

## **DELAY IN MATRIMONIAL PROCEEDINGS; EFFECT OF NON APPLICATION OF COUNTERCLAIMS – A REVIEW**

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### **INTRODUCTION:**

*“I am tired of these frequent adjournments...”*  
*“Will I not be able to see the end of my case?”*  
*“How long should I carry this stuff?”*  
*“When will I get my justice?”*

The above are some of the comments of anguish which are normally heard among the litigants who are seated at Family Courts. When the case gets adjourned, the disappointed litigant has no option other than to blame the Court or the advocate or the opposite party and to find fault with the entire justice delivery system without any basis. There are many factors which cause the delay in Court proceedings related to Family matters.

The family disputes involve sentiments, emotions, apart from other facts and circumstances. The decisions taken amidst emotional disturbance might go wrong. Conciliation and reconciliation are required to bring down the emotions of the spouses, which would guide them to understand the dispute and would enable them to identify the solution and march towards it. Such a conciliatory attempt becomes difficult due to the non co-operation of the other spouse. Therefore the Judge has to make extraordinary efforts to bring down the emotions of the spouses. More importantly, the Judge shall not exercise his Judgeship or shall not expose the powers vested on him while handling conciliation and shall have to proceed with the conciliation empathetically.

The Judge presiding over the Family Court shall have to uncap the Judgeship while dealing with the matrimonial matters and shall understand the mindset of the spouses without forming any opinion as to who was the wrongdoer. Thus it takes some time for the Judge as well as the spouses to synchronize with the process of conciliation.

In many circumstances, the failure in conciliation, counseling, mediation and other attempts made towards the settlement of disputes between the spouses would take the case towards adversarial system. The ego plays an important role in non-settlement of disputes between the spouses. By the time, when the case goes to the arena of adversarial system of trial, nearly 6 months to one year might have lapsed. This does not stop here just like that. The misery of litigation hovers around the ill-fated litigants, agonizing much more when the bout starts in the adversarial system.

In case where the matrimonial dispute has to be contested, the choice of the respondent is to file the counter objection. In case of rival claim to be made, the first option could be the filing of the counterclaim. Instead, there are instances, where a separate *lis* is opted.

The non application of counterclaims at the right time is one of the delaying tactics by either of the spouse which antagonizes the *lis* causing undue delay. The need of sensitization towards such application and effective utilization of counterclaims in matrimonial disputes is discussed hereunder.

## **COUNTER CLAIMS:**

The access to remedy in a dispute is nothing but the access to justice within the ambit of law, where the victim should get justice within a reasonable time frame. The law of tort has the basis from the maxim *Ubi jus ibi remedium*. The word “*jus*” means legal authority to do something or to demand something. The word “*remedium*” means that the person has the right of action in the Court of law. The literal meaning of the maxim is that, “*where there is a right, there is a remedy*”. Thus any litigation should end up justifiably, with the remedy available within the scope of law, in a reasonable volume of time which is mandated under the relevant laws. The famous saying “*Justice delayed is Justice denied*” would aptly suit the circumstance. Thus the essence of application of counterclaims could be sensed very well which could be paving way for a speedy disposal of a dispute.

The word Counter Claim is enunciated under **Order VIII Rule 6A of The Code of Civil Procedure. (the Code in short)** Notwithstanding to the defense taken, the respondent spouse, would be entitled to make a rival claim without filing a separate case for making such claim. This provision is exhaustive in respect of dealing with the counter claims, which are applicable to family court proceedings also. The effect of application and non-application of counterclaims in matrimonial matters and it's consequences have to be analyzed. The relevant provisions from Order VIII Rule 6A of **the Code** is extracted hereunder.

