no reason for re-opening of the question relating to the filing of counter-claim after the said order of this Court dated 26.02.2021. Apart from this, on the date on which the Division Bench chose to upset the proceedings of the suit in question by setting aside the order dated 02.05.2019, much progression had taken place, including the filing of written statement by the plaintiffs to such counter-claim; framing of issues on the counter-claim; and recording of the plaintiffs' evidence. Moreover, expeditious proceedings were required to be ensured by all the concerned, in view of the earlier orders passed by the Division Bench of the High Court as also by this Court. It appears that the Division Bench of the High Court, while passing the impugned order dated 30.11.2021, proceeded in a rather cursory manner in directing reconsideration of the prayer of the appellant for taking the counter-claim on record without considering the relevant aspects of the proceedings in the suit and the law applicable thereto as also without considering the likely impact of its order on the proceedings, which had already taken place and which were under progress. Viewed from any angle, the impugned order deserves to be set aside. The impugned order dated 30.11.2021 as passed by the Division Bench of the High Court is set aside; and order dated 02.05.2019 as passed by the learned Single Judge is restored. [Paras 15.4, 16, 16.1, 19][591-E-H; 592-A-B, E]

Case Law Reference

[2019] 17 SCR 214 relied on Para 9.2

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7203 of 2022.

From the Judgment and Order dated 30.11.2021 of the High Court of Judicature at Bombay in Appeal No.10 of 2020 in Notice of Motion (L) No.1014 of 2019 in Suit No.1821 of 2004.

Shyam Divan, Shekhar Naphade, Sr. Advs., Yadunath Chaudhari, Kunal Cheema, Apoorv Shukla, Adith Deshmukh, Mahesh Trivedi,

A Omkar Kulkarni, Ms. Ruchita Kunal Cheema, Ms. Aditi Deshpande Parkhi, Sabir Kachhi, Mahesh Agarwal, Rishi Agarwala, Ankur Saigal, Rohan Talwar, Shashwat Singh, E. C. Agrawala, Advs. for the appearing parties.

The Judgment of the Court was delivered by

B **DINESH MAHESHWARI, J.**

Leave granted.

C 2. This appeal by the defendant in a pending suit for specific performance (Suit No. 1821 of 2004) is directed against the judgment and order dated 30.11.2021, as passed by the Division Bench of the High Court of Judicature at Bombay in Appeal No. 10 of 2020 arising from an order dated 02.05.2019 in Notice of Motion (L) No. 1014 of 2019 in the said suit.

D 2.1. By the said order dated 02.05.2019, the learned Single Judge of the High Court dealing with the trial of suit in question, had accepted the notice of motion moved by the defendant-appellant so as to take the belatedly filed counter-claim on record. The Division Bench of the High Court has, however, set aside the order so passed by the Single Judge and has remitted the matter for consideration afresh, essentially on the ground that the plaintiffs were not afforded adequate opportunity to file reply and to contest the said notice of motion.

E 3. In this appeal, the main plank of submissions on behalf of the defendant-appellant is that in view of the order dated 26.02.2021 as passed by this Court in relation to the incidental proceedings pertaining to the same suit, the proceedings in question need to progress with the counter-claim on record; and, in any case, there was no justification for the Division Bench interfering with the considered order of the Single Judge taking the counter-claim on record. On the other hand, it is submitted on behalf of the plaintiffs-respondents that the Division Bench of the High Court has rightly interfered because the order dated 02.05.2019 was passed by the Single Judge without giving opportunity to the plaintiffs-respondents to contest the notice of motion; and in the true operation of the applicable rules of procedure, the counter-claim in question, which was filed nearly 13 years after filing of the written statement, could not have been taken on record, particularly when there had not been a semblance of reason for such a gross and inordinate delay.

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3.1. Thus, the short question calling for determination in this appeal is as to whether the Division Bench of the High Court has been justified in interfering with the order passed by the Single Judge for taking the counter-claim on record. A

4. Apropos the foregoing outline and the short question involved, the background aspects of the matter could be noticed in brief, and only to the extent relevant for the present purpose. B

4.1. In relation to the suit property situated at Vile Parley, Dadabhai Road, Mumbai, the plaintiffs-respondents have filed the suit in question bearing No. 1821 of 2004 on 10.06.2004, seeking specific performance of an alleged agreement for transfer dated 28.05.2001, said to have been executed by its owner, late Ramalaxmi Ravishankar Trivedi, who was the sister of the appellant and who expired on 31.01.2004. In the said suit, apart from the appellant, other legal heirs of the deceased owner were also arrayed as defendants. The appellant filed his written statement in the suit on 16.11.2005. C D

