

HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.902 OF 2017

Malaga Realtors Private Limited
A private Limited Company duly
Registered under Indian Companies Act,
1956 having its registered office at G-7,
Elvira Apartments , F-L Gomes Gad,
Opp. St. Joseph School, Vasco-da-Gama ,
Marmugao Goa 403 802,
Through its Director
Shri Sydney Aloysius D'Souza ,
Son of Albert D'Souza ,
51 years of age, Married,
Indian National, resident of Chicalim,
Marmogao, Goa.

..Petitioner

V/S

1. Shri Vilas Pundalik Malik,
Son of late Shri Pundalik Krishna Malik
Major, married, Indian National
r/o H. No.385 Hassapur,
Pernem, Goa.
2. Shri Vishram Shantaram Malik
Son of late Shri Shantaram Gopal Malik
Major, married, Indian National
r/o H. No.382 Hassapur,
Pernem, Goa.
3. Shri Namdev Narayan Malik,
Son of late Shri Narayan Gopal Malik
Major, married, Indian National
r/o H. No.382 Hassapur,
Pernem, Goa.
4. Shri Yeshwant Atmaram Malik,
Son of late Shri Atmaram Malik
Major, married, Indian National
r/o H. No.335 Hassapur,
Pernem, Goa.
5. Shri Sajo Atmaram Malik,
Son of late Shri Shantaram Malik
Major, married, Indian National

r/o H. No.335 Hassapur,
Pernem, Goa.

6. Shri Shankar Atmaram Malik,
Son of late Shri Atmaram Malik
Major, married, Indian National,
r/o H. No.335 Hassapur,
Pernem, Goa.
7. Shri Sahadev Atmaram Malik,
Son of late Shri Atmaram Malik ,
Major, married, Indian National,
r/o H. No.335 Hassapur,
Pernem, Goa.
8. Shri Vinayak@ Vinu Atmaram Malik,
Son of late Shri Atmaram Malik,
Major, married, Indian National,
r/o H. No.335 Hassapur,
Pernem, Goa.
9. Shri Sambhaji Atmaram Malik,
Son of late Shri Atmaram Malik,
Major, married, Indian National,
r/o H. No.335 Hassapur,
Pernem, Goa.
10. Shri Shantaram Anant Malik,
Son of late Shri Anant Atmaram Malik ,
Major, married, Indian National,
r/o H. No.335 Hassapur,
Pernem, Goa.
11. Shri Vishnu Navso Malik, (deceased)
Son of late Shri Navso Malik,
Major, married, Indian National,
r/o H. No.388, Hassapur,
Pernem, Goa.
12. Shri Keshav Narayan Malik,
Son of late Shri Narayan Malik
Major, married, Indian National
r/o H. No.460, Hassapur,
Pernem, Goa.
13. Shri Subhash Narayan Malik,
Son of late Shri Narayan Malik,

Major, married, Indian National,
r/o H. No.460, Hassapur,
Pernem, Goa.

14. Shri Bharat Narayan Malik,
Son of late Shri Narayan Malik ,
Major, married, Indian National
r/o H. No.460, Hassapur,
Pernem, Goa.

15. Shri Shatrughan Narayan Malik,(Since deceased)
Son of late Shri Narayan Malik,
Major, married, Indian National,
r/o H. No.460, Hassapur,
Pernem, Goa.

a) Mrs. Shakuntala Shatrughna Malik,
Wife of late Shatrughna Mailk,
Major of age,

b) Mr. Kishor Shatrughna Malik
Son of late Shatrughan Malik,
Major of age, Bachelor.

c) Miss. Leha Shatrughna Malik
Daughter of late Shatrughna Malik,
Minor, Through her Guardian,
Mrs. Shakuntala Shatrughna Malik,

All resident of H. No. 460/1, Hasapur
Perenem, Canzarvornem,
Pernem- North Goa.

(Amendment carried out as per order
dtd. 4/10/2018 in MCA No. 580/2018)

16. Shri Namdev Shivaram Malik,
Son of late Shri Narayan Malik
Major, married, Indian National
r/o H. No.366, Hassapur,
Pernem, Goa.

17. Smt. Sugandha Dina Malik,
Wife of late Shri Dina Shivram Malik ,
Major, married, Indian National,
r/o H. No.366, Hassapur,
Pernem, Goa.