**6A. Counter-claim by defendant.—(1)** *A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:*

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

**(2)** *Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.*

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

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

**6B. Counter-claim to be stated.—** *Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.*

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

**6D. Effect of discontinuance of suit.—***If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.*

**6E. Default of plaintiff to reply to counter-claim.—***If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.*

**6F. Relief to defendant where counter-claim succeeds.—***Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be the Court may give judgment to the party entitled to such balance.*

**6G. Rules relating to written statement to apply.—***The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]*

The above extracted provisions of **the Code** would make it clear that the respondent spouse who faces the proceedings initiated by the petitioner spouse and who defends the claim, need not institute a separate proceeding such as Original Suit or Original Petition to bring about their rival claim. Rather the defendant/respondent could very well invoke the above provisions of **Order VIII Rule 6-A** of **the Code** and file the counterclaim within the given time frame. However no time limit is prescribed under **the Code** for filing counterclaim which has to be analyzed through the precedents. Thus, in addition to the filing a counter statement, the respondent spouse has the choice of filing counterclaim to raise the defense.

Such counter claims, though in the form of written statement should be duly stamped as if it were instituted as separate suit/proceedings. Though a fresh case number is not assigned, the counter claim would be numbered as an Interlocutory Application (I.A) and shall be treated as a separate suit/proceeding, which shall have a separate finding in the common judgment. However separate decrees should be drafted in respect of the main case as well as the counterclaim.

In such circumstances, the plaintiff/petitioner, who originally instituted the proceedings, shall have to file the reply statement to the counterclaim within the time stipulated under Order VIII Rule 6-E of **the Code**. The non-filing of such reply statement would tender the same result as if the respondent in the counterclaim were a defaulter and would be liable to be set *ex parte* in the counterclaim. Thus the dispute could be tried in terms of both the main Original Petition as well as the Counterclaim together and jointly and decided on merits.

The Family Courts are bound to follow **the Code** in terms of the procedure. Thus the above provisions regarding counter claim enunciated under **the Code** are very well applicable to the Family Courts. In India, the disputes pertaining to matrimony gets logged in to Courts commonly either through The **Hindu Marriage Act, 1955** or **The Divorce Act 1869**, or **The Special Marriage Act, 1954** or by way of Original Suits in respect of matrimonial disputes related to **Mohammedans** or by way of **the Guardians and Wards Act 1890**.

Generally, the relief sought by the petitioner spouse would be either divorce, nullity of marriage, to declare the marriage as null and void, judicial separation, restitution of conjugal rights, guardianship of the child, claiming share in the joint property of spouses, and claim of maintenance etc. When the attempts of settlement made through counseling, mediation, conciliation goes unsuccessful, the respondent spouse would realize that the matter would not get settled amicably and eventually the respondent spouse would get mentally prepared to contest and defend the case during trial on merits. The maximum best defense would be chosen by the respondent only to ensure that the petitioner spouse goes unsuccessful.

In the cases falling under ***the Hindu Marriage Act 1955***, where the petitioner claims any relief of divorce or judicial separation or restitution of conjugal rights, and if the same is opposed by the respondent on the grounds of adultery, cruelty or desertion of the petitioner, the respondent may make a counter claim under ***section 23A of the Hindu Marriage Act 1955***. The analogous provision could be found under ***section 15 of The Divorce Act 1869***, and under ***section 35 of the Special Marriage Act 1954***. The applicability of the above provisions are limited, only to the extent when the respondent intends to charge the petitioner on the grounds of adultery, cruelty or desertion, which are the predominant grounds raised in matrimonial proceedings generally. At any event, the provisions of the personal laws could be applied by following the procedures laid under ***the Code***.

The provisions of counterclaim envisaged under **the Code** and that of the personal laws have to be read *vis-a-vis* as these provisions have semblance and relevance with each other. The application of counterclaims in matrimonial disputes could be understood lucidly. It would be useful to extract the above provisions under the various personal laws for a comparative reading with the provisions of counterclaim laid under **the Code**.

**Section 23A of the Hindu Marriage Act 1955:**

*Relief for respondent in divorce and other proceedings.<sup>1</sup> — In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.*

**Section 15 of the Divorce Act 1869:**

*Relief in case of opposition on certain grounds. — In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion [\*\*\*]<sup>2</sup> or, in case of such a suit instituted by a wife, on the ground of [her adultery or cruelty or desertion]<sup>3</sup>, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to [such adultery, cruelty]<sup>4</sup> or desertion.*

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<sup>1</sup> Ins by Act 68 of 1976, s. 17, (w.e.f. 27-5-1976).