4.2. It has been pointed by the appellant that he had acquired all the rights in the suit property by testamentary succession and by settlement with the said other legal heirs of the deceased owner. According to the appellant, the matter relating to his succession to the suit property ultimately got settled only on 05.04.2017. Thereafter, on 16.01.2018, for the appellant having acquired ownership rights in the suit property, Chamber Summons (L) No. 559 of 2017 was filed in order to delete other defendants from Suit No. 1821 of 2004; the said chamber summons was allowed and the defendant Nos. 1,2,4, & 5 were deleted from the array of parties. E

4.3. Thereafter, on 07.09.2018, the defendant-appellant filed his counter-claim (signed on 18.08.2018) in this suit in the registry of the High Court. When the suit was taken up for framing of issues on 05.12.2018, the learned Single Judge of the High Court dealing with the suit took objection against such filing of counter-claim much after the defendant had entered his written statement and without taking leave of the Court, particularly with reference to Rule 95 of the Bombay High Court (Original Side) Rules¹. The learned Single Judge, therefore, ordered that the counter-claim be de-registered and be returned to the counsel for the appellant. The counsel representing the defendant-appellant sought F G

¹ 'the Rules', for short. H

- A leave to file an appropriate application for liberty to file the counter-claim. The learned Single Judge declined this prayer, lest it was construed as some sort of permission for filing the counter-claim belatedly. Thereafter, the learned Single Judge framed the issues that very day (05.12.2018) and the matter was posted for evidence. For its relevance, we may reproduce the contents of the order so passed by the learned
- B Single Judge on 05.12.2018 as under: -
- C “1. The suit is for framing issues. Defendant No. 3, the sole surviving Defendant entered his Written Statement on 16th November 2005. It appears that, entirely contrary to the provisions of Rule 95 of the Bombay High Court (Original Side) Rules, the 3rd Defendant has very recently purported to lodge a Counter-Counter- Claim. In some fashion that I am wholly unable to comprehend, the 3rd Defendant has, without prior leave of the Court, got a lodging number for the Counter-Claim.
- D 2. Rule 95 is in pari material with Order VIII Rule 6-A of the Code of Civil Procedure, 1908 (“CPC”). Both say that a Counter-Claim proceeds like a cross-suit. This means that, exactly as in the case of a plaint, every Counter-Claim is also subject to issues of statutory limitation. But in addition, Counter-Claims are subject to a further stipulation not applicable to a suit. Both Rule 95 and
- E Order VIII Rule 6-A specify an outer limit beyond which no Counter-Claim can be filed. In other words, it is not open to a defendant to file a Counter-Claim at any time that defendant chooses. It must be filed along with the defence or before the time limited for filing the defence has expired. In no view of the matter could the 3rd Defendant have lodged any Counter-Claim
- F in 2018.
- G 3. The Registry is not to accept Counter-Claims in this manner contrary to the express wording of Rule 95 of the Bombay High Court (Original Side) Rules without an order of the Court. It is not even to accept a Counter-Claim for presentation or lodging beyond the time prescribed in Rule 95.
- H 4. The existing Counter-Claim (L) No. 186 of 2018 will be de-registered and returned to the Advocate for Defendant No. 3 forthwith.
5. Mr Tamboly seeks leave to file an appropriate application for liberty to file a Counter-Claim. I cannot grant any such leave, lest

it be construed as some sort of permission or a finding that a Counter-Claim can be filed well after the time period set out in Rule 95. I am therefore neither granting or refusing leave. A

6. There is also a pending Notice of Motion by the 3rd Defendant, Notice of Motion No. 1713 of 2018. The Additional Affidavit in Support of that Notice of Motion is to be filed in the Registry on or before 7th December 2018. Affidavit in Reply by the Plaintiff is to be filed and served on or before 1st February 2019. No Rejoinder is to be filed without leave of the Court. B

7. List Notice of Motion for hearing and final disposal on 6th February 2019. C

8. The Suit is taken up for framing issues. Issues are framed and these are appended to this order.

9. The Plaintiffs shall, on or before 18th January 2019 file (i) the Evidence Affidavit of the Plaintiff; (ii) an Affidavit of Documents; and (iii) a Compilation of Documents duly indexed and paginated. Copies of each of these will be served on the Advocates for the Defendants on or before that date. D

10. Discovery and inspection are to be completed and statements of admission and denial are to be exchanged on or before 1st February 2019. E

11. There will be no extension of time. In default of compliance, the suit will stand dismissed without further reference to the Court.

