IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL REVISION APPLICATION NO. 185 OF 2011.

SERGI Transformers Explosion Prevention)
Technologies Private Limited)
Having its office at: 324, Udyog Vihar)
Phase-IV, Gurgaon, Haryana - 122 016) ... Applicant

Versus

1. CTR Manufacturing Industries Limited)
having its office at Nagar Road,)
Pune - 411 014)

2. Easun MR Tap Changers Private Limited)
having its registered office at 612, (233),)
C.T.H. Road, Thiruinravur,)
Chennai - 602 024)

3. EMCO Limited)
having its registered office at)
No.F-5, Road No. 28,)
Wagle Industrial Estate,)
Thane, Maharashtra) ... Respondents

Mr. P. S. Dani with Mr. Sanjay Khair, Ms. Rani Bozz i/by Chaitanya Chavan, Adv. for the applicants.

Mr. Ravi Kadam, Advocate General with Mr. V. R. Dhond, Mr. Vishal Kanade, Mr. Himanshu Kane, Mr. Aditya and Mr. Rohan Lamba i/by M/s. Paras Kuhad & Associates, Adv. For respondent No.1.

CORAM: B. R. GAVAI, J.
6th June, 2011

JUDGMENT:

Admit.

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By consent taken up for final hearing.

1. The applicant challenges the order dated 18.2.2011 passed by the learned District Judge, Thane below Ex.57 and the order dated 1.3.2011 passed below Ex.133 in Civil Suit No.1/2005.

2. There have been several rounds of litigation between the parties which have not only reached to this Court, but also upto the Apex Court.

3. Bare necessary facts for adjudication of present application are as under:

The respondents-plaintiffs have filed a Civil Suit bearing No.1/2010 in the Court of learned District Judge, Thane claiming infringement of patent and for an order of injunction restraining the defendant-applicant and defendant No.2 from infringing the plaintiffs' patent by making, using, offering for sale and/or selling the impugned product. The suit was filed on 11.1.2010. The writ of summons was served on the defendant on 4.3.2010, written statement came to be filed by the present applicant on 20.3.2010. It appears that subsequently counter claim came to be filed on 8.4.2010 thereby seeking relief for revocation of patent of the plaintiff. An application was filed by the present applicant below Ex.57, for seeking leave to take defendant's counter claim on record. An objection has been filed by the respondent-plaintiff below

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Ex.59, objecting to the counter claim under section 8 of the Court Fees Stamp Act. The learned Judge vide order dated 7.8.2010 has passed an order to the following effect:

> "The application regarding allow to claim the counter claim on record. amendment which is carried out and the order below Exh.5 will be considered simultaneously and also application under S.8 of Bombay Court Fee Stamp Act."

It appears that Writ Petition No.6994/2010 came to be filed before this Court. The learned Judge of this Court (Hon'ble Mr. Justice J. H. Bhatia) vide order dated 15.9.2010 disposed of the said writ petition with certain clarification. It is pertinent to note the observations made by the learned Judge while disposing of the said writ petition:

> "3. The learned Counsel for the petitioner contends that in view of the proviso to Section 104 of the Patents Act, since the counter-claim for revocation of the patent is made by the defendant, the suit along with the counter-claim has to be transferred to the High Court for decision and the District Court ceases to have jurisdiction. He contends that the question of jurisdiction should be decided first and then only other applications, particularly Ex.5 be considered. When the District Judge in the impugned order says that all these matters, including the application to make a counter-claim will be heard together, it is implied that he will also consider the question about jurisdiction. When the provisions of Sec.104 will be pointed out to the learned District Judge, he cannot ignore the said provisions. Whether the counter-claim is of the nature as stated in the proviso to Sec.104 will have to be heard by him before coming to the conclusion whether he has or has no jurisdiction. I see no illegality or irregularity in the impugned order that all these application shall be heard together. It is presumed that if he comes to the conclusion that he does not have jurisdiction in view of the provisions of Sec.104, naturally, he would desist from passing any order. However, if he comes to the conclusion that the case is not covered by the proviso to Sec.104 and he has jurisdiction, he

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> cannot be restrained from hearing the application Exhibit 5 and from passing order on the same immediately after hearing the matter."

It is further pertinent to note that while passing order below Ex.61 dated 12.11.2010, the learned District Judge has himself observed that if simpliciter issue regarding jurisdiction is framed by this Court, all the questions pertaining to jurisdiction including pecuniary and territorial jurisdiction and as to whether the jurisdiction is barred by specific provision of law can be considered together. Thereafter, vide order dated 01.01.2011, the learned Judge has considered the issue regarding pecuniary and territorial jurisdiction and held the same in favour of the present respondent-plaintiff.

4. Being aggrieved thereby, Civil Revision Application No.62/2011 was filed before this Court. This Court vide its order dated 2.2.2011 allowed the civil revision application. This Court in paragraphs 9, 10 and 11 while allowing the revision application observed thus:

> "9. Undisputedly, the present applicant has filed its counter claim seeking relief of revocation of patent. Undisputedly, the present applicant has also raised issue regarding the jurisdiction of the learned District Judge in view of the provisions of section 104 and 64 of the Patents Act. Undisputedly, the learned Judge himself vide order dated 7.8.2010 and 12.11.2010 has directed all these applications to be heard together. Undisputedly, this Court vide its order dated 15.9.2010 has also observed that once the provisions of section 104 are brought to the notice of the learned District Judge he cannot ignore the said provisions. It has further been observed that if the learned Judge comes to a conclusion that he does not have jurisdiction under section 104 of

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the Act, naturally he would desist from passing any other order. It has been observed that if he comes to the conclusion that the case is not covered by the provisions of section 104 and he has jurisdiction, he cannot be restrained from hearing the application below Ex.5. 14. It could thus be clearly seen that learned Judge has overruled the objections of present petitioners regarding the jurisdiction of the learned Judge to entertain the suit in view of specific provisions under Section 104 of the Patents Act, 1970. In that view of the matter, I find that since the petitioners have a remedy under Section 115 to prefer the Civil Revision Application against the order impugned herein, it would be appropriate that the petitioners are permitted to covert the present writ petition into CRA.

