

---

**Bai Dayambai Sullemanji Vs Mahomedalli Ebrahimji Arsiwala**

**O.C.J. Suit. No. 86 of 1939**

---

**Court:** Bombay High Court

**Date of Decision:** Jan. 16, 1940

**Citation:** AIR 1940 Bom 410 : (1940) 42 BOMLR 919

**Hon'ble Judges:** Blackwell, J

**Bench:** Single Bench

---

**Judgement**

Blackwell, J.

This suit was filed on January 20, 1939, for a declaration that the plaintiff is the owner and absolutely entitled to the

Immovable property mentioned in the plaint, for a declaration that the defendant is not entitled to claim any charge on the property in respect of

any moneys alleged to have been expended thereon, and for various other reliefs. A written statement and counter-claim was filed by the defendant

on February 20, 1939. The defendant on coming to the counter-claim set out a further title similar to the title in a plaint making himself plaintiff to

the counter-claim and making the plaintiff to the suit defendant to the counter-claim. By the counter-claim the defendant asked for a declaration

that there was due and owing to the plaintiff to the counter-claim Rs. 15,097 and for a declaration that the plaintiff to the counter-claim has a

charge on the property and the rents arising therefrom in respect of the said sum and for a preliminary mortgage decree. The defendant to the

counter-claim did not put in a reply thereto, and consequently the plaintiff to the counter-claim took out a notice of motion, which is now before

me, asking for an order to set down the suit on board for judgment on the counter-claim for default of reply, and for judgment in terms of the

prayers to the counter-claim. One Esmailji Sakerwalla, a constituted attorney of the plaintiff to the suit, in an affidavit sworn on January 15, 1940,

submitted that no reply to the counter-claim was necessary and that this motion was not competent.

2. Mr. Engineer in support of the motion drew my attention to Rules 135 and 138 of the High Court Rules. Rule 135 gives liberty to, though it

does not impose an obligation upon, any person named in a written statement as a party to a counter-claim to deliver a reply. Rule 138 empowers

plaintiff to a counter-claim, if the defendant to the counter-claim makes default in putting in a reply to the counter-claim, to get the suit set down on

motion for judgment on the counter-claim. This is what has been done in the present motion, and Mr. Engineer has submitted that those rules in

terms entitle the plaintiff to the counter-claim to adopt the course which has been adopted on this motion if no reply is put in by any defendant to

the counter-claim.

3. Sir Jamshedji Kanga, on the other hand, has informed the Court that as far as his experience goes the view at the bar has always been that on

the true construction of Rules 130 to 138 there is no obligation upon a defendant to the counter-claim to put in a reply where the only defendant to

the counterclaim is the original plaintiff to the suit. I am also informed by the Associate that this appears to have been the view taken in the office.

Sir Jamshedji has laid stress upon the words in Rule 130 ""and the plaintiff (if so advised) shall be at liberty to file a written statement in answer to

the counter-claim of the defendant within four weeks after service upon him or his attorneys of a copy of the defendant's counter-claim "" , and has

submitted that in view of the words "" if so advised "" it is left to the plaintiff's discretion as to whether he should file a written statement in answer to

the counter-claim or not. Sir Jamshedji further submitted that: Rules 135 and 138 apply only where some person or persons other than the plaintiff

to the suit has or have been made parties to the counter-claim, and that those rules have no application where the original plaintiff to the suit is the

sole defendant to the counter-claim.

4. I am unable to construe the rules in the manner contended for by Sir Jamshedji. There is nothing in terms in Rules 135 or 138 which limit their

application to a case in which there are more defendants to the counter-claim than the original plaintiff to the suit. Moreover, the wording of Rule

130 is not in my opinion such as to warrant the view that if the defendant to the counterclaim does not put in a written statement to the counter-

claim he shall not be deemed to have admitted the allegations in the counter-claim. It is expressly provided by Rule 130 that a counter-claim is to

have the same effect as a cross-suit; in other words, it is to be treated as a new plaint to which the plaintiff to the suit is the defendant. That being

so, the implication underlying Rule 130 in my opinion is that if the defendant to the counter-claim does not exercise the liberty reserved to him

under the rule, he must be regarded as being in the same position as a defendant to a suit who does not file a written statement in answer to a

plaint. This view of the matter appears to be clinched by Rule 138, which applies in terms to any defendant to the counter-claim. Consequently, I

rule that in every case in which a counter-claim is filed there is an obligation on the defendant or defendants to the counter-claim to put in a reply if

they wish to avoid the application of Rule 138.

5. Mr. Engineer does not object to my giving the defendant an opportunity even now of putting in a reply to the counter-claim, but submits that I

ought to make her pay the costs of this motion.

6. Having regard to the fact that the construction of the rules contended for by Sir Jamshedji appears to have commended itself hitherto both to the

bar and; to the office, I; think that it would be proper for me to make the costs of this motion costs in the counter-claim, Accordingly, the order

which I make is that the defendant to the counter-claim shall be at liberty to file a reply thereto within fourteen days from to-day and that the costs

of this motion shall be costs in the counter-claim.