

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1009 OF 2017**

Umar Shah,
Son of Fakir Shah, aged 57 years,
married, Indian National, resident of
House No.2/197, Opposite ESI
Dispensary, New Wadem,
Vasco-da-Gama-Goa
(Registered address)

... Petitioner

V e r s u s

1. Smt. Shabduli Krishna Naik,
widow of late Krishna Laxman Naik,
aged 75 years, Indian National,
2. Mr. Ranganath Krishna Naik,
son of Krishna Laxman Naik,
aged about 43 years, Indian National,
married, service and his wife,
3. Mrs. Kalpana Ranganath Naik,
wife of Ranganath Naik,
aged about 42 years, married,
Indian National, housewife;
4. Mr. Rajesh Krishna Naik,
son of Krishna Laxman Naik,
aged about 39 years, unmarried,
Indian National, service,

All residents of House No.1603,
Torla, Shiroda, Ponda-Goa.

.... Respondents

(Registered addresses)

Shri Rohit Bras De Sa, Advocate for the Petitioner.

Shri A. D. Bhobe, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.
DATE: 13th March, 2018.

ORAL ORDER :

The challenge in this petition under Article 227 of the Constitution of India is to the order dated 21/8/2017 passed by the trial court allowing application Exhibit 20. That application was filed by the petitioners/defendants under Order 1 Rule 10 (2) of Code of Civil Procedure 1908 (Code, for short) for addition of parties in the counter claim.

2. The brief facts are that; the petitioner has filed Regular Civil Suit No.65/2014/A for injunction against the respondents. The case made out in the plaint is that the petitioner has purchased the suit property surveyed under nos.796/10 and 798/1 of village Shiroda which is more specifically described in the plaint, under a registered sale deed dated 22/9/1994. It was contended that late Krishna Laxman Naik, who is the husband of respondent no.1 and the father of the respondent nos.2 and 3 was residing in the property surveyed under no.796/10 and he was provided a temporary shelter on humanitarian grounds, by the predecessor of the petitioner. It is contended that the respondents subsequently started claiming to be the mundkar of the petitioner and the petitioner out of gratitude permitted them to reside in the suit property as mundkars. It is contended that the defendants, however,

started encroaching upon the open land abutting the dwelling house to the extent of 45 sq.mtrs. and also filed an application before the Joint Mamlatdar at Ponda for declaration as tenants under section 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Tenancy Act, for short) and are trying to illegally grab the entire suit property. In short according to the petitioner, the defendants who are presently occupying the dwelling house as mundkars of the petitioner are required to be restrained from interfering in the suit property beyond an area of 300 sq.mtrs. The petitioner thus filed the suit seeking injunction restraining the respondents or anybody on their behalf from interfering or carrying out any construction in the suit property beyond 300 sq.mtrs. and for a mandatory injunction directing them to demolish the structure admeasuring 45 sq.mtrs., which according to the petitioner is by way of an encroachment.

3. The respondents filed written statement resisting the suit and raised a counter claim. It is contended that the respondents are agricultural tenants of both the properties although their names or the name of their ancestors is not figuring as tenants in the revenue record. It is contended that the suit property was held by late father-in-law of respondent no.1 and after his death by the husband of the defendant no.1, i.e. late Krishna Laximan Naik. It is contended that the tenancy was created by late Madhukar Patkar about 60

years back and the respondents have become owners of the land under the Tenancy Act. It is contended that it was incumbent on the landlords/vendors of the petitioner to have given a notice of their intention to sell the suit property and in the absence of any such notice, the sale deed dated 6/9/1994 is void. The respondents have thus sought a declaration that the Deed of Sale of 6/9/1994 is null and void and for the relevant entry of the registration of the sale deed being canceled.

4. It appears that the petitioner filed a written statement to the counter claim inter alia contending that the counter claim is bad for non joinder of necessary parties and is under valued.

5. The respondents thereafter filed an application Exhibit 20 purportedly under Order I Rule 10(2) of the Code for amendment of the counter claim and for addition of the original landlord/vendors of the petitioner as party defendants in the counter claim. It was contended that their presence in the counter claim which is a cross suit would be necessary as in their absence, the declaratory relief would fail. In para 4 of the application the petitioner has enlisted twelve names as being proposed to be added as defendants in the counter claim.

6. The petitioner filed a reply to the application contending that the plea to add the parties to the counter claim is barred by section 21 of the Limitation Act inasmuch as in the application under section 7 of the Tenancy Act, the respondent no.1 had claimed that she came to know about the execution of the sale deed in favour of the petitioner on 2/2/2014 and the application for addition of parties has been filed on 18/4/2017. It is next contended that the cause of action in the counter claim is separate and distinct and the addition of parties to the counter claim would create “confusion and it would be difficult for the court to decide the issue.” In short, it was contended that the trial of the suit would be embarrassed.

7. The learned trial court found that section 21 of the Limitation Act will not apply to the counter claim as they “generally apply to all suits”. None the less, the trial court while allowing the application has kept the issue of limitation via-a-vis the newly added parties, open and has stipulated that these parties shall be deemed to have joined on the date on which the amendment to the cause title of the counter claim is carried out. The trial court while allowing the application has also noticed that under Order VIII Rule 6-A of the Code, to the effect that the counter claim shall be treated as a plaint and is governed by the rules applicable to plaints. The trial court by the impugned order has quashed the application Exhibit 20. Feeling aggrieved

the petitioner is before this court.