12. On the Plaintiffs complying with these directions, the matter will be taken up for marking of the Plaintiffs' documents and further directions on 8th February 2019 irrespective of the caption under which the matter appears. F

13. The Plaintiffs are not to tender original documents and are required to file and serve a compilation of authenticated copies. The Plaintiffs agree and undertake to preserve the originals and produce it in Court as and when required until final disposal of the Suit. G

14. It is clarified that all subsequent events, i.e., those after the filing of the suit may be referred to in the Affidavit in lieu of Examination-in-Chief of either side." H

A 4.4. The defendant-appellant challenged the aforesaid order dated
05.12.2018 in an intra-court appeal. In the said appeal, it was submitted
on behalf of the appellant that an appropriate application seeking leave
to present the counter-claim shall be filed to which, the learned counsel
appearing for the plaintiffs-respondents submitted that the appropriate
B application could be dealt with by the Single Judge on its own merits and
the plaintiffs-respondents will not raise objection to the application seeking
such leave on the ground that the issues had already been framed and
documentary evidence presented. In view of the submissions so made,
the Division Bench of the High Court, by its order dated 29.03.2019,
C granted permission to the appellant to file the necessary application within
two weeks, while leaving it open for the Single Judge to decide the same
on its own merits on consideration of objections that might be raised by
the plaintiffs. The relevant contents of order so passed by the Division
Bench of the High Court on 29.03.2019 read as under: -

D “1] The appellant is objecting to the order passed by the learned
Single Judge dated 5th December, 2018 in Notice of Motion
No.1713 of 2018 in Suit No.1821 of 2004 directing the de-
registration and return of counter claim (L) No.186 of 2018
presented by the appellant – original defendant no.3. The counter
claim has been returned back essentially for the reason that the
application seeking leave has not been presented by the appellant.

E 2] The learned Senior Counsel appearing for the appellant states
that he will tender an appropriate application seeking leave to
present the counter claim. Learned counsel appearing for the
Respondent contends that if appropriate application is presented,
the same can be dealt with on its own merits and appropriate
F order can be passed by the learned Single Judge dealing with Suit
and that the Respondent – original plaintiff will not raise the objection
to the application seeking leave on the ground that the issues have
already been framed and documentary evidence has been
presented.

G 3] Without considering merits of the controversy, we permit the
appellant herein – original defendant to present an application
seeking leave, together with counter claim in Suit No.1824 of 2004.
If the appellant-original defendant presents an application seeking
leave within a period of two weeks from today, the learned Single
H Judge may consider and decide the same, on consideration of the

objections those may be raised by the respondent-original plaintiff A
on its own merits and in accordance with law. In view of the
above, the appeal stands disposed of. In view of disposal of the
appeal, pending Notice of Motion does not survive and stands
disposed of.”

4.5. In view of the liberty so given by the Division Bench, the B
appellant filed Notice of Motion (L) No. 1014 of 2019 (later numbered
as Notice of Motion No. 1547 of 2019) seeking leave to file the counter-
claim claiming possession of the suit property. A copy of the affidavit
filed in support of this notice of motion has been placed before us wherein
the appellant has stated the reason and basis of his filing counter-claim C
to avoid multiplicity of proceedings without altering the nature of the suit
in question; and has also pointed out that the counter-claim was filed
before framing of issues and only after he became entitled to the suit
property upon finalisation of the dispute relating to succession. The
appellant, *inter alia*, stated in this affidavit as under: -

“17. I say that I have therefore filed the present notice of motion D
seeking leave of this Hon’ble court to file the Counter claim for
effective adjudication of disputes between the parties. In view of
following reasons

a. The suit is for specific performance of the agreement dated E
28th May 2001, clause no. 4 of the suit agreement clearly records
that the Plaintiffs were put in vacant and peaceful possession
upon execution of the agreement.

b. In the event the above suit is dismissed by this Hon’ble court,
then this Defendant would be entitled to seek vacant and peaceful
possession from the Plaintiff which the plaintiffs are enjoying under F
the Suit Agreement and hence the Counter Claim seeking vacant
possession of the suit property is necessary to avoid multiplicity
of proceedings and to avoid delay.

c. The claim of possession is not Barred by limitation, As this
defendant would be entitled to seek possession only upon dismissal G
of the suit and both issues can be decided together simultaneously.
As of today the Plaintiff is claiming possession of the Suit Property
under the suit agreement and not either adverse possession or
illegal trespass. My counterclaim claiming possession of the suit
property is based on my title to the suit property. I am a lawful H

A owner of the suit property. My right to recover possession of the suit property will start from the date the plaintiff refuses to hand over the possession and/or claims adverse possession of the suit property. In these circumstances my claim of possession in the suit property is not barred by law of limitation.

B d. That the counter claim was filed prior to framing of the issues in the above suit.

e. This Defendant became entitled to the suit property only upon settlement of disputed between the legal heirs of Smt. Ramalaxmi Trivedi and finalization of the probate in 2017.

C f. This Defendant or the original defendants never made any attempts to delay the proceedings and on the contrary after this defendant obtained probate, this defendant took steps to get the hearing of the above suit and the suit was proceeded till the framing of issues and filing of affidavit of evidence along with the compilation of documents.

D g. The counter claim will not materially change the nature of the suit and only additional issues will be required to be framed so that both the counter claim and the suit can be decided together.

E f. Permitting this defendant to file the counter claim will not cause any prejudice to the plaintiff as there will not be any change of cause of action in the suit and the Counter claim is only in the nature consequential reliefs.”