18. Shri Nagesh Mahadev Malik,
Son of late Shri Mahadev Pundalik Malik,
Major, married, Indian National,
r/at Hassapur, Pernem, Goa.
and House No. not known.
19. Shri Jaganath Bapu Malik ,
Son of late Shri Bapu Chandro Malik,
Major, married, Indian National,
r/o H. No.342, Hassapur,
Pernem, Goa.
(represented by his Power of Attorney
Shri Satish Jaganath Malik)
20. Shri Chandrakant Bapu Malik,
Son of late Shri Bapu Chandro Malik,
Major, married, Indian National,
r/o H. No.342/3, Hassapur,
Pernem, Goa.
21. Shri Satu Fatu Malik,
Son of late Shri Fatu Dev Malik ,
Major, married, Indian National,
r/o H. No.332, Hassapur,
Pernem, Goa.
22. Shri Fatu Devu Malik,
Son of late Shri Dev Malik,
Major, married, Indian National,
r/o H. No.332, Hassapur,
Pernem, Goa.
23. Smt. Draupadi Ganesh Malik,
Wife of late Shri Ganesh Raghunath Malik,
Major, married, Indian National,
24. Shri Anil Ganesh Malik,
Son of late Shri Ganesh Raghunath Malik,
Major, married, Indian National
and his wife,
25. Mrs. Anil Ganesh Malik, (name of wife not known)
Wife of Anil Ganesh Malik
Major, married. Indian National
26. Shri Prabhakar Ganesh Malik,
Son of late Shri Ganesh Raghunath Malik,
Major, married. Indian National

and his wife,

27. Mrs. Prabhakar Malik, (name of wife not known)
Wife of Prabhakar Ganesh Malik,
Major, married. Indian National,
All residing at H. No. not known
Alorna, Hassaur, Pernem –Goa.
28. Shri Babu Nana Malik,
Son of late Shri Nana Malik,
Major, married, Indian National,
29. Shri Sagun Babu Malik,
Son of late Shri Ganesh Raghunath Malik,
Major, married, Indian National,
And his wife,
30. Mrs. Chaya Sagun Malik,
Wife of Shri Sagun Babu Malik,
Major, married, Indian National,
31. Shri Jairam @ Gundu Babu Malik,
Son of Shri Babu Nana Malik,
Major, married, Indian National,
And his wife,
32. Mrs. Jaimala Jairam Malik,
wife of Shri Jairam @ Gundu Babu Malik,
Major, married, Indian National,
33. Shri Nilkanth @ Ramesh Babu Malik,
Son of Shri Babu Nana Malik,
Major, married, Indian National,
And his wife,
34. Mrs. Nikita Nilkant Malik,
wife of Shri Nikanth @ Ramesh Babu Malik,
Major, married, Indian National,
All residing at H. No. not known,
Alorna, Hassapur, Pernem-Goa.
35. Shri Sudan Laxman Malik,
Son of late Shri Laxman J. Malik,
Major, married, Indian National,
And his wife,
36. Smt. Sushma Sudan Malik,
wife of Shri Sudan Laxman Malik,

Major, married, Indian National, and
Both residing at H. No. not known,
Alorna, Hassapur, Pernem-Goa.

37.Smt.Gunavati Ganesh Malik,
wife of late Shri Ganesh Sakho Malik,
Major, married, Indian National,

38. Shri Ladu Ganesh Malik,
Son of late Shri Ganesh Sakho Malik,
Major, married, Indian National,

39. Shri Eknath Ganesh Malik,
Son of late Shri Ganesh Sakho Malik,
Major, married, Indian National,
And his wife,

40.Smt. Savitri Eknath Malik,
Wife of Shri Eknath Ganesh Malik,
Major, married, Indian National,

41.Shri Viswanath Ganesh Malik,
Son of late Shri Ganesh Sakho Malik,
Major, married, Indian National,
And his wife,

42.Smt.Vandana Vishwanath Malik,
Wife of Shri Viswanath Ganesh Malik,
Major, married, Indian National,

43.Mrs. Arti Anant Malik,
Wife of late Shri Anant Ganesh Malik,
Major, married, Indian National,
All residing at H. No. not known,
Alorna, Hassapur, Pernem-Goa.