10. It will be necessary to refer to section 104 of the Patents Act which reads thus:

"104. **Jurisdiction**.— No suit for a declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any Court inferior to a district Court having jurisdiction to try the suit:

Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision."

A perusal of the said provision would clearly show that where a counter claim for revocation of patent is made by the defendant, the suit along with counter claim shall be transferred to the High Court for decision. It is thus clear that issue of applicability of section 104 of the Patents Act goes to very root of the matter. As has already been observed by my brother Hon'ble Shri Justice Bhatia in earlier round of litigation that the learned District Judge is required to consider as to whether counter claim is in the nature of as stated in proviso to section 104 before he comes to the conclusion, whether he has or he has no jurisdiction. In that view of the matter, I find that the piecemeal decisions by the learned Judge in the present case are totally not only unwarranted but are in total defiance of the orders passed by this Court in earlier round of litigation and also in ignorance of his own observations in the orders dated 7.8.2010 and 12.11.2010. The learned Judge has himself in para 4 of the order dated 12.11.2010 observed as under:

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"4. Elaborate submissions from both sides heard by this Court and it has been made clear to both the parties that once the question of jurisdiction of this Court is being challenged, it is to be considered as a preliminary issue and by framing a relevant issue to that effect. Therefore, in my opinion, instead of indulging into the submissions advanced before the Court challenging the jurisdiction of this Court and thereby to frame verbose issues, it will be appropriate to this Court to frame issues simpliciter raising a question regarding the jurisdiction of this Court. For this purpose, the word `jurisdiction' shall implicate the territorial, pecuniary jurisdictions. Besides that, if the jurisdiction of this Court is barred by a specific provision of law, the same also can be discussed and decided under the same issue of jurisdiction of this Court. For this reason it has to be made clear to both the sides that this Court is going to consider all those points which have been raised for the purpose of setting the jurisdiction of this Court and it is not necessary to frame distinct issues on each point as has been suggested vide Ex.64 and Ex.65."

(emphasis supplied)

It is thus clear that the learned Judge himself was mindful of the fact that issue of jurisdiction will go to the root of the matter and has therefore framed preliminary issue. He has also directed the parties to lead oral or documentary evidence on the preliminary issue. In that view of the matter I find that the learned trial Judge ought to have decided the issue pertaining to the applicability of section 104 of the Patents Act also.

11. It is also difficult to understand as to what prevented the learned Judge from deciding the applications below Exs.57 and 59 inasmuch as no complicated issues are involved while deciding the said applications. In my considered view, unless the issue regarding as to whether counter claim is to be taken on record, as to whether objection of the respondent-plaintiff under section 8 of the Court Fees & Stamps Act is to be entertained or not and unless the issue regarding applicability of section 104 to the proceedings before the Court is decided, the decision on further proceedings including Ex.5 would not be in the interests of justice. In the event the learned Judge holds that he has no jurisdiction under section 104 of the Patents Act then naturally he would not have the jurisdiction to entertain any further proceedings including application below Ex.5. In that view of the matter, though vide

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earlier order of this Court, it had directed all the applications to be considered simultaneously and though their Lordships of Apex Court vide order dated 20.1.2011 passed in above referred SLP challenging earlier order have observed thus:

> "Since we are informed that there are other pending applications, the same may also be disposed of along with the application for interim order."

This Court further observed in paragraphs 16 and 17 thus:

> "16. Revision Application is therefore allowed. Learned Judge is directed to decide the applications below Ex.57 and 59 and issue regarding jurisdiction in view of section 104 of the Patents Act on or before 11.02.2011.
>
> 17. In the event if the learned Judge holds that he has jurisdiction and that provisions of section 104 are not applicable the learned Judge shall decide the application below Ex.5 on or prior to 25.2.2011."

5. Said order passed by this Court was challenged before the Apex Court. The Apex Court disposed of the said Special Leave Petition on 15.2.2011 with following observations:

> "Since we are informed that there are other pending applications, the same may also be disposed of along with the application for interim order."

6. In this background, the impugned order is passed on 18.2.2011. Vide the said order, learned Judge has rejected the application filed by the present applicants below Ex.57, for leave to file counter claim. By the same order, the learned Judge has also rejected the application below Ex.59, filed by the respondents-plaintiffs contending that the counter claim was not correctly

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valued. The learned Judge has observed that, the objection was raised at a premature stage. It has been further held that, if at a later stage it is found that the court-fees paid are deficient, the same can be directed to be paid. The applicants have approached this Court being aggrieved by rejection of their application below Ex.57. It is the contention of the applicants that only operative part of the order was dictated on the said date and it was informed that the detailed order would be furnished within a period of 4/5 days. There are certain allegations made against the respondents. However, I do not find it necessary to go into those allegations. The applicants, therefore, challenged the operative part of the aforesaid order dated 18.2.2011 by filing Writ Petition No.1608/2011. When said writ petition came up for hearing before this Court on 21.2.2011, it was pointed out to the petitioners that since the District Judge had rejected the objection regarding jurisdiction, a revision would be tenable under section 115 of CPC, inasmuch as, had the objection of the petitioners been upheld the proceedings would have come to an end before the learned trial Court. As such, the petitioners withdrew the writ petition, with liberty to file civil revision application. When civil revision application was mentioned before the Bench which was assigned to hear the same i.e. Hon'ble Mr. Justice A. S. Oka, the learned Judge observed that revision application was not maintainable, and as such, dismissed the same. However, the learned Judge kept open the remedy of revision applicant of challenging the impugned order. As a result of the said order, petitioners filed writ Petition No.1712/2011 before

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this Court. However, when the petition was heard on 3.3.2011, the learned counsel for the respondents objected to the tenability of writ petition, on the ground that the petitioners have equally efficacious remedy under section 115 of the CPC. This Court while granting liberty to the applicants to convert the said writ petition into civil revision application observed thus:

> "14. It could thus be clearly seen that learned Judge has overruled the objections of present petitioners regarding the jurisdiction of the learned Judge to entertain the suit in view of specific provisions under Section 104 of the Patents Act, 1970. In that view of the matter, I find that since the petitioners have a remedy under Section 115 to prefer the Civil Revision Application against the order impugned herein, it would be appropriate that the petitioners are permitted to covert the present writ petition into CRA.
>
> 15. In ordinary circumstances, this Court would not have granted such a leave to the petitioners. However, since on account of the technical objections, the petitioners have been made to run from this Bench to that Bench, I find that it is in the interest of justice to permit the petitioners to convert the present petition into Civil Revision Application.
>
> 16. At this stage Shri Kamdar, the learned senior counsel graciously states that respondents would not object to the tenability of CRA when the same is listed before Bench hearing Civil Revision Applications."