8. I have heard Shri De Sa, the learned counsel for the petitioner and Shri Bhobe, the learned counsel for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record and the impugned order passed.

9. Shri De Sa, the learned counsel for the petitioner has submitted that once the respondents have approached the Mamlatdar under section 7 of the Tenancy Act, (where the respondents would be required to join the predecessor in title of the petitioner as parties), it was not necessary for the respondents to have sought addition of these persons as party defendants in the counter claim. It is next submitted that the application Exhibit 20 is otherwise vague inasmuch as in para 4 it makes a reference to the vendors “who are partly alive” to be added as party defendants. It is next submitted that the plea for addition of parties is otherwise barred under section 21 of the Limitation Act. Lastly it is contended that once there is a validly executed and registered sale deed in favour of the petitioner, the addition of the parties to the counter claim could not have been allowed, which would have the effect of stifling/embarrassing the trial of the suit. The learned counsel was at pains to point out that the application is a clear attempt to delay the trial of

the suit filed by the petitioner.

10. On the contrary, it is submitted by Shri Bhobe, the learned counsel for the respondents that the respondents as plaintiff in the counter claim would be dominus litus and can decide as to who should be arrayed as parties to the counter claim. It is next submitted that the petitioners had raised a defence about the counter claim being bad for non joinder of necessary parties and thus now the petitioner cannot turn around and object to the addition of the vendors of the petitioner, they being necessary parties to the counter claim. It is submitted that the application read as a whole cannot be said to be vague. The learned counsel pointed out that the recital in para 4 may be in nature of a typographical error inasmuch as in para 2 of the application, the respondents have sought addition of the vendors/landlords who are “presently living” as parties to the counter claim. It is pointed out that the learned trial court in its discretion has kept the issue of limitation open and thus there is no manifest injustice which can be said to be caused to the petitioner resulting from the impugned order.

11. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

12. The suit filed by the petitioner is simplicitor for mandatory and prohibitory injunction on the premise that the respondents are mundkars in respect of a dwelling house situated in the property purchased by the petitioner under a registered sale deed dated 22/9/1994 and the respondents have made encroachment to the extent of 45 sq.mtrs. and are further trying to create encroachment. The respondents in addition to contesting the suit have raised a counter claim on the ground that the father -in-law of the respondent no.1 was a tenant in respect of the suit property from one Madhukar Vithal Patkar since about last 60 years. On his own saying according to the petitioner the respondents have approached the Mamlatdar claiming a declaration as tenants under section 7 of the Tenancy Act. The respondents are claiming a declaration in the counter claim that the sale deed dated 6/9/1994 is null and void. The question is whether in the given circumstances, the order directing impleadment of the vendors of the petitioner would exhibit any jurisdictional error and/or would result into any manifest injustice to the petitioner, so as to require interference under Article 227 of the Constitution of India (see judgment in the case of **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil (2010) 8 SCC 329**).

13. It is now well settled that a plaintiff being dominus litus can decide as to who should be made parties to the suit. This is subject to the powers of

the Court under Order I Rule 10 (2) of CPC to add or strike off parties. The respondents as plaintiffs in the counter claim and being dominus litus can decide upon who should be arrayed as parties to the counter claim. The Court can direct such addition if the parties so proposed to be joined is found to be either a necessary party or a proper party. Normally the petitioner in his capacity as a co defendant in the counter claim would not be permitted to stake a challenge to an order directing addition of a party to the counter claim. One of the challenges is that it would stifle, embarrass or delay the suit filed by the petitioner, except on the ground that such addition would further stifle the trial of his suit. However, in that event the remedy of the petitioner, if any, lies elsewhere. The remedy of the petitioner in that event would be to seek exclusion of the counter claim under Order VIII Rule 6-C of C.P.C.. In the present case, the petitioner in his written statement filed to the counter claim had raised a defence that the counter claim is bad for non joinder of necessary parties and therefore, as rightly submitted by the learned counsel for the respondents the petitioner cannot now turn around and challenge the order impleading parties to the counter claim. It is trite that a party cannot be allowed to approbate and reprobate. In the reply filed to the application Exhibit 20, it is not even the case made out that the parties who are proposed to be added are not necessary parties and in that view of the matter, the petitioner cannot successfully assail the impugned order. In so far

as the respondents having approached the Mamlatdar under section 7 of the Tenancy Act is concerned, that by itself would not preclude the respondents from seeking addition of the vendors of the petitioner as parties. The contention that the application is vague also to my mind cannot be accepted if the application is read as a whole. All that the respondents have claimed is that “the presently living respondents to be added as parties”. The Court has to read the application in an intelligible manner and if so read, certainly the recital in para 4 of the application cannot be read in isolation. In so far as the aspect of limitation is concerned, the learned trial court has observed that in consonance with section 21 of the Limitation Act the parties would be deemed to be added from the date on which amendment is carried out and at the same time the trial court has kept the issue open, which can be gone into at the trial of the counter claim. I have carefully gone through the impugned order and I do not find that it suffers from any jurisdictional error, much less, which would result in manifest injustice to the petitioner. In that view of the matter, no case for interference is made out. The petition is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/