4.6. While considering this notice of motion, the learned Single Judge felt satisfied to grant leave to file the counter-claim, particularly to avoid multiplicity of proceedings. Therefore, by the order dated 02.05.2019, the learned Single Judge made the notice of motion absolute with the clarification that all the defences of the plaintiff, including as to limitation were kept open. In fact, the learned counsel appearing for the plaintiffs also waived service of the writ of summons of the counter-claim and agreed that the written statement (to the counter-claim) shall be filed before 21.06.2019. The relevant contents of this order dated 02.05.2019 read as under: -

“1. The Suit is for specific performance. The Defendant filed a Written Statement on 16th November 2005. He did not file any Counter Claim. Leaving aside the very many interim orders, on

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5th December 2018 the suit was notified for framing issues. I found that the Defendant had purported to lodge a Counter Claim. I held that Rule 95 of the Bombay High Court (Original Side) Rules is in pari materia with the provisions of Order VIII Rule 6-A of the Code of Civil Procedure 1908. If a Counter Claim was not filed before the Defendant delivered its defence, then leave of the Court would be required. In paragraph 3 of my order of 5th December 2018, on an interpretation of Rule 95 of the Bombay High Court (Original Side) Rules, I held that the Counter Claim required an order of the Court. I directed the existing Counter Claim to be returned. The Defendant carried the matter in Appeal. The appellate order of 29th March 2019, without going in to the merits permitted the Defendant to present an application seeking leave along with the Counter Claim. This Motion is that application. It seeks precisely that leave under Order 8 Rule 6-A and Rule 95 read with Order VIII Rule 9 of the Code of Civil Procedure 1908.

2. This having been done, I can see no reason to refuse the leave. The defendant could as well have instituted a separate suit. Had he done so, the cross suit would have been tagged with the present suit. The subject matter of the two suits is the same. The Counter Claim will serve as a convenient method of disposing of both rival claims together and possibly even with common evidence, thus preventing multiplicity of proceedings. The Defendant has also to pay the full Court fee on the Counter Claim.

3. In these circumstances, the Notice of Motion is made absolute in terms of prayer clause (a) with a clarification that all defences of the Plaintiff including as to limitation are specifically kept open. The Counter Claim has already been lodged. It will be numbered within a week from today. A copy has been served.

4. The Plaintiff waives service of the Writ of Summons of the Counter Claim. She agrees that the Written Statement will be filed and served on or before 21st June 2019.”

4.7. The aforementioned order dated 02.05.2019 was challenged by the plaintiffs-respondents an intra-court appeal that has been considered and allowed by the impugned order dated 30.11.2021. Before advertng to the contents of the impugned order dated 30.11.2021, it shall be worthwhile to take note of the other incidental and ancillary

- A proceedings in the course of the trial of this suit after passing of the said order dated 02.05.2019.

5. On 28.06.2019, the plaintiffs-respondents sought extension of time for filing written statement to the counter-claim, which was granted and the matter was adjourned to 11.07.2019. Then, on 09.07.2019, the written statement to the counter-claim was filed by the plaintiffs-respondents. However, before further progress of the matter, the appellant filed Notice of Motion No. 2601 of 2019 on 18.09.2019, seeking leave to transfer right, title and interest in the suit property to third parties. This notice of motion was dismissed on 21.01.2020. Thereafter, on 28.01.2020, issues were framed on the counter-claim; examination-in-chief of PW-1 and marking of documents was completed; and commissioner was appointed to record the cross-examination of PW-1. The proceedings of commission for recording cross-examination were held from 05.02.2020 onwards. In the meantime, the appellant preferred intra-court appeal against the aforesaid order dated 21.01.2020, being Appeal No. 67 of 2020. This appeal was considered and disposed of by the Division Bench of the High Court on 20.01.2021 providing for expeditious disposal of the suit but not granting the prayer of the appellant, for leave to transfer the property in question during the pendency of the suit. Being aggrieved, the appellant approached this Court by filing a petition for Special Leave to Appeal², being SLP (C) No. 1786 of 2021.

6. The order passed by this Court on 26.02.2021 in disposal of the said SLP (C) No. 1786 of 2021 is of bearing in the present appeal in view of the submissions made before us and, therefore, it would be appropriate to take note of the salient features and the relevant contents thereof in necessary detail. Therein, this Court took note of the submissions made by the parties, including the anxiety of the appellant to dispose of the property in view of his advanced age as also the undertaking of the prospective purchasers to abide by the outcome of the suit. After interacting with the learned counsel for the concerned parties, this Court passed the order delineating the conditions agreed upon by the appellant and the prospective purchasers. This Court also took note of the apprehension expressed on behalf of the plaintiffs-respondents about the legal heirs of the appellant later on claiming rights in the property and counter submissions in this regard on behalf of the appellant. Thus, having settled the matter relating to the prayer of the appellant for leave to

H ² 'SLP', for short.

transfer the right, title and interest in the property in question, this Court expected all the parties to extend the co-operation in early disposal of the suit as already directed by the Division Bench of the High Court. The order so passed by this Court on 26.02.2021 reads as under: -

“A peculiar issue arises for our consideration. The petitioner had approached the High Court by way of Notice of motion No. 2601 of 2019 in Suit No. 1821/2004, in which the petitioner is defendant, for limited relief of permitting the petitioner to dispose of the suit property without prejudice to the rights and contentions of the respondent(s)-plaintiff(s) as he had already reached the advanced age (87 years) and wanted to settle all his issues at the earliest possible opportunity.