7. Subsequently, when a reasoned order was made available, the applicant was granted leave to place the same on record. It appears that subsequently respondents-plaintiffs filed an application under section 151 and 152 of CPC seeking clarifications/corrections in terms of the order dated 18.2.2011. The learned Judge allowed the said application below Ex.133 by an

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order dated 1.3.2011 and clarified the earlier order as under:

> "a) The defendant had brought the counter claim and placed it before the Registry for registration and numbering. It was there with the Registry for the purpose of getting the objections corrected or clarified to the Registry.
>
> b) The claim was never placed on record of this Court in this proceedings.
>
> c) This Court never intended to observe that on 8.4.2010 the counter claim was filed on record of this Court i.e. was brought on record of this Court."

8. It is also the contention of the applicants, that even before passing of the said order, an opportunity was not given to the applicants. However, I do not find it necessary to go into the said allegation. Said order is also challenged, by way of amendment which was allowed by this Court vide order dated 20.4.2011. Thereafter, on various dates, the learned counsel for both the parties have been heard extensively.

9. Mr. Dani, learned counsel appearing on behalf of applicants, submits that the suit summons were received by the defendants on 4.3.2010. Written statement is filed on 20.3.2010. He submits that however since inadvertently counter claim remained to be made in the written statement, counter claim is physically filed on 8.3.2010. He submitted that on 9.6.2010 office raised objection on counter claim. On 1.7.2010, an application was filed for removing office objections. It is submitted that, on the said date, office

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objections were removed. Learned counsel submits that, since counter claim was made by filing additional pleadings, an application for leave to take the same as required under Order 8 Rule 9 was filed on 3.7.2010. He submits that not only this, but the plaintiffs have filed an objection to the counter claim, on the ground that the court-fees is not paid below Ex.59. It was, therefore, submitted that the counter claim is physically on record of the trial Court on 8.4.2010. It is submitted that even after the amendment to the provisions to Order 8 Rule 1, the defendants could have filed written statement within 90 days without any difficulty. It is submitted that if there was some delay, in view of interpretation as placed by the Apex Court on the provisions of Order 8 Rule 1 of CPC, in a judgment in the case of ***Kailash*** Vs. ***Nanhku*** (2005) 4 SCC 480, the same could have been condoned by the learned trial Court. He submits that the application below Ex.57 was only to comply with the technical requirement of Order 8 Rule 1.

10. Learned counsel further submits that, while considering the application for leave to take counter claim on record, the learned trial Court could not have gone into the merits of the matter. It is further submitted that since the grounds regarding counter claim are already on record in the written statement, no prejudice would have been caused to the defendants, if counter claim was allowed. Learned counsel further submits that the purpose of counter claim is to avoid multiplicity of litigation. Learned counsel relies on

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the judgment of the Apex Court in the case of ***Ramesh Chand Ardawatiya*** Vs. ***Anil Panjwani***, AIR 2003 SC 2508. Learned counsel submits that the learned trial Court has only referred to some extracts of the judgment of the Apex Court in the said case without considering the ratio laid down by the Apex Court. Learned counsel also relies on the judgments of the Apex Court in the case of ***Shanti Ranidas Dewanjee*** Vs. ***Dineschandra Day***, 1997 (8) SCC 174 and ***Mahendra Kumar & Anr.*** Vs. ***State of Madhya Pradesh & Ors.***, (1987) 3 SCC 265. Learned counsel also relies on a judgment of the Apex Court in the case of ***Bollepanda P. Poonacha & Anr.***, Vs. ***K.M.Madapa,*** (2008) 13 SCC 179. Insofar as the contention of respondents-plaintiffs, that the applicants must elect a remedy and that they cannot be permitted to simultaneously prosecute different remedies for the same cause, by way of writ petition, by way of post grant opposition and by way of counter claim is concerned, learned counsel submits that the grounds available under section 64 are more than section 25. Relying on the judgment of the learned Single Judge of Nagpur High Court delivered by Justice Hidayatullah (as His Lordship then was) in the case of ***Surajmal Rambux & Ors.*** Vs. ***Laxminarayan Raghunath***, AIR (38) 1951 Nagpur 284, the learned counsel submits that grounds for revocation of patent and opposition to grant are different and that simultaneous proceedings are not barred in law. Learned counsel also relies on a judgment of the Delhi High Court in the case of ***Dr.Aloys Wobben*** Vs. ***Yogesh Mehra & Ors***., (IA No.12638/2010 in CS (OS)NO.1963/2009 decided on 6.12.2010) in support of

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the said proposition.