44.Smt. Sugandhi Shivram Malik,
Wife of late Shri Shivram Deo Malik,
Major, married, Indian National,

45.Shri Sudhakar Shivram Malik
son of late Shri Shivram Deo Malik,
Major, married, Indian National
And his wife

46.Smt. Sonia Sudhakar Malik
Wife of Shri Sudhakar Shivram Malik,
Major, married, Indian National,

47. Mrs. Sarita Satish Malik
Wife of late Shri Satish Shivram Malik,
Major, married, Indian National
48. Mast. Saish Satish Malik
Son of late Shri Satish Shivram Malik,
Major, married, Indian National,
49. Miss Smeeta Satish Malik
Daughter of late Shri Satish Shivram Malik,
Major, married, Indian National,
50. Miss Shivani Satish Malik
Daughter of late Shri Satish Shivram Malik,
Major, married, Indian National
All residing at H. No. not known,
Alorna, Hassapur, Pernem-Goa .
51. Mrs. Geeta (Sorojini) Gurudas Naik,
Daughter of late Shri Shivaram Deo Malik,
Major, married, Indian National
And her husband
52. Mr. Gurudas Ladu Naik,
Son of Shri Ladu Naik,
Major, married, Indian National
Both residing at H. No. not known,
Deulwada, Vazri, Pernem-Goa
53. Shri Gangadhar Krishna Malik
Son of Shri Krishna Jaganath Malik,
Major, married, Indian National
And residing at Girgaun,
Mumbai-400004.
54. Mr. Kochu Koshy, (since deceased)
son of late T.K. Koshy,
Proprietor of Koshy Estate,
Major, married, Indian National
residing at Koshy Chamber,
Opposite to K.T.C. bus stand,
Vasco-da-Gama, Goa.
- 54.a) Mrs. Lizy Koshy,
Widow of the defendant no. 32,
Major in age,
- 54.b) Mrs. Ajiesh Koshy

Son of the defendant no. 32,
Major in age,

54.c) Mr.Abeesh Koshy
Daughter of the defendant no. 32,
Major in age,
All residing at Koshy Chambers,
1st Floor, Opp. K.T.C. bus stand,
Vasco-da-Gama , Goa

55.M/s Eastern Farmlands (India) Pvt. Ltd
having registered office at
201-A/202-BA,
Queens Corner, No.3,
Queens Road, Bangalore-560001
Represented by its Director,
Mr. Darmesh Ranka,
Son of Shri Dinesh D.Ranka,
R/at 634 Ranka Park,
4-5-6 Lalbagh Road,
Bangalore.

..Respondents

Shri R.G. Ramani, Advocate for the petitioner.
Shri Deepak Gaonkar, Advocate for the respondents No.1 and 3.
Shri A.D. Bhobe, Advocate for the respondents No.5, 6, 7, 8, 10,
12, 13, 14, 15(a), (b), (c), 16, 18, 20, 21 and 22.
Shri Rohit Bras De Sa, Advocate for the respondent No.55.

Coram : NUTAN D. SARDESSAI, J.

Reserved on :- 5th February,2019.

Pronounced on:- 1st March, 2019.

JUDGMENT:

1. Heard Shri R.G. Ramani, learned Advocate for the petitioner,
Shri Deepak Gaonkar, learned Advocate for the respondents No.1
and 3, Shri A.D. Bhobe, learned Advocate for the respondents
No.5, 6, 7, 8, 10, 12, 13, 14, 15(a), (b), (c), 16, 18, 20, 21 and 22
and Shri Rohit Bras De Sa, learned Advocate for the respondent
No.55.

2. Rule.

3. Shri Deepak Gaonkar, learned Advocate waives service on behalf of the respondents No.1 and 3, Shri A.D. Bhobe, learned Advocate waives service on behalf of the respondents No.5, 6, 7, 8, 10, 12, 13, 14, 15(a), (b), (c), 16, 18, 20, 21 and 22 and Shri Rohit Bras De Sa, learned Advocate waives serviced on behalf for the respondent No.55.

4. The petitioners have taken exception to the order dated 16/11/2016 alongwith the corrigendum dated 04/01/2017 passed by the Adhoc Additional Senior Civil Judge, Mapusa pursuant to which it had directed the exclusion of the counterclaim filed by the petitioner / original defendant No.34 against the respondents.