The Single Judge declined to grant that relief to the petitioner, so also the Division Bench vide impugned judgment and order. The Division Bench, however, thought it appropriate to expedite the suit pending since 2004 and issued suitable directions in that regard.

The grievance of the petitioner is that although the suit is directed to be disposed of expeditiously, it is unlikely that the litigation would finally end in the near future. Considering the advanced age of the petitioner, therefore, it may not be just and proper to keep the petitioner waiting for the outcome of the proceedings, especially when the petitioner as well as the third party-proposed purchasers are willing to abide by the outcome of the pending suit and also give necessary undertaking within two weeks from today, including to indemnify the respondent(s)-plaintiff(s), if and when occasion arises.

Considering this submission, we called upon the petitioner to give notice to the proposed purchasers. They are represented through Mr. Gopal Shankaranarayanan, learned senior counsel instructed by Mr. Ajit Wagh, learned counsel.

On the oral request made by the learned counsel for the petitioner, we permit the petitioner to implead the proposed-purchasers as party respondents in these proceedings. Amendment be carried out forthwith.

After interacting with the counsel for the concerned parties, we record the agreement reached between them and dispose of this petition on that basis.

- A It is agreed, in principle, by all concerned that the proposed sale of the suit property by the petitioner be made subject to the outcome of the pending Suit No.1821/2004 and without prejudice to the rights and contentions of the respondent(s)-plaintiff(s), in any manner.
- B The conditions agreed upon by the petitioner and the proposed purchasers (added respondents) are delineated as follows: -
- C (a) The transfer deed in respect of suit property between the petitioner and proposed purchasers (added respondents) shall be executed within three weeks in the name of “*AMAR LIFESPACES LLP*”, a family firm and the three partners thereof, namely, Dinesh Joshi and his two sons (i) Gaurav Joshi and (ii) Hemang Joshi.
- D (b) The original deed to be so executed shall be submitted by the petitioner and the proposed purchasers (added respondents) in the High Court and would continue to abide by the orders of the High Court in that regard.
- E (c)The petitioner and the proposed purchasers (added respondents) undertake that they shall not create any third party right, title or interest in the suit property or indulge in further alienation thereof.
- F (d) The petitioner as well as the proposed purchasers (added respondents) shall file an undertaking within two weeks from today in this Court and also indemnity bond so as to fully secure the interest of the respondent(s)-plaintiff(s) with regard to the right, title and interest of the suit property including to indemnify in respect of legal expenses to be incurred and liability of damages in that regard in any future litigation. (This indemnity is not applicable to the pending litigation between the petitioner and respondents and now the added respondents, namely suit No. 1821/2004. In other words, the parties will bear their own legal expenses in respect of the present suit proceedings.).
- G (e)The proposed purchasers (added respondents) shall be impleaded in the suit pending before the High Court, who in turn undertake to adopt the written statement and counter claim filed by the petitioner in Suit No.1821/2004 as it is. They will not make any request for filing further written statements or independent written statement as such.
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(f) The suit shall proceed from the stage where it is presently pending and the proposed purchasers (added respondents) will not move any application for filing independent evidence/document. A

(g) Neither the petitioners nor the proposed purchasers (added respondents) will approach the occupants of the suit property either directly or indirectly or through their relatives and enter upon the suit property. B

(h) The petitioner as well as the proposed purchaser (added respondents) shall not claim any equity in any respect and abide by the outcome of the Suit No. 1821/2004.

(i) The proposed purchasers (added respondents) shall record in the undertaking that they shall not transfer their share/change the composition of the firm nor dissolve the firm during the pendency of the suit. C

Respondents-plaintiffs have expressed apprehension through counsel that the legal heirs of the petitioner may later on claim rights in the suit property, despite the sale in favour of the proposed purchasers (added respondents). This plea is refuted by the learned counsel for the petitioner on the argument that since the petitioner is claiming right, title and interest in the suit property on the basis of the will which stood probated in favour of the petitioner, the question of legal heirs claiming any right or obstructing the proposed transaction being entered into between the petitioner and added respondents, does not arise; nor they can do so during the life time of the petitioner. D E

Needless to observe that all parties including the newly added respondents shall extend full cooperation for early disposal of the suit as directed by the Division Bench of the High Court. F

The special leave petition and pending applications are disposed of in the above terms. Liberty is given to the parties to apply, if necessary. G

Registry is directed to accept the Vakalatnama/Appearance to be filed by the advocate-on-record for the impleaded/newly added party within one week from today.”