11. Mr. Dhond and Mr. Kanade who have advanced arguments in part on behalf of the respondents, submit that the petitioners have also filed Writ Petition (St.) No.1136/2010 before this Court. They have also filed an application for post grant opposition before the Competent Authority and also a counter claim seeking revocation. It is submitted that the applicants are required to elect a remedy and since the applicants have already filed other two proceedings, no error could be noticed with the impugned order. Learned counsel in this respect relies on a judgment of the Apex Court, in the case of ***A.P.State Financial Corporation*** Vs.***M/s.Gar Re-Rolling Mills & Anr.,*** (1994) 2 SCC 647. Learned counsel submits that the application below Ex.57, would be referable only to the jurisdiction under Order 8 Rule 9. He submits that since there was inordinate delay in making the application, the learned Judge has rightly exercised the jurisdiction while rejecting the application which warrants no interference. Learned counsel in this respect relies on the judgments of the learned Single Judge of this Court, in the case of ***Shailaja A. Sawant (Dr.) & Ors.,*** Vs. ***Sayajirao Ganpat Patil & Ors.***, 2004 (5) Bom.C.R 548, of the Division Bench of this Court in the case of ***Chintaman Sukhdeo Kaklij & Ors.,*** Vs. ***Shivaji Bhausaheb Gadhe & Ors.,*** 2004 (5) Bom.C.R. 573 and of the Apex Court in the case of **Ramesh Chand Ardawatiya** (supra). Learned counsel further submits that, the applicants have resorted to forum

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hunting and on this count also they are not entitled to any relief. Reliance in this respect is placed on the judgments of the Apex Court in the case of ***Dalip Singh*** Vs. ***State of Uttar Pradesh & Ors.,*** (2010) 2 SCC 114, ***M/s.Chetak Construction Ltd***. Vs. ***Om Prakash & Ors***., JT 1998(3) SC 269 and ***Tamilnad Mercantile Bank Shareholders Welfare Association*** (2) Vs. ***S.C.Sekar & Ors.,*** (2009) 2 SCC 784.

12. It is a further specific contention of the respondents, that as a matter of fact on 8.4.2010, no counter claim, as alleged, has been filed by the present applicants. Learned counsel further submits that, though the written statement contains every ground regarding counter claim, still applicant chose not to make counter claim in the written statement. It is submitted that, in such circumstances, an application below Ex.57, after the order was passed in writ petition filed by present petitioners, has been rightly rejected by the learned trial Court. Learned counsel further submits that, even applying the principle of prejudice, no interference would be warranted with the impugned order. It is submitted that, if the counter claim is permitted to be placed on record, in view of provisions of section 104 of the Patents Act, 1970, suit will have to be transferred to the Original Side of this Court. It is submitted that, if the suit is tried by the learned District Judge, the respondents-plaintiffs would have an opportunity of getting the suit decided expeditiously. However, if it is to be tried by this Court, there will be an inordinate delay, and since the patent is for

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a limited period, this Court should not interfere with the order passed by the learned trial Court in its extra ordinary jurisdiction.

13. In view of these rival submissions, limited issue that arises for consideration before this Court, is as to whether learned trial Court is justified in rejecting the application below Ex.57, for taking counter claim on record.

14. I will first deal with the contentions raised on behalf of the plaintiffs, as to whether there was a counter claim atleast physically on record of the learned trial Court or not. For this, it will be relevant to refer to certain observations of the learned Judge in the impugned order dated 18.2.2011.

> "13. Admittedly counter claim is filed by Defendant No.1 i.e. a party concerned, but the application, Exh.57 is not signed by the Defendant No.1. On the contrary, it is signed by advocate concerned who was representing Defendant No.1. For that reason in my considered view the party to the litigation can file as many as applications or petitions before the Court to agitate the cause and to refer to the Court for seeking a relevant relief.
>
> 14. The matter taken up before the Court has two distinct stags. First is to file the proceeding on record and second is for putting it before the Court for the necessary orders. The proceeding which is filed before the Court has to stand on good legal footing or otherwise it will be nothing but the nugatory process to agitate the cause. In consonance with these conditions an application which is filed before the Court if not comprising with the legal mandate, the same has to be rejected or returned back after giving appropriate hearing to the party.
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> 15. Pursuant to the above conclusions referring to the counter claim filed by the defendant though was placed on record on 08/04/2010 was merely placed on record on account of its

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having some defects therein vis-a-vis it was leaving behind some procedural steps to be taken. For that reason the proceeding which was filed on record will remain on the record of the Court, which will indicate that it is not given entitlement to the plaintiff & to take it out on its own and deal with it. Similarly, withdrawal of the documents, which are once put up on record in a suit cannot be dealt with without the leave of the Court otherwise there will be an anomaly in the proceeding.

16. On the backdrop of these propositions, contentions of Ld. Advocate Shri Kher that the proceeding which was filed by him before the Court could have been taken out by him at any time and can dealt with it until it has been exhibited. I cannot accept such proposition for a reason that the Court proceeding cannot be treated as a post bag wherein anybody can come and put his document in a said bag. There is certain system and procedure of putting up the document on record of the Court in a Civil Suit. There is a process of scrutiny by the office before admitting those documents on record or taking the proceedings like counter claim/suit of the defendant on record."

It can thus clearly be seen from the impugned order itself that the counter claim has in fact been lodged on 8.3.2010. It appears that there were certain office objections when it was lodged. It is pertinent to note that, not only that but the respondents themselves have filed an application below Ex.59, contending that the counter claim is deficiently stamped. It will be relevant to refer to Roznama dated 19.6.2010 which read thus:

"Both parties and their advocate present along with Sr.Counsel Sanjay Kher and Shri Himanshu Kane. During the course of arguments Counsel Shri Kher pointed out that note was taken by predecessors of this Court regarding the oral objection raised by the Office and parties. It has been pointed to the court that the so called counter claim has not been properly stamped nor there is any returnable of the valuation of the value property i.e. patent. Ld. Counsel Shri Kher has accepted this position and agreed to make necessary compliance that is pasting the relevant court fees stamps.

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> It is further submitted that as per institution of court fees for the monitory claim and to carry out required amendments above hearing stand over to 3rd July, 2010. Opportunity given to make required compliance on or before 3rd July, 2010."

Perusal of Roznama dated 1.7.2010, would reveal that an application was filed by the applicants' counsel, for taking the matter on board for required amendments. It can further be seen that the amendments were carried out by the advocate for the applicants and stamps affixed on counter claim.