5. Heard Shri R.G. Ramani, learned Advocate for the petitioners who invited attention to the pleadings in the plaint which pertained to the property in dispute being that bearing land description Nos.435, 436, 437 and 438 with distinct boundaries being of several persons named therein. As per the case of the original plaintiffs the said properties were inscribed in the names of the family of Malik comprised of different Survey numbers and who claimed to be the co-owners in possession and enjoyment of the said property having inherited the same from their ancestors. The

property was not partitioned as per their case by metes and bounds amongst the co-owners. The plaintiff Nos. 4 to 10 claimed inheritance to the said property through their ancestors while the other sets of the plaintiffs claimed inheritance through other ancestral duly enumerated in the body of the plaint. The plaintiff had further claimed that the properties bearing Survey No.177/0 and 160/0 (part) of the village Alorna were the part of said property and the subject matter of two separate Sale Deeds both dated 16/06/2006, being "the suit properties" for brevity's sake. These properties were sold by the defendants No.1, 6, 13-25, 29-30 to the defendant No.33 without the consent and knowledge of the plaintiffs.

6. Accordingly, the plaintiffs had maintained the suit for the relief of declaration that the Sale Deeds were null and void, that they were the co-owners of the suit property, permanent injunction to restrain the defendant No.33 from creating any lien on the suit properties amongst others. The petitioners had filed an application for impleadment under Order I Rule 10 and who are impleaded as the respondent No.34. They have filed their written statement in defence raising preliminary objection to the maintainability of the suit being barred by the limitation, for non-joinder of the necessary parties and otherwise disputed the plaintiffs claim of co-ownership to the suit property alongwith the defendants No.1 to 31 and that

the defendants No.32 and 33 had no right to the suit property pursuant to the Sale Deeds of 16/06/2006. Besides, the petitioners had raised a counterclaim alongwith their written statement in defence setting out a case that the plaintiffs and the defendants No.1 to 31 had deliberately and mischievously played a fraud on the Court by suppressing the material facts.

7. The petitioners had sought for the relief of declaration that the Sale Deeds were null and void and for permanent injunction to restrain the plaintiffs and the defendants No.1 to 33 from alienation or creating any third party rights in respect of the suit property. The plaintiffs had moved an application under order VIII Rule 6 C CPC for exclusion of the counterclaim on the premise that if at all the petitioners had title over the suit properties, their claim was to be dealt with and decided in an independent suit and not in the suit filed by them. Even otherwise the pleading raised in the counterclaim would result in embarrassing a fair trial and the claim raised by the counterclaim could not be adjudicated in the suit as it would lead to further causes of action. The defendant No.33 too had raised objection to the counterclaim on the premise that it was primarily against them and not against the plaintiffs and therefore the same had to be dismissed. The learned Trial Court by its order dated 16/11/2016 had disposed off the objection filed by the defendant no.33 to the counterclaim raised by the petitioner and

decide the application filed by the plaintiff for exclusion of the counterclaim.

8. It was further the contention of Shri Ramani, learned Advocate for the petitioner that the petitioner had not admitted the claim of the plaintiffs. He placed reliance in **Rohit Singh and Ors v/s. State of Bihar** [2006(12)SCC 734] and in that context contended that the status of the petitioner was not that of an interpleader as to attract Section 88 CPC. In his contention the impugned order had to be set aside which excluded the counterclaim as otherwise the petitioner would be driven to a separate suit unduly and the question would further arise of whether the two suits would be tried together or differently. Shri Ashwin D. Bhobe, learned Advocate for the respondents No.5-8, 10, 12, 13, 14, 16, 18, 20, 21 and 22 submitted at the outset that the suit simplicitor was for declaration that the Sale Deeds dated 16/06/2006 were null and void, on the ownership of the plaintiff and the relief of injunction. The petitioner in the written statement alongwith the counterclaim had raised an independent case though the relief of declaration was sought that the Sale Deeds executed by the plaintiffs as null and void were only to camouflage a cause of action against the plaintiffs when in fact the relief of injunction was sought against the defendants. The petitioner was claiming an independent right and the remedy available to them was by way of

a separate suit. The plaintiff would be embarrassed in the trial which would be delayed unnecessarily. The relief of injunction to include the plaintiff was only as a camouflage to bring action within the counterclaim. The impugned order therefore did not call for any interference and the petition had to be dismissed.

9. Shri Deepak Gaonkar, learned Advocate for the respondents NO.1,2 and 3 adopted the arguments of Shri Bhobe, learned Advocate while Shri Rohit Bras De Sa, learned Advocate for the respondent No.55 submitted that the relief in the counterclaim was primarily directed against his party i.e. the respondent No.55 and in that context invited attention to paragraph 5 of the impugned order where clear findings were recorded by the learned Trial Court that the reliefs was sought against the plaintiffs only to camouflage the counterclaim and to save it from being excluded. It was his contention that the main relief was claimed against the respondent No.55 and on his part placed reliance in **Comunidade of Pirla v/s. Government of Goa by Forest Department, Panaji and others** [2010 BCR 548]. The main relief claimed in the counterclaim was against the respondent no.55. The petitioner could not show any prejudice being caused to him by the exclusion of the counterclaim which could otherwise be registered and tried as a separate suit. There was no perversity on the face of the impugned order and therefore the petition had to be dismissed.