7. Thereafter, while the suit in question had been proceeding in evidence, the said intra-court appeal bearing No. 10 of 2020, which was H

A filed against the order dated 02.05.2019 taking the counter-claim on record, was taken up for consideration by the Division Bench of the High Court on 30.11.2021. The aforesaid order of this Court dated 26.02.2021 was placed before the Division Bench for consideration but the Division Bench also took note of the grievance of plaintiffs that they were not given adequate opportunity of contesting the notice of motion for taking the counter-claim on record; and considered it proper to remit the matter for consideration afresh by the Single Judge while setting aside the order dated 02.05.2019. The judgment and order so passed by the Division Bench of the High Court on 30.11.2021 is in challenge in this appeal and reads as under: -

C “1. By the above Appeal, the Appellant has impugned the Order passed by the Learned Single Judge dated 2nd May, 2019 granting leave to the Respondent to file Counter Claim almost after a period of seventeen years. Admittedly, the matter had appeared before the Court for the first time on 2nd May, 2019, when the Junior Advocate representing the Appellants requested for time to file Reply. However, the Learned Judge declined to grant time and proceeded to pass an Order in favour of the Respondent. In fact, the Respondent before us has relied on an order dated 26th February, 2021 passed by the Supreme Court which is passed subsequent to the passing of the impugned order by the learned Single Judge. In view thereof, we pass the following order :

(i) The impugned Order dated 2nd May, 2019 is set aside.
(ii) The Appellants shall file their response to Notice of Motion No. 1014 of 2019 within a period of one week from today.

F (iii) The Respondent shall file his Rejoinder to the Reply within a period of one week thereafter.

G (iv) The Learned Single Judge is requested to hear the parties and dispose off the Notice of Motion afresh within a period of two weeks from the date of filing of the Rejoinder, without being influenced by the Order passed by the Learned Single Judge dated 2nd May, 2019.

(v) All contentions of the parties are kept open.

H 2. The above Notice of Motion is accordingly disposed off.”

8. Learned senior counsel Mr. Shyam Divan appearing for the appellant has referred to the background aspects and has contended that the impugned judgment and order dated 30.11.2021 remains unsustainable for several reasons including the fundamental one that it stands in the teeth of the order passed by this Court on 26.02.2021. The learned senior counsel would submit that in view of the order passed by this Court, the question of receiving the counter-claim on record no longer remained open to be re-agitated, particularly when this Court approved the proposition that the proposed purchasers, (who were to be impleaded in the suit), shall adopt the written statement as also the counter-claim filed by the appellant, as existing; and the suit would proceed further from the stage it stood at the time of the passing of the order by this Court. The learned senior counsel would submit that the said order dated 26.02.2021 was placed before the Division Bench and despite noticing the same, the Division Bench has failed to consider that the question of taking counter-claim on record could not be reopened.

8.1. The learned senior counsel has further contended that in the impugned order, the Division Bench of the High Court has proceeded in a rather cursory manner inasmuch as no reason whatsoever is assigned for setting aside the considered order passed by the learned Single Judge on 02.05.2019.

8.2. The learned senior counsel has also referred to the said order dated 02.05.2019 and has submitted that the learned Single Judge has assigned proper reasons for granting leave to the appellant to submit his counter-claim and has left all the defences of the plaintiffs, including that of limitation open. This order, according to the learned senior counsel, was not suffering from any infirmity so as to warrant interference.

9. *Per contra*, the learned senior counsel Mr. Shekhar Naphade appearing for the contesting respondents has made a detailed reference to the proceedings in the suit and has emphatically argued that in this civil suit, which was filed way back in the year 2004 and in which the written statement was filed by the appellant on 16.11.2005, the attempt to present a counter-claim nearly 13 years later could not have been countenanced.

9.1. The learned senior counsel has particularly referred to the order dated 05.12.2018 and has submitted that surreptitiously filed counter-claim by the appellant was rightly taken off the record, particularly

- A when written statement had been filed more than 13 years back and not even an application was moved to seek permission to place the counter-claim on record. The learned senior counsel would further submit that even if in the appeal against the order dated 05.12.2018, serious objections were not raised on the question of filing of the application by the appellant
- B and a concession was stated for not raising objection with reference to the stage of suit where issues had already been framed, such a concession cannot bind a party contrary to law nor could be read as acceptance of filing the counter-claim at a belated stage.

- C 9.2. The learned senior counsel has further submitted that the order dated 02.05.2019 had been a cryptic and non-speaking order and therein, the learned Single Judge failed to consider the law applicable to the case including Rule 95 of the Bombay High Court (Original Side) Rules. The learned senior counsel has also submitted, with a strong reliance on a 3- Judge Bench decision of this Court in the case of *Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri and Ors.: (2020) 2 SCC 394* that belatedly filed counter-claim in the present matter is directly hit by the law declared by this Court.