15. Not only this, the learned Single Judge of this Court (Hon'ble Mr. Justice J. H. Bhatia) while disposing of Writ Petition No.6994/2010, vide order dated 15.9.2010 has specifically observed thus:

> "When the provisions of Sec. 104 will be pointed out to the learned District Judge, he cannot ignore the said provisions. Whether the counter-claim is of the nature as stated in the proviso to Sec.104 will have to be heard by him before coming to the conclusion whether he has or has no jurisdiction. I see no illegality or irregularity in the impugned order that all these application shall be heard together. It is presumed that if he comes to the conclusion that he does not have jurisdiction in view of the provisions of Sec.104, naturally, he would desist from passing any order. However, if he comes to the conclusion that the case is not covered by the proviso to Sec.104 and he has jurisdiction, he cannot be restrained from hearing the application Exhibit 5 and from passing order on the same immediately after hearing the matter."

It can further be seen that the very learned Judge of the District Court himself vide his order dated 12.11.2010 below Ex.61 has observed thus:

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> "Besides that, if the jurisdiction of this Court is barred by a specific provision of law, the same also can be discussed and decided under the same issue of jurisdiction of this Court. For this reason it has to be made clear to both the sides that this Court is going to consider all those points which have been raised for the purpose of setting the jurisdiction of this Court ....."

It can thus be seen that, not only the counter claim filed by the present applicants was on record, but also parties understood the very much to be so. Not only this, but the learned Judge also understood in the same manner, as otherwise, there was no occasion for the learned Judge, to have observed that if the jurisdiction of this Court is barred by specific provisions of law, the same also can be discussed. It can further be seen that, the parties were also of the same impression, when the writ petition was argued before Hon'ble Mr. Justice Bhatia inasmuch as the learned Judge observed that, whether counter claim is of the nature as stated in the proviso to Sec.104, will have to be heard by him, before coming to the conclusion, whether he has or has no jurisdiction. It is however difficult to understand, as to what was the necessity to file the application below Ex.133 and the order passed thereon. The learned Judge, vide clarification dated 1.3.2011, clarified that the defendants had brought the counter claim and placed before the Registry for registration and numbering and that it was there with the Registry for the purpose of getting objections clarified to the Registry. The learned Judge further observes that the claim was never placed on record of this Court in the proceedings. The aforesaid clarification, in my view, was totally unwarranted. A perusal of the Roznama

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dated 19.6.2010, 1.7.2010 and 3.7.2010 would show that firstly the observations so made are contrary to record and at the most can be said to be hyper-techinical. Perusal of Roznama dated 19.6.2010 would reveal that, the very same learned Judge has observed that during the course of arguments, Counsel Mr. Sanjay Kher pointed out that, a note was taken by predecessor of this Court regarding oral objection raised by the office and the parties. He further observes that, it has been pointed to the Court that the so called counter claim has not been properly stamped nor there is any returnable of the valuation of the value property i.e. patent. He further observes that, the learned counsel Shri Kher has accepted this position and agreed to make necessary compliance i.e. pasting of relevant court fees stamps. It further appears from the Roznama dated 1.7.2010, that at the request of the applicants, the matter was taken on board for carrying out necessary amendments and that the necessary amendments were carried out by the Advocate for the applicants and stamps were fixed on the counter claim. The Roznama dated 3.7.2010 would reveal that, there is a reference to the defendant No.1 making compliance in view of order below Ex.57. Perusal of Roznama would reveal that, on the same date, an application is made by the present applicants below Ex.57, for seeking leave to take counter claim on record. The learned Judge has wasted much paper and ink in trying to draw a distinction as to whether the counter claim was placed on record on 8.4.2010 before the Registry or before the Court. However, fact cannot be disputed that, as a matter of fact on 8.4.2010, a counter claim was in

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fact placed on record of the Court and in any case atleast before the Registry of the Court. It is further pertinent to note that the present respondents-plaintiffs themselves have filed an application under section 8 of the Bombay Court Fees Act below Ex.59. If according to the plaintiffs, counter claim was not on record, it is difficult to understand as to what was the occasion, for filing such an application. In that view of the matter, the submission in this regard, by the learned counsel for the respondent-plaintiff is without any substance.

16. Insofar as the contention of the respondents-plaintiffs, regarding the present applicants indulging into forum hunting is concerned, same is also without any substance. Undisputedly, under the provisions of section 25 of the Patents Act, 1970 (hereinafter referred to as the "said Act"), one is entitled to make a representation by way of opposition, against the grant of patent on the grounds mentioned in the said section. The said application is to be made to the Controller. Undoubtedly, under section 104 of the said Act, where counter claim for revocation of patent is made by the defendants, the suit along with counter claim is required to be transferred to the High Court. Section 64 of the said Act provides that a patent may be revoked, on a petition of any person interested or of the Central Government, by the Appellate Board or on a counter claim in a suit for infringement of the patent by the High Court, on the grounds mentioned in the said section. It can be seen from the perusal of section 25 and section 64, that though certain grounds are overlapping, there are certain

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additional grounds, that are available under section 64 to a party which are not available under section 25. His Lordship Mr. Justice Hidayatulla (as His Lordship then was) in his judgment of the Nagpur High Court in the case of **Surajmal Rambux & Ors**. (supra) has observed thus:

> "7. Further, S.26 deals with the revocation of a patient, while S.9 deals with opposition to the grant of a patent. These are different stages and at least in so far as the grounds are different and in the absence of any prohibition, it cannot be said that a person who has unsuccessfully opposed the grant of a patent cannot file an application for its revocation."

17. In the case of **Dr. Aloys Wobben** (supra), in a suit filed by the plaintiffs against the defendants, for infringement of patents, the defendants filed written statement and also counter claim seeking cancellation of patent. The defendants had also sought revocation of plaintiffs' patent, before the Intellectual Property Appellate Board. The application was filed by the plaintiffs arguing that defendants cannot take recourse to both the defence of revocation in this suit, as well as an application before the Appellate Board. It was contended that the plaintiffs cannot be permitted to take recourse to these remedies simultaneously, and therefore, it was prayed that he should be restrained from pressing the application for revocation. The Delhi High Court rejected the said contention, holding that it would be contrary to the statute to hold that defendants cannot pursue his independent statutory remedy and that would be plainly against the public policy. Insofar as the contention of respondents-plaintiffs that the plaintiffs having failed to get the orders in writ

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petition, have filed counter claim, and have therefore, indulged into forum hunting is concerned, the same is also devoid of any substance. As a matter of fact, as discussed herein above, a counter claim has been filed on 8.4.2010. Writ petition is filed much after the date on which the said counter claim was filed. In any event, Division Bench of this Court vide order dated 7th June, 2010 in the said Writ Petition (L) No.1136/2010 has observed thus:

> "1. We are adjourning the matter for two weeks at the request of the counsel for the petitioners. It is made clear that the pendency of the petition shall in no way preclude the trial courts and the office of the Controller of Patents from dealing with respective suits pending between the parties."

