

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

914 WRIT PETITION NO. 7790 OF 2013

RAMESH NAGNATHRAO NAALE AND OTHERS
VERSUS
SALEEM QURESHI HANIF QURESHI, L.RS. BISMILLAH BI AND
OTHERS

...
Advocate for Petitioners : Shaikh Mujtaba Gulam Mustafa
Advocate for Respondents 1/1 to 1/ 4 & 1/6 : A.D. Kasliwal
...

CORAM : T.V. NALAWADE, J.
DATED : 14th October, 2016.

ORDER :

1. The petition is filed to challenge the order made on Exh. 68 in Special Civil Suit No. 50/2012 which is pending in the Court of Civil Judge, Senior Division, Aurangabad. Heard both the sides.

2. The suit is filed by present respondent Nos. 1 to 6 against the petitioners and others for specific performance of contract of sale. Agreement of sale was executed in favour of plaintiffs in the year 2008. It is the case of plaintiffs that before filing of suit, they realized that one more agreement was executed by defendant Nos. 1 to 6 in favour of defendant Nos. 7 to 9 and that was executed on 7.6.2011. They asked defendant Nos. 1 to 6 about their intention and then defendant Nos. 1 to 6

expressed that they were not intending to complete the sale deed in favour of the plaintiffs. In view of these circumstances, the suit was filed against the present petitioners and also the parties to the agreement of sale. Present petitioners, defendant Nos. 7 to 9 filed written statement and also counter claim and following reliefs were claimed in the counter claim.

“i) To declare the Agreement of Sale dated 11.6.2008 and the Bharna Pavti executed on 1.9.2009 and 17.6.2009 as null and void and the same are not binding on the defendants 7 to 9, since both the documents were not signed by the other legal heirs of the late Shaikh Chand;

ii) To declare the confirmation deed executed on 5.9.2009 before the Sub-Registrar, Aurangabad vide document No. 4637/2009 as null and void, invalid and to direct the Sub-Registrar, Aurangabad to cancel the same since it was sham and fictitious document due to non-joinder of the parties;

iii) To declare the agreement of sale and Bharna Pavti, dated 8.6.2011 entered in between defendants 1 to 6 and defendants 7 to 9 as valid and enforceable as per law;

iv) To direct the defendants No. 1 to 6 to execute the registered sale deed in favour of the defendants No. 7 to 9 as per the agreement of sale and Bharna Pavti, dated 8.6.2011, and the defendants No. 7 to 9 are ready to deposit the balance sale consideration according to para - 1 of the said agreement of sale.

v) To direct the City Survey Officer, Aurangabad to cancel the P.R. Card standing in the name of plaintiff by deleting the entreis

made in the C.S.T. 17684/3 in respect of the suit schedule property;

vi) To deliver the physical and symbolic possession of the suit schedule property i.e. the land admeasuring 21000 square feet along with structure of Roxy Theatre Cinema situated at Paithan Gate, Sabji Mandi, Aurangabad, to defendant Nos. 7 to 9;

vii) Award the costs of the counter claim along with exemplary costs;"

3. In view of the aforesaid counter claim filed by present petitioners, the plaintiffs filed application under Order 8, Rule 6 (a) of Civil Procedure Code for exclusion of the aforesaid counter claim from the suit. After giving hearing to both the sides, the Trial Court has allowed the application of plaintiffs and the aforesaid counter claim is excluded.

4. The learned counsel for petitioners submitted that the counter claim was filed not only against the co-defendants, but it was against plaintiffs and there was no scope of exclusion of the counter claim. It is true that in counter claim some reliefs are shown to be claimed against plaintiffs and they are (I) and (II) quoted above. But, it can be said that there was no necessity of claiming such reliefs as in the issues which are framed in a suit filed for specific performance of contract of sale, such defences are always included and it is up to the plaintiffs to

prove that the agreement which was entered in to by the plaintiffs with defendant Nos. 1 to 6 is legally enforceable. Thus, there was no need of claiming such reliefs by way of counter claim.

5. If the remaining reliefs mentioned above which the defendant Nos. 7 to 9 were claiming by way of counter claim are considered, it can be said that they were only against defendant Nos. 1 to 6. The suit was filed for specific performance of contract of sale. In such a case the provisions of section 19 of the Specific Relief Act needs to be kept in mind. It is up to the plaintiffs to decide as to who needs to be added as party defendant, though only party to the agreement are necessary parties to the suit. Due to aforesaid circumstances, defendant Nos. 7 to 9 were added as party defendant, but that does not give right to defendants to make the counter claim. The provision of section 19 also shows that the relief of the aforesaid nature can be claimed only against defendant Nos. 1 to 6 by present petitioners.

6. The learned counsel for petitioners placed reliance on the case reported as **2012 (7) ALL MR 411 [Smt. Serolina D'Costa & Ors. Vs. Mr. Antonio Jose Rodrigues & Ors.]** of

Panji Bench of this Court. This Court has carefully gone through the facts of that reported case. The facts were totally different. The relevant facts of the present matter are already quoted. The learned Judge of the Trial Court has relied on the observations made by the Apex Court in the case reported as **AIR 2007 SUPREME COURT 10 [Rohit Singh and Ors. Vs. State of Bihar (now State of Jharkhand)]**. The Apex Court has made it clear that in ordinary circumstances, the counter claim only cannot be made against co-defendants. In the present matter, the counter claim was filed against co-defendants and in view of the relevant facts, this Court holds that counter claim was not tenable. This Court sees no reason to interfere in the order made by the learned Trial Court.

7. So, the petition stands dismissed. Court fee paid by the defendant Nos. 7 to 9 is to be refunded to them. There is liberty to these defendants, petitioners to file separate suit.

[T.V. NALAWADE, J.]

ssc/