- E 9.3. It has also been submitted on behalf of the respondents that the subject matter of the said SLP (C) No. 1786 of 2021 before this Court was concerning transfer of the suit property by the appellant to a third party and no question regarding counter-claim was mentioned or argued therein. Hence, the order dated 26.02.2021 passed in disposal of the said SLP does not operate against the objections of the respondent concerning the counter-claim.

- F 10. In his rejoinder submissions, learned senior counsel for the appellant would submit that the said decision in *Ashok Kumar Kalra* (supra) does not operate against the prayer of the appellant for taking the counter-claim on record and rather, the principles of law enunciated therein support the submissions made on behalf of the appellant.

- G 11. Having given thoughtful consideration to the rival submissions and having examined the material placed on record, we are clearly of the view that neither the impugned order of the Division Bench of the High Court could be approved nor the submissions made on behalf of the respondents against the legality and validity of the order dated 02.05.2019 could be accepted.

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12. As regards the provisions of law applicable to the case, we may usefully take note of the provisions contained in Order VIII Rule 6-A of the Code of Civil Procedure, 1908³ and Rule 95 of the Bombay High Court (Original Side) Rules as follows: -

Order VIII Rule 6-A CPC:

“6-A. Counterclaim 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 counterclaim 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 counterclaim is in the nature of a claim for damages or not:

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

Rule 95 of the Bombay High Court (Original Side) Rules:

“95. A defendant in a suit, in addition to his right of pleading a set-off under Order VIII, Rule 6 of the Code of Civil Procedure, may set-up by way of counter-claim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit but before the defendant has delivered his defence and before the time limited for delivering his defence has expired, whether such counter-claim sounds in damages or not, and such counter-claim shall have the same effect as a cross-suit, so as to enable the Court to pronounce

³ ‘CPC’, for short.

A a final judgment in the same suit, both on the original claim and on
the counter-claim; and the plaintiff (if so advised) shall be at liberty
to file a reply to the counter-claim of the defendant within eight
weeks after service upon him or his Advocate on record of a
copy of the defendant's counter-claim; and the Court or the Judge
B in Chambers may, on the application of the plaintiff before trial if
in the opinion of the Court or the Judge such counter-claim cannot
be disposed of in the pending suit or ought not to be allowed,
refuse permission to the defendant to avail himself thereof and
require him to file a separate suit in respect thereof.”

C 13. In *Ashok Kumar Kalra* (supra), the 3-Judge Bench of this
Court essentially considered the question on reference as to whether it
is mandatory for a counter-claim of the defendant to be filed along with
the written statement. While answering this question, this Court
underscored the basic principles that procedural law should not be
D construed in such a way that it would leave court helpless; and that a
wide discretion had been given to the Civil Court regarding the procedural
elements of a suit. Having said so, this Court observed that a counter-
claim is designed to avoid multiplicity of proceedings; that time limit for
filing a counter-claim is not explicitly provided for but there is limitation
as to the accrual of the cause of action. However, the majority opinion
E has been that the defendant cannot be permitted to file counter-claim
after the issues are framed and the suit has proceeded substantially. It
was observed and held in the lead judgment, *inter alia*, as under: -

F “18. As discussed by us in the preceding paragraphs, the whole
purpose of the procedural law is to ensure that the legal process
is made more effective in the process of delivering substantial
justice. Particularly, the purpose of introducing Rule 6-A in Order
8 CPC is to avoid multiplicity of proceedings by driving the parties
to file separate suit and see that the dispute between the parties is
G decided finally. If the provision is interpreted in such a way, to
allow delayed filing of the counterclaim, the provision itself
becomes redundant and the purpose for which the amendment is
made will be defeated and ultimately it leads to flagrant miscarriage
of justice. At the same time, there cannot be a rigid and hyper-
H technical approach that the provision stipulates that the
counterclaim has to be filed along with the written statement and
beyond that, the court has no power. The courts, taking into

consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC.

21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

(i) Period of delay.

(ii) Prescribed limitation period for the cause of action pleaded.

(iii) Reason for the delay.

(iv) Defendant's assertion of his right.

(v) Similarity of cause of action between the main suit and the counterclaim.

(vi) Cost of fresh litigation.