It can thus clearly be seen that the Division Bench of this Court itself, has in unequivocal terms clarified that pendency of the petition shall, in no way, preclude the trial Court and office of the Controller of Patents from dealing with respective suits pending between the parties. In that view of the matter, the contention of the respondents that the applicants are indulging in forum hunting and making an attempt to approach one forum after failing before the other forum is concerned, is factually without substance. Insofar as the reliance placed by the respondents on various judgments of the Apex Court, to the effect that forum hunting has to be curbed at any costs is concerned, the reliance though well placed, would not be applicable to the facts of the present case. In that view of the matter, the contention in this regard also requires to be rejected.

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18. Insofar as the contention of the petitioners regarding doctrine of election is concerned, the petitioners have relied on a judgment of the Apex Court in the case of **A. P. Estate Financial Corporation** (supra). In the said judgment itself the Apex Court observes thus:

> "15. The Doctrine of Election clearly suggest that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different."

It can thus clearly be seen that the Apex Court itself has held that the said doctrine would not apply to the cases, where the ambit and scope of the two remedies is essentially different. As already discussed herein above, Nagpur High Court in the case of **Surajmal Rambux & Ors.** (supra) has held that in the absence of prohibition, it cannot be said that the person who has unsuccessfully opposed the grant of patent, cannot file an application for its revocation. Similar view has been taken by Delhi High Court in the case of **Dr.Aloys Wobben** (supra).

19. In any event, while considering the application for leave to place counter claim on record, in my view, merits of the counter claim cannot be gone into. Limited scope of enquiry would be, as to whether the applicants have made out a case for grant of permission or not. The other issues would arise only in the event the counter claim is permitted to be taken on record.

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Insofar as the contention of the respondents regarding prejudice is concerned, it is contended that if the suit is permitted to continue in Thane Court, it can be decided expeditiously and if counter claim is permitted to be taken on record, it will have to be transferred to the Original Side of this Court and it will take a long time for suit to be decided. To appreciate this submission, a reference to section 104 of the said Act would be necessary.

Section 104 of the Patents Act, 1970 reads thus:

> "104.**Jurisdiction**.__ No suit for a declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any Court inferior to a district Court having jurisdiction to try the suit.
>
> Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision."

20. It can thus clearly be seen that, though a suit for declaration under section 105 or for any relief under section 106 has to be instituted in the District Court, where a counter-claim for revocation is made by the defendant, the suit along with counter claim has to be transferred to the High Court for decision. When the Legislature has specifically provided that once counter claim is made by the defendant for revocation of patent the suit shall be transferred to the High Court, can a party be permitted to make a grievance that counter claim should not be permitted only on the ground that if the suit is decided by District Court, it would be decided expeditiously and if it is transferred to High Court, the decision would be delayed. When the Legislature has specifically provided

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that once counter claim for revocation of patent is made, the suit and the counter claim are to be transferred to the High Court, can a question of prejudice be permitted to be raised. It is settled law, that when the law requires a particular thing to be done in a particular manner, it has to be done in that manner alone. The question is when the Legislature has specifically provided that the suit and counter claim to be transferred to the High Court once a counter claim is made for revocation of patent, can an application for permission to place counter claim on record be rejected, only because the plaintiffs desire that the suit should be decided by the District Court and not the High Court. In my respectful view, the answer will have to be No.

21. That leads us to the question as to whether the learned trial Judge was right in rejecting the application. The learned Judge has rejected the application on three grounds viz;

(i) that the defendants have not given any justification for not filing counter claim within time and not filing it with written statement within time;

(ii) that belated filing of counter claim would prejudice the plaintiffs;

(iii) that in view of the provisions of Patents Act, an opportunity had not been lost to the defendants and his right is not being deprived. The learned Judge has heavily relied on the judgment

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of the Apex Court in the case of **Ramesh Chand Ardawatiya** (supra).

22. In so far as the first ground on which the learned Judge relies is concerned, the Apex Court in the case of **Mahendra Kumar & Anr.**, (supra) has observed thus:

> "15. The next pint that remains to be considered is whether Rule 6-A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6-A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6-A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6-A (1) in holding that as the appellants had filed the counter-claim after the filing of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6-A (1) of the Code of Civil Procedure."

Same view has been taken by the Apex Court in the case of **Shanti Ranidas Dewanjee** (supra). The finding of the learned trial Judge, therefore, that since no compelling reasons are given for not filing the counter claim with written statement, is not correct. Insofar as the second ground on which the application is rejected, that the defendants have not lost their remedy and the statutory remedies are available to them is concerned, in my view, the said ground cannot be a ground, for rejecting the application for placing the counter

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claim on record. As already discussed herein above, firstly it is not permissible to go into merits of the counter claim at this stage, secondly, though the applicants-defendants have other remedies available in law, the remedy to file counter claim cannot be denied to him, on that ground, in view of the view taken by the Nagpur High Court in the case of **Surajmal Rambux & Ors.** (supra) and Delhi High Court in the case of **Dr.Aloys Wobben** (supra).