<sup>2</sup> The words "without reasonable excuse," omitted by s. 10, *ibid.*, (w.e.f. 3-10-2001).

<sup>3</sup> Subs. by s. 10, *ibid.*, for "her adultery and cruelty" (w.e.f. 3-10-2001).

<sup>4</sup> Subs. by s. 10, *ibid.*, for "such cruelty" (w.e.f. 3-10-2001).

### **Section 35 of the Special Marriage Act 1954:**

Relief for respondent in divorce and other proceedings<sup>5</sup> — *In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.*

A comparative reading of all the above extracted provisions would make it clear that the respondent spouse has every possibility to raise the defense by way of counterclaim in response to the charges leveled by the petitioner spouse and this could be done at the earliest possible time.

By applying the above provision(s) envisaged as above, the dispute, both the main petition as well as the counterclaim, could be litigated together and adjudicated in common by the same Court and thus there are chances for putting the entire proceedings to rest in a reasonable span of time. But in most of the circumstances, the respondent spouse, instead of filing counterclaim, chooses to file the counter and proceed to contest the main case. In simple words, the respondent challenges the case instituted by the petitioner by filing the counter statement without opting to challenge the case through counterclaim. Obviously the necessity of counterclaim has to be decided by the litigating opponent at the earliest point of time and should seek legal guidance at the right time and to proceed further.

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<sup>5</sup> Subs. by s. 35, *ibid.*, for section 35 (w.e.f. 27-5-1976).

In general, when finality is about to be reached in the first petition, the respondent spouse files a fresh case making his/her claim which was put forth as defense in his/her counter statement. Except for the relief of nullity or null and void of a marriage, there is no specified time limitation under the ***above personal laws or the Code***, to file a separate counter case under any of the other narrated circumstances. Hence the new rival counter case is filed belated even when the previously instituted case is reserved for judgement.

In specific, where the petition is for divorce or restitution of conjugal rights, the respondent spouse, who having opposed the case, would contest and see the completion of trial by adversarial procedure and when the previous case is about to end up, the respondent spouse would file a new petition separately for either restitution of conjugal rights or for divorce on some other grounds, as the case may be, before the same Court or some other Court having concurrent jurisdiction so as to be taken up as a fresh case.

After the belated filing of fresh case, the respondent approaches the Court with a prayer to stop the earlier proceedings and to take up the fresh petition together with the earlier proceedings so as to avoid conflict of verdict. By this time, certainly two years or more might have lapsed. This adds agony to the petitioner who initiated the earlier proceedings. Equally the respondent, believing that he/she could get the relief through fresh claim, would also waste his/her precious life and also the Court's precious time. By virtue of such tactful practice, the Court's proceedings are put to a standstill.

Therefore the sensitization in applying the provisions of counterclaim with reference to the predominant Acts such as ***the Hindu Marriage Act 1955, the Special Marriage Act 1954 and the Divorce Act 1869***, under which most petitions are filed before the Family Courts and civil courts, would be the need of the hour. The stakeholders are to be sensitized. The concept of “***What is sauce for Goose is the sauce for Gander***”, has to be understood literally. Thus a delay caused by one party so as to antagonize the other party, would certainly antagonize the delaying party also, which the delaying party might realize, when the fire is put off. By such time, the damage would be much more for both sides. This has to be understood by all the stakeholders concerned. The statutes and the laws laid down by the Honourable Supreme Court of India and precedents of various Honourable High Courts are to be followed in letter and spirit without any deviation. The discretion should be judicially exercised to ensure that the ***lis*** is adjudicated and put to rest within the ambit of law.

**The Honourable Supreme Court of India in Mahesh Govindji Trivedi Vs Bakul Maganlal Vyas and others**<sup>6</sup> has observed that “***the procedural law should not defeat the ends of justice and leave the Court helpless. When there is no explicit time limit fixed for filing counterclaims, the belated filing of the counterclaim could be permitted in order to avoid multiplicity of proceedings***”

The above observation came to be made as the counterclaim was filed before the framing of issues and was deregistered for not obtaining leave of the Court of Honourable Single Judge of Bombay High Court. Later, by order of the Honourable Division Bench of Bombay High Court, the petition to file the counterclaim was filed and the filing of the counterclaim soon before the framing of issues was ratified in the above decision.