10. The plaintiffs had maintained the suit for declaration that the Sale Deeds dated 16/06/2006 and 22/06/2006 were null and void and not binding on them, for a declaration that they were the co-owners of the suit property, for an inclusion of their names in the survey record and that of permanent injunction to restrain the defendants from interfering in the suit property and with their possession in respect of the suit property. The petitioners as the defendant No.34 had filed their written statement in defence that the suit was bad for non-joinder of necessary parties, the bar of limitation, that the plaintiffs nor the defendants No.1-31 had any right, title or interest to the suit property and could not have sold to the defendants No.32 and 33 and simultaneously raised a counterclaim that they were the owners of the suit property, that the Sale Deeds dated 16/06/2006 and 22/06/2006 were null and void and as they had no right to sell the suit property in favour of the defendants No.32 and 33 and sought for the relief of permanent injunction to restrain the plaintiffs and the defendants No.1 to 32 from alienating the suit property or creating any third party interest therein. The defendant no.33 had raised objection to the counterclaim of the petitioner on the premise that it could only be set up against the plaintiffs but the present counterclaim was set up against the defendants No.33 and on that premises deserved to be dismissed.

11. In **Rohit Singh**(supra), the Hon'ble Apex Court held at paragraph 18 as below:

"18. Normally, a counterclaim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counter- claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counterclaim directed solely against the co-defendants cannot be maintained. By filing a counterclaim the litigation cannot be converted into some sort of an inter-pleader suit."

There can be no dispute with this proposition laid down by the Hon'ble Apex Court and in that light it is to be seen whether the counterclaim raised against the plaintiffs or whether it is one camouflaged to be against the plaintiff and in fact against the co-defendants.

12. In **Comunidade of Pirla**(supra), the learned Single Judge of this Court (N.A. Britto,J.) quoting **Rohit Singh**(supra), held that a counterclaim directed solely against the co-defendants cannot be maintained. It was further stated that by filing counterclaim the litigation cannot be converted into some sort of an interpleader suit, the counterclaim filed by the appellant was clearly not maintainable and the courts below had rightly dismissed the same.

13. Although it has been the contention of Shri Ramani, learned Advocate for the petitioner that the Sale Deeds were executed by the defendants No.1-32 in favour of the defendant No.33 and the plaintiff was seeking the relief of declaration in respect of the said deeds, the petitioner was claiming right through one Gama by a Sale Deed of 2007 who in turn claimed rights to the suit properties vide a document of 1939. All these aspects would have a material bearing in his estimation on the decision of the counterclaim qua the suit. Howsoever palatable the contention, the counterclaim as framed is apparently directed against the defendants, though a declaratory relief has been claimed to seek a declaration that the Sale Deeds are null and void. If at all the case of Shri Ramani, learned Advocate is to be accepted that the petitioners are claiming an independent right, the remedy to them would be by way of a separate suit and not by raising the counterclaim. There is otherwise force in the contention of Shri A.D. Bhole, learned Advocate that the plaintiff would be embarrassed in the course of the trial and which would have the effect of unnecessary delay of the trial in the proceedings. Moreover the relief of injunction sought to include the plaintiffs is only as a camouflage to bring the action within the cause of action to maintain the counterclaim when otherwise the reliefs are sought against the defendants when the pleadings are construed in a proper manner. There is also force in the contention of Shri Rohit

Bras De Sa, learned Advocate that the relief in the counterclaim is primarily aimed against the respondent No.55. Moreover no prejudice has been shown to be caused to the petitioner by the exclusion of the counterclaim which can be very well pursued as an independent proceeding at the instance of the petitioners.

14. The learned Trial Judge while deciding the application has on an assessment on the material on record clearly observed that the counterclaim is mainly directed against the defendants and no cause of action is made out against the plaintiffs and whatever relief sought against the plaintiffs is only to camouflage the counterclaim to save it from being executed. No perversity is writ large in the order under challenge as to call for an interference in exercise of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. In view thereof, i pass the following :

O R D E R

The petition is dismissed with no order as to costs.

NUTAN D. SARDESSAI, J.