

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4639 OF 2019

Kishor s/o Tatyaraao Reddy and another ...Petitioners

versus

Shivanand s/o Shivshankar Mathpati and others ...Respondents

.....
Mr. T. M. Venjane, advocate for the petitioners
Mr. S. J. Salunke, advocate for respondent no.1
Mr. R.S. Deshmukh, senior counsel a/w Mr. Kunal Kale, Advocate i/b
Mr. D. R. Deshmukh for respondent Nos. 3 and 4.
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CORAM : V. K. JADHAV, J.
DATED : 22nd FEBRUARY, 2021

PER COURT:-

1. By consent, heard finally at admission stage.
2. The petitioners are original defendant Nos. 1 and 2. Respondent No.1-original plaintiff has instituted a suit bearing Regular Civil Suit No. 441 of 2017 for a decree of perpetual injunction. In the pending suit, the respondents-original defendant Nos. 3 and 4 filed a counter claim with following prayers :-

“A) *That, the mandatory injunction may kindly be issued in favour of plaintiff directing to the defendant No.1 to demolish the construction made encroachment on the 36 sq. meter open space Gaonthan area adjacent to the G.P. House No. 542 ad City Survey No. 521 during pendency of suit situated at village Ramling Mudgad, Tq. Nilanga.*

- B) *That, it be ordered to the Dy. S.L.R. Nilanga the name of the plaintiff be taken in P.R. Card on the basis of the sale deed from Surbhan Bhima Reddy for G.P. House No. 544.*
- C) *That, any other just and equitable reliefs may also be granted to the plaintiff for which they are entitled to."*

3. Learned counsel for the petitioners submits that the suit is instituted for a decree of perpetual injunction in respect of the suit road. However, the respondents-defendant Nos. 3 and 4, by way of counter claim, are seeking direction to petitioner No.1 to demolish the construction made on the encroached area to the extent of 36 sq. meters open space adjacent to Gram Panchayat house No. 542 and City Survey No. 521. Learned counsel for the petitioners submits 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. Learned counsel submits that in the instant case, respondents-defendant Nos. 3 and 4 have filed a counter claim by almost filing consent written statement seeking relief against the petitioners original defendant Nos. 1 and 2.

4. Learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the judgment of Supreme Court in the case of ***Rohit Singh and Ors. vs. State of Bihar (Now State of Jharkhand) and others, delivered in Appeal (Civil) No. 4517 of 2006 dated 17.10.2006***, wherein in para 18 the Supreme Court has

made the following observations.

“18. Normally, a counter-claim, 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 counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into some sort of an inter-pleader suit. Here, defendants 3 to 17 had no claim as against the plaintiff except that they were denying the right put forward by the plaintiff and the validity of the document relied on by the plaintiff and were asserting a right in themselves. They had no case even that the plaintiff was trying to interfere with their claimed possession. Their whole case was directed against defendants 1 and 2 in the suit and they were trying to put forward a claim as against the State and were challenging the claim of the State that the land involved was a notified forest in the possession of the State. Such a counter-claim, in our view, should not have been entertained by the trial court.”

5. Learned senior counsel Mr. Deshmukh for respondents-original defendant Nos. 3 and 4 submits that respondent No.1-original plaintiff has instituted the suit for a decree of perpetual injunction in a representative capacity. In view of the same, even if in the counter claim, the respondents-original defendant Nos. 3 and 4 sought for relief against original defendant Nos. 1 and 2, the same is justifiable.

6. Learned counsel Mr. Salunke, appearing for respondent-original plaintiff submits that the petitioners-original defendant Nos. 1 and 2 have not only made encroachment over the portion on the public road, which is constructed in cement, but also made encroachment over the portion of Gaothan and the respondents-original defendant Nos. 3 and 4 have sought relief by filing their counter claim in respect of the said encroachment over the portion of Gaothan.

7. In the case of ***Rohit Singh and Ors. (supra)*** relied upon by learned counsel for the petitioners, the Supreme Court has observed 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 counter-claim directed solely against the co-defendants cannot be maintained. In the instant case, the respondents-original defendant Nos. 3 and 4 have filed a consent written statement and in addition to that, they sought specific relief for removal of encroachment over the portion of Gaothan by way of counter claim against the petitioners-original defendant Nos. 1 and 2. Thus, the ratio laid down in the above cited case is squarely applicable to the facts and circumstances of the present case. Leaned Judge of the trial court has not considered the application Exh. 138 filed by the present petitioners for striking out

the counter claim of the respondents-original defendant Nos. 3 and 4. The learned Judge of the trial court, in para 12 of the order, has considered the nature of the suit as in the representative capacity and in terms of Order I Rule 8-A of the Civil Procedure Code, any person can take part in the proceeding. Learned Judge has further observed that the respondents-original defendant Nos. 3 and 4 came to be added in the suit because they are having some sort of grievance against defendant Nos. 1 and 2.

8. It appears that, the learned Judge of the trial court seems to have exercised the power under Order I Rule 8-A of the Civil Procedure Code which prescribes the power of court to permit a person or body of persons to present opinion or to take part in the proceedings if the said person or body of persons is interested in any question of law which is directly and substantially in issue in the suit. Further, if it is necessary in the public interest to allow that person or body of persons to present his or its opinion on that question of law.

9. In the instant case, the respondents-original defendant Nos. 3 and 4 have not raised any question of law but they altogether brought a new theory of encroachment on the part of the petitioners-original defendant Nos. 1 and 2 over the portion of Gaothan area. It is needless to say here that respondent Nos. 3 and 4 can institute a separate suit for the same. However, in view of the ratio laid down by the Supreme Court in the aforesaid case, which squarely applies to

the facts and circumstances of the present case, the order impugned is not sustainable in the eyes of law. Hence, I proceed to pass the following order:-

O R D E R

I. Writ petition is allowed in terms of prayer clauses "B" and "C".

10. At this stage, learned counsel for the respondents submits that the suit is of the year 2017, raising some serious issue about encroachment over the portion of public property. In view of the same, the trial court may be directed to decide the suit as expeditiously as possible.

11. Learned counsel for the petitioners has no objection, if such directions are given for expeditious disposal of the suit.

12. In view of above, the trial court is hereby directed to dispose of the suit as expeditiously as possible, preferably within a period of one year from the date of receipt of this order.

(V. K. JADHAV, J.)

rlj/