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<sup>6</sup> 2022 LiveLaw (SC) 836

The dispute regarding permitting the counterclaim to be filed or not was settled in the above case. After the decision of entertaining the counterclaim, the trial was commenced in the above case. Though this might delay the proceedings, the Court can have control over the proceedings by fixing time frame to complete the trial proceedings. At any event the belated filing of a fresh litigation and disposing it along with the previous *lis*, would certainly consume more time when compared with that of the filing of the counterclaim and disposing it with the main *lis*. Therefore the fair attempt to bring the litigation to a conclusion at a reasonable point of time could be by exercising the choice of raising the defense by way of counterclaim within the timeframe, which could be tried together with the main litigation at one and the same time by the same Court.

Equally, when two cases are filed and agitated in respect of the same relief and same cause of action, there are possibilities for miscarriage of justice due to undue delay by virtue of the second *lis*. The cross examination in the previous case would have been completed by recording the evidence let on both sides. Further, in the newly instituted case, a demand would be raised to bring about fresh evidence. It would become a cumbersome process for the Presiding Officer to find out the gaps and lapses in the evidences of both cases so as to find as to who, was the wrongdoer, and who is trying to take advantage of his/her own wrong. More particularly the challenge would be heavy, while comparing the evidences recorded in both the cases. Such a complicated situation would delay the process of delivery of common Judgement.

The above decision of Division Bench of Honourable Supreme Court of India has assessed the decision of the larger bench of Honourable Supreme Court of India in *Ashok Kumar Kalra Vs Wing CDR. Surendra Agnihotri and others*<sup>7</sup>. In the above decision, the Honourable three Judges of Supreme Court laid their decision and the other Honourable single Judge had certain differences in the findings and has given his views separately.

It would be useful to extract the guidance laid by the Honourable three bench Judges as follows;

***“20. We sum up our findings, that Order VIII Rule 6A of the 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.***

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<sup>7</sup> (2020) 2 SCC 394

- vi. Cost of fresh litigation.*
- vii. Injustice and abuse of process.*
- viii. Prejudice to the opposite party.*
- ix. and facts and circumstances of each case.*
- x. In any case, not after framing of the issues.*

**21. We answer the reference accordingly. The instant Special Leave Petition may be placed before an appropriate Bench after obtaining orders from the Hon'ble Chief Justice of India, for considering the case on merits.”**

**The Honourable Single Judge has given his views as follows;**

*“Second, a perusal of Order VIII Rule 6B suggests that it is only limited to cases where the counterclaim is made along with the written statement. In instances where a belated counter claim is raised by way of an amendment to the written statement, or as a subsequent pleading, Rule 6B cannot be said to be applicable. This is because in any such case, if the Court relies on a technical interpretation of Rule 6B to disallow the filing of a belated counter-claim, the defendant would still be free to file a fresh suit for such a claim. He may, in such matters, after filing the separate suit, request the Court to club the suits or to hear them simultaneously. This may further delay the process of adjudication and would certainly not help the plaintiff in the first suit, who may have opposed the filing of the belated counter claim. Such multiplicity of proceedings goes against the object with which Rules 6A6G were introduced to the CPC. Thus, the provisions under Order VIII should not be read in isolation, but in a conjoint and harmonious manner, and Rule 6B cannot be read as a limitation on the Court’s discretion to permit the filing of a belated counterclaim. Therefore, I do not find force in the argument raised by Counsel for Respondent.*

**Further the Honourable Judge concluded his views as follows;**

*“25. Having considered the previous judgments of this Court on counter-claims, the language employed in the rules related thereto, as well as the intention of the Legislature, I conclude that it is not mandatory for a counter-claim 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 counter claim 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 may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.”*

The ratio laid in the above decision by Honourable larger bench as well as the view of the Honourable Single Judge would endorse upon the sum and substance, that the counterclaim cannot be permitted to be filed after the settlement of issues. Thus by bringing in amendments to the personal laws, a mandate would be on the rival spouse to make a choice within a given time frame to either go for a counterclaim or to contest the case by the usual filing of the counter and shall be precluded from either filing a separate Original Suit or Original Petition for the same cause of action at a belated stage, more particularly after the commencement of trial. This would cause an embargo in lodging multiple number of cases by the litigants against each other just out of ego and frustration resulting the delay in disposal of the matrimonial dispute.