23. That leads us to consider the third ground on which the application is rejected. Admittedly, the application made by the applicants will have to be referred to the jurisdiction under Order 8 Rule 9 of CPC. Learned Judge has reproduced certain extracts from the judgment of the Apex Court in the case of **Ramesh Chand Ardawatiya** (supra) in support of its reasoning and particularly for finding that the application which is filed at such a belated stage would prejudice the plaintiffs. In the case of **Ramesh Chand Ardawatiya** (supra) before the Apex Court the plaintiff had filed a suit for declaration, possession and permanent injunction against the defendant-Ardawatiya. On 10.2.1987 the defendant appeared through his counsel. On the said date, the trial Court granted order of status quo. In the said suit, the defendant did not file written statement though the matter was adjourned for 15 dates. The plaintiff thereafter moved an application on 24.2.1997 for appointment of Commissioner to carry out inspection of the suit property. In the said Commissioner's report, it was found that the defendant had proceeded

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with construction work inspite of interim order of Court directing to maintain status quo. On 4.6.1988, under the administrative orders of the District Judge, case came to be transferred to the Court of Additional Judge. Thereafter, case was adjourned on 29 dates and even then the written statement was not filed. On 29.10.1992 the defendant absented from appearance from the Court and case proceeded ex-parte. On 24.7.1993 i.e. the date appointed for plaintiff's ex-parte evidence, the defendant filed an application under Order 9 Rule 7 of the CPC seeking setting out ex-parte proceedings. On 6.9.1993, case came to be transferred to another Court. On 11.5.1994, the trial Court passed a detailed order holding that the defendant completely failed to assign any good cause for his previous non-appearance, and therefore, rejected the application under Order IX Rule 7 of CPC. The evidence on behalf of the plaintiff was recorded. Arguments of the counsel for the plaintiff were heard and the judgment was reserved. In the meantime, the defendant had preferred a civil revision application No.1202/94 challenging the order dated 11.5.1994. Civil revision application was directed to be dismissed on 20.3.1995 by the High Court. On 25.3.1995, the defendant moved an application under Order 18 Rule 17 for giving him an opportunity to cross-examine the plaintiff's witness. The said application was allowed on 2.5.1995. At this stage, after seeking leave of the Court, an application proposing to place on record a file written statement under Order 8 Rule 6 of CPC by way of counter claim came to be filed. In the meantime, the plaintiff had challenged the order dated 2.5.1995 by filing civil

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revision application which was allowed by the High Court on 16.1.1996. By a judgment and decree dated 8.1.2001, a suit was decreed. Defendant preferred First Appeal against the said judgment and decree which was dismissed by the Additional District Judge, Jaipur on 7.3.2001. Second Appeal was also dismissed on 16.4.2001. Being aggrieved thereby, an SLP was filed before the Apex Court. Dealing with the submission on behalf of the appellant that even if the defendant was being proceeded ex-parte, his counter claim should have been taken on record, the Apex Court observed thus:

> "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 stastement 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 defendant, 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.

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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 (1955) 2 SCR 1 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 appearances. If he wishes to be relegated to the position which he would have occupied had he appeared during those proceedings which have been held ex-parte, he is obliged to show good cause for his previous non-appearance. It was clearly held that unless good cause is shown and the defendant relegated to the position backwards by setting aside the proceedings held ex-parte, he cannot put in a written statement. If the case is one in which the Court considers that a written statement should have been put in and yet was not done, the defendant is condemned to suffer the consequences entailed under O. VIII, R.10. The view taken in Samngram Singh (supra) by two Judges Bench was reiterated and re-affirmed by three Judges Bench in Arjun Singh v. Mohinder Kumar and others (1964) 5 SCR 946. Certain observations made by this Court in Laxmidas Dayabhai Kabrawala v. Nandabhai Chunilal Kabrawala and Ors. (1964) 2 SCR 567, 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 part 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 O.VI R. 17 of the CPC.

28. Looking to the scheme of O. 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 R. 1 may itself contain a counter claim which in the light of R.1 read with R.6-A would be a counter claim against the claim of the plaintiff preferred in exercise of legal right conferred by R.6-A. Secondly, a counter claim maybe 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 R.9. In

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the latter two cases the counter claim though referable to R.6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O.VI R.17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O.VIII, R.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 could 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 proceedings. 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 couter claim was obviously not set up in the written statement within the meaning of R.6-A. There is no question of such counter claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter claim being raised by way of 'subsequent pleading' as there is no `previous pleading' on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter claim may not prejudice the defendant because in spite of the counter claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter claim.

29. The purpose of the defendant which was sought to be

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achieved by moving the application dated 2.5.1995 under O.VIII R.6-A 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 O.IX R.7 of 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 another's case (supra) counter claim was sought to be brought on record after the filing 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 written statement was ipso facto not maintainable. This Court upset such erroneous view by clarifying the legal position, apparent on a bare reading of the relevant provision that the only requirement of R.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 placing a positive defence to defend himself against the relief sought for by the plaintiff." (emphasis supplied)

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24. The Apex Court in the said case, has clearly held that counter claim must necessarily find its place in the written statement. It has been further held that once a right of the defendant to file written statement has been lost, then neither written statement can be filed as of right nor counter claim can be allowed to be taken on record, since counter claim must find its place in the written statement. The Apex Court has further held that since a court has a discretion to permit written statement being filed belatedly, therefore also has a discretion to permit the written statement containing a plea in the nature of set off and counter claim being filed belatedly. However, it has been held that, 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 defendant, 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. The Apex Court has further held that there are three modes of pleading or setting up counter claim in a civil suit viz.

(i) in a written statement under Rule 1;

(ii) a counter claim may be preferred by way of amendment incorporated subject to leave of the Court in written statement;

(iii) a counter claim may be filed by way of subsequent pleadings under Rule 9.

It has further been held that in subsequent two cases, counter claim cannot be brought on record as of right but shall be governed by the discretion

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vested in the Court either under Order 6 Rule 17 of CPC, if sought to be incorporated by way of amendment or subject to exercise of discretion conferred on the Court under Order 8 and Rule 9 of CPC if sought to be placed on record by way of subsequent pleadings. The Apex Court has further held that the purpose of filing of a counter claim is to avoid multiplicity of judicial proceedings and save upon Court's time. It is also for the purpose of avoiding inconvenience to the parties by enabling all disputes between the same parties being decided in the course of same proceedings. The Apex Court has further observed that a counter claim either by way of amendment or by way of subsequent pleading should not be permitted to prolong the trial or otherwise smooth flow of proceedings or causing delay in the progress of the suit. It has been held that such a discretion should not be exercised as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceedings. The Apex Court however observed that if the issues have already been framed and the case is set down for trial or more so when the trial has already commenced, generally a counter claim may be refused to be taken on record. It holds that certainly when there is no written statement on record, counter claim is not at all entertainable.

