

IN THE HIGH COURT OF BOMBAY AT GOA**CIVIL REVISION APPLICATION NO. 7 OF 2016**

M/S COLONIA SANTA MARIA HOTELS
PVT. LTD., THROUGH ITS MANAGER
MR. SANJAY KALANGUTKAR ... Petitioner

Versus

MR. INACIO C. FERNANDES & ANR. ... Respondents

Shri Pranay A. Kamat, Advocate for the
Petitioner.

Shri Ashwin D. Bhole, Advocate for Respondent
No.1.

Coram:- C. V. BHADANG, J.

Date:- 25th July, 2016

ORAL ORDER:

Heard learned Counsel for the petitioner and
the learned Counsel for the respondent no.1.
None appears for the respondent no.2.

2. The petitioner has filed Regular Civil Suit
No.74/2012 for mandatory and permanent
injunction and certain consequential reliefs
against Mr. Inacio C. Fernandes and his wife
Mrs. Carol Fernandes. The petitioner has inter
alia prayed for an injunction restraining the
defendants or anybody on their behalf from

effecting any construction or encroaching in the open area in plot no.16. The petitioner is also seeking mandatory injunction directing the defendants to remove all the construction material and the illegal construction allegedly made in plot no.16.

3. The defendant no.1 Inacio Fernandes raised a counter claim in the suit in which apart from the original plaintiff, M/s Colonia Santa Maria Hotels Pvt. Ltd. and Mrs. Carol Fernandes, one Mr. Gil Rebeiro and his wife Mrs. M.F. Lobo have been arrayed as defendant nos.2 & 3. Admittedly, the petitioner as also the defendants Inacio Fernandes and his wife Carol Fernandes have purchased different portions of the land from Mr. Gil Ribeiro and his wife Mrs. M.F. Lobo. In other words, Mr. Gil Ribeiro and his wife are the predecessors-in-title of the petitioner as also the defendant nos.1 & 2.

4. The petitioner filed an application under

Order 8 Rule 6C of the Civil Procedure Code for exclusion of the counter claim inter alia on the ground that the counter claim cannot be tried in the same suit for the reason that Mr. Gil Rebeiro and his wife are not party defendants to the suit. The learned Trial Court by the impugned order has rejected the application.

5. I have heard Shri P.A. Kamat, the learned Counsel for the petitioner and Shri A.D. Bhobe, the learned Counsel for the contesting respondent no.1. With the assistance of the learned Counsel for the parties I have perused the plaint as also the counter claim and the impugned order.

6. It is contended on behalf of the petitioner that in a counter claim a defendant cannot array any party except the original plaintiff (as a party defendant). The contention is that Mr. Gil Ribeiro and his wife not being parties to the original suit could not have been arrayed as

defendants in the counter claim and for this reason the counter claim is liable to be excluded. It is also contended that the cause of action for the counter claim is also distinct. It is further contended that there was an Application for Appointment of Arbitrator bearing no.1/2012 filed against Mr. Gil Ribeiro, which has been dismissed by this Court on the ground that the claim of the respondent no.1 (defendant no.1) is time barred and, as such, the counter claim is not maintainable.

7. Reliance on behalf of the petitioner is placed on the decision of the Supreme Court in the case of **Rohit Singh And Ors. V/S. State Of Bihar** reported in **AIR 2007 SC 10**.

8. On the contrary, the learned Counsel for the respondent no.1 has supported the impugned order. It is submitted that in an appropriate case even a distinct cause of action can be agitated by way of a counter claim. The learned

Counsel submits that Mr. Gil Ribeiro and his wife being the predecessor of the petitioner and having regard to the relief claimed in the counter claim they were necessary parties and there is no prohibition from joining them, in the counter claim. He submits that the decision in the case of **Rohit Singh** (supra) is distinguishable on facts.

9. I have carefully considered the rival circumstances and the submissions made. At the outset it is necessary to note the provisions of Order 8 Rule 15 (the High Court amendment) which would show that in a given case the counter claim can include any defendant, other than the original plaintiff. That apart in the present case, on facts, it appears that the defendant nos.2 & 3 in the counter claim are the predecessors-in-title of the petitioner. Having regard to the fact that a relief of declaration that the Sale Deed dated 18/07/2006 is illegal, null and void is sought in the counter claim

they would be necessary parties.

10. In the case of **Rohit Singh** (supra), the counter claim was raised after the issues were framed and the evidence was closed. Further, the counter claim was directed solely against the co-defendants. In these circumstances it was held that such a counter claim which is filed against co-defendants could not be entertained. The observations in para 18 of the judgment would clearly show that what has been held is that by raising such a counter claim the litigation cannot be converted into some sort of an inter-pleader suit. In the case in hand, the plaintiff is one of the party defendant in the counter claim. Thus, in my considered view, the judgment in the case of **Rohit Singh** (supra) cannot come to the aid of the petitioner. Even as regards the contention that counter claim is based on different cause of action, the Supreme Court in the case of **Rohit Singh** (supra) has held in para 18 that a counter claim based on

different cause of action than the one agitated in the suit by the plaintiff, could be made. In such circumstances, both these contentions cannot be accepted.

11. The contention based on the rejection of the application filed under the Arbitration Act, would not fall within the purview of Order 8 Rule 6C of the Civil Procedure Code, as that cannot be a ground for exclusion of the counter claim. It would be open for the petitioner to raise the said ground in the written statement of the counter claim and which shall be decided by the Trial Court in accordance with law. Subject to this no case for interference is made out. The Civil Revision Application stands rejected with no order as to costs.

C. V. BHADANG, J.

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