## **CONCLUSION:**

The application of **the Code** by the Family courts is specifically dealt with under section **10(1) of the Family Courts Act 1984** which is extracted hereunder.

**10. Procedure generally. — (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.**

Thus obviously, the application of counterclaims as laid under **the Code** in respect of matrimonial disputes becomes inevitable. The need of the hour would be to bring about an amendment to the provisions of Family Courts Act 1984 and the other personal laws to ensure that the party intending to file his counter or written statement shall be aware of his/her case as to whether he/she prefers to contest the case on any grounds of adultery, cruelty or desertion by way of filing counterclaim.

In Original Petitions which are predominantly filed before Family Courts or other Civil Courts, the question of framing of issues would not arise. Therefore in respect of Original Petitions, the provisions of proposed amendments shall mandate time limitation for filing the counterclaim soon before the commencement of trial. Only in certain cases the litigations are lodged by way of Original Suits.

In cases of Original Suits, the counterclaim shall be filed before the settlement of issues. In case if the counterclaim is not filed before the commencement of trial, the choice of filing the fresh suit shall be barred by the proposed amendments. It has to be reiterated that the filing of a counter claim shall be treated as a separate suit or claim and separate finding has to be given, even if the plaintiff/petitioner spouse is not contesting the suit or proceeding. Therefore the amendment to the statutes could be in such a manner that if a fresh Original Suit or Original Petition is brought about after the commencement of first proceeding, the subsequent suit or Original Petition has to be considered a bar under law and shall have to be rejected by grounding the provisions of Order 7 Rule 11 of the Code of Civil Procedure.

The stakeholders should also be sensitized in respect of the application of the provisions of counterclaim in a proceeding before the Family Courts and also the other Civil Courts dealing with matrimonial disputes, so as to ensure speedy disposal of the *lis*.

The proposed amendments might sound little bit hard to accept. There may be a voice raised claiming that the constitutional right to contest the case cannot be taken away by virtue of these amendments. But it has to be noted that the right to speedy remedy cannot be taken away by certain procedures which make the procedural laws go toothless. Thus to make the procedural laws more effective, it becomes essential to consider the amendments in the right perspective so as to meet the ends of justice. It may be offending to the opposite spouse, as it takes away the rights of filing a separate claim. However the same is justifiably equated by means of adopting to the choice of filing counterclaim.

At this juncture it would be wise to interpret the philosophy of Justice **Benjamin N. Cardozo**<sup>8</sup>, who authored the book titled as ***The nature of Judicial process***<sup>9</sup> wherein he has evaluated about the 4 methods towards evolution of laws namely;

- a) *The method of Philosophy.***
- b) *The method of History.***
- c) *The method of Tradition.***
- d) *The method of Sociology.***

The theory of **Justice Benjamin N. Cardozo**, in a nutshell would be that in order to meet the social needs, the history, tradition and philosophy could be mended by balancing the above four. Thus for the welfare of the system, it could be concluded that the proposed amendments to the procedural as well as personal laws would certainly result as a welfare measure to the justice delivery system.

If such amendments are brought to enforcement, the delay could be minimized to a great extent and the burden of the Courts would also be minimized. In such case there are possibilities to reduce the comments of frustration from the litigants as endorsed at the commencement of this article.

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<sup>8</sup> Justice Benjamin N. Cardozo was the Associate Justice of the United States Supreme Court and Chief Judge of New York Court of Appeals.

<sup>9</sup> Authored in the year 1921 which was a compilation of The Storrs lectures delivered at Yale Law School.