25. I am of the considered view that the learned Judge has totally misapplied the principles laid down by the Apex Court in the case of **Ramesh Chand Ardawatiya** (supra). In the said case, the Apex Court was considering

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an attempt to prefer a counter claim when defendant had inspite of grant of dozens of chances, failed to file written statement and was proceeded ex-parte. The case therein was a case of gross-negligence. The Apex Court found that it was difficult to conceive the defendant being conferred with a right to attack the plaintiff by way of counter claim in that very suit, in which he has not been entitled even to defend himself by filing written statement.

26. Let us examine the facts of the present case. The suit summons were served on the applicants on 4.3.2010. On 20.3.2010, a written statement is filed. On 8.3.2010, a counter claim is physically lodged in the Court/Registry. On 19.6.2010, office has raised objections. On 1.7.2010, office objections are removed. On 3.7.2010, an application in question has been filed. In accordance with the provisions of Order 8 Rule 1, defendants as a matter of right, can file written statement within a period of 30 days from the service of suit summons. Even when written statement is not filed within 30 days, normally a party would be permitted to file the same within a period of 90 days from the date of service of summons for the reasons to be recorded. As held by the Apex Court in the case of **Kailash** (supra), the said provisions are held to be directory and not mandatory. Even after a period of 90 days, defendant can be permitted to file written statement if he makes out a compelling case. However, so far as the first period of 90 days is concerned, in normal course, party would be permitted to file written statement. In the present case, though

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the written statement is filed within 30 days, the counter claim is lodged on 34th day. At the most, it could be said that it is filed belatedly by four days beyond the prescribed period of 30 days. However, admittedly it is within a period of 90 days. It appears that subsequently there were certain objections which came to be raised by the office and which were subsequently removed and when the matter was heard on 3.7.2010, an application in question came to be filed. It appears that realising that counter claim could not be placed on record under Order 8 Rule 9 by way of subsequent pleadings unless leave of the Court was obtained, an application in question came to be filed so as to overcome the technical lacunae. However, counter claim, in fact, is physically on record on 8.4.2010. The proceedings before the learned trial Court were only at the stage of considering the application for temporary injunction. The issues are yet to be framed, leave aside the trial being commenced. As has been held by the Apex Court in para 28 of the judgment in the case **Ramesh Chand Ardawatiya** (supra), generally speaking, the counter claim not contained in the original written statement, may be refused to be taken on record if issues have already been framed and case is set down for trial and more so when the trial has already commenced. Though the learned Judge in para 30 of the impugned order, has reproduced earlier and later portion of the said paragraph, it appears that the aforesaid observations of the Apex Court which appear in between the quotations reproduced in the impugned judgment have missed the attention of the learned Judge. Had the learned Judge noticed this observation then the learned Judge would have considered that in the present case, the issues were

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yet to be framed, leave aside case being set down for trial or trial being commenced, and as such, could have exercised the jurisdiction in allowing the application. This could be looked from another angle. If instead of filing an application for leave to place counter claim on record, even if today, an application for amendment of written statement under Order 6 Rule 17 of CPC was made for making the counter claim, could it have been rejected? Even as of today, the issues are yet to be framed. It is settled principle of law that the Courts are required to take liberal view in the matter of amendment. Insofar as the written statements are concerned, Courts are required to be more liberal. The only rider is in view of proviso to Order 6 Rule 17 of CPC which requires that amendment should not be granted if a party seeks to bring on record, a matter which with exercise of due diligence, it could have brought on record prior to commencement of trial. In that view of the matter, since the trial is yet to commence, even if an application for amendment of written statement incorporating counter claim is filed today, the same would have been allowed as it would not be hit by the proviso to Order 6 Rule 17. Apart from that even according to the respondents-plaintiffs, the facts pleaded in the counter claim are identical with the facts pleaded in the written statement. If that be so, there was no question of any prejudice being caused to the respondents-plaintiffs. In my considered view, since the application in question was filed at the stage, when the issues are also not framed, the learned trial Court ought to have allowed the same.

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27. The Apex Court in the case of ***Smt. Rani Kusum*** Vs. ***Smt. Kanchan Devi & Ors***., (2005) 6 SCC 705 observed thus:

> "10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific langauge of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.
>
> 11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.
>
> 12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. (See Sushil Kumar Sen v. State of Bihar).
>
> 13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See Blyth v. Blyth). A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath v. Rajesh.)"

28. It can thus be seen that the procedure is handmaid of justice. The intent of the legislature to bring Order 8 Rule 6-A of the CPC is to avoid

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multiplicity of judicial proceedings and save upon the Court's time. It is further aimed at deciding all disputes between the same parties in the course of same proceedings. Taking into consideration all these aspects of the matter, I am of the view that the approach adopted by the learned trial Judge to say the least, is hyper-technical. I find that the findings of the learned trial Judge regarding prejudice are totally without substance, in the facts of the present case. In that view of the matter, I find that the learned trial Judge has exercised the jurisdiction vested in it with material irregularity warranting interference in revisional jurisdiction of this Court under section 115 of CPC.

29. In the result, Civil Revision Application is allowed. The impugned order dated 18.2.2011 is quashed and set aside. Application filed by the present applicants below Ex. 57 seeking leave to file counter claim on record is allowed.

30. At this stage, Mr. Dhond, learned counsel for respondent No.1 prays for stay of this order. He submits that in the event the stay is not granted, the suit will have to be transferred to this Court.

31. Learned counsel, Mr. Rajadhyaksha appearing for the applicant opposed this prayer.

Bombay High Court

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32. Taking into consideration the long history of litigation between the parties, it is directed that the suit shall not be transferred to this Court for a period of six weeks from today.

(B. R. GAVAI, J)

Bombay High Court

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