

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO. 34 OF 2019

Luis Lerio Khembo & anr.

... Petitioners

V e r s u s

Shanu Bodko Velip (Dec)
(Deleted) Thr. LRS & 29 Ors.

... Respondents

Applicant in person.

Coram :- C. V. BHADANG, J.
Date : 15th July 2019

ORAL ORDER

1. Heard the petitioner no.1 in person.
2. The challenge in this Civil Revision Application, is to the order dated 27.12.2018, passed below exhibit 172, by the learned Senior Civil Judge, at Quepem, in Regular Civil Suit No.33/2010/A(New) [Special Civil Suit No.27/2003/A(old)].
3. The petitioners are the original plaintiffs in the aforesaid suit. That suit is filed for specific performance against the respondents in which the original defendant nos.26 and 27 filed written statement and raised a counter claim, which is at exhibit B-16. In the counter claim, the defendant nos.26 and

27 are challenging the Power of Attorney dated 20.03.1984 and are seeking a declaration that the said Power of Attorney be declared as null and void and for a consequent declaration for cancellation of the Sale Deed executed on the strength of the said Power of Attorney.

4. It appears that by an order dated 25.09.2006, the learned Trial Court has dismissed the counter claim as being barred by limitation. The petitioner no.1, who appears in person, states that this order was not challenged by the defendant nos.26 and 27 any further.

5. The petitioners filed an application, exhibit 172, with the following prayers :

“a) It is hereby prayed that the defendant nos.26, 27 be stopped henceforth from staging any defence/prosecution against the suit in any manner.

b) It is prayed that interventions made by defendant nos.26, 27 in the suit by way of submission of papers or otherwise after 25.09.05 be declared null and void.”

6. The learned Trial Court by the impugned order has dismissed the said application on the ground that the dismissal

of the counter claim does not prohibit the defendant nos.26 and 27 from contesting the suit.

7. Mr. Luis Khembo, the petitioner no.1, who appears in person has raised two contentions, first that the dismissal of the counter claim per se is sufficient to preclude the defendant nos.26 and 27 from contesting the suit and the order of dismissal of the counter claim operates as res judicata. For this proposition, the petitioner has placed reliance on the following decisions :

- 1. Rajni Rani & anr. vs. Khairati Lal & Ors. (2015) 2 SCC 682**
- 2. R. Rathinavel Chettiar & Anr vs. V. Sivaraman & Ors. (1999) 4 SCC 89**
- 3. City & Industrial Development Corporation of Maharashtra Ltd., Bombay & anr. vs. M/s. Nagpur Steel and Alloys Pvt. AIR 1992 Bombay 55.**
- 4. M/s. Charkop Priya Co-op Housing Society Ltd. vs. M/s. Trade Well Constructions 1998(4) Bom. C. R. 881.**
- 5. S.Rajeshwari vs. Perumal & Ors. MANU/TN/4214/2018.**
- 6. Mathew V Mathew vs. Premier Enterprises, Kerala (Ernakulam) Dec. 8/6/09 OS No.1/2000(A).**

7. Nherapoyil N. P. Moideen vs. K. Narayanan Nair AIR 1997 Kerala 318.

8. Rajinder Singh & Ors. vs. Dilmi Ram & Ors. MANU/HP/0867/2017.

9. Piar Chand & Ors. vs. Ranjeet Singh & Ors. MANU/HP/1162/2016.

10. Saran vs. Gulab Chand & Ors. MANU/HP/0886/2017.

8. Secondly, it is contended that the impugned order is contrary to the order dated 20.01.2018, below exhibit 176, which is an order of dismissal of application for temporary injunction filed by the petitioners.

9. According to the petitioner no.1, the said order dated 20.01.2018 is stated to be subject matter of challenge, before the learned District Judge.

10. I have considered the circumstances and the submissions made. It is difficult to accept that the dismissal of the counter claim either on merits or as being barred by limitation as in the present case, would preclude the contesting defendants who have raised such counter claim from even contesting the suit. The reliance placed on the various decisions by the petitioners is misplaced. The petitioner was repeatedly asked to point out as to where it is

held that the dismissal of the counter claim would preclude the concerned defendant from contesting the suit. Strong reliance was placed on the decision of the Supreme Court in the case of **Rajni Rani & anr. vs. Khairati Lal** (supra). All that the said decision holds is that when the counter claim is conclusively adjudicated on merits and dismissed by order of court, finality is attached in respect of rights of the defendants and such a dismissal of the counter claim is a decree within the meaning of Order II Rule 2 of the Civil Procedure Code which is amenable to a challenge in appeal and not by way of revision under Section 115 of the Civil Procedure Code or petition under Article 227 of the Constitution of India. All that the decision holds is that the dismissal of the counter claim attaches finality insofar as the reliefs claimed in the counter claim are concerned. There is nothing in the said decision to hold that it even precludes the concerned defendants in taking part in the suit and contesting the same.

11. In **R. Rathinavel Chettiar** (supra), the issue was about grant of leave to the plaintiffs to withdraw the suit after passing of the decree at the appellate stage.

12. The decision in the case of **City and Industrial Development Corporation** (supra), involves an issue as to the breach of warranty under the Sale of Goods Act.

13. The decision in the case of **M/s. Charkop Priya Co-op Housing Society** (supra), arises out of the provisions of the Arbitration Act 1940 read with Section 33 of the Partnership Act 1932. One of the contentions was that the Arbitrator had not given reasons for rejection of the counter claim which amounted to misconduct on the part of the Arbitrator. It was held that the matter was within the jurisdiction of the Tribunal and the Court cannot interfere when giving of the reasons was not provided for in the agreement.

14. In none of the other decisions, it is held that once the counter claim is dismissed, the concerned defendants raising the counter claim are precluded from contesting the suit itself. This is obvious because the defence in the suit and the counter claim are two different aspects. I have gone through all the judgments on which reliance is placed by the petitioners. The petitioners did not produce copy of the judgment in **Mathew V Mathew** (supra)

15. Be that as it may, the legal position is too well settled that the dismissal of the counter claim cannot have the effect of shutting out the defence by the concerned defendants.

16. Coming to the second ground, the order dated 20.01.2018 is passed on an application, exhibit 176, filed by the petitioners for a relief which is styled as an order of "intermediate injunction and intermediate full possession". That application has been dismissed by the Trial Court on 20.01.2018 which, according to the petitioner no.1, is subject matter of challenge in appeal before the learned District Judge. Even assuming that any of the findings in the said order support the case of the petitioners, they are essentially prima facie findings and in fact the ultimate order on application, exhibit 176, is against the petitioners. On the basis of the said order, it cannot be accepted that the defendant nos.26 and 27 should be precluded from contesting the suit.

17. I have carefully gone into the impugned order and it does not suffer from any infirmity so as to require interference.

18. The Civil Revision Application is hereby dismissed.

C. V. BHADANG, J.

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