13.1. In the partly dissenting and partly concurring judgment, one of the Hon'ble Judges of the Bench stated his opinion that though the normal rule is that subsequent to filing of written statement, counter-claim cannot be filed after issues have been framed, under exceptional circumstances, counter-claim may be permitted to be filed even after issues have been framed, but before commencement of recording of plaintiff's evidence. The Hon'ble Judge observed, *inter alia*, as follows: -

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for trial. Allowing counterclaims beyond this stage would not only
prolong the trial, but also prejudice the rights that may get vested
with the plaintiff over the course of time. A

*** *** ***

60.I conclude that it is not mandatory for a counterclaim to
be filed along with the written statement. The court, in its discretion,
may allow a counterclaim to be filed after the filing of the written
statement, in view of the considerations mentioned in the preceding
paragraph. However, propriety requires that such discretion should
ordinarily be exercised to allow the filing of a counterclaim till the
framing of issues for trial. To this extent, I concur with the
conclusion reached by my learned Brothers. However, for the
reasons stated above, I am of the view that in exceptional
circumstances, a counterclaim maybe permitted to be filed after
a written statement till the stage of commencement of recording
of the evidence on behalf of the plaintiff.” B C D

14. 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 E F G H

- A 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.

- 14.1. 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.

15. Apart from the above, there are a few other reasons, for which we find the impugned order of the Division Bench to be wholly unjustified.

- 15.1. As noticed, in the order dated 26.02.2021, this Court had provided for expeditious proceedings while taking note of the submissions of the parties and while ensuring that even if the appellant shall transfer his right, title and interest to third parties, such transferees will not seek filing of further pleadings and shall remain bound by the proceedings of the suit in question. In that context, it was provided that the proposed purchasers shall be impleaded in the suit; and their undertaking was also recorded that they will adopt the written statement and counter-claim filed by the appellant and will not make any request for filing further written statements or independent written statement as such. This Court further provided that the suit shall proceed from the stage where it was pending and the proposed purchasers will not move any application for filing independent evidence/document.

- 15.2. True it is, as contended on behalf of the respondents, that the subject matter of the said SLP before this Court was of the proposition

of the appellant to transfer the suit property to a third party and not regarding the permissibility to file counter-claim but, for this reason alone, the substance and impact of the order passed by this Court is not whittled down. Even when the subject matter of the said SLP related to the proposition of the appellant to transfer the suit property to a third party and even when the arrangement provided by the order dated 26.02.2021 was essentially concerning the defendant-appellant and the prospective transferees, fact of the matter remains that the said order was passed in the presence of the plaintiffs-respondents, whose apprehension of a different nature, about the likely claims in future by the legal heirs of the appellant, was also taken note of with its response on behalf of the appellant. This Court, thereafter, re-emphasised the requirements of expeditious proceedings.

15.3. When construed on its pith and substance, the impact of the said order dated 26.02.2021 on the procedural aspect concerning pleadings has clearly been that existence of the counter-claim on record was taken by this Court as a *fait accompli*; and this order left a little, rather nil, scope for upsetting the existing pleadings. The expectations had been that the proceedings in the suit coupled with the counter-claim shall be taken forward from the given stage onwards.

15.4. On a comprehension of the impugned order dated 30.11.2021, we are impelled to observe that even when this Court's order dated 26.02.2021 was placed before it, the Division Bench of the High Court did not consider its purport and meaning as also its impact on the suit proceedings and on the question of filing of counter-claim. There was no reason for re-opening of the question relating to the filing of counter-claim after the said order of this Court dated 26.02.2021.

16. Apart from the above, on the date on which the Division Bench chose to upset the proceedings of the suit in question by setting aside the order dated 02.05.2019, much progression had taken place, including the filing of written statement by the plaintiffs to such counter-claim; framing of issues on the counter-claim; and recording of the plaintiffs' evidence. Moreover, expeditious proceedings were required to be ensured by all the concerned, in view of the earlier orders passed by the Division Bench of the High Court as also by this Court.

16.1. With respect, it appears that the Division Bench of the High Court, while passing the impugned order dated 30.11.2021, proceeded in a rather cursory manner in directing reconsideration of the prayer of the

A appellant for taking the counter-claim on record without considering the relevant aspects of the proceedings in the suit and the law applicable thereto as also without considering the likely impact of its order on the proceedings, which had already taken place and which were under progress. Viewed from any angle, the impugned order deserves to be set aside.

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17. In the passing, we may observe that one small segment of arguments on behalf the appellant had also been concerning maintainability of intra-court appeal against the order dated 02.05.2019 for no valuable rights having been decided, which had been duly countered on behalf of the respondents. However, this aspect need not be dealt with in this appeal, looking to the facts and circumstances of the present case, where the impugned order of the Division Bench is not being approved on its merits. Other questions are left open, to be examined in an appropriate case.

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18. Before parting, we may also observe that during the course of submissions, it has been pointed out before us that the subject suit is proceeding in defendant's evidence, particularly after this Court had stayed the operation and effect of the impugned order dated 30.11.2021 by the order dated 03.01.2022. Needless to reiterate what has already been observed in the previous orders that the parties shall be expected to extend full co-operation for early disposal of the suit.

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19. In the result, this appeal succeeds and is allowed; the impugned order dated 30.11.2021 as passed by the Division Bench of the High Court is set aside; and order dated 02.05.2019 as passed by the learned Single Judge is restored. No costs.

Divya Pandey
(Assisted by : Roopanshi Virang, LCRA)

Appeal allowed.